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# The Federal Tax Implications of Bush v. Gore

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# THE FEDERAL TAX IMPLICATIONS OF *BUSH V. GORE*

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## INTRODUCTION

About the only thing that all of the Supreme Court Justices agreed upon in the recent *Bush v. Gore*[1] decision was the proposition that, as a general rule, federal courts should defer to state courts on matters of state law. Chief Justice Rehnquist, in a concurring opinion joined by Justices Scalia and Thomas, stated that "[i]n most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law."[2] The separate dissenting opinions contain similar language, with Justice Stevens calling such deference a "settled practice,"[3] Justice Ginsburg

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1. 531 U.S. 98 (2000) (per curiam).

2. *Id*. at 112. Chief Justice Rehnquist explained that this practice "reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. *Cf.* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)." *Id. See also* 531 U.S. at 114 ("[W]e generally defer to state courts on the interpretation of state law.") (Rehnquist, C.J., and Scalia & Thomas, JJ., concurring).

3. *Id*. at 123 (Stevens, Ginsburg & Breyer, JJ., dissenting).

labeling it the "ordinary practice,"[4] and Justice Souter citing the Court's "customary respect for state [court] interpretations of state law."[5] Indeed, the Justices differed only as to whether, as Justice Breyer put it in his dissent, "this case [was] one of the few in which we may lay that fundamental principle aside."[6]

But federal courts regularly lay aside this "fundamental principle" in tax cases. In literally dozens of areas, cutting across the federal income,[7] estate,[8] gift,[9] and generation-skipping[10] taxes, the Internal Revenue Code (the Code) incorporates state law rather than creating a federal rule to control the federal tax result. This creates a situation unique to the tax area in which a party obtains a state court decree on an issue of state law and later invokes the decree in federal court litigation involving a federal tax issue that turns on the application of that state law. The question thus is how much deference the federal court should give to the state court's interpretation of state law.

Unlike the situation in *Bush v. Gore*, where the United States Supreme Court reviewed the decision of the Florida Supreme Court, most of the state court decisions at issue in subsequent federal tax litigation involve decisions of lower state courts. Yet the same principles of "comity and respect for federalism" support giving deference to lower state court interpretations of its own laws. In the parallel context of the *Erie* doctrine,[11] where the federal courts apply state substantive law for claims brought in federal court based solely on diversity jurisdiction, only decisions of the state's highest court are binding on the federal court. In *Commissioner v. Estate of Bosch*,[12] the Supreme Court applied *Erie* principles in holding that federal courts must give "proper regard" to decisions of lower state courts in subsequent federal tax litigation. Although the *Bosch* "proper regard" standard in theory appears

4. *Id*. at 136 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting).

5. *Id*. at 133 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

6. *Id*. at 148 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting).

7. *E.g.*, I.R.C. §162(c)(2) (1994) (income tax deduction for ordinary and necessary business expenses disallowed for bribe, kickback, or other payment that is illegal under state law).

8. *E.g.*, I.R.C. §2053(a) (1994) (estate tax deduction for funeral expenses, administration expenses, claims against the estate, and unpaid mortgages permitted if these items are allowable by state law).

9. *E.g.*, I.R.C. §2514(d) (1994) (exercise of power of appointment to create another power of appointment is treated as a deemed gift for gift tax purposes if, under applicable state law, the second power can be validly exercised so as to postpone the vesting of any interest in the property subject to the first power for a period ascertainable without regard to the date of the creation of the first power).

10. *E.g.*, I.R.C. §2652(c) (1994) (person not treated as having interest in trust for generation-skipping tax purposes merely because income or corpus of trust could be used to satisfy person's obligation of support under state law).

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

12. 387 U.S. 456 (1967).

consistent with the *Bush v. Gore* deference principle, this Article demonstrates that federal courts in practice have given "no regard" to lower state court decisions by concluding in over one-half of the cases applying *Bosch* over the past thirty-four years that the state court judge had misapplied state law. The Article argues that the federal courts should return to the *Erie* roots of the "proper regard" test in order to give effect to the *Bush v. Gore* deference principle.

Part I reviews the pre-*Bosch* confusion regarding how much deference federal courts should give to prior state court decisions in federal tax litigation. Federal courts used and advocated a wide variety of approaches during this period, none of which properly accommodated the underlying revenue and comity interests. Part I then turns to the *Bosch* decision and the original promise of the "proper regard" standard as a way to balance these competing concerns.

Part II explains how in practice federal courts have converted this "proper regard" deference standard into a de novo standard of review. Over one thousand federal court cases have cited *Bosch* over the past thirty-four years, and courts in a clear majority of those cases in which the taxpayer was involved in prior state court litigation have refused to follow the state court's interpretation of state law in the federal tax proceeding. As a result, the federal courts, in practice, have converted the "proper regard" standard into a license to give "no regard" to state court decisions on state law.

Part III discusses the recent *Bush v. Gore* decision and argues that it is inconsistent with this "no regard" approach. The enormous interest generated by the *Bush v. Gore* decision makes this a particularly propitious time to re-think this nettlesome question of federal tax law.

Part IV argues that the *Erie* doctrine provides the best vehicle for reconciling *Bosch* with *Bush v. Gore*. The complete-deference approach originally embraced by the Supreme Court and recently resurrected by commentators exalts the *Bush v. Gore* comity interest at the expense of the federal revenue interest. The nonadversary proceeding test adopted by the Internal Revenue Service (the Service) and commentators in recent years inevitably degenerates into a pointless inquiry into the requisite degree of adversariness necessary to make a lower state court decision on state law controlling in subsequent federal tax litigation. Procedural devices such as federal court certification of state law questions to state courts and joinder of the Service in the state court action also do not provide a workable solution to this intractable problem. This Article rejects the "no regard" approach in the existing case law and instead contends that a federal court should apply the same standard of review to a state court decision as would have been applied had the decision been appealed in the state court system. This

"bottom-up" approach is consistent with recent cases and commentary on the *Erie* doctrine. This revitalization of the "proper regard" standard allows federal courts to protect the federal revenue interest without undermining the comity concern by allowing state courts, in most situations, to be the final arbiter of state law. Only in the rare tax equivalent of the *Bush v. Gore* case should federal courts step in and overturn a state court's application of state law.

## I. THE *BOSCH* STANDARD IN THEORY

I have argued elsewhere[13] that determination of the appropriate amount of deference that federal courts should give to prior state court decisions in tax litigation requires the balancing of competing revenue and comity concerns.[14] Where the Code incorporates state law, there is a federal revenue interest in ensuring that the state law is correctly applied. This view led an early commentator to argue that federal courts should give no deference to state court interpretations of state law;[15] however, a federal court has never explicitly adopted this approach.[16]

In contrast, in 1916, the Supreme Court, concerned about the comity interest later highlighted in *Bush v. Gore*,[17] gave complete deference to lower state court decisions in later federal tax litigation in *Uterhart v. United States*.[18] Two decades later, the Supreme Court revisited the issue and balanced the revenue and comity interests through a focus on the nature of the state court proceeding.

In *Freuler v. Helvering*[19] and *Blair v. Commissioner*,[20] the Court retreated from *Uterhart* and held that only "noncollusive" state court decisions were binding in later federal tax litigation. Unfortunately, neither *Freuler* nor *Blair*

13. Paul L. Caron, Bosch *and the Allure of Adversariness*, 64 TAX NOTES 673 (1994) [hereinafter Caron, *The Allure of Adversariness*]; Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation:* Bosch, Erie, *and Beyond*, 71 OR. L. REV. 781, 785-87 (1992) [hereinafter Caron, *The Role of State Court Decisions*].

14. For a criticism of this approach, see Bernard Wolfman, Bosch *and the* Erie *Blind Alley*, 64 TAX NOTES 967 (1994). For my response, see Paul L. Caron, *Tax Court and Service Stake Out Positions in State Law Debate*, 71 TAX NOTES 229 (1996).

15. Michael H. Cardozo IV, *Federal Taxes and the Radiating Potencies of State Court Decisions*, 51 YALE L.J. 783, 796-97 (1942).

16. Although I argue later in this Article that the federal courts in practice have come close to this approach in concluding in over one-half of the cases that the state court judge had misapplied state law. *See infra* notes 72-97 and accompanying text.

17. 531 U.S. 98 (2000) (per curiam).

18. 240 U.S. 598 (1916).

19. 291 U.S. 35 (1934).

20. 300 U.S. 5 (1937).

set forth a detailed list of factors that would make a state court proceeding sufficiently "collusive" to enable a federal court to substitute its own view of state law for that of the state court. The result was thirty years of confusion in the lower federal courts as they struggled to define "collusion."

After initially equating collusion with fraud,[21] many courts subsequently permitted federal courts to re-examine state court interpretations of state law that were the product of nonadversary proceedings.[22] But the courts again did not agree on the factors to be used in making this determination.[23] For example, in some cases,[24] but not others,[25] the initiation of the state court action after commencement of the federal tax controversy was evidence of nonadversariness. Similarly, the lack of notice to the Service of the state court proceeding sometimes,[26] but not always,[27] supported a finding of nonadversariness. Other federal courts focused on such factors as the lack of briefing or a hearing in the state court,[28] or the failure to call witnesses or to conduct cross-examination.[29]

The federal courts thus were mired in confusion. Neither the no-deference

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21. *See* Gallagher v. Smith, 223 F.2d 218, 223-25 (3d Cir. 1955) (en banc). *See also* Estate of Darlington v. Comm'r, 302 F.2d 693, 694-95 (3d Cir. 1962); Eisenmenger v. Comm'r, 145 F.2d 103, 106-07 (8th Cir. 1944); Old Kent Bank & Trust Co. v. United States, 232 F. Supp. 970, 978-81 (W.D. Mich. 1964), *rev'd*, 362 F.2d 444 (6th Cir. 1966).

22. *See, e.g.*, Old Kent Bank & Trust Co. v. United States, 362 F.2d 444, 449-50 (6th Cir. 1966); Estate of Pierpont v. United States, 336 F.2d 277, 281 (4th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965); Estate of Peyton v. Comm'r, 323 F.2d 438, 443-44 (8th Cir. 1963); Saulsbury v. United States, 199 F.2d 578, 580 (5th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953).

23. Commentators were similarly unsuccessful. *See, e.g.*, Robert C. Bartlett, *The Impact of State Law on Federal Income Taxation*, 25 CHI.–KENT L. REV. 103 (1947); Edmond N. Cahn, *Local Law in Federal Taxation*, 52 YALE L.J. 799 (1943); Covey T. Oliver, *The Nature of the Compulsive Effect of State Law in Federal Tax Proceedings*, 41 CAL. L. REV. 638 (1953); Richard B. Stephens & James J. Freeland, *The Role of Local Law and Local Adjudications in Federal Tax Controversies*, 46 MINN. L. REV. 223 (1961); Paul A. Teschner, *State Court Decisions, Federal Taxation, and the Commissioner's Wonderland: The Need for Preliminary Characterization*, 41 TAXES 98 (1963); Note, *The Role of State Law in Federal Tax Determinations*, 72 HARV. L. REV. 1350 (1959).

24. *See, e.g.*, Estate of Darlington v. Comm'r, 302 F.2d 693, 695 (3d Cir. 1962); Estate of Stallworth v. Comm'r, 260 F.2d 760, 763 (5th Cir. 1958); Estate of Sweet v. Comm'r, 234 F.2d 401, 404 (10th Cir.), *cert. denied*, 352 U.S. 878 (1956).

25. *See, e.g.*, Blair v. Comm'r, 300 U.S. 5, 8 (1937); Freuler v. Helvering, 291 U.S. 35, 38 (1934).

26. *See, e.g.*, Estate of Peyton v. Comm'r, 323 F.2d 438, 443-44 (8th Cir. 1963); Estate of Faulkerson v. United States, 301 F.2d 231, 232 (7th Cir.), *cert. denied*, 371 U.S. 887 (1962).

27. *See, e.g.*, Estate of Farish v. United States, 233 F. Supp. 220, 229 (S.D. Tex. 1964), *aff'd*, 360 F.2d 595 (5th Cir. 1966).

28. *See, e.g.*, Old Kent Bank & Trust Co. v. United States, 362 F.2d 444, 448 (6th Cir. 1966); Estate of Pierpont v. Comm'r, 336 F.2d 277, 281 (4th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965); Estate of Darlington v. Comm'r, 302 F.2d 693, 695 (3d Cir. 1962); Estate of Faulkerson v. United States, 301 F.2d 231, 233 (7th Cir.), *cert. denied*, 371 U.S. 887 (1962).

29. *See, e.g.*, Estate of Peyton v. Comm'r, 323 F.2d 438, 440 (8th Cir. 1963); Estate of Rainger v. Comm'r, 12 T.C. 483, 496 (1949), *aff'd per curiam*, 183 F.2d 587 (9th Cir. 1950).

nor the complete-deference approaches permitted consideration of both the revenue and the comity interests. Although the nonadversarial approach in theory purported to balance these interests, in practice it degenerated into confusion over the appropriate indicia of nonadversariness. The Supreme Court took another stab at clearing up the confusion in *Commissioner v. Estate of Bosch*.[30]

The *Bosch* case involved the validity under state law of a wife's inter vivos partial release of a testamentary general power of appointment, which converted it into a special power of appointment.[31] If the release was invalid under state law, the husband's estate would get the benefit of the marital deduction because the wife would have received a life estate coupled with a general power of appointment.[32] But if the release was valid under state law, the husband's estate would not get the benefit of the marital deduction. While the case was pending in Tax Court, the executor of husband's estate obtained a state court ruling that the release was invalid under state law.[33] The question thus was whether the federal courts should defer to this state court ruling.

The Tax Court characterized the lower federal courts' approach after *Freuler* and *Blair* as "highly confusing" and refused "to undertake a comprehensive analysis of all of the cases in this field and to attempt to find a rationalization among them which the appellate courts themselves have been unable satisfactorily to do."[34] Although the Tax Court did not consider itself "bound" by the state court decision, the Tax Court "accept[ed]" the decision.[35]

A divided Second Circuit panel affirmed. The majority held that because there was no evidence of fraud, the state court litigation conclusively established the state law issue for federal tax purposes.[36] Judge Friendly

30. 387 U.S. 456 (1967).

31. *Id.* at 457-58. Prior to the release, the power was a general power of appointment because a wife could exercise it on behalf of anyone she wished (including herself, her creditors, her estate, or the creditors of her estate). After the release, the power was a special power of appointment because she no longer could exercise it on behalf of herself, her creditors, her estate, or the creditors of her estate.

