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Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures

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NOTE

ERIE R.R. AND STATE POWER TO CONTROL STATE LAW: SWITCHING TRACKS TO NEW CERTIFICATION OF QUESTIONS OF LAW PROCEDURES

I. INTRODUCTION

In Erie Railroad v. Tompkins, the Supreme Court addressed the question of whether state or federal law bound federal courts when the basis for jurisdiction is diversity. The Court held that state courts have exclusive jurisdiction to define state law and consequently stripped the federal judiciary of the power to enunciate state law. Since the decision in Erie, the power of the federal courts to determine unsettled areas of state law has been the subject of much litigation, particularly when a law has both substantive and proce-

1. 304 U.S. 64 (1938).
2. See id. at 69-71. The specific controversy was between a ruling by the highest court of Pennsylvania, which held that persons using pathways along railroads were trespassers to whom the railroad could not be liable, and federal rulings which held that railroads could be liable. See id. at 70.

Diversity jurisdiction generally grants federal courts the right to hear actions between citizens of different states. See 28 U.S.C. § 1332 (1982) (providing federal courts with diversity jurisdiction); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 2.6 (1985) [hereinafter J. FRIEDENTHAL] (discussing diversity jurisdiction); see also Erie, 304 U.S. at 69 (explaining the reasons for diversity in Erie).
3. See id. at 78-79. The Court noted that "[t]here is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." Id. at 78.
4. See, e.g., Hanna v. Plumer, 380 U.S. 460, 467 (1965) (holding that the meaning of Guaranty Trust Co. v. York, 326 U.S. 99 (1945), is not to create "any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the Erie rule" to determine whether federal or state rules should apply); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 539 (1958) (holding that "state laws cannot alter the essential character or function of a federal court" because that function 'is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the federal court . . . .") (quoting Herron v. Southern Pacific Co., 283 U.S. 91, 94 (1930))

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In light of *Erie* and its progeny, federal courts have long been troubled by the question of how state law should be determined in diversity cases when no clear precedent exists. The Supreme Court

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6. See J. Friedenthal, supra note 2, § 4.6 (discussing how federal courts determine state law). Chief Judge Brown of the Fifth Circuit Court of Appeals, in his discussion of the powers inherent in the state courts, stated that “[i]n our vaunted federal-state structure, the
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recognizes the right of state courts to glean their law from applicable state statutes, utilizing whatever rules of construction they deem appropriate to create and define common law causes of action independent of the federal judiciary. Additionally, when federal courts are required to stay an action under the doctrine of abstention because relevant state law issues have not been determined by that state's courts, parties to the action are forced to forego their right to a...
federal forum.\(^9\) Hence, the Congressional intent in creating diversity jurisdiction is frustrated.\(^10\) However, when federal courts are prohibited from deciding issues of state law in order to avoid constitutional decision making,\(^11\) certification of questions of state law to a state court\(^12\) offers an efficient and equitable solution.\(^13\)

See L. Tribe, supra note 4, § 3-30, at 200 (citing Harris County Comm’rs Court v. Moore, 420 U.S. 77, 83 (1975)). As Lawrence Tribe noted “[a]bsent Pullman abstention, federal courts . . . would risk interfering with the role of state courts as ‘the principal expositors of state law.’” Id. (quoting Moore v. Sims, 422 U.S. 415, 429 (1979)).

Clay v. Sun Ins. Off. Ltd., 363 U.S. 207 (1960), marked a turning point in the history of the Erie doctrine. See supra notes 1-5 and accompanying text (discussing the Erie doctrine). In Clay, a 1945 Florida statute was used for the first time to invoke the process of certifying questions of state law as an alternative to abstention. 363 U.S. at 212; see Brown, supra note 6, at 457; infra notes 11-67 and accompanying text (explaining the certification of questions of law doctrine).

It should be noted that the Supreme Court has created several other abstention doctrines which are beyond the scope of this Note. See, e.g., Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Younger v. Harris, 401 U.S. 37 (1971); see also L. Tribe, supra note 4, §§ 3-28 to 3-30, at 105-208 (discussing other abstention doctrines).


10. See Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980) (stating that the policies underlying diversity jurisdiction do not support different outcomes in federal and state court solely because of the fortuity that there is diversity of citizenship between the litigants); see also Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 Cornell L. Rev. 733, 788 (1986) (stating that “[t]he debate about the wisdom of the course taken in diversity cases after Erie has included the question whether, in effecting a policy against different outcomes on the basis of citizenship, the Court was interpreting the Rules of Decision Act or something else.” (footnote omitted)); Rowe & Sibley, Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction, 135 U. Pa. L. Rev. 7, 37-38 (1986) (discussing various factors considered by federal courts in determining choice of law in cases based on diversity jurisdiction); cf. Note, supra note 9, at 1254-56 (arguing that abstention in diversity cases can violate the principle of separation of powers).

11. See Pullman, 312 U.S. at 501-02; supra note 8 (discussing the Pullman doctrine); see also Roth, supra note 8, at 6 (stating the benefits of abstention in giving deference to the state courts on issues of state law, but also recognizing the problems of dissimilar results and unwieldy procedures); infra note 119 (discussing the policies underlying Erie, including judicial economy, convenience and fairness to the litigating parties); cf. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (discussing why federal courts should hesitate in exercising pendent and ancillary jurisdiction, and concluding that one of the goals of federal courts in deciding state claims should be “to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.”); Hanna v. Plumer, 380 U.S. 460, 468 (1965) (finding one of the goals of the Erie doctrine is to avoid a miscarriage of justice); Brown, supra note 6, at 456 (recognizing that harm may result from inconsistent findings and stating that “more important than possible embarrassment is the frustration for litigants when the rule of law [that judges in the federal system] prescribe turns out to be a ticket for one ride only.”).

12. See infra text accompanying note 21 (defining certification); infra text accompanying notes 22-67 and accompanying text (discussing the current certification of questions of law doctrine).
This Note first examines the existing certification procedures, \[^{14}\] including the Uniform Certified Questions of Law Act \[^{15}\] and other state acts. \[^{16}\] Next, this Note addresses the problems that have arisen as a result of the utilization of these procedures, \[^{17}\] including the reluctance of some courts to utilize certification procedures and the questionable constructions to which some certification acts have been subjected. \[^{18}\] Finally, this Note concludes by recommending rules, acts and constitutional provisions for adoption at the state \[^{19}\] and federal levels. \[^{20}\]

**II. Certification Today**

**A. Uniform Certification of Questions of Law Act**

Generally, certification of questions of law refers to a procedure whereby a court outside of the state whose law is unsettled may "ask" the high court of the state with the unsettled area of law for an opinion declaring its position on the unsettled issue. \[^{21}\] Certification is an alternative to abstention \[^{22}\] and federal prediction of state law \[^{23}\] that allows state courts to determine their law for cases pend-
ing in federal courts or other state courts. However, many current certification laws and rules\(^{24}\) are used sparingly and are often construed in a manner violative of the legislative intent.\(^{25}\)

The Uniform Certification of Questions of Law Act,\(^{26}\) which all available sources . . . including scholarly works such as law review articles, textbooks, treatises, and the Restatements of the Law, as well as decisions of other states, federal decisions or the general weight of authority.

24. See infra notes 27-67 and accompanying text (discussing the Uniform Certification of Questions of Law Act, the New York statutes and the Montana rule).

25. Presumably, when a legislature creates procedures for certification of questions of law, it intends to reserve for the state, through its courts, the right to construe state statutes and define the formal requirements and elements necessary to prove a common law cause of action. See supra notes 1-5 (discussing Erie and its progeny); infra text accompanying note 55 (discussing Judge Pratt's interpretation of the goals behind the New York amendment to its state constitution).

26. The Uniform Certification of Questions of Law Act provides as follows:

§ 1. [Power to Answer]

The [Supreme Court] may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court [or the highest appellate court or the intermediate appellate court of any other state], when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the [Supreme Court] [and the intermediate appellate courts] of this state.

§ 2. [Method of Invoking]

This [act] [rule] may be invoked by an order of any of the courts referred to in section 1 upon the court's own motion or upon the motion of any party to the cause.

§ 3. [Contents of Certification Order]

A certification order shall set forth

1. the questions of law to be answered; and
2. a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

§ 4. [Preparation of Certification Order]

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the [Supreme Court] by the clerk of the certifying court under its official seal. The [Supreme Court] may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the [Supreme Court], the record or portion thereof may be necessary in answering the questions.

§ 5. [Costs of Certification]

Fees and costs shall be the same as in [civil appeals] docketed before the [Supreme Court] and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

§ 6. [Briefs and Arguments]

Proceedings in the [Supreme Court] shall be those provided in [local rules or statutes governing briefs and arguments].

§ 7. [Opinion]

The written opinion of the [Supreme Court] stating the law governing and the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.
has been adopted either in whole or in part in twenty-six states,\textsuperscript{27} the District of Columbia\textsuperscript{28} and Puerto Rico\textsuperscript{29} provides that the highest court of a state "may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court [or the highest appellate court or the intermediate appellate court of any other state]. . . ."\textsuperscript{30}

Under the Uniform Act, the procedure for certifying a question

\section*{§ 8. [Power to Certify]}

The [Supreme Court] [or the intermediate appellate courts] of this state, on [its] [their] own motion or the motion of any party, may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

\section*{§ 9. [Procedure on Certifying]}

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

\section*{§ 10. [Severability]}

If any provisions of this [Act] [Rule] or the application thereof to any person, court or circumstances is held invalid, the invalidity does not affect the other provisions of this [Act] [Rule] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] [Rule] are severable.

\section*{§ 11. [Construction]}

This [Act] [Rule] shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

\section*{§ 12. [Short title]}

This [Act] [Rule] may be cited as the Uniform Certification of Questions of Law [Act] [Rule].

\section*{§ 13. [Time of Taking Effect]}

This [Act] [Rule] shall take effect

*Unif. Certification of Questions of Law Act, 12 U.L.A. 49 (1967)*. The use of brackets surrounding a provision of the Uniform Act indicates that the respective provision is optional. *Id.* at 51.


