Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure

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It has been sixty years since the United States Supreme Court decided *Erie Railroad v. Tompkins*[1] and established state sovereignty over the crafting of state law. The *Erie* decision marked a profound shift in the judicial division of labor in our federalist system by delineating the contours of judicial authority and responsibility for making state law.[2] Federal courts in the post-*Erie* universe must, when a state law question is posed within the context of a federal case, apply state substantive law as the rule of decision.[3]

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[1] 304 U.S. 64 (1938) (holding that federal courts exercising diversity jurisdiction must apply the law of the applicable state).

[2] Prior to *Erie*, federal courts sitting in diversity applied general principles of federal common law as the rule of decision in the absence of statutory authority. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) (announcing that "general principles and doctrines of commercial jurisprudence" — i.e., federal common law — apply in diversity cases).

[3] This most frequently happens in diversity cases. Federal law provides for federal subject-matter jurisdiction over suits between citizens of different states. *See* 28 U.S.C. § 1332 (1994). The situation can also arise, however, when the federal court's jurisdiction is based on 28 U.S.C. § 1331, which provides for federal subject-matter jurisdiction over suits involving a federal question. *See, e.g.*, Imel v. United States, 523 F.2d 853 (10th Cir. 1975) (explaining that the resolution of a federal tax

As it is with most aspects of the law, the *Erie* doctrine is easier stated than applied. Locating the proper state rule of decision, even in well-developed areas of state law, can be a difficult task.[4] For most cases, the federal judge faced with a state law issue of first impression has three options: (1) hazard a well-informed guess as to what the state courts would say were they to address the issue,[5] (2) abstain in favor of the state court deciding the issue,[6] or (3) certify the question to the highest court of the state whose substantive rule of decision governs.[7] The first of these options, this Article will suggest, substi-

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law issue is governed by state law regarding apportionment of property). The need to apply state law also arises when the court is required to resolve a dispute when exercising supplemental jurisdiction. *See* 28 U.S.C. § 1367 (1994) (stating that federal courts have jurisdiction over non-federal claims that are so related to federal claims "that they form part of the same case or controversy under Article III of the United States Constitution").

[4] *See generally* Note, *How A Federal Court Determines State Law*, 59 HARV. L. REV. 1299 (1946). Judge Friendly colorfully described this process: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960).

[5] *See* CHARLES A. WRIGHT, FEDERAL COURTS § 58, 397 (5th ed. 1994) [hereinafter WRIGHT, FEDERAL COURTS]. As the author explains,

> The federal court must keep in mind, however, that its function is not to choose the rule which it would adopt for itself, if free to do so, but to choose the rule which it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt.

Id.

[6] *Pullman*-style abstention, named eponymously after the case of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), is the most applicable abstention doctrine when issues of state law arise in diversity cases. *See* Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1073 (1997) ("Certification today covers territory once dominated by a deferral device called '*Pullman* abstention.'"). Under this doctrine, a federal court abstains in favor of state court adjudication of unsettled issues of state law that dispose of a case without the need for deciding issues of federal constitutional law present in the controversy. *See generally* 17A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4241 (2d ed. 1988) [hereinafter WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE]. Though generally applied only when resolution of the unsettled state law issue would obviate the need for deciding a federal constitutional issue, a variant of *Pullman* abstention that is closely related in effect to certification has been applied even where there exist no constitutional or statutory issues of a public nature. *See id.* § 4246 (compiling cases). For a general discussion of the abstention doctrines, see WRIGHT, FEDERAL COURTS, *supra* note 5, § 52 at 322-39; AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT, TENTATIVE DRAFT NO. 2, 144-45 (April 14, 1998).

[7] Though the scope of this Article is limited to the question of interjurisdictional certification from federal to state courts, similar issues are present when a state court must apply the law of a foreign state. For a thoughtful discussion of certification in this context, see generally Ira P. Robbins, *Interstate Certification of Questions of Law: A Valuable Process in Need of Reform*, 76 JUDICATURE 125 (1992) [hereinafter Robbins, *Interstate Certification*].

tutes federal common-law making for state common-law making and, at the very least, exists in considerable tension with the philosophy and teaching of *Erie*. The second option, abstention, while allowing the state courts to decide state law issues, is a rarely applied and awkward procedural device that forces parties to litigate their claims first in a state trial court and then through any available appeals before obtaining a definitive answer to the unsettled state law question. Abstention, not surprisingly, is prone to causing enormous delays, expense, and inconvenience to both courts and litigants.[8] Therefore, it is an inadequate solution to the problem presented by state law issues of first impression arising in federal cases. The third option, certification, provides the benefits of state court adjudication of state law issues of first impression without the inordinate delay that often accompanies abstention. Unlike abstention, certification directly presents a question to the highest court of the state.