32. I.R.C. § 2056(b)(5) (1994).

33. Comm'r v. Estate of Bosch, 363 F.2d 1009, 1010-11 (2d Cir. 1966), *rev'd*, 387 U.S. 456 (1967). According to the state court, a donee of a power of appointment could not *release* the power under state law if the donee was unable to *exercise* the power at that time. Because the power was a testamentary power of appointment, the state court held that a wife's release of the power in an inter vivos instrument was invalid. *See id.* at 1011-12 n.3 (reprinting entire state court opinion).

34. Estate of Bosch v. Comm'r, 43 T.C. 120, 122-23 (1964), *aff'd*, 363 F.2d 1009 (2d Cir. 1966), *rev'd*, 387 U.S. 456 (1967).

35. *Id.* at 124.

36. 363 F.2d at 1014.

dissented, chastising the Supreme Court for not having addressed this "important problem" for nearly thirty years.[37] He noted that the "cryptic character" of the Court's "dated pronouncements" had caused widespread confusion in the circuits over this "intractable" problem.[38] Judge Friendly stated that the problem had been "bedeviled by iteration of terms such as 'collusive' or 'non-adversarial.' To require proof of collusion in the normal sense of prearrangement would impose a nigh impossible burden on the Commissioner; yet a court shrinks from using such an opprobrious epithet when no prearrangement has been shown."[39] Judge Friendly rejected the majority's use of fraud as the only circumstance empowering a federal court to disregard a state court's interpretation of state law.[40] Instead, Judge Friendly disregarded the state court decision under the nonadversary proceeding test because the "state court litigation ha[d] been brought primarily to have an effect on federal taxes" and "the state court ha[d] not had the benefit of a fair presentation of both sides of the controversy."[41] After citing various nonadversariness factors,[42] Judge Friendly concluded that "what makes this case so easy is that the state court proceeding had no significant purpose other than the reduction of tax liability."[43] After a de novo review of state law, Judge Friendly concluded that the state court judge had misapplied state law.[44]

The Supreme Court granted certiorari to resolve the "widespread conflict among the circuits."[45] In its brief, the Service argued that the Court should adopt the nonadversary proceeding test to balance the competing revenue and comity interests.[46] According to the Service, permitting federal courts to re-examine a state court's interpretation of state law only in the case of fraud slights the revenue interest; federal courts would have "too narrow" a role if taxpayers could arm themselves with a state court ruling on state law and, in the absence of fraud, "eliminate the role of the federal courts in adjudicating federal tax controversies."[47] Conversely, the Service argued that embracing a

37. *Id*. at 1015 (Friendly, J., dissenting).
38. *Id*.
39. *Id*. at 1018.
40. *Id*.
41. *Id*. at 1016.
42. *Id*. at 1017-18.
43. *Id*. at 1018. According to Judge Friendly, the state court decision was "devoid of any effect except on taxes." *Id.*
44. *Id*. at 1016-18 (subsequent state court cases confirmed that the enactment of state statute overruled prior decisions supporting the view that donee could not release testamentary power of appointment prior to donor's death).
45. 387 U.S. at 457.
46. Petitioner's Brief, *Comm'r v. Estate of Bosch*, 387 U.S. 456 (1967) (No. 673).
47. *Id*. at 15.

pure *Erie* approach would implicate comity concerns; federal courts would have "too broad" a role if a taxpayer would have to press his state law position "to the highest State appellate court if he is to foreclose the possibility that a federal court will tax him as if he had lost the State proceeding."[48] Instead, the Service argued that the federal courts should be permitted to re-examine the state law issue where the lower state court decision was the product of a nonadversary proceeding.[49] The executor contended that this nonadversariness standard was administratively unworkable and would violate the comity concern by permitting "unnecessary intrusions" by federal courts into state court determinations of state law.[50]

Justice Clark, writing for six members of the Court, rejected both fraud and nonadversariness as the trigger for a federal court's re-examination of a state court's interpretation of state law. The majority instead seized on a statement in the legislative history of the marital deduction at issue in the case that "'proper regard,' not finality, 'should be given to interpretations of the will' by state courts."[51] The majority also quoted the portion of the legislative history that required the state court interpretation to be the product of "a bona fide adversary proceeding."[52] But in offering general guidance on the question of the degree of deference that federal courts must give to state court interpretations of state law in subsequent federal tax litigation, the majority made clear that "proper regard," and not nonadversariness, would be the future touchstone:

> [U]nder some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling. This is but an application of the rule in *Erie*, where state law as announced by the highest court of a state is to be followed. This is not a diversity case but the same principles may be applied for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving

48. *Id*. at 10-11.
49. *Id*. at 33 ("[A]ll of the parties [were] arrayed on the same side of the issue and urging the same result").
50. Brief for the Respondent at 5-8, *Comm'r v. Estate of Bosch*, 387 U.S. 456 (1967) (No. 673).
51. 387 U.S. at 464 (quoting S. REP. NO. 1013, at 4 (1948), *reprinted in* 1948-1 C.B. 331, 334).
52. *Id*.

> "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.[53]

The Court remanded the case to allow the Second Circuit to determine whether the wife's partial release was valid under state law, after giving "proper regard" to the lower state court's decision.[54] However, the Court did not provide any guidance on the meaning of the term "proper regard."

There were three separate dissenting opinions in *Bosch*.[55] Justice Douglas argued that, absent fraud, lower state court decisions on state law should control subsequent federal tax litigation.[56] In a lengthy dissenting opinion, Justice Harlan embraced the Service's proposed nonadversary proceeding test as the appropriate way to balance the competing revenue and comity concerns.[57] Justice Harlan's dissent provides the intellectual foundation for the Service's current position on the appropriate deference to be given by federal courts to state court decisions on state law as well as for commentators who advocate abandonment of the majority's "proper regard" approach.

Justice Harlan noted at the outset of his dissent that the question of the weight to be given a state court decision in subsequent federal tax litigation was "doubly important: it is a difficult and intensely practical problem, and it involves basic questions of the proper relationship in this context between the state and federal judicial systems."[58] In federal question cases such as tax, as with diversity cases, he stated that lower state court decisions should not be treated as conclusive statements of state law.[59] However, Justice Harlan questioned whether the *Erie* framework "is necessarily applicable without modification in all situations in which federal courts must ascertain state law."[60] Justice Harlan contended that the *Erie* framework provided only "relevant guidance" where the legal and factual circumstances before the

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53. *Id*. at 465 (citation omitted).

54. *Id*. at 466.

55. *Id*. at 466 (Douglas, J., dissenting), 471 (Harlan & Fortas, JJ., dissenting), 483 (Fortas, J., dissenting).

56. *Id*. at 471 (Douglas, J., dissenting).

57. Justice Harlan also criticized the majority's focus on the "proper regard" language in the legislative history of the marital deduction at the expense of the "bona fide adversary proceeding" language. *Id.* at 475 n.3. Justice Harlan contended that this language was "broadly consistent with virtually any resolution of these issues, but it is difficult to see the pertinence of the sentence's last four words if, as the Court suggests, conclusiveness was intended to be given to the State's highest court, but to none other." *Id.*

58. *Id*. at 471.

59. *Id*. at 476.

60. *Id*. at 477.

federal court were identical as those before the state court.[61]

Justice Harlan argued that neither Justice Douglas's fraud standard nor the majority's "proper regard" standard "satisfactorily reconciles the relevant factors involved."[62] The fraud standard slighted the revenue interest because it created

> excessive risks that federal taxation will be evaded through the acquisition of inadequately considered judgments from lower state courts . . . brought, in reality, not to resolve truly conflicting interests among the parties but rather as a predicate for gaining foreseeable tax advantages, and in which the point of view of the United States had never been presented or considered.[63]

The "proper regard" standard slighted the comity concern because it required "federal intervention into the administration of state law far more frequently than the federal interests here demand," thereby destroying both "the proper relationship between state and federal law and . . . the uniformity of the administration of law within a State."[64]

Instead, Justice Harlan identified the federal revenue interest as a narrow one: to obtain "a considered adjudication of the relevant state law issues."[65] The federal revenue interest in such a "considered adjudication" could be satisfied through a lower state court's decision if it was the product of an adversary proceeding.[66] However, if the state court proceeding was nonadversarial, the revenue interest could be protected only through a federal court's re-examination of state law.[67] Although Justice Harlan did not "define with any particularity" the weight to be given to various factors in determining whether the state proceeding was adversarial, he did provide several illustrative factors. Justice Harlan conceded that this approach lacked the precision of Justice Douglas's fraud approach and of the majority's "proper regard" approach, but argued that it reflected "more faithfully than either of those resolutions the demands of our federal system and of the competing interests involved."[68]

In the third dissent, Justice Fortas agreed with Justice Harlan's adoption

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61. *Id*.
62. *Id*. at 480.
63. *Id*.
64. *Id*.
65. *Id*. at 481.
66. *Id*.
67. *Id*.
68. *Id*. at 482. Justice Harlan contended that despite the "wide use" of the adversary test in the circuits, there was no evidence of "practical difficulties" in its application. *Id.* at 482 n.9.

of the nonadversary proceeding test and wrote separately to elaborate on the factors that determine the requisite degree of adversariness to render the state court's decision controlling in subsequent federal tax litigation.[69] Justice Fortas agreed with the factors listed by the Tax Court.[70]

On remand, the Second Circuit held that the highest state court would not have followed the probate court's decision in *Bosch* and instead would have upheld the partial release of the general power of appointment.[71] This decision presaged how the federal courts would apply the *Bosch* "proper regard" standard over the next thirty-four years.

## II. THE *BOSCH* STANDARD IN PRACTICE

Over 1,000 federal court cases have cited *Bosch* since the Supreme Court handed down the decision in 1967.[72] Courts in a clear majority (60%)[73] of those cases in which the taxpayer was involved in prior state court litigation have refused to follow the state court's interpretation of state law in the federal tax proceeding.[74]

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69. *Id.* at 483 (Fortas, J., dissenting).

70. *See id*. at 483-84. These factors include: (i) whether state court had jurisdiction; (ii) whether state court's determination is binding on parties; (iii) whether state court's decisions had precedential value throughout state; (iv) whether Service had notice of state court proceeding and opportunity to participate; (v) whether state court "rendered a reasoned opinion and reached a deliberate conclusion;" (vi) whether state court decision had potentially offsetting adverse tax consequences to the parties; and (vii) whether state court decision authoritatively determined future property rights). *Id.* at 484 (Fortas, J., dissenting).

71. Comm'r v. Estate of Bosch, 382 F.2d 295 (2d Cir. 1967) (per curiam).

72. The results of this empirical research must be interpreted in light of the inherent limitations of such a focus on reported cases. *See, e.g.*, Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 GREEN BAG 2D 17 (2000); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235 (1998); Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Threat?*, 44 AM. U. L. REV. 757 (1995); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989). See also *infra* note 96 for a discussion of the impact of the "case-selection effect" on the empirical results reported in this Article.

73. The precise percentage of cases reaching this result probably is less important than the federal courts' adoption of de novo review in the face of the " proper regard" standard. This is true in part because of the relatively small number of relevant cases and the lack of a comparative yardstick of results in other areas in which a federal court must rule on the correctness of a state court's application of state law in a case involving a party to the federal proceeding.

74. Remarkably, my earlier empirical study of the 1967-1991 period found the same sixty percent federal court rejection of state court rulings on state law. *See* Caron, *The Role of State Court Decisions*, *supra* note 13, at 824-32. The consistency of these results in both the 770 cases citing *Bosch* in the 1967-1991 period and the 328 cases citing *Bosch* in the 1992-2000 period supports the conclusion that the federal courts have transformed the *Bosch* "proper regard" standard into a "no

| *Bosch* in the Federal Courts: 1967-2000 | | | | |
|---|---|---|---|---|
| Court | Cases Citing *Bosch* | Tax Cases Citing *Bosch* | Tax Cases Following State Court On State Law | Tax Cases Not Following State Court On State Law |
| Courts of Appeals | 302 | 92 | 19 | 28 |
| District Courts | 536 | 77 | 15 | 24 |
| Tax Court | 260 | 260 | 35 | 53 |
| Total | 1098 | 429 | 69<br>40% | 105<br>60% |

Of note in this compilation is the consistency with which all levels of federal courts have converted the *Bosch* "proper regard" test into a license to disregard the state court's interpretation of state law. In over fifty percent of the cases in the courts of appeals (59.6%)[75] as well as in the two tax trial courts[76] (federal district court (61.5%)[77] and Tax Court (60.2%)[78]), the

regard" standard.

75. Scott v. Comm'r, 226 F.3d 871, 874-76 (7th Cir. 2000); Estate of Rapp v. Comm'r, 140 F.3d 1211, 1214-18 (9th Cir. 1998); Estate of Kenly v. Comm'r, 139 F.3d 904 (9th Cir. 1998), *aff'g* 72 T.C.M. (CCH) 1314, 1317-19 (1996); McDonald v. Comm'r, 114 F.3d 1194, 1997 WL 284819, at 7-8 (9th Cir. 1997) (unpublished table decision); Autin v. Comm'r, 109 F.3d 231, 233-36 (5th Cir. 1997); Robinson v. Comm'r, 70 F.3d 34, 37-38 (5th Cir. 1995); Estate of Carpenter v. Comm'r, 52 F.3d 1266, 1270-74 (4th Cir. 1995); Burke v. United States, 994 F.2d 1576, 1583-84 (Fed. Cir.), *cert. denied*, 510 U.S. 990 (1993); Estate of Chagra v. Comm'r, 935 F.2d 1291 (5th Cir. 1991) *aff'g* 60 T.C.M. (CCH) 104, 107 (1990); Brown v. United States, 890 F.2d 1329, 1341-42 (5th Cir. 1989); Estate of Kraus v. Comm'r, 875 F.2d 597, 600-01 (7th Cir. 1989); Estate of Selby v. United States, 726 F.2d 643, 644-48 (10th Cir. 1984); Estate of Foster v. Comm'r, 725 F.2d 201 (2d Cir. 1984), *aff'g* 45 T.C.M. (CCH) 679, 682 (1983); Estate of Newman v. Comm'r, 624 F.2d 1096 (5th Cir. 1980), *aff'g* 38 T.C.M. (CCH) 898, 900-01 (1979); Lemle v. United States, 579 F.2d 185, 187 (2d Cir. 1978); Estate of Hamilton v. Comm'r, 577 F.2d 726 (3d Cir. 1978), *aff'g* 35 T.C.M. (CCH) 1609, 1613-14 (1976); Magavern v. United States, 550 F.2d 797, 800-02 (2d Cir.), *cert. denied*, 434 U.S. 826 (1977); Wiles v. Comm'r, 491 F.2d 1406 (5th Cir. 1974), *aff'g* 59 T.C. 289, 295-97 (1972); *In re* Estate of Abely, 489 F.2d 1327, 1328 (1st Cir. 1974); Greene v. United States, 476 F.2d 116, 119-20 (7th Cir. 1973); Risher v. United States, 465 F.2d 1, 4 (5th Cir. 1972); Murrah v. Wiseman, 449 F.2d 187, 190 (10th Cir. 1971); Krakoff v. United States, 439 F.2d 1023, 1025-28 (6th Cir. 1971); Kasishke v. United States, 426 F.2d 429, 435-36 (10th Cir. 1970); Cox v. United States, 421 F.2d 576, 577-83 (5th Cir. 1970); Sappington v. United States, 408 F.2d 817 (4th Cir. 1969), *aff'g* 68-1 U.S. Tax Cas. ¶ 12,514, at 87,337-38 (D. Md. 1968), *cert. denied*, 396 U.S. 876 (1969); Comm'r v. Estate of Bosch, 382 F.2d 295, 295 (2d Cir. 1967) (per curiam).