29. P.R. SUP. CT. R. 27.

of law may be invoked by a motion from any of the parties or by the
court's own motion.31 The court certifying the questions is required
to transmit "the questions of law to be answered,"32 and "a state-
ment of all facts relevant to the questions certified and showing fully
the nature of the controversy in which the question arose."33 If the
answering court desires, it may require the record, or portions of
the record, be transmitted to it.35

The procedures to be followed regarding briefs, arguments and costs are governed by state statutes or local court rules.38 The opinion by the answering court, stating the answer to the questions certified, is then sent to the certifying court.40

Under the Uniform Act, two important elements must be satis-

fied before a high or intermediate appellate court may certify a ques-
tion to another state's high court. First, it must appear that "there
are no controlling precedents" in decisions of the highest court or
intermediate courts of the state.41 Second, the question must be one
that "may be determinative of the cause then pending."42

31. Id. § 2, 12 U.L.A. at 53.
32. Id. § 3(1), 12 U.L.A. 49, 53.
33. Id. § 3(2), 12 U.L.A. 49, 53. The commissioner's comment to § 3 states "[t]he
purpose is to give the answering court a complete picture of the controversy so that the answer
will not be given in a vacuum." Id. Comm'r Comment; cf. infra note 161 and accompanying
text (discussing the requirement of the Proposed Revised Uniform Act, that the entire record
be transmitted to the answering court); infra text accompanying notes 174-92 (setting forth
the Proposed Revised Uniform Act).
34. For purposes of this Note, the highest court of the state in which the law is unsettled
shall be referred to as the "answering court."
35. UNIF. ACT § 4, 12 U.L.A. 49, 54. The answering court may require that either the
original or copies of the record be sent to the court. Id. Cf. infra note 161 (discussing the need
that the entire record be transmitted to the answering court).
37. Id.
38. Id. § 5, 12 U.L.A. 49, 54 (providing that costs associated with certification are to be
governed by those rules which govern civil appeals and shall be shared equally by the parties
unless the certifying court orders a different division of costs).
39. Id. §§ 5-6, 12 U.L.A. 49, 54.
40. Id. § 7, 12 U.L.A. 49, 55. The commissioner's comment to § 1 states that answering
a certified question is not mandatory. Id. Comm'r Comment; cf infra note 150, 174 and ac-
companying text (proposing the inclusion of an enumerated list of reasons for refusing to an-
swer a certified question in the revised Uniform Act, as proposed by this Note [hereinafter
Proposed Revised Uniform Act]).
41. Id. § 8, 12 U.L.A. 49, 55.
42. Id. Some, courts have read "may" as "must" and have refused to answer questions
when an alternative ground existed for resolving the cause. See Greene v. Massey, 384 So. 2d
24, 27-28 (Fla. 1980); Retail Software v. Lashlee, 71 N.Y.2d 788, 790, 525 N.E.2d 737, 738,
530 N.Y.S.2d 91, 92 (1988); Jefferson v. Moran, 479 A.2d 734, 738 (R.I. 1984); see also
infra notes 94-95 (discussing the "determinative of the cause" requirement). But see infra note
B. *Alternative Approaches to the Uniform Act*

Two states which do not follow the Uniform Act are Montana and New York. Montana's rule reduces the number of ambiguities.

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43. Montana's rule is the following:

**RULE 44. Certification of questions of law.**

(a) Power to answer. Whenever in an action pending in a United States court it shall appear that there is a controlling question of Montana law as to which there is a substantial ground for difference of opinion, a judge of the United States court wherein the action is pending may certify that the question upon which adjudication is sought is controlling in the federal litigation and the adjudication by the supreme court of Montana will materially advance ultimate termination of the federal litigation. Rendition of an answer by the supreme court of Montana to any such question of law certified to it is discretionary with the supreme court of Montana, and it may refuse to render an answer if it appears that there is another ground for determination of the case pending in the United States court, or if the question for adjudication is not clearly defined, or if the question is not adequately briefed or argued.

(b) Method of invoking. This rule may be invoked by a certification order of a United States court filed with the supreme court of Montana.

(c) Contents of certification order. A certification order shall set forth:

1. the questions of law to be answered; and
2. a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the question arose.

(d) Preparation of certification order. The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the supreme court by the clerk of the certifying court under its official seal. The supreme court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the supreme court, the record or portion thereof may be necessary in answering the questions.

(e) Costs of certification. Fees and costs shall be the same as in civil appeals docketed before the supreme court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

(f) If any party to the action believes that the supreme court should refuse to answer the certification order, such party may file a motion to such effect within ten days after such party receives notice that the certification order has been filed with the supreme court. Thereafter Rule 22 will govern further procedure as to such motions.

(g) Briefs and arguments. Proceedings in the supreme court shall be those provided in the foregoing rules governing briefs and arguments.

(h) Opinion. The written opinion of the supreme court stating the law governing the questions certified shall be sent by the clerk under the seal of the supreme court to the certifying court and to the parties.

**MONT. R. APP. P. 44.**

44. The New York rule is the following:

**500.17 Discretionary proceedings to review certified questions from Federal Courts and other courts of last resort.**

(a) Whenever it appears to the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state, that
which exist under both the Uniform Act and the New York rule, and attempts to facilitate application of the *Erie* doctrine. On the other hand, the New York rule appears to be a means by which the New York Court of Appeals can avoid defining law which may have political ramifications, thereby frustrating the will of the people of New York.

The Montana rule, rather than requiring that the question be "determinative of the cause," merely requires that it be a question of Montana law that is controlling in the federal litigation. Like-

determinative questions of New York law are involved in a cause pending before it for which there is no controlling precedent of the Court of Appeals, such court may certify the dispositive questions of law to the Court of Appeals.

(b) The certifying court shall prepare a certificate which shall contain the caption of the case, a statement of the facts setting forth the nature of the cause and circumstances out of which the questions of New York law arise, and the questions of New York law, not controlled by precedent, which may be determinative, together with a statement as to why the issue should be addressed in the Court of Appeals at this time.

(c) The certificate, certified by the clerk of the certifying court under its official seal, together with the original or copies of all relevant portions of the record and other papers before the certifying court, as it may direct, shall be filed with the clerk of the Court of Appeals.

(d) The Court of Appeals on its own motion, will examine the merits presented by the certified question, first to determine whether to accept the certification, and second, the review procedure to be followed in determining the merits.

(e) The court shall instruct the clerk to request any additional papers which it requires for its review. Time periods for filing papers and calendaring of any hearings directed by the court shall be on notice given by the clerk of the court.

(f) If the constitutionality of an act of the Legislature of this State affecting the public interest is involved in a certification to which the State of New York or an agency is not a party, the Clerk of the Court of Appeals shall notify the Attorney General in accordance with the provisions of Executive Law, section 71.

(g) When a determination is rendered by the Court of Appeals with respect to the questions certified, it shall be sent by the Clerk of the Court of Appeals to the certifying court.

N.Y. COMP. CODES. R. & REGS. tit. 22, § 500.17 (1987); see also N.Y. CONST. art. VI, § 3, cl. 9; infra note 54 (setting forth the New York Constitutional amendment).

45. These ambiguities include, but are not limited to: legitimate grounds for refusal to answer a certified question; requirement of a state constitutional amendment to enact a certification procedure; and whether the answering court or the certifying court is empowered to determine whether an area of law is settled. See infra notes 87-107 and accompanying text.

46. See supra notes 1-5 and accompanying text (discussing the *Erie* doctrine); supra notes 8-11 and accompanying text (discussing abstention and the policies which led to its creation).

47. See infra notes 108-44 and accompanying text (discussing cases where this type of action is prevalent); cf. infra note 137 (discussing the medical malpractice crisis of 1985-86).


49. MONT. R. APP. P. 44(a); see supra note 43. The Supreme Court of Montana has, at least once, refused to answer a certified question when it appeared that the "litigation may be
wise, it requires that the question contain a "substantial ground for difference of opinion" and that the answer by the Montana Supreme Court "materially advance [the] ultimate termination of the federal litigation." 50

The Montana rule permits the high court discretion when deciding whether to answer. The court "may refuse to answer if it appears there is another ground to answer the question, the question for adjudication is not clearly defined, or if the question is not adequately briefed or argued." 51 The requirements for copies of the record and documents to be included in the certification order are the same as those of the Uniform Act. 52

In the interest of protecting the parties, the Montana rule provides that any party who feels that certification should not be per-

50. Id. It is the position of this Note that the Montana court's adoption of the language contained in the federal interlocutory appeal statute, 28 U.S.C. § 1292(b) (1982), was intended to incorporate the presumption against piecemeal decision-making embodied in that statute. See 28 U.S.C.S. § 1292 n.1 (Law. Co-op. 1986) (indicating the federal policy behind the statute); see also Pacific Union Conference v. Marshall, 434 U.S. 1305, 1307 (1977) (discussing the federal policy against interlocutory appeal from district courts). The policy against piecemeal decision making, as defined by Congress, is codified in the requirement that a federal appellate court only address issues on appeal if a final decision has been entered by the lower court. See 28 U.S.C. § 1257 (1982); accord ASARCO, Inc. v. Kadish, 109 S. Ct. 2037, 2042 (1989); R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 136 (1986); New York v. Quarles, 467 U.S. 649, 651 n.1 (1984).

51. MONT. R. App. P. 44(a); see supra note 43. This rule appears to present a non-exclusive list of reasons for which a certified question may be refused. Cf. Grant Creek Water Works, Ltd., 775 P.2d at 685 (noting that the refusal to answer a certified question was made "[p]ursuant to [the court's] discretionary authority"). This Note recommends adopting an exclusive enumerated list of acceptable reasons for refusing to answer. See infra text accompanying notes 174.

mitted may file a brief "within 10 days of notification of the filing of the action." 53

When compared to the New York rule, the Montana rule would be more effective at promoting the will of the people of the state. The will of the people of the state of New York was evidenced by the adoption of an amendment to New York's Constitution. 54 The goals of the New York amendment were to "reduce the guesswork that in the past has been required under the doctrine of Erie Railroad v. Tompkins when a federal court must predict how the New York Court of Appeals would rule on an issue of state law." 55

The New York Court of Appeals adopted relevant provisions of both the Montana rule and the Uniform Act when it promulgated the New York rule by conferring power on the Court of Appeals to answer certified questions and empowering the appellate courts of New York to transmit certified questions to the high courts of other states. 56 However, this rule, as promulgated by the Court of Appeals, is contrary to the will of the people of New York reflected by the constitutional amendment creating the certification procedure. The state constitutional provision requires the certifying court to determine if the question is governed by precedent. 57 However, the rule promulgated by the Court of Appeals reserved to itself the power to review the merits of the certified question on its own motion. 58 Therefore, the Court of Appeals granted itself the power to refuse to answer any certified question, for any reason, regardless of the ripe-

53. MONT. R. APP. P. 44(f); see supra note 43. This rule appears to be aimed at enhancing judicial economy, which is frequently cited as an important goal in certification and in other cases, see infra note 119, because it decreases costs, in terms of both time and money.
54. See N.Y. CONST. art. VI, § 3, cl. 9. The constitutional provision, adopted by the citizens of New York by referendum, states the following:
   The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.
Id.
55. Pratt, The State of New York's State-Federal Judicial Council, 3 TOUR. L. REV. 1, 4-5 (1986) (footnote omitted). Judge Pratt is a member of the Second Circuit and chaired the New York State-Federal Judicial Council, which was largely responsible for the adoption of the constitutional amendment which established certification in New York state. Id. at 4.
57. N.Y. CONST. art. VI, § 3, cl. 9.
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ness of the issue presented and contrary to the mandate contained in the New York Constitution.