While most states in the union have adopted certification procedures, New Jersey is one of the few that has not.[9] Consideration of whether New Jersey should adopt a certification procedure is currently pending before the New Jersey Supreme Court.[10] This Article will set forth the reasons, both practical and philosophical, why the New Jersey Supreme Court both can and should adopt a certification procedure. Part I of the Article briefly surveys the historical development of the certification procedure and discusses the issues likely to be considered by the New Jersey Supreme Court in deciding whether to adopt a certification procedure. Part II of the Article summarizes arguments that have developed in the substantial body of scholarly literature and judicial opinions on the subject of certification in general. Next, this part addresses the chief objections to certification raised by the Supreme Court Committee on Civil Practice

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[8] *See* Gerald M. Levin, Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 346-48 (1963).

[9] Certification procedures have been adopted in varying forms by 46 states, the District of Columbia, and the Commonwealth of Puerto Rico. New Jersey is one of the four states, along with Arkansas, North Carolina, and Vermont, that has not adopted such a procedure. *See* Jona Goldschmidt, American Judicature Society, *Certification of Questions of Law: Federalism in Practice* 1, 117-18 (1995). With the adoption of Rule 29.5 in January of this year, California has become the most recent state to adopt a certification procedure. *See* CAL. R. CT. 29.5. On October 28, 1998, the Pennsylvania Supreme Court adopted a rule that provides for certification on a one-year trial basis, effective January 1, 1999. *See In re: Certification of Questions of Law*, No. 197 Judicial Administration Docket No. 1 (Oct. 28, 1998).

[10] *See* COMMITTEE ON CIVIL PRACTICE, 1998 REPORT OF THE SUPREME COURT COMMITTEE ON CIVIL PRACTICE (Jan. 15, 1998) [hereinafter COMMITTEE REPORT]. This report, including its conclusions and recommendations, is discussed in further detail in Part II of this Article, *infra*.

in its report on certification to the New Jersey Supreme Court.[11] Finally, this Part explores whether such a procedure would be constitutional, whether issuing an opinion answering a certified question would constitute an advisory opinion, and whether certification would place an unwarranted burden on the New Jersey Supreme Court.[12] Part III discusses the specific type of certification procedure that would most benefit New Jersey and federal judges applying New Jersey law.

I.

A. *Historical Development of Interjurisdictional Certification in the United States*

The ability of a federal court to request an authoritative determination from a state's highest court when faced with an uncertain question of state law is a relatively new phenomenon in American jurisprudence. In 1945, Florida became the first state to enact a statute enabling the United States Supreme Court, any circuit court of appeals, or the District of Columbia Court of Appeals to certify questions to the Florida Supreme Court.[13] The procedure, however, lay

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[11] *See* COMMITTEE REPORT, *supra* note 10, at 254-55.

[12] The majority of scholarly opinion weighs in favor of certification. *See, e.g.*, Jerome I. Braun, *A Certification Rule for California*, 36 SANTA CLARA L. REV. 935, 937-42 (1996). *See supra* note 9 (noting that California subsequently adopted a certification procedure). *See generally* Vincent L. McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 ME. L. REV. 33 (1964) (arguing in favor of certification procedures generally); J. Michael Medina, *The Interjurisdictional Certification of Questions of Law Experience: Federal, State and Oklahoma — Should Arkansas Follow?* 45 ARK. L. REV. 99 (1992) (arguing in favor of certification procedure for Arkansas courts); Robbins, *Interstate Certification*, *supra* note 7; Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127 (1992) [hereinafter Robbins, *Proposal for Reform*] (arguing in favor of revised certification statute); Stella L. Smetanka, *To Predict or To Certify Unresolved Questions of State Law: A Proposal for Federal Court Certification to the Pennsylvania Supreme Court*, 68 TEMP. L. REV. 725 (1995) (arguing in favor of certification procedure for Pennsylvania courts). Pennsylvania has not adopted a permanent certification procedure. *But see supra* note 9 (noting that Pennsylvania has adopted a temporary certification rule).