76. There are no relevant decisions of the third tax trial court (the Claims Court).

77. Davies v. United States, 124 F. Supp. 2d 717, 722-27 (D. Me. 2000); Estate of Starkey v. United States, 58 F. Supp. 2d 939, 948-55 (S.D. Ind. 1999), *rev'd*, 223 F.3d 694 (7th Cir. 2000); Leavenworth Nat'l Bank v. United States, 1996 WL 225193, at 10 (D. Kan. 1996); Hall v. United States, 822 F. Supp. 470, 473-75 (M.D. Tenn. 1993), *rev'd*, 39 F.3d 102 (6th Cir. 1994); Trent v. United States, 1990-1 U.S. Tax Cas. (CCH) ¶ 60,008, at 84,212-14 (S.D. Ohio 1987), *rev'd*, 893 F.2d 846 (6th Cir.), *cert. denied*, 498 U.S. 814 (1990); Crawford v. Unit ed States, 1981-1 U.S. Tax Cas. (CCH) ¶ 13,402, at 84,477-78 (D. Mass. 1981); Am. Nat'l Bank & Trust Co. v. United States, 78-2 U.S. Tax Cas. (CCH) ¶ 9767, at 85,590-92 (E.D. Tenn. 1978), *aff'd mem.*, 633 F.2d 213 (6th Cir. 1980); Lemle v. United States, 419 F. Supp. 68, 70 (S.D.N.Y. 1976); Magavern v. United States, 415 F. Supp. 217, 219-21 (W.D.N.Y. 1976), *aff'd*, 550 F.2d 797 (2d Cir.), *cert. denied*, 434 U.S. 826

(1977); Estate of Horner v. United States, 1976-2 U.S. Tax Cas. (CCH) ¶ 13,143, at 85,652-54 (S.D. Iowa 1976); Van Nuys v. United States, 1975-2 U.S. Tax Cas. (CCH) ¶ 13,081, at 88,815 (C.D. Cal. 1975); Thayn v. United States, 386 F. Supp. 245, 248-50 (D. Utah 1974); Folkerds v. United States, 369 F. Supp. 1176, 1179-82 (N.D. Iowa 1973), *rev'd*, 494 F.2d 749 (8th Cir. 1974); Condon Nat'l Bank v. United States, 349 F. Supp. 755, 757-59 (D. Kan. 1972); Risher v. United States, 339 F. Supp. 484, 487-88 (S.D. Ala.), *aff'd*, 465 F.2d 1 (5th Cir. 1972); Greene v. United States, 336 F. Supp. 464, 466-68 (E.D. Wis. 1971), *aff'd*, 476 F.2d 117 (7th Cir. 1973); Krakoff v. United States, 313 F. Supp. 1089, 1092-94 (S.D. Ohio 1970), *aff'd*, 439 F.2d 1023 (6th Cir. 1971); Murrah v. Wiseman, 1970-2 U.S. Tax Cas. (CCH) ¶ 12,696, at 88,904 (W.D. Okla. 1970), *aff'd*, 449 F.2d 187 (10th Cir. 1971); Kasishke v. United States, 1969-1 U.S. Tax Cas. (CCH) ¶ 12,597, at 84,922 (N.D. Okla. 1969), *aff'd*, 426 F.2d 429 (10th Cir. 1970); Cox v. United States, 296 F. Supp. 145, 147 (M.D. Ala. 1968), *aff'd in part, rev'd in part*, 421 F.2d 576 (5th Cir. 1970); Estate of Leggett v. United States, 293 F. Supp. 22, 24-26 (W.D. Pa. 1968), *rev'd*, 418 F.2d 1257 (3d Cir. 1969); Schmidt v. United States, 279 F. Supp. 811, 813-16 (D. Kan. 1968); Sappington v. United States, 1968-1 U.S. Tax Cas. (CCH) ¶ 12,514, at 87,337-38 (D. Md. 1968), *aff'd*, 408 F.2d 817 (4th Cir.), *cert. denied*, 396 U.S. 876 (1969); Underwood v. United States, 270 F. Supp. 389, 395-96 (E.D. Tenn. 1967), *aff'd in part, rev'd in part*, 407 F.2d 608 (6th Cir. 1969).

78. Estate of Young v. Comm'r, 110 T.C. 297, 300-06 (1998); Estate of Bond v. Comm'r, 104 T.C. 652, 657 n.3 (1995); Estate of Williams v. Comm'r, 103 T.C. 451, 453-64 (1994); Robinson v. Comm'r, 102 T.C. 116, 128-34 (1994), *aff'd in part, rev'd in part*, 70 F.3d 34 (5th Cir. 1995); Hayes v. Comm'r, 101 T.C. 593, 597-605 (1993); Estate of Bennett v. Comm'r, 100 T.C. 42, 59-60 (1993); Estate of Fletcher v. Comm'r, 94 T.C. 49, 54-60 (1990); Estate of Horne v. Comm'r, 91 T.C. 100, 103-10 (1988); Estate of Preisser v. Comm'r, 90 T.C. 767, 769-71 (1988); Graham v. Comm'r, 79 T.C. 415, 419-23 (1982); Padre Island Thunderbird, Inc. v. Comm'r, 72 T.C. 391, 395-99 (1979); Gordon v. Comm'r, 70 T.C. 525, 531 (1978); Estate of Kincade v. Comm'r, 69 T.C. 247, 253-60 (1977); Estate of Draper v. Comm'r, 64 T.C. 23, 32-33 (1975), *rev'd*, 536 F.2d 944 (1st Cir. 1976); Estate of Salter v. Comm'r, 63 T.C. 537, 541 (1975), *rev'd*, 545 F.2d 494 (5th Cir. 1977); Newhouse v. Comm'r, 59 T.C. 783, 790-91 (1972); Wiles v. Comm'r, 59 T.C. 289, 295-97 (1972), *aff'd mem.*, 491 F.2d 1406 (5th Cir. 1974); Estate of Campbell v. Comm'r, 59 T.C. 133, 137 (1972); Estate of Miller v. Comm'r, 58 T.C. 699, 712 (1972); Estate of Rowan v. Comm'r, 54 T.C. 633, 636-40 (1970); Estate of Lawler v. Comm'r, 52 T.C. 269, 276 (1969); Estate of Ahlstrom v. Comm'r, 52 T.C. 220, 224-31 (1969); Estate of Pangas v. Comm'r, 52 T.C. 99, 101-04 (1969); Estate of Lewis v. Comm'r, 49 T.C. 684, 686-89 (1968); Estate of Chamberlain v. Comm'r, 77 T.C.M. (CCH) 2080, 2085-88 (1999); Estate of Horstmeier v. Comm'r, 77 T.C.M. (CCH) 1940, 1942-45 (1999), *aff'd sub nom.*, Scott v. Comm'r, 226 F.3d 871 (7th Cir. 2000); Estate of Kenly v. Comm'r, 72 T.C.M. (CCH) 1314, 1319 (1996), *aff'd mem.*, 139 F.3d 904 (9th Cir. 1998); Estate of Rapp v. Comm'r, 71 T.C.M. (CCH) 1709, 1715-19 (1996), *aff'd*, 140 F.3d 1211 (9th Cir. 1998); Estate of Millikin v. Comm'r, 69 T.C.M. (CCH) 3032, 3036-37 (1995), *vacated*, 125 F.3d 339 (6th Cir. 1997) (en banc); Estate of Tenenbaum v. Comm'r, 69 T.C.M. (CCH) 1787, 1788 (1995), *rev'd*, 112 F.3d 251 (6th Cir. 1997); McDonald v. Comm'r, 68 T.C.M. (CCH) 1400, 1408-09 (1994), *aff'd mem.*, 114 F.3d 1194 (9th Cir. 1997); Estate of McKay v. Comm'r, 68 T.C.M. (CCH) 279, 281-85 (1994); Estate of Simpson v. Comm'r, 67 T.C.M. (CCH) 3062, 3063-3 to 3064 (1994); Estate of Carpenter v. Comm'r, 67 T.C.M. (CCH) 2400, 2403-08 (1994), *aff'd*, 52 F.3d 1266 (4th Cir. 1995); Estate of DePaoli v. Comm'r, 66 T.C.M. (CCH) 1493, 1497-98 (1993), *rev'd on other grounds*, 62 F.3d 1259 (10th Cir. 1995); Estate of Melville v. Comm'r, 66 T.C.M. (CCH) 1076, 1081-84 (1993); Estate of Swallen v. Comm'r, 65 T.C.M. (CCH) 2332, 2335-38 (1993), *rev'd*, 98 F.3d 919 (6th Cir. 1996); Estate of Hedrick v. Comm'r, 64 T.C.M. (CCH) 249, 252-54 (1992), *rev'd mem.*, 30 F.3d 139 (9th Cir. 1994); Estate of Chagra v. Comm'r, 60 T.C.M. (CCH) 104, 107 (1990), *aff'd mem.*, 935 F.2d 1291 (5th Cir. 1991); Estate of Cole v. Comm'r, 58 T.C.M. (CCH) 715, 718-27 (1989); Estate of Kraus v. Comm'r, 55 T.C.M. (CCH) 600, 603-04 (1988), *aff'd in part, rev'd in part*, 875 F.2d 597 (7th Cir. 1989); Morris v. Comm'r, 54 T.C.M. (CCH) 1062, 1062-64 (1987); Estate of Jakel v. Comm'r, 54 T.C.M. (CCH) 264, 265 (1987); Estate of Foster v. Comm'r, 45 T.C.M. (CCH) 679, 682 (1983), *aff'd*, 725 F.2d 201 (2d Cir. 1984); Estate of Ashenhurst v. Comm'r, 43 T.C.M. (CCH) 673, 674-76 (1982); Garriss Inv. Corp. v. Comm'r, 43 T.C.M. (CCH) 396, 401-03

federal courts have refused to follow the state court's interpretation of state law. In many of these cases, the federal courts have cavalierly disregarded the state court's interest in being the final arbiter of laws within the state, characterizing state court decisions with which it disagreed as merely "another evidentiary factor"[79] to consider or as an example of "judicial fiat."[80] One federal court brazenly noted "the very limited role that state trial court decisions may play in determining federal tax liability"[81] and instead called upon federal courts "to reexamine de novo the state court decisions."[82] Other courts emphasized that they were "free to differ" with the state court's interpretation of state law[83] and that to allow state court decisions to bind federal courts in later federal tax litigation "would subject the federal tax system to 'the whim of the state courts.'"[84] Another court characterized the "lesson" of *Bosch* as follows: the Service, "having been absent from the State court proceeding that established rights to the decedent's property, is entitled to [have its] day in Federal court."[85]

In less than fifty percent of the cases did the courts of appeals (40.4%)[86]

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(1982); Estate of Newman v. Comm'r, 38 T.C.M. (CCH) 898, 900-01 (1979), *aff'd mem.*, 624 F.2d 1096 (5th Cir. 1980); Estate of Hamilton v. Comm'r, 35 T.C.M. (CCH) 1609, 1613-15 (1976), *aff'd mem.*, 577 F.2d 726 (3d Cir. 1978); Estate of Bath v. Comm'r, 34 T.C.M. (CCH) 493, 502-06 (1975); Robinson v. Comm'r, 33 T.C.M. (CCH) 1140, 1142-43 (1974); Estate of Urge v. Comm'r, 31 T.C.M. (CCH) 275, 276-77 (1972); Estate of Goldstein v. Comm'r, 30 T.C.M. (CCH) 1399, 1402-05 (1971), *rev'd*, 479 F.2d 813 (10th Cir. 1973); Kraus v. Comm'r, 26 T.C.M. (CCH) 1078, 1081 (1967).

79. Lake Shore Nat'l Bank v. Coyle, 296 F. Supp. 412, 418 (N.D. Ill. 1968), *rev'd*, 419 F.2d 958 (7th Cir. 1969).

80. Cox v. United States, 296 F. Supp. 145, 147 (M.D. Ala. 1968), *aff'd in part, rev'd in part*, 421 F.2d 576 (5th Cir. 1970).

81. Hall v. United States, 822 F. Supp. 470, 474 (M.D. Tenn. 1993), *rev'd*, 39 F.3d 102 (6th Cir. 1994).

82. *Id*. at 475.

83. Leggett v. United States, 418 F.2d 1257, 1258 (3d Cir. 1969).

84. Burke v. United States, 994 F.2d 1576, 1583 (Fed. Cir.) (quoting Estate of Street, 974 F.2d 723, 728 (6th Cir. 1992)), *cert. denied*, 510 U.S. 990 (1993).

85. Estate of Kenly v. Comm'r, 72 T.C.M. (CCH) 1314, 1319 (1996), *aff'd mem.*, 139 F.3d 904 (9th Cir. 1998).

86. *See* Estate of Starkey v. United States, 223 F.3d 694, 699-704 (7th Cir. 2000); Estate of Davenport v. Comm'r, 184 F.3d 1176, 1182-85 (10th Cir. 1999); Neal v. United States, 187 F.3d 626 (3d Cir. 1999), *aff'g* 1998 WL 718117, at 4-9 (W.D. Pa. 1998); Estate of Delaune v. United States, 143 F.3d 995, 1000-04 (5th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999); Estate of Swallen v. Comm'r, 98 F.3d 919, 921-26 (6th Cir. 1996); Hall v. United States, 39 F.3d 102, 105-06 (6th Cir. 1994); Estate of Hedrick v. Comm'r, 30 F.3d 139, 1994 WL 409713, at 3-6 (9th Cir. 1994) (unpublished table decision); Estate of Warren v. Comm'r, 981 F.2d 776, 779-84 (5th Cir. 1993); Griffith v. Comm'r, 749 F.2d 11 (6th Cir. 1984); Sun First Nat'l Bank v. United States, 607 F.2d 1347, 1354 (Ct. Cl. 1979); Estate of Salter v. Comm'r, 545 F.2d 494, 497-501 (5th Cir. 1977); Estate of Draper v. Comm'r, 536 F.2d 944, 949-50 (1st Cir. 1976); Folkerds v. United States, 494 F.2d 749, 752 (8th Cir. 1974); Keinath v. Comm'r, 480 F.2d 57, 61-65 (8th Cir. 1973); Estate of Goldstein v. Comm'r, 479 F.2d 813, 819 (10th Cir. 1973); Hatt v. Comm'r, 457 F.2d 499 (7th Cir. 1972) (per curiam); First Nat'l Bank v. United States, 422 F.2d 1385, 1387 (10th Cir. 1970); Estate of Leggett v. United States, 418 F.2d

and the tax trial courts (federal district court (38.5%)[87] and Tax Court (39.8%)[88]) accept the state court's view of its own state's laws. Ultimately, the federal courts agreed with the state court only after a rigorous, de novo examination of state law.