The New York rule also requires that the certification request include a statement as to why the issue should be addressed by the Court of Appeals at the time of its certification. This requirement begs the question since the court essentially reviews the issue de novo. Additionally, this requirement allows the Court of Appeals to avoid deciding an issue that may have adverse political ramifications. Since the state constitution provides that the certifying court should determine if the issue is controlled by New York law, the Court of Appeals should be required to file a statement in defense of a refusal to answer a certified question.

The New York rule continues to permit the Court of Appeals to “review the procedure to be followed in determining the merits.” This provision, when examined in conjunction with the provision permitting a review of the merits, implies that, on a case by case basis, the New York State Court of Appeals has the power to set standards of review to determine whether the merits are adequate to support the certified question. The absence of a published list of criteria as to whether or not a certified question will be answered leads to uncertainty and speculation about the certification process. Such results will, therefore, defeat the purpose of certification, which is to avoid speculation and improve judicial efficiency.

59. See id.
60. Id. § 500.17(b). Compare N.Y. Const. art VI, § 3, cl. 9 (specifying guidelines for the powers granted to the certifying and answering courts and empowering the certifying court to determine whether New York law is dispositive of the cause and if not, to certify the question to the Court of Appeals) with N.Y. Comp. Codes R. & Regs. § 500.17(b) (1987) (providing guidelines for the Court of Appeals to review a certified question on the merits).
61. See infra notes 133-39 and accompanying text.
62. N.Y. Const. art. VI, § 3, cl. 9. But see infra notes 116-18 and accompanying text (discussing cases in which the Court of Appeals refused to answer a certified question where the certifying courts had determined there existed an unsettled area of New York law).
63. See infra text accompanying note 181 (setting forth the Proposed Revised Uniform Act § 7).
64. N.Y. Comp. Codes R. & Regs. tit. 22, § 500.17(d); see supra note 44.
65. See id.
66. See supra text accompanying note 55 (discussing the policies underlying the adoption of the New York constitutional amendment permitting certification of questions of law); cf. supra notes 48-51 and accompanying text (discussing the Montana procedure for refusal to certify questions of law).

If the Court of Appeals intended to empower itself to refuse to answer a certified question which is not controlling in the dispute or when an insufficient record exists to answer the question, the language in the New York rule, N.Y. Codes R. & Regs. tit. 22, § 500.17(d) should have so stated. For example, that section may have stated that the court would not
chosen by the Court of Appeals is construed to suggest an ad hoc procedure for certification, then the New York procedure is extremely disconcerting.\textsuperscript{87}

III. A RECENT CASE OF CONFUSION: Dorman v. Satti

The process of certification promotes all four policies set forth by the Supreme Court in Gibbs v. United Mine Workers\textsuperscript{68} with minimal burden. Gibbs addressed the issue of mixed federal-state questions in the context of pendent jurisdiction.\textsuperscript{69} The Court enunciated four criteria which must be examined to determine whether a state or federal court should decide an issue of law: (1) judicial economy; (2) convenience to the litigants; (3) fairness to the litigants; and (4) comity to the states.\textsuperscript{70}

When a court fails to avail itself of the process of certification, the resulting burden may include unsettled areas of law, inconsistent holdings and a return to the pre-Erie days of forum-shopping.\textsuperscript{71} Such

\footnotesize

67. Cf. text accompanying note 64-66 (discussing Judge Pratt's conclusion that the purpose of certification is to "reduce the guesswork" of Erie). If no formal procedure is adopted to determine which questions may be answered by the court, the guesswork will merely switch from what is the state's law, to whether the New York State Court of Appeals will answer the question. Thus, rather than reducing the confusion, the New York approach only increases the complexity of the judicial guesswork inherent in an Erie question.


69. Pendent Jurisdiction allows a federal court to hear a state court claim: whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"... and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." Id. at 725 (quoting U.S. CONST., art. III, § 2). The standard is that "[t]he state and federal claims must derive from a common nucleus of operative fact." Id.

70. Id. at 726.

71. Obviously, the failure of a state court to answer a certified question leaves the federal courts alone to determine what they consider to be an unsettled area of state law. See UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 1, 12 U.L.A. 49, 52 (1967) (allowing an answer only when no controlling precedent exists); MONT. R. APP. P. 45(a) (requiring "a substantial ground for difference of opinion" before a certified question can be answered); N.Y. COMP. CODES R. & REGS. tit. 22, § 500.17(a) (allowing an answer only when "there is no controlling precedent of the Court of Appeals. . . .").

Additionally, the opportunity for inconsistent results emerges because the state and federal rulings may differ; cf. Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938) (discussing the problem of uniformity where federal courts and state courts make their own rules). This lack
consequences arguably occurred in *Dorman v. Satti*, 7 a recent case in which the Court of Appeals for the Second Circuit refused to certify to the Connecticut Supreme Court questions regarding the construction and interpretation of terms used in a state statute.73

In *Dorman*, the Second Circuit addressed the question of the constitutionality of a Connecticut statute prohibiting harassment of those engaged in the lawful taking of wildlife.74 The majority denied a motion to certify questions to the Connecticut Supreme Court75 and declared the statute was overbroad and vague and therefore unconstitutional.76

Judge Miner, in his dissent, stated his belief that “[federal courts] should, if possible, have the benefit of the [state’s highest court’s] construction of the statute” before determining its constitutionality.77 Judge Miner demonstrated how each term in the statute could be construed to be within the constitutional boundaries under Connecticut law. For example, “[t]he word ‘interfere’ in a statute imposing a criminal penalty for interfering with a police officer is easily yielded to an interpretation . . . that preserved the constitutionality of the statute.”78

The majority declined to take such action stating, “the Connecticut court would be in no better position than a federal court to de-

of uniformity may well lead to forum-shopping. See J. FRIEDENTHAL, supra note 2, § 4.6, at 221 (noting that “forum-shopping might be engendered if federal courts were obliged to apply rigidly outmoded state precedents that a state court could disregard.”).

By contrast, the only costs that appear to be associated with using certification are the time required to prepare the certification statement and the time lost as the question travels through the state court’s system. These burdens are clearly outweighed by the goals that can be accomplished through certification.

72. 862 F.2d 432 (2d Cir. 1988).

73. Id. at 436.

74. Id. at 434.

75. Id. at 436. The court noted that “[t]he test for determining the appropriateness of employing the certification procedure is whether the statute in question is ‘readily susceptible to the proffered narrowing construction that would render an otherwise unconstitutional statute constitutional.’” Id. at 435 (citing Virginia v. American Booksellers Ass’n, 108 S. Ct. 636, 645 (1988); Bellotti v. Baird, 428 U.S. 132, 148 (1976)). The *Dorman* court held that the statute was not “readily susceptible” to a constitutional interpretation. 862 F.2d at 435.

76. 862 F.2d at 437. The court noted that “although *American Booksellers* counsels in favor of expanded use of state certification procedures, we do not believe that it stands for the proposition that certification should be pursued whenever available.” Id. at 436.

77. Id. at 438 (Miner, J., dissenting); see also *American Booksellers Ass’n*, 108 S. Ct. at 644 (agreeing to certify two questions concerning the interpretation of a Virginia statute); *Bellotti*, 428 U.S. at 148 (directing certification of questions pertaining to the construction of a state statute that was susceptible to multiple interpretations, one of which would “avoid or substantially modify a federal constitutional challenge”).

78. 862 F.2d at 438 (Miner, J., dissenting).
cide which interpretation is correct." The Court failed to recognize
that federal courts have no power to determine the construction of a
state statute, and that the Connecticut Supreme Court was the
only court competent to make such a determination.

There are two alternatives to certification available to parties in
federal court in a case that involves an issue of state law. First, the
federal court can “guess” how the state courts will define the state
law. Second, the court may invoke the doctrine of abstention and
force the parties to either bring a suit in the state court for declara-
tory judgment or wait for another action to be brought in that state’s
court to settle the question.

Judicial economy obviously suffers if the federal court abstains
and waits for action in the state court. Additionally, in the absence
of certification, judicial economy suffers when a federal court
“guesses” as to an unsettled area of state law, since the possibility
exists that the federal and the state court holdings will be inconsis-
tent. Even if the holdings were not inconsistent, both the federal
and the state court systems would hear appeals on the same issue until
the state’s high court determined the law, wasting the resources of
both judicial systems. If the holdings did turn out to be inconsis-
tent, the outcome of future litigation would be determined based on
whether an action is pursued in federal or state court, and the status
of the Connecticut statute would remain in doubt.