[13] *See* 1945 Fla. Laws ch. 23098 § 1 (codified at FLA. STAT. ANN. § 25.031 (West 1997)). The Florida Supreme Court implemented the certification procedure by enacting FLA. APP. R. 9.150. *See In re* Florida Appellate Rules, 127 So. 2d 444 (Fla. 1961) (enacting precursor to Rule 9.150). As early as 1909, however, Justice Holmes presaged the use of certification by noting that such a procedure "dispose[s] of cases in the least cumbersome and most expeditious way." Chicago B. & O. Ry. Co. v. Williams, 214 U.S 492, 495-96 (1909).

dormant until 1960 when the United States Supreme Court first raised the certification issue in *Clay v. Sun Insurance Office, Ltd.*[14]

Florida's example has been followed with increasing frequency over the last thirty-eight years.[15] In 1971, when Professors Richard B. Lillich and Raymond T. Mundy addressed the pros and cons of certification by federal courts, only seven states had adopted a certification procedure.[16] By 1976 fifteen states allowed certification.[17] Today, forty-six states have provided by constitution, court rule, or statute that federal courts, or, in some cases, other state courts may obtain an authoritative determination of the applicable state law.[18]

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[14] 363 U.S. 207 (1960). Though not utilized by United States courts, a procedure for certifying questions of law to courts within a multi-sovereign system has in fact existed for a considerable time in the British Commonwealth. *See* Robbins, *Proposal for Reform*, *supra* note 12, at 131-32 (tracing the origins of certification procedure to the British Law Ascertainment Act of 1859).

[15] *See* Robbins, *Proposal for Reform*, *supra* note 12, at 165 (noting that 26 of the 40 jurisdictions that, as of 1992, had adopted certification procedures, did so after 1975). Since 1992, when Professor Robbins's article appeared in the *Harvard Journal on Legislation*, five additional states have enacted a certification procedure, and Pennsylvania has adopted a certification procedure on a one-year trial basis, *see supra* note 9.

[16] *See* Richard B. Lillich & Raymond T. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888, 888 (1971).

[17] *See* Note, *Civil Procedure — Scope of Certification in Diversity Jurisdiction*, 29 RUTGERS L. REV. 1155, 1156 n.6 (1976) [hereinafter Note, *Civil Procedure*].

[18] *See* ALA. R. APP. P. 18; ALASKA R. APP. P. 407; ARIZ. REV. STAT. ANN. § 12-1861 (West 1994), ARIZ. SUP. CT. R. 27; CAL. R. CT. 29.5; COLO. R. APP. P. 21.1; CONN. GEN. STAT. ANN. § 51-199a (West 1997); CONN. R. APP. P. §§ 82-1 to -7; DEL. CONST. art. IV, § 11(9); DEL SUP. CT. R. 41; D.C. CODE ANN. § 11-723 (1981 & 1987 Supp.); D.C. CT. APP. R. 54; FLA. CONST. art. V, § 3(b)(6); FLA. STAT. ANN. § 25.031 (West 1997); FLA. R. APP. P. 9.150; GA. CODE ANN. § 15-2-9 (1998); GA. R. S. CT. 46; HAW. R. APP. P. 13; IDAHO APP. R. 12.1; ILL. SUP. CT. R. 20; IND. CODE ANN. § 33-2-4-1 (West 1996); IND. R. APP. P. 15(O); IOWA CODE ANN. §§ 684.A.1-A.11 (West 1998); KAN. STAT. ANN. §§ 60-3201-60-3212 (1994); KY. R. CIV. P. 76.37; LA. REV. STAT. ANN. § 13:72.1 (West 1993 & Supp. 1998); LA. SUP CT. R. XII; ME. R. CIV. P. 76B; MD. CODE ANN., CTS. & JUD. PROC. §§ 12-601 to -609 (1997); MASS. R. CT. 1:03; MICH. CT. R. 7.305; MINN. STAT. ANN. § 480.061 (West 1993); MISS. SUP. CT. R. 20; MO. ANN. STAT. § 477.004 (West 1993) (*held unconstitutional by* Grantham v. Missouri Department of Corrections, No. 72576, 1990 WL 602159, at *1 (Mo. Jul. 13, 1990)); MONT. R. APP. P. 44; NEB. REV. STAT. § 24-219 to -225 (1997); NEV. R. APP. P. 5; N.H. SUP. CT. R. 34; N.M. STAT. ANN. §§ 39-7-1 to 7-10 (Michie 1997); N.M. R. APP. P. 12-607; N.Y. CT. R. § 500.17; N.D. R. APP. P. 47; OHIO SUP. CT. PRAC. R. XVIII; OKLA. STAT. ANN. tit. 20, §§ 1601-1611 (West 1991); OR. REV. STAT. §§ 28.200-.255 (1997); OR. R. APP. P. 12.20; P.R. SUP. CT. 27; R.I. SUP. CT. R. 6; S.C. R. APP. P. 228; S.D. CODIFIED LAWS §§ 15-24A-1 to 15-24A-11(Michie 1994); S.D. SUP. CT. R. 85-7; TENN. SUP. CT. R. 23; TEX. R. APP. P. 214 (Texas Court of Criminal Appeals); TEX. R. APP. P. 114 (Texas Supreme Court); UTAH R. APP. P. 41; VA. SUP. CT. R. 5:42; WASH. REV. CODE §§ 2.60.010 to 2.60.900 (West 1998); WASH. SUP. CT. R. 16.16; W. VA. CODE §§ 51-1A-1 to -13 (1994); WIS. STAT. ANN. §§ 821.01 to 821.12 (West 1994); WYO. STAT. ANN. § 1-13-106 (Michie 1994); WYO. R. APP. P. 11.01-.07; *see also* Goldschmidt, *supra* note 9,