The language of these federal courts, whether ultimately rejecting or accepting the state court's interpretation of state law, is striking in their disrespect for state courts.[89] At best, the federal courts give mere lip service

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1257, 1258-61 (3d Cir. 1969); Smith v. Comm'r, 418 F.2d 573 (9th Cir. 1969) (per curiam); Underwood v. United States, 407 F.2d 608, 611 (6th Cir. 1969).

87. Estate of O'Neal v. United States, 81 F. Supp. 2d 1205, 1215-18 (N.D. Ala. 1999); Neal v. United States, 1998 WL 718117, at 4-9 (W.D. Pa. 1998), *aff'd mem.*, 187 F.3d 626 (3d Cir. 1999); Estate of Stern v. United States, 1998 WL 172640, at 4-6 (S.D. Ind. 1998); Mervis Industries, Inc. v. Sams, 866 F. Supp. 1143, 1145-49 (S.D. Ind. 1994); Stansbury v. United States, 543 F. Supp. 154, 156-58 (N.D. Ill. 1982); Provident Nat'l Bank v. United States, 504 F. Supp. 987, 988-92 (E.D. Pa. 1980); Wheaton v. United States, 471 F. Supp. 972, 974-79 (D. Minn. 1979); United States v. Bosurgi, 389 F. Supp. 1088, 1090-92 (S.D.N.Y. 1975), *aff'd in part, rev'd in part*, 530 F.2d 1105 (2d Cir. 1976); Endicott Trust Co. v. United States, 75-2 U.S. Tax Cas. (CCH) ¶ 13,111, at 88,936-39 (N.D.N.Y. 1975); Miglionico v. United States, 323 F. Supp. 197, 200-01 (N.D. Ala. 1971); First Nat'l Bank of Amarillo v. United States, 1969-1 U.S. Tax Cas. (CCH) ¶ 12,589, at 84,992-93 (D.N.M. 1969), *aff'd*, 422 F.2d 1385 (10th Cir. 1970); Ritter v. United States, 297 F. Supp. 1259, 1263-65 (S.D.W. Va. 1968); Lake Shore Nat'l Bank v. Coyle, 296 F. Supp. 412, 416-20 (N.D. Ill. 1968); Kellmann v. United States, 286 F. Supp. 632, 634-37 (E.D. Mo. 1968); Rudin v. United States, 285 F. Supp. 901, 903-05 (E.D. Pa. 1968).

88. Estate of Hubert v. Comm'r, 101 T.C. 314, 318-22 (1993), *aff'd on other grounds*, 63 F.3d 1083 (11th Cir. 1995), *aff'd*, 520 U.S. 93 (1997); Estate of Spruill v. Comm'r, 88 T.C. 1197, 1216-22 (1987); Estate of Paxton v. Comm'r, 86 T.C. 785, 802-03 (1986); Estate of Fulmer v. Comm'r, 83 T.C. 302, 308 (1984); Mass v. Comm'r, 81 T.C. 112, 123-28 (1983); Estate of Stewart v. Comm'r, 79 T.C. 1046, 1048-52 (1982); Estate of Weiskopf v. Comm'r, 77 T.C. 135, 142-45 (1981); Estate of Greenberg v. Comm'r, 76 T.C. 680, 684-87 (1981); Mann v. Comm'r, 74 T.C. 1249, 1259-62 (1980); Estate of Sawyer v. Comm'r, 73 T.C. 1, 3-4 (1979); Harrah v. Comm'r, 70 T.C. 735, 746-56 (1978); Tracy v. Comm'r, 70 T.C. 397, 400-03 (1978); Estate of Craft v. Comm'r, 68 T.C. 249, 264-69 (1977); Estate of Williams v. Comm'r, 62 T.C. 400, 406-13 (1974); Estate of Hamelsky v. Comm'r, 58 T.C. 741, 744-45 (1972); Harris v. Comm'r, 56 T.C. 1165, 1177-79 (1971), *rev'd*, 477 F.2d 812 (4th Cir. 1973); Willits v. Comm'r, 50 T.C. 602, 617-18 (1968); Smith v. Comm'r, 50 T.C. 273, 281-83 (1968), *aff'd*, 418 F.2d 573 (9th Cir. 1969) (per curiam); Herman A. Moore Trust v. Comm'r, 49 T.C. 430, 440-41 (1968); Estate of Lassiter v. Comm'r, 80 T.C.M. (CCH) 541, 551-57 (2000); Steingold v. Comm'r, 80 T.C.M. (CCH) 95, 96 (2000); Estate of Davenport v. Comm'r, 74 T.C.M. (CCH) 405, 410-12 (1997), *aff'd*, 184 F.3d 1176 (10th Cir. 1999); Estate of Baird v. Comm'r, 73 T.C.M. (CCH) 1883, 1884-86 (1997); Estate of Street v. Comm'r, 73 T.C.M. (CCH) 1787, 1788-89 (1997), *aff'd on other grounds*, 152 F.3d 482 (5th Cir. 1998); Zurn v. Comm'r, 72 T.C.M. (CCH) 440, 449-50 (1996); Wells v. Comm'r, 70 T.C.M. (CCH) 1278, 1280-82 (1995); Estate of Goree v. Comm'r, 68 T.C.M. (CCH) 123, 125-28 (1994), *nonacq.*, 1996-1 C.B. 1, 1996-2 C.B. 1; Estate of Haydel v. Comm'r, 62 T.C.M. (CCH) 956, 964 (1991); Estate of Henderson v. Comm'r, 56 T.C.M. (CCH) 1332, 1336-39 (1989); Griffith v. Comm'r, 46 T.C.M. (CCH) 189, 192 & n.5 (1983), *aff'd*, 749 F.2d 11 (6th Cir. 1984); Estate of Roberts v. Comm'r, 45 T.C.M. (CCH) 1101, 1103-04 (1983); Estate of Reichenberger v. Comm'r, 39 T.C.M. (CCH) 1035, 1038-40 (1980); Estate of Rose v. Comm'r, 32 T.C.M. (CCH) 461, 462-63 (1973); Estate of Aquilino v. Comm'r, 31 T.C.M. (CCH) 906, 907-08 (1972); Hatt v. Comm'r, 28 T.C.M. (CCH) 1194, 1199-1200 (1969), *aff'd*, 457 F.2d 499 (7th Cir. 1972) (per curiam).

89. This lack of respect is especially troubling given the evidence in the *Erie* context illustrating how often federal courts incorrectly gauge state law. *See, e.g.*, Jerome I. Braun, *A Certification Rule for California*, 36 SANTA CLARA L. REV. 935, 937-40 (1996); John B. Corr & Ira P. Robbins,

to the *Bosch* "proper regard" standard.[90] In most cases, the federal courts engage in de novo review of state law without giving *any* weight to the state court decision.[91] In addition, many federal courts also have reverted to a pre-*Bosch* focus on the adversariness of the state court decision.[92] For example, in *Estate of Delaune v. United States*[93] the Fifth Circuit stated that where "the state court adjudication arises out of a manifestly non-adversarial proceeding and the relevant federal tax statute indicates no preference for the sanctity of the state court's ruling, we need accord no particular deference, and must conduct our own investigation of the relevant state law."[94] In other cases, however, federal courts have noted that *Bosch* intended the "proper regard" test as a substitute for the nonadversary proceeding test.[95]

This thirty-four year experience with *Bosch* demonstrates that the initial promise of the "proper regard" test as a way to balance the competing revenue and comity interests instead has given way to a one-sided focus on the revenue interest.[96] The well-settled practice of federal courts giving "no

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*Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 415 n.11 (1988); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679-80 (1992); Stella L. Smetanka, *To Predict or to Certify Unresolved Questions of State Law: A Proposal for Federal Court Certification to the Pennsylvania Supreme Court*, 68 TEMP. L. REV. 725, 729-35 (1995). *See also* Jed I. Bergman, Note, *Putting Precedent in its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969 (1996). *Cf.* 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).

90. In some cases, federal courts of appeals have gone out of their way to applaud lower federal courts for construing state law differently than the state court, even where the federal court of appeals ultimately agrees with the state court's interpretation of state law. *See* Estate of Swallen v. Comm'r, 98 F.3d 919, 926 (6th Cir. 1996) ("We thus differ with the legal conclusion of the Tax Court, not with its method of review. The Tax Court gave 'proper regard' to the probate court decisions when it recounted and attempted to apply the same Ohio law. It simply did so in an incorrect manner.").

91. In some cases, federal courts have followed a decision of a state's intermediate appellate court on state law. *See, e.g.*, Estate of Starkey v. Comm'r v. United States, 223 F.3d 694, 699-702 (7th Cir. 2000); Estate of Swallen v. Comm'r, 98 F.3d 919, 921-25 (6th Cir. 1996).

92. *See, e.g.*, Robinson v. Comm'r, 70 F.3d 34, 37-38 (5th Cir. 1995), *cert. denied*, 519 U.S. 824 (1996); Estate of Warren v. Comm'r, 981 F.2d 776, 781-83 (5th Cir. 1993); Burke v. United States, 994 F.2d 1576, 1583 (Fed. Cir.), *cert. denied*, 510 U.S. 990 (1993); Brown v. United States, 890 F.2d 1329, 1342-43 n.15 (5th Cir. 1989); Lemle v. United States, 579 F.2d 185, 188 (2d Cir. 1978); Leavenworth Nat'l Bank v. United States, 1996 WL 225193, at 10 (D. Kan. 1996); Estate of Bond v. Comm'r, 104 T.C. 652, 670 n.3 (1995); Robinson v. Comm'r, 102 T.C. 116, 132-33 (1994), *aff'd in part, rev'd in part*, 70 F.3d 34 (5th Cir. 1995), *cert. denied*, 519 U.S. 824 (1996); Estate of Bennett v. Comm'r, 100 T.C. 42, 60 (1993); Estate of Chamberlain v. Comm'r, 77 T.C.M. (CCH) 2080, 2088 (1999); Estate of Simpson v. Comm'r, 67 T.C.M. (CCH) 3062, 3063-4 to 3063-5 (1994).

93. 143 F.3d 995 (5th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999).

94. *Id.* at 1002.

95. *See, e.g.*, Keinath v. Comm'r, 480 F.2d 57, 62 n.7 (8th Cir. 1973); Trent v. United States, 1990-1 U.S. Tax Cas. (CCH) ¶ 60,008, at 84,213 (S.D. Ohio 1987).

96. These results must be considered in light of the "case-selection effect," which notes that litigated cases are not a random sample of the universe of such cases. Under this theory, cases reach trial only where the parties disagree over the likely outcome; cases where the legal rules favor one

regard" to state court decisions on state law is inconsistent with the deference principle reaffirmed in the recent *Bush v. Gore*[97] decision.

## III. THE IMPACT OF *BUSH V. GORE*

In its December 12, 2000 decision that put an end to the five-week-long presidential election imbroglio, the Supreme Court split into three separate camps in an unsigned per curiam delivering the judgment of the Court accompanied by five separate opinions. About the only thing that all of the Justices agreed upon was the proposition that, as a general rule, federal courts should defer to state courts on matters of state law.[98] On one side, Chief Justice Rehnquist, in a concurring opinion joined by Justices Scalia and Thomas, stated that "[i]n most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law."[99] Chief Justice Rehnquist cited *Erie* in explaining that this practice "reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns."[100] As a result, the federal courts "generally defer to state courts on the interpretation of state

party or the other are settled prior to trial. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998); Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990); Eric Helland & Alexander Tabarrok, *Runaway Judges? Selection Effects and the Jury*, 16 J.L. ECON. & ORG. 306 (2000); Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233 (1996). As a result, even a pro-taxpayer legal standard would not result in a trial success rate much different than fifty percent because most such cases would be settled in the taxpayer's favor; only the close questions on both sides of the standard would remain for trial. Although the taxpayer's forty percent success rate in requiring the Service to follow a state court's prior application of state law despite the *Bosch* "proper regard" standard would appear to support the case-selection effect thesis, the basic assumption of the case-selection effect theory undercuts its application here. The case-selection effect theory depends on the parties being able to predict the outcome of litigation under a legal standard in deciding whether or not to settle. However, as this Article has demonstrated, the *Bosch* standard has engendered thirty-four years of disarray, as the federal courts have read all meaning out of "proper regard." By paying lip service to this standard, but then subjecting lower state court determinations of state law to de novo federal review, the federal courts have undermined the parties' ability to correctly gauge the result of litigation. This is especially true in light of the federal courts' sporadic reliance on the pre-*Bosch* nonadversary proceedings test and the uncertainty faced by the parties under both the *Bosch* standard and the separate state law issue. In these circumstances, the case-selection effect does not offer a convincing explanation for the results of the empirical research reported here.

97. 531 U.S. 98 (2000) (per curiam).

98. *Id.* The Justices also agreed with this proposition in the unanimous per curiam opinion in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 76 (2000) (per curiam) ("As a general rule, this Court defers to a state court's interpretation of a state statute.").

99. 531 U.S. at 112 (Rehnquist, C.J., and Scalia & Thomas, JJ., concurring).