IV. JUDICIAL INTERACTION WITH CERTIFICATION

Acceptance of certification has been less than enthusiastic in
both the federal and state courts. This Section discusses grounds

79. Id. at 436.
80. See, e.g., Hanna v. Plumer, 380 U.S. 460, 465 (1965) (recognizing that federal
courts in diversity cases to “recognize the definition of state-created rights and obliga-
tions by the state courts.”); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (arguing
that the outcome of the litigation in federal court “should be substantially the same” as it
would be in state court); Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
81. See supra note 23 and accompanying text (discussing federal prediction of state
law); see also J. FRIEDENTHAL, supra note 2, § 4.6, at 222 (noting that “the federal court must
be careful to determine the law as it believes the state court would choose were it to rule on
the matter, not the law as the district judge thinks is the best.”).
82. See supra notes 8-11 (discussing abstention).
83. See infra note 119 (discussing the principles of judicial economy).
84. See Carr & Robbins, supra note 21, at 431 (discussing reasons why state courts do
not employ certification procedures); infra notes 87-144 (discussing cases in which courts have
refused to utilize certification procedures or have found grounds upon which to refuse to an-
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upon which courts have refused to answer certified questions, culmi-
inating with a discussion of Rufino v. United States\textsuperscript{68} and Flannery v. United States.\textsuperscript{86}

A. Grounds for Refusal to Answer Certified Questions

First, a court may refuse to utilize the process of certification if it violates a state’s constitution. In Holden v. N L Industries,\textsuperscript{87} the Supreme Court of Utah, after determining that Utah’s constitution granted the court no original jurisdiction to answer certified questions,\textsuperscript{88} looked to its constitutional grant of appellate jurisdiction.\textsuperscript{89} The court looked to other definitions of the term in other constitutions,\textsuperscript{90} including the United States Supreme Court’s definition of appellate jurisdiction,\textsuperscript{91} and held that since a federal court was not an “inferior court”, Utah’s certification rule violated the Utah Constitution because it attempted to expand the scope of the court’s appellate jurisdiction.\textsuperscript{92} The court withdrew the certification rule and

\begin{itemize}
\item 85. 69 N.Y.2d 310, 506 N.E.2d 910, 514 N.Y.S.2d 200 (1987) (holding that a refusal to answer a certified question is justified by a desire to view a case through the filter of the New York courts’ procedural hierarchy); see infra notes 114-39 and accompanying text (discussing Rufino).
\item 86. 649 F.2d 270 (4th Cir. 1981) (discussing the de facto overruling of the answer to a certified question by the Fourth Circuit); see also infra notes 140-44 and accompanying text (discussing Flannery).
\item 87. 629 P.2d 428 (Utah 1981).
\item 88. Id. at 430.
\item 89. Id.
\item 90. Id. at 431.
\item 91. See Ex parte Watkins, 32 U.S. (7 Pet.) 568, 573 (1833) (discussing appellate power to issue a writ of Habeas Corpus); Ex parte Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) (defining “appellate jurisdiction” as “the revision of a decision of an inferior court.”).
\item 92. Holden, 629 P.2d at 431; accord United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 863 (Tex. 1965) (dismissing an action for declaratory judgment for lack of a case or controversy under the Texas constitution because it refused to render an advisory opinion). But see supra notes 54-55 and accompanying text (discussing New York’s apparent recognition of a conflict with its state constitution which resulted in the adoption of a constitutional amendment which empowered the Court of Appeals to answer certified questions of law).
\end{itemize}

Utah’s Constitution grants its Supreme Court original jurisdiction to issue writs including mandamus, certiorari, prohibition, quo warranto and habeas corpus. Utah Const. art. viii, § 4. The court compared its constitution and certification rules with those of Colorado. Holden, 629 P.2d at 430. The court noted that Colorado’s certification rule was grounded in the grant of original jurisdiction to that state’s highest court. Id. Compare Colo. Const. art. vi, § 3. (stating that “[t]he supreme court shall have power to issue writs . . . and such other original and remedial writs as may be provided by rule of court with authority to hear and determine the same.”) with Utah Const. art. viii, § 4 (limiting the power to issue writs beyond those enumerated to those that are “necessary and proper for the exercise of [appellate] jurisdiction.”).
dismissed the request for certification.93

Second, if the answering court finds that the certified question is not determinative of the cause of action, it may refuse to answer.94 This is based on the reluctance of courts to issue advisory opinions in their answers to certified questions.95

Third, state courts generally refuse to answer certified questions

The Utah Supreme Court then analyzed the constitutional language granting appellate jurisdiction. Holden, 629 P.2d at 430. This language states that "[i]n other cases the Supreme Court shall have appellate jurisdiction only . . . ." Utah Const. Art. VIII, § 4 (emphasis added). The court noted if not for the use of the word "only", "the constitutional conferment of appellate jurisdiction would be susceptible to the construction that the court's jurisdiction could be enlarged by an exercise of legislative or judicial power . . . ." Holden, 629 P.2d at 430. Compare Utah Const. Art. VIII, § 4 with Wash. Const. Art IV, § 4 (granting "appellate jurisdiction in all actions and proceedings . . . ." (emphasis added)). It was the use of the word "only" that forced the court to look to the definition of "appellate jurisdiction" and subsequently withdraw its certification rules. See Holden, 629 P.2d at 430-31.

Therefore, states wishing to utilize certification procedures should review their constitutions and either specifically grant power to their highest courts to answer certified questions or amend current language to ensure a construction that permits certification.


94. See, e.g., Greene v. Massey, 384 So. 2d 24, 27-28 (Fla. 1980) (holding that where an issue has been decided by a lower court and certiorari is denied, the issue is resolved and cannot be relitigated, and therefore, any certified question cannot be dispositive of the action in the federal system); Retail Software Serv. v. Lashlee, 71 N.Y.2d 788, 789, 525 N.E.2d 737, 738, 530 N.Y.S.2d 91, 92 (1988) (finding that the question certified did not meet the New York State Constitution's requirement that the question be "determinative of the cause"); Jefferson v. Moran, 479 A.2d 734, 738 (R.I. 1984) (holding that when a cause of action must ultimately have an issue resolved by a proceeding brought in state court, no question certified from that action may be dispositive of the cause then pending in the federal court).

In Lashlee, the New York Court of Appeals held that where alternative grounds exist for deciding an issue of law presented in a certified question, the court will refuse to answer. 71 N.Y.2d at 79, 525 N.E.2d at 738, 530 N.Y.S.2d at 92. In that case, two laws were available to create jurisdiction in the New York courts. One had a well-known construction, the New York long arm statute, N.Y. CIV. PRAC. L. & R. 302 (McKinney 1972 & Supp. 1990), and the other was the New York franchise act, N.Y. GEN. BUS. LAW § 686 (McKinney 1984), which was a relatively new statute. Lashlee, 71 N.Y.2d at 789-90, 525 N.E.2d at 737-38, 530 N.Y.S.2d at 91-92. The Second Circuit certified the question of whether § 686 of the New York franchise act "provide[d] a basis for personal jurisdiction . . . ." Id. at 789, 525 N.E.2d at 737, 530 N.Y.S.2d at 91. The Court of Appeals refused to answer the question since N.Y. CIV. PRAC. L. & R. 302 might also provide jurisdiction and, therefore, the court's response "would not be meaningful, let alone dispositive of the cause pending in the Second Circuit." 71 N.Y.2d at 791, 525 N.E.2d at 738, 530 N.Y.S.2d at 92; see The Second Circuit Gets Some Mixed Signals from the New York Court of Appeals About Certifying New York Law Questions, N.Y.S. L. Dig., Oct. 1988, at 1 (discussing Lashlee).

95. See Carr & Robbins, supra note 21, at 422 (discussing the requirement that certified questions be "determinative" of the issue); supra notes 42, 48-49, and accompanying text (discussing these requirements in the Uniform Act and in the Montana Rules of Appellate Procedure); infra notes 140-44 and accompanying text (discussing Flannery and the Fourth Circuit's refusal to answer a certified question).
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requiring a federal constitutional determination—a position which is consistent with the policies underlying Erie and certification. Just as federal courts must reserve to the states unsettled issues of state law, federal courts are entitled to decide issues of federal law.

96. See, e.g., Oulette v. Sturm, Ruger & Co., 466 A.2d 478, 480-81 (Me. 1983) (holding that where Maine's long-arm statute had been construed as being “co-extensive with the fullest limits of jurisdiction permitted by the concept of due process under the United States Constitution,” the question certified was one of federal constitutional law and properly within the scope of the federal judiciary to decide); Widgeon v. Eastern Shore Hosp. Center, 300 Md. 520, 527, 479 A.2d 921, 929 (1984) (refusing to answer a question which required interpretation of the sovereign immunity doctrine of the eleventh amendment); Abrams v. West Va. Racing Comm'n, 263 S.E.2d 103 (W. Va. 1980) (holding a state court should refuse to answer a question which inherently contains a determination of federal constitutionality).

97. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); see supra notes 1-5 and accompanying text (discussing Erie).

98. See Brown, supra note 6, at 457-58 (stating the considerations taken into account by the Fifth Circuit in "determining whether to exercise . . . discretion in favor of certification."); Note, The Law/Fact Distinction and Unsettled State Law in the Federal Courts, 64 Tex. L. Rev. 157, 164 (1985) (authored by Jeffrey C. Alexander) (discussing state court refusal to answer certified questions); supra text accompanying note 55 (discussing the policy underlying New York's adoption of a constitutional amendment.

99. Under the United States Constitution, state courts are the sole determiners of state law in all cases where the federal government is not empowered to act by the Constitution or a federal statute. See U.S. Const. art. III, § 2, cl. 1; Id. amend. X. The Constitution grants jurisdiction to federal courts over the following:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. art. III, § 2, cl. 1. The tenth amendment states, in pertinent part, as follows: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Id. amend. X.

Since Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Supreme Court has repeatedly recognized and affirmed the power of the states to define state law. See, e.g., Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 353 (1988) (stating the policies underlying the discretionary nature of pendent jurisdiction are “comity to the States” and the “promotion of justice between the litigating parties.”); Duckworth v. Serrano, 454 U.S. 1, 4 (1981) (expressing the need for deference to state courts in connection with habeas corpus motions when “considerations of federal-state comity would still inhere, and it would be unseemly in our dual system of government for the federal courts to upset a state-court conviction without affording to the state courts the opportunity to correct a constitutional violation.”); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978) (holding that when an amended complaint eliminates complete diversity, the policy of judicial economy will not override the inherent non-federal nature of the case at bar); United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (stating that “[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable
that are rightfully within the domain and expertise of the federal judiciary.100

Fourth, at least one court has held that if a party removes a case from state court, that party no longer has the right to seek certification.101

Finally, state courts have created rules of construction regarding the interpretation of certified questions, including which issues are to be examined and which facts the answering court may consider.102 Depending upon which state court is answering the question, both the facts to be examined102 and the formulation of the answer may vary.104

100. See supra note 96 and accompanying text (discussing state courts' recognition of federal courts' exclusive jurisdiction over federal issues).