B. *Scholarly and Judicial Commentary: Broad Support for Interjurisdictional Certification*

The almost universal adoption of certification procedures among the fifty states stems from the nearly unanimous endorsement certification has received from major American legal institutions, legal scholars, and judges who have addressed the issue. In 1967, the National Conference of Commissioners on Uniform State Laws initiated the Uniform Certification of Questions of Law Act,[19] which was subsequently revised by the commissioners at its national conference in July of 1995.[20] In 1969, the American Law Institute followed suit and strongly endorsed certification.[21] In 1977, the Judicial Administration Division of the American Bar Association urged those courts that had not adopted a certification procedure to do so.[22] At the National Conference on State-Federal Judicial Relationships held in Orlando, Florida, in 1992, certification was recognized by both federal and state judges in attendance as a means by which state-federal relations could be enhanced.[23] In 1995, the Committee on Long Range Planning of the United States Judicial Conference also "encouraged states to adopt certification procedures where they do not currently exist."[24] In the same year, the American Judicature Society published its exhaustive study on all aspects of certification with the stated purpose of "facilitat[ing] the certification procedure where it exists and encourag[ing] its adoption where it does not."[25]

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at 117 app. A: Sources of Authority for State Certification Procedures. Since the AJS publication, California became the forty-fifth state to adopt a certification rule. In addition, Pennsylvania has adopted a certification procedure on a trial basis beginning January 1, 1999. *See supra* note 9.

[19] UNIF. CERTIF. OF QUESTIONS OF LAW ACT (1967), 12 U.L.A. 86 (1996).

[20] *See* UNIF. CERTIF. OF QUESTIONS OF LAW [ACT][RULE] (1995), 12 U.L.A. 71 (1996); *see also* Goldschmidt, *supra* note 9, at 101-02 (discussing the 1995 revisions).

[21] *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, OFFICIAL DRAFT § 137(e) (1969). Although the ALI reporters on the subject of certification opposed a recommendation favoring certification, a large majority of the Institute voted in favor of certification. *See id.* Commentary to Subsection (e), at 292.

[22] *See* AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO APP. CTS. (1994).

[23] The conference was convened by the Federal Judicial Center and the State Justice Institute and "was attended by 300 state and federal judges, scholars, administrators, practicing attorneys, and government officials," Goldschmidt, *supra* note 9, at 104, making it "the largest gathering in history convened for the express purpose of discussing issues of judicial federalism." William Schwarzer, "Letter to Our Readers," in *FJC Directions: Special State-Federal Issue (A Distillation of Ideas from the National Conference on State-Federal Judicial Relationships)* 1 (1993).