100. *Id.* (citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)).

law."[101] But the majority concluded that the extraordinary circumstances of the case warranted a departure from this general principle in holding that the Florida Supreme Court's order requiring manual recounts under Florida election law violated federal equal protection guarantees.[102]

On the other side, the separate dissenting opinions contain similar language endorsing the general desirability of federal court deference to state court interpretations of state law. Justice Stevens called such deference a "settled practice"[103] and criticized the majority for its "unstated lack of confidence in the impartiality and capacity of the state judges."[104] Justice Souter called *Bush v. Gore* a "straightforward" doctrinal case[105] and chided the majority for cavalierly disregarding the Court's "customary respect for state [court] interpretations of state law."[106] Justice Ginsburg noted that the "ordinary practice"[107] of federal courts is to defer to state court interpretations of state law and that "disagreement with the Florida court's interpretation of its own State's laws" did not justify the majority's substitution of its judgment for that of the state court.[108] Justice Ginsburg stated that "[i]n deferring to state courts on matters of state law, we appropriately recognize that this Court acts as an 'outsider lacking the common exposure to local law which comes from sitting in the jurisdiction.'"[109] In perhaps the clearest expression of the general deference standard in all of the various opinions, Justice Ginsburg stated: "The extraordinary setting of this case has obscured the ordinary principle that dictates its proper resolution: Federal courts defer to state high courts' interpretations of their state's own laws. This principle reflects the core of federalism, on which all agree."[110] In the end, the Justices differed only as to whether, as Justice Breyer put it in his dissent, "this case [was] one of the few in which we may lay that fundamental principle aside."[111]

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101. *Id*. at 114.
102. *Id*.
103. *Id*. at 123 (Stevens, Ginsburg & Breyer, JJ., dissenting). In his opinion dissenting from the grant of the application for a stay and from the grant of the writ of certiorari, Justice Stevens called this a "venerable [rule] of judicial restraint." Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Stevens, Souter, Ginsburg & Breyer, JJ., dissenting) ("On questions of state law, we have consistently respected the opinions of the highest courts of the States.").
104. *Id*. at 128.
105. *Id*. at 129 (Souter, Stevens, Breyer & Ginsburg, JJ., dissenting).
106. *Id*. at 133.
107. *Id*. at 135 (Ginsburg, Stevens, Souter & Breyer, JJ., dissenting).
108. *Id*. at 136. *See also id*. (majority had no cause to upset state court's "reasoned interpretation of Florida law").
109. *Id*. at 138 (quoting Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974)).
110. *Id*. at 142.
111. *Id*. at 148 (Breyer, Stevens, Ginsburg & Souter, JJ., dissenting).

Whatever one's view about the ultimate outcome in *Bush v. Gore*, run-of-the-mill federal tax cases simply do not require the same level of federal intrusion into state court determinations of state law as the most hotly contested presidential election in a century. To be sure, most of the state court decisions at issue in subsequent federal tax litigation involve decisions of lower state courts rather than the decision of the highest state court at issue in *Bush v. Gore*. Yet the same principles of comity and federalism at the heart of *Bush v. Gore* support federal courts giving deference to a lower state court interpretations of its own laws. This notion is reflected in the language of the Justices' separate opinions re-stating the deference principle in the broadest possible terms to encompass decisions of not only the highest state court but also lower state courts.

Moreover, the enormous visibility of the *Bush v. Gore* decision makes this an especially propitious time to re-think this nettlesome aspect of federal tax law that has bedeviled courts and commentators for decades. With both the legal community and the public now more attuned to the comity issues implicated by federal judicial intervention into state court decision making,[112] federal courts no longer should be able to blithely convert the *Bosch* "proper regard" standard into a one-sided embrace of the federal revenue interest through their no regard approach. To that effect, there are various alternative ways to implement the *Bush v. Gore* deference principle, either within the existing *Bosch* framework or through an entirely new approach.[113]

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112. *See generally* ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); E.J. DIONNE, JR. & WILLIAM KRISTOL, *BUSH V. GORE*: THE COURT CASES AND THE COMMENTARY (2001); SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (2001); ROBERT M. JARVIS ET AL., *BUSH V. GORE*: THE FIGHT FOR FLORIDA'S VOTE (2001); RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001); Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001); Craig M. Bradley, *"Be Careful What You Ask For": The 2000 Presidential Election, the U.S. Supreme Court, and the Law of Criminal Procedure*, 76 IND. L.J. 889 (2001); Erwin Chemerinsky, Bush v. Gore *Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001); Linda Greenhouse, *Learning to Live with* Bush v. Gore, 4 GREEN BAG 2d 381 (2001); Lonny Hoffman, *Federal Courts Law and the 2000 Presidential Election*, 95 NW. U. L. REV. (forthcoming 2001); Michael J. Klarman, Bush v. Gore *Through the Lens of Constitutional History*, 89 CAL. L. REV. (forthcoming 2001); Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361 (2001); *Symposium:* Bush v. Gore, 68 U. CHI. L. REV. 613 (2001); *Symposium: The Law of Presidential Elections: Issues in the Wake of Florida 2000*, 28 FLA. ST. U. L. REV. (forthcoming 2001); Michael W. McConnell, *A Muddled Ruling*, WALL ST. J., Dec. 14, 2000, at A26.

113. Twelve years ago, the Supreme Court appeared on the verge of revisiting *Bosch* when it granted certiorari in *White v. United States*, 489 U.S. 1051 (1989). In *White*, a state probate court approved the payment of both an attorney's fee and an executor's commission to the same person. United States v. White, 650 F. Supp. 904, 905 (W.D.N.Y. 1987). In auditing the estate, the Service disallowed the claimed administration expense deduction for the fees and instituted a summons enforcement proceeding to obtain information about the fees (the attorney's time records or an

## IV. RECONCILING *BOSCH* WITH *BUSH V. GORE*

There are several possibilities for injecting the *Bush v. Gore* comity concern back into the *Bosch* "proper regard" framework: (1) requiring federal courts to defer to *all* state court determinations of state law in subsequent federal tax litigation; (2) requiring federal courts to accept only state court determinations that are the product of an adversarial proceeding; or (3) using procedural devices such as certification and joinder. This section argues that none of these approaches adequately balances the competing concerns and that federal courts instead should return to the *Erie* underpinnings of the *Bosch* standard to give effect to the *Bush v. Gore* deference principle.

### *A. Complete Deference*

As noted earlier,[114] the Supreme Court when first faced with this issue in 1916 held in *Uterhart v. United States*[115] that state court decisions on state law are controlling in later federal tax litigation. Lower federal courts followed this complete-deference approach for two decades,[116] until the Supreme Court in the 1930s held that only noncollusive state court decisions

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itemized list of legal work performed for the estate). *Id.* at 905-06. The district court refused to enforce the summons because it would not "second guess" the state court's decision. *Id*. at 911. The Second Circuit reversed the decision and ordered the enforcement of the summonses because, under *Bosch*, the federal courts and the Service could reexamine the state court's application of state law. United States v White, 853 F.2d 107, 117 (2d Cir. 1988). Although the Second Circuit questioned whether the Service was "allocating wisely the time and effort of its limited staff" in pursuing the matter, it concluded that the Service had a "legitimate purpose" for issuing the summonses to investigate the circumstances of the expenses. *Id.* at 117-18. The case thus involved the narrow context of a summons enforcement proceeding, but the estate in its certiorari petition cast the issue in broad *Bosch* terms as "the degree of deference owed by the federal tax authorities to determinations by state courts." Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 4, White v. United States (No. 88-928). After the Supreme Court granted certiorari, White v. United States, 489 U.S. 1051 (1989), and heard oral arguments in the case, the Court, with Justice White dissenting, dismissed the writ of certiorari as having been "improvidently granted." White v. United States, 493 U.S. 5 (1989). The case apparently had become moot as the Service had obtained the information it requested in the summonses, and a year later the Service agreed to refund the entire amount of estate tax attributable to the disputed deductions. Consent to Judgment, White v. United States, No. 88-0725T (W.D.N.Y. Sept. 18, 1990). *See* Paul L. Caron, *Must an Administration Expense Allowed by State Law Also Meet a Federal Necessity Test?*, 70 J. TAX'N 352 (1989); Marilyn E. Nelson, *Deductibility for Estate Tax Purposes of Legal Fees and Administration Expenses*, 30 TAX MGM'T. MEM. 287 (1989).

114. *See supra* notes 17-18 and accompanying text.

115. 240 U.S. 598 (1916).

116. *See, e.g.*, Boal v. Metropolitan Museum of Art, 19 F.2d 454, 459 (2d Cir.), *cert. denied*, 275 U.S. 565 (1927); Sutherland v. Selling, 16 F.2d 865, 868 (9th Cir. 1926), *cert. denied*, 273 U.S. 760 (1927); Hidden v. Durey, 34 F.2d 174, 178 (N.D.N.Y. 1929).

were binding in later federal tax proceedings.[117] Gilbert Verbit has recommended that federal courts return to this complete-deference approach:

> This *Uterhart* rule should replace *Bosch* as the method of dealing with state court decisions in federal tax cases. In short, all final decisions of state courts should be accepted as binding in federal tax cases, regardless of the level of the state court or the character of the proceedings in that court.[118]

The difficulty with this approach is that it exalts the *Bush v. Gore* comity interest at the expense of the legitimate federal interest in protecting federal revenues against aberrant manifestations of state law. Although Professor Verbit refuses to view state court judges as active participants in a "Great Treasury Raid,"[119] requiring federal courts to give controlling weight to *all* state court decisions would eliminate any role for federal courts in ensuring the correctness of state court interpretations that control federal tax liability. Moreover, it would create an incentive for taxpayers to manufacture state court litigation in order to come within the protection of this rule.[120] Instead, the question is how to afford meaningful federal supervision of state law without running afoul of the *Bush v. Gore* deference principle as is currently the case with the *Bosch* "proper regard" standard.

### *B. Deference to State Court Adversarial Proceedings*

One possible solution, embraced by Justices Harlan and Fortas in their *Bosch* dissents,[121] by some federal courts since then,[122] and recently again by the Service[123] is to give controlling weight to state court interpretations of state law only where the state court decision is the product of an adversarial proceeding. Bernard Wolfman[124] and other commentators[125] support this

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117. Blair v. Comm'r, 300 U.S. 5 (1937); Freuler v. Comm'r, 291 U.S. 35 (1934).

118. Gilbert P. Verbit, *State Court Decisions in Federal Transfer Tax Litigation:* Bosch *Revisited*, 23 REAL PROP. PROB. & TR. J. 407, 457 (1988).

119. *Id*. at 461.

120. *See* Mitchell M. Gans, *Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance?*, 48 EMORY L.J. 871, 932-33 (1999).

121. Comm'r v. Estate of Bosch, 387 U.S. 456, 471 (Harlan, J., dissenting), 483 (Fortas, J., dissenting) (1967).

122. *See supra* notes 92-94 and accompanying text.

123. *See infra* note 207 and accompanying text.

124. Bernard Wolfman, Bosch, *Its Implications and Aftermath: The Effect of State Court Adjudications on Federal Tax Litigation*, 3 U. MIAMI INST. ON EST. PLAN. 2-1 (1969).

125. *See, e.g.*, Elliott K. Braverman & Mervyn S. Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 TAX L. REV. 545 (1962); Jackson M. Bruce, Jr., Bosch *and Other Dilemmas: Binding the Parties and the Tax Consequences in Trust Dispute Resolution*, 18 U.

approach as the best way to guarantee a measure of federal court involvement in the state law question short of the wholesale federalization of state law determinations seen under the *Bosch* "proper regard" rubric: state court adjudications "should not be accepted as determinative for federal tax purposes when the state court proceeding does not appear to have compelled the state court to resolve the issue with the full exploration and consideration of conflicting viewpoints ordinarily required in adversary proceedings."[126] This approach is misguided for several reasons.

As explained earlier,[127] the federal courts in the pre-*Bosch* period were unable to agree on the set of relevant factors to determine whether the state court proceeding was sufficiently adversarial so as to bind the federal court. Although Justices Harlan and Fortas tried to supply such a list in their *Bosch* dissents, any such effort is doomed to fail because of the inherent nonadversarial nature of most of the state court proceedings at issue in subsequent federal tax litigation.[128]

Moreover, giving controlling status only to adversarial state court proceedings encourages the taxpayer's counsel to engage in elaborate "pillow fights" and other machinations designed to produce the requisite adversity.[129] The adversarial approach is fundamentally flawed because it generates controversy and litigation over a peripheral issue rather than what should be the focus of the inquiry: the correctness of the state court's application of state law. As I have noted elsewhere, why should a state court's erroneous application of state law control the federal tax result merely because the state proceeding "was cloaked with sufficient indicia of adversariness?"[130] Professor Wolfman took me to task for "ignor[ing] the fact that it is always the business of courts, particularly federal courts deciding tax cases, to look under cloaks, to see through even elaborate facades to the structure (or the

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MIAMI INST. ON EST. PLAN. 9-1 (1984); David G. Sacks, *The Binding Effect of Nontax Litigation in State Courts*, 21 N.Y.U. INST. ON FED. TAX'N 277 (1963). *See also* PAUL R. MCDANIEL, JAMES R. REPETTI & PAUL L. CARON, FEDERAL WEALTH TRANSFER TAXATION 89-90 (4th ed. 1999).

126. Wolfman, *supra* note 124, at 2-25. *See also* Bernard Wolfman, Bosch *Revisited*, 64 TAX NOTES 269 (1994) ("For me, some degree of adversariness is essential before a federal court sitting on a tax case should be required to accept what a state court has said.").

127. *See supra* notes 22-29 and accompanying text.

128. *See* Hibernia Bank v. United States, 581 F.2d 741, 747 (9th Cir. 1978) (Duniway, J., concurring) ("[I]n California, and I suspect in most other states, probate proceedings are essentially ex parte in character."); Verbit, *supra* note 118, at 454 ("The fundamental difficulty with *Freuler/Blair*, even with the more operational gloss by Justices Harlan and Fortas, is that the usual state court proceeding the federal court is asked to embrace is, by design, a non-adversary proceeding.").

129. *See* Gans, *supra* note 120, at 932-33.

130. Caron, *The Allure of Adversariness*, *supra* note 13, at 673-74 (quoting Caron, *The Role of State Court Decisions*, *supra* note 13, at 844).

lack of structure) that lies behind."[131] Substance-over-form considerations undeniably are endemic in the tax law,[132] but there is simply no reason to lard yet another tax area with these uncertainties when there is a better alternative described in Part D of this section.[133]

### *C. Procedural Devices*

The *Bosch* "proper regard" standard and the "total regard" and adversarial approaches thus do not adequately protect federal and state interests in giving effect to state court decisions in federal tax litigation. This section examines procedural devices such as certification and joinder and concludes that they too fail to protect these interests.

#### *1. Certification*

One way to obviate the thorny issue of the degree of federal deference owed to lower state court determinations of state law is to have the federal court certify the state law issue to the highest court in the state.[134] Under *Erie*, decisions of the highest state court would be controlling in the federal tax litigation.[135] Certification thus would protect the federal revenue interest in

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131. Wolfman, *supra* note 14, at 967.

132. *See generally* 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 4.3.3 (3d ed. 1999); Lewis R. Steinberg, *Form, Substance and Directionality in Subchapter C*, 52 TAX LAW. 457 (1999); Robert Willens, *Form and Substance in Subchapter G—Exposing the Myth*, 84 TAX NOTES 739 (1999).