101. See National Bank v. Pearson, 863 F.2d 322, 327 (4th Cir. 1988). In Pearson, the lower state court decided against the defendant on the issue which he later sought to certify to the Maryland Court of Appeals after removing the case to federal court. Id. at 324-25. The Fourth Circuit determined that certification was inappropriate given the procedural posture and noted that if the defendant "had wanted the Maryland Court of Appeals to rule on the matter, he should not have removed the action to federal court." Id. at 327. But see supra notes 1-11 and accompanying text (discussing Erie and the abstention doctrine).

102. See infra note 104 (discussing the power of a state court to reframe a question in formulating its answer and look beyond the supplied statement of facts).

103. Compare Food Fair Stores, Inc. v. Joy, 283 Md. 205, 219 n.7, 389 A.2d 874 n. 7, 882 n.7 (1978) (explaining that Maryland law does not permit the high court to weigh or examine evidence in answering a question but only to accept the supplied statement of facts) and Reliance Ins. Co. v. Chevron U.S.A., Inc., 713 P.2d 766, 769 (Wyo. 1986) (stating that fact finding is beyond the court's power when answering certified questions) with Penn Mut. Life Ins. Co. v. Abramson, 530 A.2d 1202, 1207-08 (D.C. 1987) (reading the Uniform Certification of Questions of Law Act, which gives the answering court the power to require any portion of the record or the entire record to be transmitted to the answering court, to infer authority for the answering court to use any factual information it deems necessary to obtain a fair, fully informed and educated understanding of the question before them).

104. See Abramson, 530 A.2d at 1207; Kelley v. Integon Indem. Corp., 726 F.2d 1519 (11th Cir. 1984); see also Meckert v. Transamerica Ins. Co., 742 F.2d 505, 507 (9th Cir. 1984) (discussing the certified question and stating that "[w]e do not intend this formulation to be exclusive. The Idaho court is free to frame the basic issues in any appropriate manner."). But see Public Serv. Comm'n v. Highfield Water Co., 293 Md. 1, 10, 441 A.2d 1031, 1035 (1982) (stating that "this Court is not authorized to go beyond the question certified in the order of the certifying court."); Krashes v. White, 275 Md. 549, 557, 341 A.2d 798, 802 (1975) (noting that the Uniform Act does not permit the answering court to go beyond the question certified unless the certification order expressly gives permission).

In Abramson, the court held that when a question is certified, the answering court has the right to frame the answer as it sees fit although the statutory language would tend to indicate the opposite. 530 A.2d at 1207. There are three reasons for this construction of the statute. First, the answering court has expertise with its own law—a federal or state court (of another state) might incorrectly frame a question because they are unaware of a relevant provision of the answering state's law. See id. Second, there may be a need to answer the question in a different form in order to create an answer that is informed and useful. See id. Third, other
Overall, when examining the issue of certification, the main objective of any court should be to ensure that state courts remain the sole decision makers of state law\(^{108}\) and that the doctrine of *Erie*\(^{108}\) is followed, not frustrated.\(^{107}\)

**B. Rufino and Flannery: Judicial Resistance to Certification of Questions of Law**

In *Rufino v. United States*,\(^{108}\) where the New York Court of Appeals refused to answer two questions certified by the Second Circuit, and *Flannery v. United States*,\(^{108}\) where the Fourth Circuit refused to follow an answer to a certified question from the Supreme Court of Appeals of West Virginia, both courts failed to recognize the purpose of the certification process,\(^{110}\) and thereby frustrated the policies of *Erie*.

In jurisdictions without a certification process, when state questions arise within claims that are subject to exclusive federal jurisdiction,\(^{111}\) or where a defendant raises a counterclaim based on state courts have created such a rule. *See id*. The state court’s answer in this case ultimately lead the Circuit Court to vacate the district court’s order. *See Penn Mut. Life Ins. Co. v. Abramson*, 837 F.2d 484, 485 (D.C. Cir. 1987). In *Kelley v. Integon Indemnity Corp.*, 726 F.2d 1519 (11th Cir. 1984), the Eleventh Circuit adopted the Fifth Circuit’s rule:

"[T]he particular phrasing used in the certified question is not to restrict the Supreme Court’s consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the Supreme Court’s restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.” *Id.* at 1521 (quoting *Martinez v. Rodriquez*, 394 F.2d 156, 159 n.6 (5th Cir. 1968)).

*Id.* at 1521 (quoting *Martinez v. Rodriquez*, 394 F.2d 156, 159 n.6 (5th Cir. 1968)).

105. State courts have attempted to issue answers to certified questions which are similar to what the state court would normally issue in its appellate capacity. *See Mercantile-Safe Deposit & Trust Co. v. Purifoy*, 280 Md. 46, 54, 371 A.2d 650, 655 (1977) (stating that “[u]nder the Uniform Certification of Questions of Law Act, we consider only questions of state law, not questions of fact or questions of federal constitutional law.”); *see supra* note 96 and accompanying text (discussing the refusal of state courts to answer certified questions when a constitutional issue is raised).

106. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); *see supra* notes 1-5 and accompanying text (discussing *Erie*).

107. *See infra* notes 108-44 and accompanying text (discussing *Rufino* and *Flannery* and the practices adopted by the New York Court of Appeals and the Fourth Circuit).


110. *See supra* text accompanying notes 22-23 (discussing the purpose of certification); *supra* notes 21-67 and accompanying text (discussing Montana’s, New York’s and the Uniform Act’s certification rules).

111. Both *Rufino* and *Flannery* dealt with claims under the Federal Torts Claim Act, 28
law in federal court, the party without the choice of forum is required to rely on the federal judiciary's ability to predict the governing state law.\footnote{Rufino involved a question of an award of damages for “loss of the enjoyment of the normal pursuits and pleasures of life.” The Second Circuit certified two questions regarding this element of damages to the New York Court of Appeals: (1) whether, under New York law, “loss of normal pursuits and pleasures of life” or “loss of enjoyment of life” is a separately compensable item of damages apart from other items, such as pain and suffering; and (2) if so, whether a claimant must possess cognitive awareness in order to recover for such a loss.}

Despite the compelling need for certification, the highest court of New York refused to answer the certified question since a lower court, the Supreme Court, New York County, had issued an opinion on the same question about the time of the certification request, and because the issue was the subject of an appeal in the Appellate

U.S.C. §§ 2671-2680 (1982) [hereinafter FTCA]. Flannery, 649 F.2d at 271; Rufino, 69 N.Y.2d at 311-12, 506 N.E.2d at 411, 514 N.Y.S.2d at 201. The parties in such actions are subject to the exclusive jurisdiction of the federal courts. 28 U.S.C. § 1346(b) (1982). However, under FTCA, “damages are determined by the law of the State where the tortious act was committed, subject to the limitations that the United States shall not be liable for ‘interest prior to judgment or for punitive damages.’” Rufino, 829 F.2d at 359 (citations omitted) (citing Hatahley v. United States, 351 U.S. 173, 182 (1956)); see also 28 U.S.C. §§ 1346(b), 2674 (1982).

Compulsory counterclaims, as well as crossclaims and impleader claims, may fall within a federal court’s authority, even if based on state law, under the doctrine of ancillary jurisdiction. See J. Friedenthal, supra note 3, § 2.14, at 77-78. Ancillary jurisdiction allows federal courts to hear such a claim “‘when it bears a logical relationship to the aggregate core of operative facts which constitutes the main claim over which the court has an independent basis of federal jurisdiction.’” Id. at 77 (quoting Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 714 (5th Cir. 1970)).

When the law involved is substantive, these predictions clearly violate the policies underlying \textit{Erie} and its progeny. See supra notes 1-5 and accompanying text (discussing \textit{Erie}).

\textit{Rufino}, 829 F.2d at 358. “Loss of enjoyment of life” is a measure of damages similar to “pain and suffering” except that a person may recover for loss of enjoyment of life even if he fails to regain consciousness. See id. at 358-59. More specifically, loss of enjoyment of life “‘provides compensation for the deprivation or impairment of the senses or one’s ability to engage in those activities and perform those functions which were part of the victim’s life prior to the injury.’” Id. at 359 n.8 (quoting Comment, \textit{Loss of Enjoyment of Life as a Separate Element of Damages}, 12 PAC. L.J. 965, 972 (1981) (authored by Carleton Robert Cramer)).

\textit{Rufino}, 829 F.2d at 359 n.7.

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The New York Court of Appeals justified its refusal to answer the certified question by reasoning that since \textit{McDougald v. Garber} was already on appeal in the New York courts, it was "unquestionably preferable in the resolution of significant State law issues to secure the benefit afforded by our normal process—the considered deliberation and writing of our intermediate appellate court in a pending litigation."

The Court of Appeals' reasoning endorsed judicial action which encourages judicial ineconomy,\textsuperscript{118} and declined to accept the comity

\begin{itemize}
\item 117. \textit{Rufino}, 69 N.Y.2d at 311, 506 N.E.2d at 911, 514 N.Y.S.2d at 201; \textit{see McDougald v. Garber}, 135 A.D.2d 80, 524 N.Y.S.2d 192 (1st Dep't 1988) (holding that loss of enjoyment of life was "a damage element separate and distinct from pain and suffering, for which compensation may be awarded despite the injured party's lack of cognitive awareness."); \textit{aff'd as modified}, 73 N.Y.2d 246, 536 N.E.2d 372, 538 N.Y.S.2d 937 (1989); \textit{see also Rufino}, 829 F.2d at 359 n.7.

The possible harms caused by \textit{Rufino} are not limited to the parties in that action. While a great loss would have been suffered by the bereaved widow if her claim had been wrongfully denied, the United States government also risked a loss from an improper enunciation of state law. Additionally, the judicial systems of the federal government and New York state were harmed. Judicial economy suffered in two ways. First, judicial economy suffered from the time spent by the Second Circuit in writing and preparing the certification order and also the time invested by the Court of Appeals in considering the certification order. Second, whether loss of enjoyment of life is an independent element of damages in New York is still an unsettled area of law. Therefore, both the state and federal systems will continue to hear cases regarding "loss of enjoyment of life" at the appellate level.


118. 69 N.Y.2d at 312, 506 N.E.2d at 911, 514 N.Y.S.2d at 201; \textit{see also Rufino}, 829 F.2d at 359 n.7.

119. The federal courts look to several criteria in determining whether to exercise jurisdiction where both state and federal issues are involved. The most common of these are "judicial economy, convenience and fairness to [the] litigants." \textit{Gibbs}, 383 U.S. at 726. The Supreme Court has continued to value and utilize these policies since \textit{Gibbs}, \textit{see}, e.g., Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988) (affirming the validity of the \textit{Gibbs} criteria when federal courts are deciding whether to exercise jurisdiction over pendent claims). \textit{But cf.} Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (concluding that judicial economy is not an adequate basis for asserting jurisdiction when complete diversity, a valid ground for federal jurisdiction, no longer exists).

The Court has also looked to the policy of judicial economy under circumstances not involving both state and federal issues. \textit{See}, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988) (concluding that in the interest of judicial economy, a case should not be remanded to the lower courts simply to have the lower court expressly state what is implied in their decision and then rapidly return it to the Supreme Court); Thomas v. Arn, 474 U.S. 140, 147 (1985) (finding the policy of judicial economy sufficient to support the creation of a rule requiring the filing of objections to a magistrate's brief in order to limit the number of appealable issues); General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) (Burger,
to states which the Supreme Court has determined to be constitutionally mandated. In addition, the court’s refusal to answer a certified question which was ripe for consideration deprived the New York court system of the efficient use of its resources.

Faced with the Court of Appeals’ refusal, the Second Circuit decided the questions at issue by resolving to “do our best to ascertain the rule which would issue from [the New York Court of Appeals], were it faced with the questions before us.” Noting the “well reasoned opinion” of the New York Supreme Court in Mc Dougald, the Second Circuit “cautiously” predicted that under New York law, “a plaintiff need not be consciously aware of loss of enjoyment of life . . .” and that “New York will in due course recognize loss of enjoyment of life as a separately compensable item of damages.”

In Mc Dougald v. Garber, the New York Supreme Court, Appellate Division, First Department affirmed the decision of the trial court, consistent with the Second Circuit’s prediction in Rufino. However, on appeal, the New York Court of Appeals concluded “that the [lower] court erred, both in instructing the jury that

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100. See supra text accompanying note 70 (discussing the Supreme Court’s determination of states’ rights).
101. Forcing both the federal courts and the New York courts to fully adjudicate cases until the New York Court of Appeals resolves the issue is duplicative, and therefore, wastes time and money. See supra note 119 (discussing the policy of judicial economy).
102. Rufino, 829 F.2d at 359.
103. Id. at 361.
104. Id. at 362.
105. Id. at 361.
106. Id. at 362.
108. See supra text accompanying note 126.
[plaintiff's] awareness was irrelevant to their consideration of damages for loss of enjoyment of life and in directing the jury to consider that aspect of damages separately from pain and suffering. This decision, issued by a court that had previously declined to answer these questions when certified by the Second Circuit, created, as Judge Brown stated, a "ticket for one ride only." During the period between the issuance of the opinion in McDougald by the Court of Appeals, and the Second Circuit's opinion in Rufino, a party that brought a state law claim relying on "loss of enjoyment of life" as an element of damages under New York law in federal court was treated to a more favorable rule than they would have been provided with in the New York State court system. The possibility of two common laws, one state and the other federal, created a situation reminiscent of the pre-Erie days of Swift v. Tyson. As Judge Pratt of the Second Circuit noted, the certification process was designed to avoid this possibility.

The possibility of an encroachment of the Erie doctrine in cases dealing with unsettled law was clearly illustrated in Rufino. The New York Court of Appeals was not bound by the federal court's prediction of law, and chose not to provide the federal court with any guidance in predicting New York law. Thus, the greatest harm was suffered by the party against whom the federal court made their prediction of state law. The Court of Appeals, in refusing to answer the questions when certified by the Second Circuit in

130. See Brown, supra note 6, at 455-56 (discussing Judge Brown's belief that if a federal court, absent any state law, made a prediction that turned out to be wrong under subsequent state decisions, the effect would be that the prediction by the federal court would be valid for only one case, and thereby unjustly injure a party to that action).
131. 41 U.S. (16 Pet.) 1, 18-19 (1842) (holding that a federal court is free to make its own judgments on questions of general law without being bound by state court decisions).
132. See supra text accompanying note 55 (presenting Judge Pratt's comments concerning the certification amendment to the New York State Constitution).
133. See supra notes 1-6 and accompanying text (discussing Erie and the right of states to define state law); supra notes 8-11 and accompanying text (discussing abstention and its underlying policies).
134. This is a proper view for a state court to take under Erie since the state courts have the sole authority to define state law. See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); supra notes 1-5 (discussing the "Erie doctrine").
135. See supra notes 114-26 and accompanying text (discussing Rufino).
136. See Brown, supra note 6, at 456 (stating that "more important than possible embarrassment is the frustration for litigants when the rule of law prescribe[d] [by the federal court] turns out to be a ticket for one ride only."); see also supra notes 8-11 and accompanying text (discussing abstention and the problem of a federal judge predicting state law).
Rufino, implicitly took the position that an inconsistency between court systems is not a serious enough problem to be avoided, even when it is clearly possible.

Alternatively, the Court of Appeals might have avoided the "loss of enjoyment of life" issue because it was a politically charged issue in the midst of a medical malpractice crisis which occurred in 1985-1986. Any expansion of the amount of recovery and the number of persons capable of recovering, at a time of increasing

137. In 1986, a medical malpractice insurance crisis was developing. Although the problem reached an alarming level in Massachusetts, see Wald, Doctors Weigh Strike over Insurance, N.Y. Times, Mar. 9, 1986, at A18, col. 3 (reporting that Massachusetts doctors were threatening to stop performing surgery or decline to take new patients in protest of the high cost of medical malpractice insurance); Massachusetts Warns Doctors in Premium Protest, N.Y. Times, Feb. 9, 1986, at A56, col. 1 (reporting the refusal by Massachusetts doctors to treat patients in protest to rising medical malpractice insurance rates and the state's threat of disciplinary action), there was debate on the issue throughout the northeastern states. See The $65 Million Malpractice Question, N.Y. Times, July 24, 1986, at A24, col. 1 (discussing an award of $65 million and the anxiousness with which individuals file marginal malpractice claims and suggesting a cap to pain and suffering as a solution to the crisis); Schmals, Insurance Curbs to Help Doctors Voted in Albany, N.Y. Times, June 25, 1986, at A1, col. 5 (reporting that New York's governor and legislature had reached an agreement that permitted the state insurance commissioner to monitor and regulate the medical malpractice insurers more closely); Belamy, Malpractice Reform That is Fair to All, N.Y. Times, June 12, 1986, at A31, col. 2 (suggesting that a cap to the amount which may be awarded for pain and suffering would reduce the insurance companies' uncertainty in estimating future losses, thus helping to alleviate the medical malpractice crisis); W. Virginia Eases Law After Insurers' Threat, N.Y. Times, May 27, 1986, at A17, col. 1 (reporting the West Virginia legislature's easing of restrictions it placed on malpractice insurers in order to prevent them from leaving the state); Two Professions Feud in Boston, N.Y. Times, May 11, 1986, at A34, col. 1 (reporting the Massachusetts legislature's debate over a medical malpractice bill which, by capping jury awards for pain and suffering, limited the amount of contingency fee's collected by attorneys); Stevens, Malpractice Insurers Stir Wrath of West Virginia, N.Y. Times, May 3, 1986, at A8, col. 1 (reporting West Virginia's creation of a state owned insurance system to replace insurance companies that refused to renew policies in the state following the enactment of a law which restricts the rights of the companies to cancel and renew malpractice insurance policies); Abram, To Curb Medical Suits, N.Y. Times, Mar. 31, 1986, at A19, col. 1 (suggesting that physicians consult with patients and permit patients to make informed decisions regarding treatment as a mechanism to reduce the awards in medical malpractice suits and thereby reduce the premiums for medical malpractice insurance); Carroll, In Albany, Malpractice Issue Awaits Solution, N.Y. Times, Mar. 9, 1986, at A56, col. 1 (reporting that New York politicians continued to seek a solution to the medical malpractice insurance problem since a temporary freeze on insurance rates had expired); Brinkley, Doctors v. Lawyers: 'A Real Nasty Fight', N.Y. Times, Feb. 14, 1986, at A18, col. 3 (reporting the continuing controversy raging in the states over medical malpractice and the high powered Washington lobbyists who have joined both sides); Taylor, Lawyers-vs.-Doctors Battle on Malpractice Builds, N.Y. Times, Feb. 4, 1986, at A1, col. 4 (discussing head-to-head confrontation directed at Congress between the American Medical Association and the American Bar Association regarding limitations on remedies in medical malpractice suits); Letter from Perry Pazer to the New York Times, N.Y. Times, Jan. 2, 1986, at A22, col. 1 (discussing the advantages of the jury system in determining medical malpractice damages).
medical bills and medical malpractice insurance rates, might have created a political controversy. This danger may well have been elevated given the status of a tentative agreement that had been reached to resolve the malpractice crisis.\textsuperscript{138} Therefore, the Court of Appeals may have abstained from deciding the issue with the knowledge that the life-tenured judges of the federal bench would decide it.\textsuperscript{139}

Another possible explanation for the actions taken by the New York Court of Appeals may have been that the court did not feel that the Second Circuit would follow their answer, a result which occurred previously in \textit{Flannery v. United States}.\textsuperscript{140} In \textit{Flannery}, the Fourth Circuit certified to West Virginia's high court a question regarding "loss of enjoyment of life."\textsuperscript{141} In its answer, the Supreme

\begin{quote}
\textsuperscript{138} See Schmalz, \textit{supra} note 137, at A1, col. 5 (discussing the medical malpractice crisis and the tentative agreement the New York legislature had reached with the governor).
\textsuperscript{139} Since judges of the federal judiciary are life tenured, and therefore politically insulated, those state judges who are politically appointed may find it appealing to allow the federal judges to decide the controversial issues and bear the public's wrath, risk free. The life tenure of federal judges and its consequential political insulation has long been recognized in the United States. See U.S. CONST. art. III, \S\ 1 (stating "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); see also \textit{The Federalist} No. 78, at 482-91 (A. Hamilton) (H. Lodge ed. 1911) (interpreting Article III as guaranteeing judges life tenure and no diminution of salary for the purpose of maintaining an independent and equal branch of government in the Judicial Branch); Diver, \textit{Statutory Interpretation in the Administrative State}, 133 U. PA. L. REV. 549, 581 (1985) (stating that "[s]ince federal judges in particular have life tenure and constitutional protection against salary reduction, Congress can do little to harm them directly."); Howard, \textit{The States and the Supreme Court}, 31 CATH. U.L. REV. 375, 393 (1982) (stating "life tenure give[s] federal judges an independence that most state judges do not enjoy, [with the result that] federal forums [are] likely to yield more uniform results, and that federal judges [are] more willing to intervene when other organs of government fail to act."); Shapiro \& Levy, \textit{Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions}, 1987 DUKE L.J. 387, 399 n.40 (noting that "[t]he independence of federal judges was protected under Article III through provisions granting them life tenure and precluding diminution of salaries.").