133. *See infra* notes 164-230 and accompanying text. Martin Fried also has criticized the adversarial approach for its over-emphasis on the form of the state court proceeding. Martin L. Fried, *A New Voice in the Debate over the "Ascertainment" of State Law*, 71 TAX NOTES 543 (1996); Martin L. Fried, *Adverseness, Not Adversariness*, 64 TAX NOTES 971 (1994); Martin L. Fried, *External Pressures on Internal Revenue: The Effect of State Court Adjudications in Tax Litigation*, 42 N.Y.U. L. REV. 647 (1967). However, his alternative approach of focusing on whether the parties to the state court litigation were economically adverse suffers from the other failings of the adversarial approach. The result under either approach is controversy and litigation over subsidiary issues (adversariness or economic adverseness) rather than the central issue of the correctness of the state court decision under state law.

134. *See generally* 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4248 (2d ed. 1988).

135. In Massachusetts and other states, taxpayers can obtain expedited consideration by the highest state court of a state law question that bears on a federal tax issue. MASS. GEN. LAWS ANN. ch. 215, § 13 (West 2000) (probate court may certify question of state law to intermediate appellate court); *id*. ch. 211A, §10(A) (highest state court may bypass intermediate appellate court in certain circumstances and decide certified questions of state law). *See, e.g.*, Berman v. Sandler, 399 N.E.2d 17, 19 (Mass. 1980) ("It is appropriate for us to render a decision in this case . . . because only an interpretive decision by the highest State court will dispose of contrary interpretations by the Internal Revenue Service."); John H. Clymer & Deborah S. Kay, Kirchick v. Guerry: *A Yellow Flag*, BOSTON BAR J. Mar.-Apr. 2000, at 16; Verbit, *supra* note 118, at 449-51.

obtaining the highest state court's imprimatur on the state law interpretation while preventing needless federal intrusion into the state law determination.[136] However, several procedural obstacles prevent widespread use of certification in federal tax litigation involving questions of state law.[137]

Forty-six states (and the District of Columbia and Puerto Rico) now accept inter-jurisdictional certified questions of state law.[138] In addition, the Supreme Court,[139] other federal judges,[140] law reform groups,[141] and commentators[142] endorse the practice. However, use of certification is not mandatory and instead lies within the discretion of the federal court.[143]

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136. Certification would be desirable given the federal courts' inability to correctly gauge state law in the *Erie* context. *See supra* note 89.

137. For one of the few tax cases employing certification in the *Bosch* context, see Gaskill v. United States, No. 83-1433, Slip. Op. (10th Cir., May 20, 1985) (certifying question of Kansas law to Kansas Supreme Court); Gaskill v. United States, 708 P.2d 552 (Kan. 1985) (decision of Kansas Supreme Court on certified question of Kansas law); Gaskill v. United States, 787 F.2d 1446 (10th Cir. 1986) (per curiam) (resolving federal tax issue that turned on application of Kansas law).

138. *See* Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 373 (2000); M. Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law*, 41 WAYNE L. REV. 273, 275 & n.1 (1995); Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. REV. 2123, 2129-30 (1999). The four states that do not accept certification of state law questions are Arkansas, New Jersey, North Carolina, and Vermont. *Id.*

139. *See, e.g.*, Fiore v. White, 528 U.S. 23, 29 (1999); Arizonans for Official English v. Arizona, 520 U.S. 43, 79-80 (1997); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 395-97 (1988); Elkins, President, Univ. of Md. v. Moreno, 435 U.S. 647, 668-69 (1978); *cf.* Stenberg v. Carhart, 530 U.S. 914, 915 (2000) (refusing to certify question regarding interpretation of Nebraska's partial-birth abortion statute because Attorney General had not sought certification, statute was not susceptible to narrowing construction, and state answer to question would not have been determinative in federal litigation).

140. *See, e.g.*, John D. Butzner, Jr. & Mary Nash Kelly, *Foreward to Fourth Circuit Review: Certification: Assuring the Primacy of State Law in the Fourth Circuit*, 42 WASH. & LEE L. REV. 449 (1985); William J. Holloway, Jr., *Certifying Questions to State Supreme Courts*, *in* THE FEDERAL JUDICIARY IN THE 21ST CENTURY 93 (Federal Judicial Center 1989).

141. *See, e.g.*, ABA JUD. ADMIN. DIV., STANDARDS RELATING TO APPELLATE COURTS § 3.33(c) (1977); AMER. LAW INST., STUDY OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371(e) 1969; JONA GOLDSCHMIDT, AMERICAN JUDICATURE SOCIETY, STUDIES OF THE JUSTICE SYSTEM, CERTIFICATION OF QUESTIONS LAW: FEDERALISM IN PRACTICE (1995); JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 32-33 (Dec. 1995); UNIF. CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] (amended 1995), 12 U.L.A. 67 (1996); UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT (1967), 12 U.L.A. 81 (1996).

142. For a list of the "voluminous" favorable scholarly commentary on certification, see Peter Jeremy Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 657-58 & nn.53-54 (1999).

143. *See, e.g.*, Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974) (footnote omitted) ("We do not suggest that where there is doubt as to local law and where certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court."); Coletti v. Cudd Pressure Control, 165 F.3d 767, 775 n.7 (10th Cir. 1999).

Moreover, many state certification procedures provide various limitations on the types of questions they will answer,[144] do not permit certification from federal trial courts,[145] and retain discretion to refuse to answer particular questions.[146] In addition, a growing number of judges[147] and commentators[148] question the desirability of the widespread use of certification. In any event, any attempt to make certification mandatory would raise serious constitutional concerns.[149] But the foremost barrier to the routine use of certification in the *Bosch* context is that most of the fact-bound state law questions at issue in federal tax litigation are not appropriate candidates for certification.[150] As the Seventh Circuit observed, "fact specific, particularized decisions that lack broad, general significance are not suitable for certification to a state's highest court."[151]

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144. *See, e.g.*, Richard B. Lillich & Raymond T. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888 (1971); Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127 (1992).

145. *See, e.g.*, GOLDSCHMIDT, *supra* note 141, at 15-18. *See also* Estate of German v. United States, 7 Cl. Ct. 641, 645-46 (1985) (citation omitted) ("The most satisfactory resolution of this question of state law would have been by certification to the Maryland Court of Appeals. Unfortunately, . . . [Maryland law] does not allow certification from this court.").

146. *See, e.g.*, GOLDSCHMIDT, *supra* note 141, at 20-21. *See also* Kaye & Weissman, *supra* note 138, at 397 (New York Court of Appeals has refused to answer only five of forty-five questions certified to it); Schneider, *supra* note 138, at 316-22 (states in the Sixth Circuit refused to answer twelve of thirty-two questions certified to them).

147. *See, e.g.*, L. Cohen & Co. v. Dun & Bradstreet, Inc., 629 F. Supp. 1419, 1423 (D. Conn. 1986) (Cabranes, J.) ("It would impose an unreasonable and unnecessary burden on [a state supreme court] if the certification process were to be invoked routinely whenever a federal court was presented with an unsettled question of [state] law."); Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 691 (1995) ("The practice of certification has been plagued by theoretical and practical difficulties since its inception. Federal courts evince no clear understanding of when, how, or even why to certify questions, and state courts remain anxiously ambivalent about how, or even whether, to respond.").

148. *See, e.g.*, Geri J. Yonover, *A Kinder, Gentler* Erie: *Reining in the Use of Certification*, 47 ARK. L. REV. 305, 359 (1994) ("Although recent trends indicate a move to a greater use of certification, this is not an altogether wholesome development . . . .").

149. *See* Smith, *supra* note 142.

150. For a detailed description of the fact-bound nature of federal tax litigation in the federal courts of appeals raising state law issues, see Paul L. Caron, *The Federal Courts of Appeals' Use of State Court Decisions in Tax Cases: "Proper Regard" Means "No Regard,"* 46 OKLA. L. REV. 443 (1993).

151. Woodbridge Place Apts. v. Washington Square Capital, Inc., 965 F.2d 1429, 1434 (7th Cir. 1992). *See also* Hunter v. Knoll Rig & Equip. Mfg. Co., 80 F.3d 136, 137 (5th Cir. 1996) (per curiam) (certification not appropriate where state law issue is "case specific, responding to unique factual circumstances"); Baker v. America's Mortgage Servicing, Inc., 58 F.3d 321, 325 (7th Cir. 1995) ("There may be difficulties in applying Illinois law to the particular facts of a case, but those are not problems which the certification procedure is intended to address.")

*2. Joinder*

Commentators who advocate a return to the complete-deference[152] and adversariness[153] approaches couple these standards with a requirement that the Service be given notice of, and the opportunity to appear in, the state court proceeding. Indeed, joinder of the Service as a party in the state court proceeding would serve both the revenue and comity interests.[154] Joinder would allow the Service to litigate the state law issue in state court, but then res judicata and collateral estoppel principles would bar it from re-litigating the issue in federal court. However, there are both practical and theoretical difficulties in joining the Service as a party in the state court proceeding.

The Service's long-standing policy is not to appear in state court litigation involving state law issues that may bear on the taxpayer's federal tax liability.[155] The *Internal Revenue Manual*[156] sets forth specific guidelines for dealing with state court litigation "[i]n a *Bosch* type of case":[157] the Service will not respond to notice about the state court action,[158] will decline attempts by the taxpayer to have the Service intervene in the state court action,[159] will decline service of process in the state court action,[160] and will seek to have itself dismissed as a party if it is successfully served in the state court proceeding.[161]

The Service's reluctance to appear in state court is understandable in the context of most state court proceedings vis-à-vis the later federal tax proceeding. At the time of the state court litigation, the federal tax issues often have not yet ripened. In the estate tax context of *Bosch* litigation, the state law issues are decided in state probate proceedings, which typically

152. *See* Verbit, *supra* note 118, at 457 n.245.

153. *See* Caron, *The Role of State Court Decisions*, *supra* note 13, at 844 n.297.

154. My thanks to Michael Kelly for forcefully pressing the case for joinder of the Service in the *Bosch* context.

155. For some of the few appearances by the Service in a state court proceeding, see *In re* Estate of Benson, 285 A.2d 101 (Pa. 1972); *In re* Estate of Merrick, 275 A.2d 18 (Pa. 1971). For examples of the more common situation where the Service declines to participate in the state court proceeding, see Dana v. Gring, 371 N.E.2d 755, 756 (Mass. 1977); Babson v. Babson, 371 N.E.2d 430, 431 (Mass. 1977); Worcester County Nat'l Bank v. King, 268 N.E.2d 838, 839 (Mass. 1971).

156. INTERNAL REVENUE MANUAL (2000).

157. *Id*. ch. 34, § 790(4)(c) ("Certain guidelines have been established to determine what course of action the United States should take when the Internal Revenue Service is erroneously named as a party defendant in a state court proceeding concerning a tax issue, and when intervention in the proceeding by the United States is unnecessary or undesirable.").

158. *Id*. ch. 34, § 790(4)(c)(1).

159. *Id*. ch. 34, § 790(4)(c)(2).

160. *Id*. ch. 34, § 790(4)(c)(3).

161. *Id*. ch. 34, § 790(4)(c)(4). If it is improperly served, the Service will move for dismissal on jurisdictional grounds. *Id.* ch. 34, § 790(4)(c)(5).

occur before audit of the federal estate tax return. It is unrealistic to expect the Service to appear in state court and anticipate the impact of all state law issues on the eventual federal tax controversy. In light of the Service's declining ability to police tax compliance,[162] it does not make sense to devote the Service's limited resources to state court litigation where, as the next section of this Article explains, subsequent federal proceedings can more efficiently protect the Service's revenue interest while furthering the comity interest as well. Indeed, over forty years ago two commentators suggested that those who support the Service's participation in state court litigation "assume that, if the Commissioner is an uninvited guest at a family gathering, he can be made to wash the dishes."[163]

### *D. A Return to* Erie *Principles*

As noted earlier,[164] the Court in *Bosch* explicitly relied on the *Erie* doctrine as the foundation for the "proper regard" test.[165] Indeed, it is well-settled that although the *Erie* doctrine arose in the diversity context, it also operates in nondiversity cases whenever federal law incorporates state law as the applicable rule of decision.[166] Courts and commentators have gone awry in failing to give sufficient weight to the *Erie* underpinnings of the *Bosch* "proper regard" standard.

The Court has consistently identified the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of the inequitable administration of the [state's] laws."[167] The current practice of federal courts giving mere lip service to the *Bosch* "proper regard" standard in concluding in over one-half of the cases that the state court judge had misapplied state law contravenes both of these aims. This failure to adhere to the *Bush v. Gore* deference principle discourages the use of state courts to resolve issues of state law and undermines the ability of state courts to administer the laws of

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162. *See, e.g.*, Christopher Bergin, *IRS Audit Rate Takes Another Dramatic Drop*, 90 TAX NOTES 982 (2001) (current audit rate of .49% is lowest in recent memory).

163. Stephens & Freeland, *supra* note 23, at 250.

164. *See supra* note 53 and accompanying text.

165. The Fifth Circuit recently confirmed that "the Supreme Court laid down an essentially *Erie*-based approach to the analysis of state court adjudications of state law questions that have occurred in prior aspects of a federal tax case." Estate of Delaune v. United States, 143 F.3d 995, 1001 (5th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999).

166. *See, e.g.*, DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 161 n.13 (1983) ("[W]here Congress directly or impliedly directs the courts to look to state law to fill in details of federal law, *Erie* will ordinarily provide the framework for doing so."). *See generally* Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

167. Hanna v. Plumer, 380 U.S. 460, 468 (1965). *See also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428 (1996); Stewart Org. v. Ricoh Corp., 487 U.S. 22, 27 n.6 (1988).

the state.

Mitchell Gans argues that *Erie* simply is "not relevant" in the *Bosch* situation.[168] According to Professor Gans, concerns about forum shopping are misplaced because "federal tax disputes are resolved only in the federal courts."[169] But where the federal tax result turns on the application of state law, the choice of whether to litigate the state law issue in state or federal court is undeniably affected by the degree of deference afforded the state court determination by a federal court. Professor Gans also contends that *Bosch's* reliance on *Erie* cannot be justified

> by a concern about federal courts trampling on state law: a federal court resolving a tax dispute does not, by determining a state-law issue in the course of reaching its ultimate tax conclusion, trample upon state law in the same way that a federal court exercising diversity jurisdiction might were it permitted to disregard state-court decisions.[170]

But as explained below, the different procedural postures of the typical *Erie* and *Bosch* cases suggest that there is a *greater* violation of the *Bush v. Gore* comity concern when federal courts trample upon state law in federal tax litigation.[171]

The proper resolution of this nettlesome issue of tax law thus should accommodate the procedural differences between the garden-variety *Erie* and *Bosch* cases.[172] In the traditional *Erie* diversity case, the question is the weight to be afforded in the federal proceeding to state law determinations by lower state courts in cases *involving other parties*. In contrast, in the typical *Bosch* tax case, the question is the weight to be afforded in the federal proceeding to a state law determination by a lower state court in a case *involving the taxpayer*. Implementation of the *Bush v. Gore* deference principles requires a careful consideration of the competing revenue and comity interests.