The judges of the New York Court of Appeals are appointed to terms of fourteen years and must be nominated by a judicial commission, N.Y. CONST. art. VI, \S\ 2(a) \& (c), which is empowered to consider the qualifications of applicants for Justice to the Court of Appeals. \textit{Id.} \S\ 2(d)(4). The commission "consists of twelve members of whom four shall be appointed by the governor, four by the chief judge of the court of appeals, and one each by the speaker of the assembly, the temporary president of the senate, the minority leader of the senate, and the minority leader of the assembly." \textit{Id.} \S\ 2(d)(1). The justices are then appointed by the governor with consent of the senate. \textit{Id.} \S\ 2(e).

139. \textit{See also} \textit{The Federalist} No. 78, at 482-91 (A. Hamilton) (H. Lodge ed. 1911) (interpreting Article III as guaranteeing judges life tenure and no diminution of salary for the purpose of maintaining an independent and equal branch of government in the Judicial Branch); Diver, \textit{Statutory Interpretation in the Administrative State}, 133 U. PA. L. REV. 549, 581 (1985) (stating that "[s]ince federal judges in particular have life tenure and constitutional protection against salary reduction, Congress can do little to harm them directly."); Howard, \textit{The States and the Supreme Court}, 31 CATH. U.L. REV. 375, 393 (1982) (stating "life tenure give[s] federal judges an independence that most state judges do not enjoy, [with the result that] federal forums [are] likely to yield more uniform results, and that federal judges [are] more willing to intervene when other organs of government fail to act."); Shapiro \& Levy, \textit{Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions}, 1987 DUKE L.J. 387, 399 n.40 (noting that "[t]he independence of federal judges was protected under Article III through provisions granting them life tenure and precluding diminution of salaries.").


141. 649 F.2d 270, 273 (1981). The Fourth Circuit certified the following question in connection with loss of enjoyment of life: "Under West Virginia law, is a plaintiff in a personal injury action, who has been rendered permanently semi-comatose by his injuries and is there-
Court of Appeals held that a permanently semi-comatose plaintiff is “entitled to recover for the impairment of his capacity to enjoy life . . .”\textsuperscript{142} Upon receipt of this answer, the Fourth Circuit denied recovery based on its holding that the damages sought were in fact punitive, and therefore, not recoverable as a matter of federal law.\textsuperscript{143} Flannery may have led to the cautious approach taken by courts in cases such as Rufino.\textsuperscript{144}

IV. Recommendations

A. State Rule Amendments to the Uniform Act

In order to prevent state courts from strained constructions of a certification statute or state constitution, it is advisable that states adopt an optional provision of the Uniform Act in the form of a state constitutional amendment.\textsuperscript{145} The New York State constitutional provision contains all the relevant policies and powers, and therefore should be adopted as the standard for this amendment to the Uniform Act.\textsuperscript{146} Two additional provisions should be added to the New York constitutional provision. First, rather than requiring that the question address an area of unsettled law, the act should follow the Montana rule\textsuperscript{147} and adopt an alternative standard consistent with the policies underlying certification of questions of law—the “sub-

\textsuperscript{142} Flannery v. United States, 297 S.E.2d 433, 439 (W.Va. 1982).


\textsuperscript{144} Proof of this proposition may be found in the fact that the Second Circuit addressed the issue in Flannery by stating that the court would not overrule a state court’s answer after certifying a question to that court. See Rufino v. United States, 829 F.2d 354, 362 (2d Cir. 1987). The Second Circuit, in explaining their position, stated that “we agree with the Ninth Circuit’s explicit refusal to follow Flannery, on the ground that the Flannery rule would ‘impinge seriously upon the architecture of the Act which provides recovery according to the lex loci delictus.’” Id. (quoting Shaw v. United States, 741 F.2d 1202, 1208-09 (9th Cir. 1984)).

\textsuperscript{145} See supra notes 87-93 and accompanying text (discussing the Utah Supreme Court's finding, in Holden v. N L Indus., 629 P.2d 428 (Utah 1981), that a certification rule violated the state constitution since the rule did not fall within the state's definition of “appellate jurisdiction,” of the highest court).

\textsuperscript{146} See N.Y. Const. art. VI, § 3, cl. 9; supra note 54 (setting forth the New York constitutional provision); supra text accompanying note 55 (discussing the policies embodied in the New York constitutional amendment); see also infra text accompanying notes 171-73.

\textsuperscript{147} Mont. R. App. P. 44; see supra note 43 (setting forth the Montana rule).
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substantial ground for difference of opinion" test.\textsuperscript{148} Second, the constitution should require that the answer to a certified question be treated similarly to all other opinions of the answering court.\textsuperscript{149}

Section one of the Uniform Act should be amended to include an enumerated list of situations recognized as justifiable grounds for refusing to answer a certified question.\textsuperscript{150} A rule should be adopted permitting a non-moving party to file a brief which objects to the certification.\textsuperscript{151} The brief submitted should be limited to objections regarding the propriety of certifying a question on this issue and should not include objections to the facts or the phrasing of the question, which under the Proposed Revised Uniform Act shall be the sole province of the federal court.\textsuperscript{152} The issue of oral argument shall be left to the states to determine, but states should note that any provision for oral argument will increase the time and cost associated with certification\textsuperscript{153} and therefore act as a disincentive to the use of the certification process. The right to certify a question should be reserved to the Federal Courts of Appeals and the Supreme Court, thereby eliminating the possibility of a question being answered

\textsuperscript{148} See supra notes 48-50 and accompanying text (discussing the need for the “substantial ground for difference of opinion” test rather than the current “unsettled area of law” test); infra notes 171-87 (setting forth the Proposed Revised Uniform Act).

\textsuperscript{149} See infra note 181 and accompanying text (discussing the addition of a sentence to the Uniform Act stating the answer to a certified question “shall be treated and given the equal effect of all other published opinions of [this issuing court].”).

\textsuperscript{150} A pattern for such a rule is MONT. R. APP. P. 44; see supra note 43 (setting forth the Montana rule). However, rather than leaving an open question as to whether the list is exclusive, see supra note 51 and accompanying text, the Proposed Revised Uniform Act recommends that the list is exclusive. See infra notes 188-92 and accompanying text (discussing the Proposed Revised Uniform Act).

\textsuperscript{151} The purpose of this section is to provide a method by which a non-moving party may object. However, the right of the non-moving party to be heard on the certified question will be limited in the interest of judicial economy. See supra note 66 and accompanying text (demonstrating how the right to challenge certification creates judicial ineconomy); supra note 119 (discussing judicial economy); see also infra notes 171-87 (setting forth the Proposed Revised Uniform Act).

\textsuperscript{152} See infra text accompanying notes 161, 176 (discussing materials which should be transmitted to the answering court by the certifying court). The power to decide what issues are relevant and what facts are required to formulate an answer lies with the two court systems which are parties to the certification process. The certifying court will suggest in its certification statement those facts it deems relevant. However, the answering court under the Uniform Act has the power to request any portion of the record, UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 4, 12 U.L.A. 49, 54 (1967), while under the Proposed Revised Uniform Act the court would already have a copy of the entire record transmitted to it as part of the certification order. See infra text accompanying note 176 (setting forth the relevant provision of the Proposed Revised Uniform Act). Therefore, the answering court may determine what is relevant as to both facts and issues of law at its discretion.

\textsuperscript{153} See supra note 119 and accompanying text (discussing judicial economy).
while this issue dangles in a vacuum of facts.154

A final correction should be made to the Uniform Act. The requirement that the certified question be "determinative of the cause"155 should be changed to require only that the resolution of the issue would "materially advance ultimate termination of the federal litigation."156

B. Proposed Federal Rule of Appellate Procedure

In response to the problems discussed previously, this Note proposes the following federal rule of appellate procedure to be adopted by the federal judiciary to facilitate the increased utilization of certification procedures.157

I. A question of law may be certified to the high court of a given state by a federal Court of Appeals or the Supreme Court158 upon motion of any party to the suit when the area of law contains substantial ground for a difference of opinion.159

II. Upon certification of a question, a statement of the facts shall be prepared and transmitted by the court to the answering court as shall the question160 and a copy of the entire record.161 The answer-

154. The foundation for this provision is the "final decision" rule of the federal courts. If interlocutory questions were permitted, it is possible that questions could be certified when inadequate facts exist to properly determine their resolution, or rather when the questions themselves will be moot upon termination of the litigation. Cf. 28 U.S.C. § 1292 (1982) (defining the standards for interlocutory appeals).

155. Unif. Act § 1, 12 U.L.A. 49, 52; see supra notes 93-100 and accompanying text (discussing the problem of determining what "determinative of the cause" means).

156. See Mont. R. App. P. 44; supra note 43 (setting forth the Montana rule).

157. Amendments to the Uniform Act will aid in making certification more acceptable and, therefore, more likely to be utilized by courts. However, it is necessary to recognize that the primary partners of the states in certifying questions are the federal courts. To facilitate uniformity and consistency it is imperative that the federal courts adopt a uniform rule. For examples of federal court rules see 2D Cr. R. 0.27; 7th Cr. R. 52; 10th Cr. R. 27.1.

158. See, e.g., N.Y. Const. art. VI, § 3, cl. 9; Mont. R. App. P. 44; N.Y. Comp. Codes R. & Regs. tit. 22, § 500.17; Unif. Act, 12 U.L.A. 49; see also supra note 50, 154 (discussing the policies underlying permitting certification from appellate level courts only); cf. infra notes 174-92 and accompanying text (setting forth the Proposed Revised Uniform Act and discussing the courts' power to answer certified questions).

159. Cf. Mont. R. App. P. 44; see supra note 43 (setting forth the Montana rule which provides the "substantial ground for a difference of opinion" standard). This section is intended to assure a standard that does not automatically preclude certification merely because an opinion on an issue exists.