On the one hand, the revenue interest supports giving less deference to prevent the taxpayer from manipulating the state proceeding to obtain a state law ruling with favorable federal tax consequences not otherwise permitted under state law. On the other hand, the comity interest supports giving more

168. Gans, *supra* note 120, at 891 n.83.

169. *Id*.

170. *Id*.

171. Bernard Wolfman criticizes the Court in *Bosch* for "its simplistic, forcible co-opting of *Erie* doctrine." Wolfman, *supra* note 124, at 2-6. Professor Wolfman argues that the differences between the *Erie* and *Bosch* contexts support a return to the adversariness approach. *Id*. at 2-7 to 2-8.

172. *See* Caron, *The Role of State Court Decisions*, *supra* note 13, at 844-52.

deference to avoid having the federal court render a state law determination contrary to that of the state court on the same facts involving the same taxpayer. The best way to balance the twin *Erie* goals, the *Bush v. Gore* deference principle, and the revenue and comity interests is to heed the Court's direction in *Bosch* that in applying the "proper regard" standard, federal courts must "in effect, sit[] as a state court."[173]

Traditional *Erie* doctrine employs a "top-down" analysis by predicting how the highest state court would decide the state law issue. However, when the federal courts "sit as a state court" in a *Bosch* tax situation, they should use a "bottom-up" *Erie* analysis by giving the same deference to the lower state court's decision as it would receive on appeal in the state court system.[174] There is support for this approach in recent *Erie* jurisprudence as well as in a recent Tax Court case applying *Bosch*.[175]

One current *Erie* controversy concerns a dispute among federal district judges in Illinois over the proper application of *Erie* in the face of conflicting decisions by the Illinois intermediate appellate court. Under Illinois law, decisions of the state intermediate appellate court's five districts are treated as binding only on the state trial courts within each district.[176] Some federal district judges apply a traditional *Erie* analysis and predict how the Illinois Supreme Court would decide the case. Under this "top-down" approach, the federal court in a diversity case gives no special deference to any of the conflicting intermediate state appellate court decisions.[177] Other federal district judges consider themselves bound by an intermediate appellate court decision from the district within which the federal judge sits. Under this "bottom-up" approach, the federal court gives effect to the geographic reach

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173. *Bosch*, 387 U.S. at 465.

174. In states with an intermediate appellate court between the trial court and the highest court in the state, this approach would apply the same standard of review to a trial court's decision as would be employed on appeal by the intermediate appellate court. In states without an intermediate appellate court, this approach would apply the same standard of review to a trial court's decision as would be employed on appeal by the highest court of the state.

175. Estate of Goree v. Comm'r, 68 T.C.M. (CCH) 123 (1994).

176. *See, e.g.*, People v. Harris, 526 N.E.2d 335, 340 (Ill. 1988); Sidwell v. Griggsville Cmty. Sch. Dist. 4, 566 N.E.2d 838, 840 (Ill. App. Ct. 1991); Bradshaw v. Pellican, 504 N.E.2d 211, 216 (Ill. App. Ct. 1987); Taylor Mattis & Kenneth G. Yalowitz, *Stare Decisis Among [sic] the Appellate Court of Illinois*, 28 DEPAUL L. REV. 571, 573, 578-81 (1979). In addition, if only one district of the intermediate appellate court has decided a state law issue, a trial court located in another appellate district is bound by that decision. *See, e.g.*, People v. Thorpe, 367 N.E.2d 960, 963 (Ill. App. Ct. 1977).

177. *See, e.g.*, Allstate Ins. Co. v. Westinghouse Elec. Corp., 68 F. Supp. 2d 983, 986-87 (N.D. Ill. 1999); Murry v. Sheahan, 991 F. Supp. 1052, 1053-54 & 1054 n.3 (N.D. Ill. 1998); Applied Micro, Inc. v. SJI Fulfillment, Inc., 941 F. Supp. 750, 755-56 (N.D. Ill. 1996); Roberts v. Western-Southern Life Ins. Co., 568 F. Supp. 536, 538-45 (N.D. Ill. 1983); Kelly v. Stratton, 552 F. Supp. 641, 643-45 (N.D. Ill. 1982).

of the precedential effect of the intermediate state appellate court's decisions.[178] Judge Posner of the Seventh Circuit recently stated that

> the issue of whether the federal courts should be bound by the decisions of the intermediate state appellate court to which the case would have been appealed had it been litigated in a state trial court is a recurrent one and we might as well lay it to rest and put the contending district judges out of their misery.[179]

Judge Posner championed the "top-down" *Erie* approach,[180] stating that "we can do no better than to fall back on the familiar rule, clearly articulated in *Commissioner v. Estate of Bosch*, that decisions by intermediate state appellate courts are not authoritative in federal court."[181] According to Judge Posner, "[t]he federal court is to imagine itself the state supreme court rather than an intermediate court of the state."[182] In an earlier article,[183] Geri Yonover agreed that the "top-down" approach is more consistent with *Erie* principles.[184] Like Judge Posner, Professor Yonover based her argument on *Bosch* in concluding that the "top-down" approach avoided having the federal court apply "a rule different from that which would ultimately be applied in state court."[185] Although Chief Judge Posner and Professor Yonover correctly conclude that the "top-down" approach better accommodates *Erie* in the non-*Bosch* setting where there was no prior state court litigation involving the parties, the "bottom-up" approach better serves *Erie* principles where the taxpayer was a party in the prior state court litigation.

In the *Bosch* situation, federal courts should give the same deference to the lower state court decision as would be given to it on appeal in the state

178. *See, e.g.*, Systemax, Inc. v. Schoff, 972 F. Supp. 439, 441-43 (N.D. Ill. 1997); Integrated Measurement Sys., Inc. v. Int'l Commercial Bank of China, 757 F. Supp. 938, 944 n.11 (N.D. Ill. 1991); CNC Serv. Ctr., Inc. v. CNC Serv. Ctr., Inc., 731 F. Supp. 293, 297-98 (N.D. Ill. 1990); Abbott Laboratories v. Granite State Ins. Co., 573 F. Supp. 193, 196-99 (N.D. Ill. 1983).

179. Outsource Int'l, Inc. v. Barton, 192 F.3d 662, 674 (7th Cir. 1999) (Posner, C.J., dissenting).

180. In contrast, the panel majority deferred to the district judge's choice of the bottom-up *Erie* approach. *Id*. at 666. Judge Posner correctly noted in dissent that under Salve Regina College v. Russell, 499 U.S. 225 (1991), federal courts of appeals are not permitted to defer to district courts' interpretations of state law. 192 F.3d at 674 (Posner, C.J., dissenting). *See also* Leavitt v. Jane L., 518 U.S. 137, 145 (1996) (Supreme Court does not defer to federal court of appeals' interpretations of state law).

181. 192 F.3d at 675 (Posner, C.J., dissenting) (citation omitted).

182. *Id*.

183. Geri B. Yonover, *Ascertaining State Law: The Continuing* Erie *Dilemma*, 38 DEPAUL L. REV. 1 (1989).

184. *Id*. at 31-42.

185. *Id*. at 37.

court system. This approach is necessary to prevent a result that a litigant could not have obtained had the lower state court's decision been appealed in the state court system.[186] The proposed "bottom-up" approach will implement the *Bush v. Gore* deference principle and result in more deference being given by federal courts to state court determinations of state law than is currently the case under the *Bosch* "proper regard" standard. Although the precise standard of review will depend on the applicable state law in a given situation, very few of the cases that have invoked *Bosch* over the past thirty-four years have presented pure questions of law subject to de novo review in the state appellate court. Instead, most of the cases have involved either pure questions of fact or mixed questions of fact and law where the state appellate courts would employ a more deferential "clearly erroneous" or "abuse of discretion" standard of review.

For example, in *Estate of Goree v. Commissioner*,[187] the decedent died intestate in an airplane crash, survived by his wife and three minor children.[188] The principal asset of the estate was $3.9 million of stock in a single corporation. Decedent's father was appointed administrator of the estate, and his wife was appointed conservator of the estates of their children.[189] Under Alabama's intestacy statute,[190] one-half of the estate was to be distributed to decedent's wife and the other one-half divided among the three children, resulting in significant estate tax liability.[191] To prevent these adverse tax consequences, decedent's wife petitioned the Alabama Probate Court to enter protective orders authorizing each child to execute partial disclaimers renouncing any interest in their father's estate in excess of $200,000.[192] The plan thus was to defer the estate tax by having a total of

186. *Cf.* People's Bank of Polk County v. Roberts, 779 F.2d 1544, 1545-46 (11th Cir. 1986) (per curiam) (facing conflicting decisions of different districts of state intermediate appellate court, Eleventh Circuit followed decision of court that "would have reviewed this case had it been brought in state court"); Farmer v. Travelers Indem. Co., 539 F.2d 562, 563 (5th Cir. 1976) (where state court action would have been reviewed by state intermediate appellate court that had taken position contrary to plaintiff's in another case, Fifth Circuit refused to circumvent intermediate appellate court's decision by certifying question to highest court of state; instead, Fifth Circuit applied same state law "as would have been applied in the specific courts available to plaintiff in the state system" and did not "permit a party, by choosing a federal over a state forum, to get the [state] Supreme Court's attention through this Court to issues which that Court has refused to accept from state litigants").

187. 68 T.C.M. (CCH) 123 (1994). As will be seen, this Article focuses on the *Goree* case because of its important contribution to unraveling the *Bosch* conundrum, not because of the similarity of its name to one of the parties in *Bush v. Gore*.

188. *See* Caron, *supra* note 14, at 231-33.

189. 68 T.C.M. (CCH) at 124.

190. ALA. CODE §§ 43-8-40 to 43-8-58 (1991).

191. 68 T.C.M. (CCH) at 124.

192. *Id.*

$600,000 pass to the three children to use up the father's unified credit,[193] with the remaining assets passing to the wife under the Alabama intestacy statute to qualify for the marital deduction.[194] The Alabama Probate Court appointed a guardian *ad litem* for the children and, after a hearing, approved the disclaimers as being in the best interests of the children under the relevant Alabama statute.[195]

The Service disallowed the estate's claimed marital deduction on the ground that the Alabama Probate Court had misapplied the best interests of the children standard in approving the disclaimers.[196] The Service contended that the Tax Court should give no deference to the Alabama Probate Court's decision and instead conduct a de novo review to determine whether the disclaimers were in the best interests of the children under Alabama law.[197] In a memorandum decision, the Tax Court refused to eviscerate *Bosch* and instead applied the same standard of review that the Alabama Supreme Court would have used had the Alabama Probate Court's decision been appealed in the state court system.[198]

Although the lack of a record or transcript of the Alabama Probate Court hearing hampered the Tax Court,[199] the estate presented as witnesses at trial in the Tax Court all of the parties to the probate proceeding,[200] as well as the Alabama probate judge.[201] After hearing these witnesses, the Tax Court held that the Alabama Probate Court's determination that the disclaimers were in the best interests of the children was not "plainly and palpably erroneous" under Alabama law.[202] The Tax Court rejected the Service's argument that the wife's sole motive in seeking approval of the disclaimers was to eliminate the estate tax liability. Although tax considerations clearly were present, the Tax Court pointed to nontax factors, such as the desire to preserve capital and

193. At the time of the *Goree* case, the unified credit sheltered $600,000 from tax. Under current law, the credit shelters $675,000 from tax, and this amount is scheduled to rise to $1 million in 2002 and in several increments to $3.5 million in 2009, followed by the repeal of the estate tax in 2010 (and its subsequent return in 2011). Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 521, 115 Stat. 71 (2001) (to be codified at I.R.C. 2010(c)); *id.* § 901 (sunset provision).

194. I.R.C. § 2056 (1994).

195. ALA. CODE § 26-2A-136(c) (1991).

196. 68 T.C.M. (CCH) at 128.

197. *Id.* at 126.

198. *Id*. at 127 ("To decide whether the highest court of Alabama would decide contrary to the Probate Court judge's decision in the instant case, we will consider the standard of review that the Alabama Supreme Court would use to review the Probate Court judge's decision.").

199. *Id*. at 127 n.9.

200. *Id.* at 127-28. The father-administrator, the wife-conservator, and the children's guardian all testified in the Tax Court proceeding. *Id.*

201. *Id*. at 127.

202. *Id*. at 128.

fulfill the decedent's wishes to keep the stock within the family and the likelihood that the children would receive large inheritances upon the deaths of other elderly family members.[203]

The Service announced that it would not acquiesce in the *Goree* decision on the ground that "the Tax Court erred in applying an appellate standard of review to a lower state court factual determination instead of reviewing the question *de novo*."[204] The accompanying Action on Decision,[205] however, is much broader. The Service argued that the Tax Court "misapplied" *Bosch* because "[t]he cases it cited in support are all distinguishable in that they concern the extent to which lower state court legal determinations are binding on the Tax Court, not factual determinations."[206] This fixation on the distinction between legal and factual determinations misses the mark. *Goree* is the typical *Bosch* case in that it involves a state court factual determination that would receive great deference by state appellate courts under the "plainly and palpably erroneous" standard of review. In contrast, state appellate courts only apply the de novo standard of review proposed by the Service to pure questions of state law that are quite rare in the *Bosch* context. Under the Service's approach, federal courts would give no deference to state court proceedings that lack the requisite degree of adversariness.[207] As I have

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203. *Id*. In an interesting postscript to the case, the estate petitioned the Tax Court to assess attorneys' fees against the Service under I.R.C. §7430. The estate contended that the Service's position was not "substantially justified" within the meaning of §7430 because the Service had misinterpreted *Bosch* in arguing that the Tax Court was required to make a de novo determination of state law. The Tax Court rejected the attorneys' fees request, but only because of the lack of a state court record; the Tax Court implied that had such a record existed, the Service's argument for de novo review would not have been "substantially justified":

> Respondent's position in the instant proceeding was reasonable, especially in light of the fact that no record or transcript of the Probate Court proceeding was maintained. Although we held in our prior opinion that *Commissioner v. Estate of Bosch*, *supra*, did not necessarily require us to review the Probate Court proceeding de novo, we conclude that petitioner would not have satisfied its burden of proof in the absence of a record or other evidence of what transpired in the Probate Court proceeding. Had petitioner not offered the testimony of those persons who participated in the Probate Court proceeding at trial, we would not have had a record from which we could decide whether the Probate Court judge's decision to permit the partial disclaimers was plainly and palpably erroneous. We think that even the Supreme Court of Alabama, had it been required to review the Probate Court judge's decision, would have remanded the case to the lower court to make a record sufficient for it to review. Respondent's position in the instant case was reasonable, taking into account the fact that there was no record to support petitioner's position that the Probate Court judge did not abuse his discretion in allowing the disclaimers by decedent's minor children. Consequently, we hold that respondent's position was substantially justified.