161. For examples of statutes permitting the answering court to request portions of the
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The answering court may request briefs from the parties to the action if, in the opinion of the answering court, this will aid in deciding the issue.  

III. The factors to be considered in determining if substantial grounds for difference of opinion exist are:  

(1) the amount of time since the high court of the state last proclaimed its opinion on the issue;  
(2) the conformity or disparity among the recent opinions issued by the courts of the respective states;  
(3) any current trends toward change which may exist in a particular area of law; and  
(4) any special facts in a particular case which the certifying court feels are specially relevant in its determination of the applicable law.  

This proposed Federal Rule of Appellate Procedure is intended to create a uniform national standard as to when certification should be invoked. The provisions of this rule focus on and seek to resolve the problem of a court answering a certified question in a factual vacuum. Lastly, the new rule is intended to provide federal judges with guidelines as to when a question should be certified. 

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162. See infra note 176 and accompanying text (discussing the desirability of permitting the answering court maximum access to information relevant to the question).  
163. The purpose of this section is to promote decision making by the answering court. Avoiding inadequacy of facts and legal analysis will facilitate this goal and should increase the desire of state courts to answer certified questions. See supra notes 102-04 (discussing the refusal of courts to answer certified questions due to lack of sufficient facts).  
164. The list may be modified; however, its purpose is to provide objective standards by which to decide whether to certify questions, and thereby increase predictability in this area of the law. The rule is based on MONT. R. APP. P. 44.  
165. See supra note 71 (discussing the desire to avoid courts' speculation regarding an area of law).  
166. See supra notes 114-28 and accompanying text (discussing Rufino v. United States, 829 F.2d 354 (2d Cir. 1987), and the actions of the New York Court of Appeals).  
167. The list provided in this section is not exclusive but is indicative of the type of factors which courts have examined in determining if a question is ripe for decision. See supra notes 87-104 (discussing situations when courts should refuse to answer certified questions).  
168. The standards for when a question should be certified in the proposed federal rule mirrors the standards contained in the Proposed Revised Uniform Act thereby creating a national standard for certification of questions of law. See infra text accompanying notes 171-87. The desire for uniformity was expressed by the drafters of the current Uniform Act. See UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, Commr's Prefatory Note, 12 U.L.A. 49, 51 (1967) (noting that uniformity increases the likelihood that certification procedures will be used).  
169. See supra notes 160-63 (discussing the transmission of the entire record to the answering court and the answering court's power to request additional information from the parties to the action).  
170. See supra notes 164-67 (discussing factors to be examined when determining if a
C. Constitutional Amendment

In order to avoid potential conflicts with state constitutions, the following constitutional amendment should be adopted in all states:

The [Supreme Court of State X] shall adopt and from time to time may amend a rule to permit the court to answer questions of [State X] law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or an appellate court of last resort of another state, which may materially advance ultimate termination of the federal litigation then pending in the certifying court and as to which in the opinion of the certifying court there are substantial grounds for difference of opinion as to what the law is and such answer shall have effect equal to all other published opinions issued by this court.

D. Proposed Revised Uniform Certification of Questions of Law Act

In response to the problems discussed previously, this Note also proposes that the following rules be adopted by state legislatures to facilitate the increased utilization of certification procedures:

§ 1. [Power to Answer]

question should be certified).

171. See supra notes 87-93 and accompanying text (discussing Holden v. N L Indus., 629 P.2d 428 (Utah 1981)); see also supra notes 145-49 and accompanying text (discussing the constitutional amendment proposed by this Note); supra note 50 (discussing the rationale for only permitting appellate courts to certify questions). The section is modeled after the New York State Constitution. N.Y. CONST. art. VI, § 3, cl. 9; see supra note 54 (setting forth the New York constitutional provision).

172. This provision expressly rejects the "no precedent on point" test for unsettled law, and rather adopts the "substantial difference of opinion" test. The test is adapted from the Montana rule, MONT. R. APP. P. 44 and allows the court flexibility in determining ripeness without depending upon total non-existence of precedent. See supra notes 147-48 and accompanying text (discussing the desirability of adopting the "substantial grounds for difference of opinion" test).

173. This constitutional amendment is intended to give answers to certified questions the same precedential effect as other opinions of the high court. See supra text accompanying note 149 and accompanying text (discussing the need to give the answer to a certified question precedential value in the interest of judicial economy).


This section has been divided into subsections (a) and (b). Subsection (a) provides a general rule when certification is proper, allowing certification from appellate level courts only. See supra notes 50, 154 and accompanying text (discussing the rationale for only permitting appellate courts to certify questions). Subsection (b) provides exclusive instances in which the court may refuse to answer a certified question. See supra note 150 (discussing instances when courts should refuse to answer certified questions); supra note 51 and accompanying text (dis-
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(a) The [Supreme Court] may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, [or the highest appellate court or the intermediate appellate court of any other state], when requested by the certifying court if there are involved in any proceeding before it questions of law of this state about which there are substantial grounds for difference of opinion regarding controlling precedent in the decisions of the [Supreme Court] [and the intermediate appellate courts] of this state.

(b) Upon occurrence of one of the following, certification may be denied:

(i) If alternative grounds exist upon which to decide the issue;
(ii) There are inadequate facts in the record upon which to make an informed and educated decision;
(iii) The issue was not raised at trial and is a newly litigated issue;
(iv) The question presents an issue which is settled under the law of this state; or
(v) The question presented is a question which the certifying court maintains expertise in and is properly empowered to answer.

§ 2. [Method of Invoking] 175

This [act] [rule] may be invoked by an order of any of the courts referred to in section 1 upon the court's own motion or upon the motion of any party to the cause.

§ 3. [Contents of Certification Order] 176

A certification order shall set forth

(1) the questions of law to be answered;
(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose; and
(3) a copy of the entire record before the certifying court.

§ 4. [Preparation of Certification Order] 177

Throughout the Proposed Revised Uniform Act, the bracketed material indicates optional provisions.

176. Cf. id. § 3. Subsection (3) has been added to this act in order to provide the answering court with a full copy of the record. This will prevent the inefficient process of courts being forced to request portions of the record from the certifying court, or alternatively from answering questions in an uninformed manner due to a vacuum of information that may exist.
177. Cf. UNIF. ACT § 4, 12 U.L.A. at 54. This section of the Uniform Act gives the answering court the power to request portions or the entire record. Id. This provision has been omitted from the Proposed Revised Uniform Act since it requires the entire record to be transmitted.
The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the [Supreme Court] by the clerk of the certifying court under its official seal.

§ 5. [Costs of Certification]

Fees and costs shall be the same as in [civil appeals] docketed before the [Supreme Court] and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

§ 6. [Briefs and Arguments]

If any party to the action believes that the [Supreme Court] should refuse to answer the certification order, such party may file a motion to such effect within ten days after such party receives notice that the certification order has been filed with the [Supreme Court].

§ 7. [Opinion]

The written opinion of the [Supreme Court] stating the law governing and the questions certified shall be sent by the clerk under the seal of the [Supreme Court] to the certifying court and to the parties and shall be treated and given the effect of all other published opinions of the [Supreme Court]. If no answer is issued, the [Supreme Court] shall issue an opinion declaring its reasons for refusing to answer the question certified from the federal or other state court.

§ 8. [Power to Certify]

The [Supreme Court] (or the intermediate appellate courts) of this state, on [its] (their) own motion or the motion of any party, may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

§ 9. [Procedure on Certifying]

178. Id. § 5.

179. Id. § 6. The certifying court will have the power to structure the question and the statement of facts, and the answering court will have the entire record before it. See supra notes 161, 176 and accompanying text (discussing proposed revisions). Therefore, the procedure will be non-adversarial and employed in the interest of justice and should not require action by either advocate.

180. This proposed section is identical to the Montana rule, MONT. R. App. P. 44(f).

181. See supra notes 62-63 and accompanying text (discussing the issuance of an opinion in the event a court refuses to answer a certified question); cf. UNIF. ACT § 7, 12 U.L.A. at 55. In addition to the existing Uniform Act, this act expressly provides that the opinion shall be binding in effect on future actions brought within the courts of the answering state or when the law of the answering state is utilized.


183. Id. § 9.
CERTIFICATION PROCEDURES

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

§ 10. [Severability][184]

If any provisions of this [Act] [Rule] or the application thereof to any person, court, or circumstance is held invalid, the invalidity does not affect the other provisions of the [Act] [Rule] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] [Rule] are severable.

§ 11. [Construction][185]

This [Act] [Rule] shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 12. [Short title][186]

This [Act] [Rule] may be cited as the Revised Uniform Certification of Questions of Law [Act] [Rule].

§ 13. [Time of Taking Effect][187]

This [Act] [Rule] shall take effect ________________

V. CONCLUSION

The proposals of this Note would enable more states to adopt certification by creating a state constitutional amendment.[188] Additionally, the Revised Uniform Certification of Questions of Law Act provides for the publication of opinions issued in certified questions.[189] The reasons for which a certified question may be denied are no longer discretionary, but rather are codified in an enumerated, exclusive list.[190] Where an answering court is presented with a question in a vacuum of facts, the entire record will be transmitted and the answering court may request additional briefs from any of the parties.[191] The Proposed Revised Uniform Act should be construed uniformly in order to achieve its desired impact.[192] The Re-

184. Id. § 10.
185. Id. § 11.
186. Cf. id. § 12.
187. Id. § 13.
188. See supra notes 145-49, 171-73 and accompanying text.
189. See supra note 149, 181 and accompanying text.
190. See supra text accompanying note 150, 174.
191. See supra notes 161-62 and accompanying text.
192. This rule of construction, that laws with similar language should be construed in a similar manner, is widely followed. See, e.g., Yates v. United States, 354 U.S. 298, 309 (1957); Carolene Prods. Co. v. United States, 323 U.S. 18, 26 (1944); United States v. Aguon, 851 F.2d 1158, 1164 (9th Cir. 1988); People of Territory of Guam v. Borja, 732 F.2d 733, 735 (9th Cir. 1983); Van Cleef v. Aeroflex Corp., 657 F.2d 1094, 1098 (9th Cir. 1981); Interform
vised Uniform Act has been drafted in a way that will reduce ambiguity and afford more predictability to both the federal and state courts.

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