Estate of Goree v. Comm'r, 68 T.C.M. (CCH) 1068, 1069 (1994).

204. 1996-2 C.B. 1 n.10.

205. Action on Dec. 1996-001 (Mar. 4, 1996), 1996 WL 89733.

206. *Id*., 1996 WL 89733.

207. The Service quoted the Supreme Court's rationale for a deferential standard of appellate review of factual findings in *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985): "[T]he trial on the

argued elsewhere, the Service's Action on Decision "amounts to a virtual nonacquiescence [to] *Bosch* itself."[208]

Although there is some support for the "bottom-up" approach of *Goree* in prior[209] and subsequent cases,[210] as a memorandum decision it has not been followed by subsequent Tax Court decisions[211] or been widely embraced by

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merits should be the 'main event' . . . rather than a 'tryout on the road.'" *Id.* According to the Service, the nonadversarial nature of the Alabama Probate Court's proceeding destroyed the justification for such deferential review:

> [T]he situation that prompted the rule in *Estate of Bosch* did not involve an adversarial "main event," but the opposite extreme of possible collusion between the parties. Similarly, in this case, there was doubt as to the adversarial nature of the state court proceeding, and as to the extent of testimonial evidence available to the trier of fact. In addition, there was no factual record available for review; the Tax Court was required to make its own but then reviewed the state court conclusions of fact based upon this subsequently created record, using an appellate (palpably erroneous) standard. The utilization of the palpably erroneous standard for review of factual findings in a nonadversarial situation is inconsistent with the rationale for the palpably erroneous standard, which assumes a vigorously contested lower court hearing.

Action on Dec. 1996-001 (Mar. 4, 1996), 1996 WL 89733.

208. Caron, *supra* note 14, at 233.

209. *See, e.g.*, Estate of Salter v. Comm'r, 545 F.2d 494, 499-500 (5th Cir. 1977) (federal court must determine whether highest court of state "would have affirmed the [state court's] decree had there been an appeal"); Greene v. United States, 476 F.2d 117, 119 (7th Cir. 1973) (federal court must determine whether state "Supreme Court would have decided the case differently if there had been a party who had taken an appeal"); Underwood v. United States, 407 F.2d 608, 611 (6th Cir. 1969) (federal court must determine whether highest court of state "would have affirmed the action of the probate court"); Comm'r v. Estate of Bosch, 382 F.2d 295, 295 (2d Cir. 1967) (per curiam) (highest state court "would not follow the decision of the [state court]"); Harrah v. Comm'r, 70 T.C. 735, 754 (1978) (highest court in state "would have approved the action by the [lower state] court had it been called upon to review it"). However, as Professor Verbit has observed, the "courts adopting this view do not seem to have given much attention to the standard of review the relevant state supreme court would have applied in reviewing the lower court decision." Verbit, *supra* note 118, at 442 n.188.

210. *See* Estate of O'Neal v. United States, 81 F. Supp. 2d 1205, 1216-17 (N.D. Ala. 1999). *See also* Estate of Delaune v. United States, 143 F.3d 995, 1001 n.4 (5th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999); Estate of DePaoli v. Comm'r, 62 F.3d 1259, 1262 (10th Cir. 1995); Estate of Pruitt v. Comm'r, 80 T.C.M. (CCH) 348, 354 (2000).

211. *See* Estate of Young v. Comm'r, 110 T.C. 297, 300-06 (1998); Estate of Bond v. Comm'r, 104 T.C. 652, 657 n.3 (1995); Estate of Lassiter v. Comm'r, 80 T.C.M. (CCH) 541, 551-57 (2000); Steingold v. Comm'r, 80 T.C.M. (CCH) 95, 96 (2000); Estate of Chamberlain, 77 T.C.M. (CCH) 2080, 2085-88 (1999); Estate of Horstmeier v. Comm'r, 77 T.C.M. (CCH) 1940, 1942-45 (1999), *aff'd sub. nom.*, Scott v. Comm'r, 226 F.3d 871 (7th Cir. 2000); Estate of Davenport v. Comm'r, 74 T.C.M. (CCH) 405, 410-12 (1997), *aff'd*, 184 F.3d 1176 (10th Cir. 1999); Estate of Baird v. Comm'r, 73 T.C.M. (CCH) 1883, 1884-86 (1997); Estate of Street v. Comm'r, 73 T.C.M. (CCH) 1787, 1788-89 (1997), *aff'd on other grounds*, 152 F.3d 482 (5th Cir. 1998); Estate of Kenly v. Comm'r, 72 T.C.M. (CCH) 1314, 1317-19 (1996), *aff'd mem.*, 139 F.3d 904 (9th Cir. 1998); Zurn v. Comm'r, 72 T.C.M. (CCH) 440, 449-50 (1996); Estate of Rapp v. Comm'r, 71 T.C.M. (CCH) 1709, 1715-19 (1996), *aff'd*, 140 F.3d 1211 (9th Cir. 1998); Wells v. Comm'r, 70 T.C.M. (CCH) 1278, 1280-82 (1995); Estate of Millikin v. Comm'r, 69 T.C.M. (CCH) 3032, 3036-37 (1995), *vacated*, 125 F.3d 339 (6th Cir. 1997) (en banc); Estate of Tenenbaum v. Comm'r, 69 T.C.M. (CCH) 1787, 1788 (1995), *rev'd*, 112 F.3d 251 (6th Cir. 1997); McDonald v. Comm'r, 68 T.C.M. (CCH) 1400, 1408-09 (1994), *aff'd mem.*, 114 F.3d 1194 (9th Cir. 1997).

other commentators.[212] Yet it offers the best balance of the twin *Erie* goals of eliminating forum shopping and ensuring effective state court administration of state law. Where, as in *Goree*, the state appellate court would apply a deferential standard in reviewing the lower state court's application of state law, the federal court should similarly circumscribe its review of the lower state court's decision. Under this approach, the federal court is not free, as is the existing practice under the "proper regard" standard, to disregard the state court's decision and conduct a plenary review of state law. In contrast, a "top-down" approach, which focuses on predicting how the highest state court would decide the case, would provide review not otherwise available in the state court system. This "top-down" approach would interfere with the *Erie* goal of obtaining the same result in the federal system to minimize forum shopping incentives and preserve the state courts' role in administering the laws of the state.

At first blush, *Goree's* adoption of the state law standard of appellate review appears inconsistent with the Supreme Court's recent embrace, in the diversity context, of a federal standard of appellate review. In *Gasperini v. Center for Humanities, Inc.*,[213] the New York legislature had enacted a statute requiring that state intermediate appellate courts determine whether a jury award was excessive based on whether it "deviates materially from what would be reasonable compensation."[214] The New York courts had extended this standard to the state's trial courts as well.[215] The issue was whether federal courts in a diversity action should use this New York standard or the more deferential federal standard.[216] The Court balanced the respective state interest (to rein in excessive jury awards) and federal interest (to preserve the jury's role as decisionmaker under the Seventh Amendment) and reached different conclusions with respect to the applicable standard to be applied by the federal district court and the federal court of appeals.[217]

The Court held that a federal district court should apply the state's more restrictive standard for *trial court review* of a jury's verdict, rather than the more deferential federal standard ("shock the conscience").[218] According to

212. The leading tax treatise first cites the *Bosch* "proper regard" test and then the *Goree* bottom-up approach, but concludes that "the lower courts have not always been blind to relationships among the litigants in the state court proceedings or the presence of federal tax motives for those proceedings." 1 BORIS I. BITTKER & LAWRENCE LOKKEN, *supra* note 132, at 4-15 to 4-16.

213. 518 U.S. 415 (1996).

214. N.Y. C.P.L.R. § 5501(c) (McKinney 1995).

215. 518 U.S. at 425.

216. *Id*. at 422.

217. *Id*. at 457.

218. *Id*.

the Court, this was a "false conflict" between the state and federal interests because the federal interest could be accommodated by yielding to "New York's dominant interest."[219] In contrast, the Court held that a federal court of appeals should apply the more deferential federal standard (abuse of discretion) for *appellate review* of the trial court's decision, rather than the more restrictive state standard. According to the Court, this was a "true conflict" and the federal interest trumped the state interest.[220]

The second *Gasperini* holding does not undercut the "bottom-up" *Erie* approach in the *Bosch* situation. Although the *Gasperini* Court embraced a federal standard of appellate review at the expense of the state standard, the Seventh Amendment concerns undergirding the federal interest are absent in the *Bosch* situation because there is no federal constitutional right to jury trial in state court.[221] Moreover, the state interest is stronger in the federal tax litigation context where the taxpayer was a party to the prior state court litigation. In this situation, the twin *Erie* goals, the *Bush v. Gore* deference principle, and the revenue and comity interests all support using the state appellate standard of review in deciding the state law question in federal court.[222]

The "bottom-up" approach best serves the *Bosch* direction to "sit as a state court" by focusing on what actually would have happened had the state court system reviewed the lower state court's decision. In virtually every case applying *Bosch* over the past thirty-four years, the taxpayer has obtained a lower state court ruling on state law that would have favorable federal tax consequences for the taxpayer if followed in the subsequent federal tax litigation. Under current practice, the federal courts greet the taxpayer's "offensive" use of the lower state court decree by giving "no regard" to the state court's application of state law. As a result, the federal courts have run

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219. *Id*. at 437 (New York's dominant interest can be respected, without disrupting the federal system, once it is recognized that the federal district court is capable of performing the checking function, *i.e.*, that court can apply the State's 'deviates materially' standard in line with New York case law . . . .").

220. *Id*. at 434-36.

221. In addition, most of the state court cases implicating *Bosch* are actions before a probate judge involving the administration of a decedent's will.

222. In any event, there has been much scholarly criticism of this aspect of *Gasperini*. *See* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1288 (1999); Michael A. Berch & Rebecca White Berch, *An Essay Regarding* Gasperini v. Center for Humanities, Inc. *and the Demise of the Uniform Application of the Federal Rules of Civil Procedure*, 69 MISS. L.J. 715, 732-48 (1999); C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267, 298-05 (1997); Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1657-62 (1998); Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV. 751, 773-74 (1998).

roughshod over the *Bush v. Gore* deference principle in concluding in over one-half of the cases that the state court had misapplied state law. In contrast, the "bottom-up" approach would give teeth to the "proper regard" standard by requiring the federal courts to give the same degree of deference to the state court decision that it would have received on appeal in the state court system.[223]

The current judicial practice of federalizing questions of state law through de novo re-examinations of state law decisions is contrary to the long-standing probate exception to federal diversity jurisdiction. Under this "venerable" doctrine,[224] the federal courts' diversity jurisdiction does not extend to the administration of a decedent's estate or the probate of a will.[225] The doctrine is based in part on the greater expertise of state judges in dealing with these issues compared to their federal counterparts.[226] Even though most of the *Bosch* issues arise in the estate administration and probate context, federal courts have used the "proper regard" standard to oust their state counterparts in interpreting state law.[227]

The "bottom-up" approach also accommodates both the revenue and the comity concerns. Federal revenue interests are protected by permitting meaningful review of the state court's application of state law. Comity concerns are protected by limiting federal review of the state court decision to the same standards that would have been applied by the state courts on appeal of the original decision.

The "bottom-up" approach may not strike the ideal balance between federal and state interests in every situation. But the burden in these situations is for Congress to re-calibrate the respective roles for federal and state law under the particular federal tax provision. For example, Mitchell Gans has convincingly argued that various provisions of federal tax law either under-emphasize[228] or over-emphasize[229] state law. He contends that

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223. In the rare case where the Service makes "defensive" use of a lower state court determination that would have adverse tax consequences for the taxpayer if followed in the subsequent federal tax litigation, the bottom-up approach again would require the federal courts to give the same degree of deference to the state court decision as it would have received on appeal in the state court system.

224. Turja v. Turja, 118 F.3d 1007 (4th Cir. 1997). *See also* Dragan v. Miller, 679 F.2d 712, 713 (7th Cir.) (Posner, J.) ("The probate exception is one of the most mysterious and esoteric branches of the law of federal jurisdiction."), *cert. denied*, 459 U.S. 1017 (1982).

225. *See, e.g.*, Markham v. Allen, 326 U.S. 490 (1946); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909). *See generally* 13B WRIGHT, MILLER & COOPER, *supra* note 134, § 3610.

226. *See, e.g.*, Dragan v. Miller, 679 F.2d 712, 714-15 (7th Cir.) (Posner, J.), *cert. denied*, 459 U.S. 1017 (1982).

227. *See* Verbit, *supra* note 118, at 455-56. *See also* Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994).

228. Gans, *supra* note 120, at 874-75.

the *Bosch* framework has caused an over-reliance on state law in the marital deduction area and advocates reform of Code section 2056 that would eliminate any role for state law.[230] Absent such re-calibration in specific situations, the "bottom-up" approach is the best way to balance the twin *Erie* goals, the *Bush v. Gore* deference principle, and the revenue and comity interests.

## CONCLUSION

For eighty-five years, the federal courts have been unable to agree on how much weight should be given in federal tax litigation to a state court's determination of state law. The focus on the general question of federal court deference to state court decisions in *Bush v. Gore* should be directed at finally resolving this nettlesome federal tax question. The only approach that gives fealty to the *Bush v. Gore* deference principle, while also furthering the goals of the *Erie* doctrine and balancing the competing revenue and comity interests, is for federal courts to afford the same degree of deference to the state court determination as it would have received on appeal in the state court system. As a result, federal courts no longer should treat the *Bosch* "proper regard" test as a roving license to second-guess state court determinations of state law. Instead, it should take the rare tax equivalent of the *Bush v. Gore* situation to impel a federal court to overturn a state court's application of state law.

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229. *Id*. at 876-83.

230. *Id*. at 933-42. I part company with Professor Gans over his suggestion that a "more modest" solution to the marital deduction's over-emphasis of state law would be for Congress to overrule *Bosch* by statute. *Id*. at 891 n.83 & 931-33. Since *Bosch* has widespread impact in the federal tax law beyond the marital deduction, overruling the decision to solve a problem with the marital deduction would be throwing the baby out with the bath water. Moreover, Professor Gans' suggestion that *Bosch* could be replaced by having federal courts either give complete deference to state court decisions or give deference only to state court decisions that are the product of adversarial proceedings ignores the inherent difficulties of both of these approaches. *See supra* notes 114-33 and accompanying text.