[24] COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (Mar. 1995).

[25] Goldschmidt, *supra* note 9, at 2.

The increased adoption by the states since 1965 of a procedure by which a court of the United States may certify a question of state law to the highest court of a state, and its endorsement by significant American legal institutions, has spawned a vast amount of literature.[26]

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[26] *See generally* John R. Brown, *Certification — Federalism In Action*, 7 CUMB. L. REV. 455 (1977); Michael H. Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility*, 55 NW. L. REV. 419 (1960); Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation:* Bosch, Erie, *and Beyond*, 71 OR. L. REV. 781 (1962); Richard A. Chase, *A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted?*, 66 ST. JOHN'S L. REV. 407 (1992); Charles E. Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEX. L. REV. 211 (1962); Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899 (1989); The Committee on Federal Courts, *Analysis of State Laws Providing for Certification by Federal Courts of Determinative State Issues of Law*, 42 THE RECORD 101 (1987); John B. Corr, *Thoughts on the Vitality of* Erie, 41 AM. U. L. REV. 1087 (1992); John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411 (1988); Theodore B. Eichelberger, *Certification Statutes: Engineering a Solution to* Pullman *Abstention Delay*, 59 NOTRE DAME L. REV. 1339 (1984); Robert H. Hall, *Federal Courts, State Law and Certification*, 23 GA. ST. B.J. 120 (Feb. 1987); Charles J. Hanemann, *Certification to State Courts: Progress in the Field of Federal Abstention*, 36 TUL. L. REV. 5711 (1962); Scott W. Johnson, *Rethinking Certification*, 51 BENCH & B. 27 (Oct. 1994); Stanton S. Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413 (1962); Philia B. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Courts Abstention Doctrine*, 24 F.R.D. 481 (1959); Paul A. LaBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999 (1985); Lillich & Mundy, *supra* note 16; Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969); McKusick, *supra* note 12; Medina, *supra* note 12; Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992); Roger J. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 ALB. L. REV. 151 (1987); Lawrence L. Piersol, *Certifying Questions to State Supreme Courts as a Remedy to the Abstention Doctrine*, 9 S.D. L. REV. 158 (1964); Robbins, *Interstate Certification*, *supra* note 7; Robbins, *Proposal for Reform*, *supra* note 12; David W. Robertson, *Inter-Sovereign Certification as an Answer to the Abstention Problem*, 21 LA. L. REV. 777 (1961); Jack J. Rose, Erie R.R. *and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 HOFSTRA L. REV. 421 (1989); Larry M. Roth, *Certified Questions from the Federal Courts: Review and Re-proposal*, 34 U. MIAMI L. REV. 1 (1979); John A. Scanelli, *The Case for Certification*, 12 WM. & MARY L. REV. 627 (1971); Dolores K. Sloviter, *Diversity Jurisdiction Through the Lens of Federalism*, 76 JUDICATURE 90 (1992); Smetanka, *supra* note 12; Allan D. Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629 (1951); Winton D. Woods, *The* Salve Regina *Case: Putting* Erie *Back on Track*, 32 ARIZ. L. REV. 773 (1990); Geri J. Yonover, *A Kinder, Gentler* Erie*: Reining in the Use of Certification*, 47 ARK. L. REV. 305 (1994) [hereinafter Yonover I]; Geri J. Yonover, *Ascertaining State Law: The Continuing* Erie *Dilemma*, 38 DEPAUL L. REV. 1 (1988) [hereinafter Yonover II]; Note, *Abstention and Certification in Diversity Suits: Perfection of Means and Confusion of Goals*, 73 YALE L.J. 850 (1964); Note, *Abstention — Election of Forum and Intersovereign Certification*, 18 RUTGERS L. REV. 895 (1964); Note, *Civil Procedure*, *supra* note 17; Levin, *supra* note 8; Drake A. Titze, Note, *Giving Deference to State Law: New South Dakota Certification Statutes Enable Federal Courts to Defer to Supreme Court*, 30 S.D. L. Rev. 180 (1984); Note, *The Uniform Certification of Questions of Law Act*, 55 IOWA L. REV. 465 (1969) [hereinafter Note, *Uniform Certification*]. A

The commentary in this large corpus of legal literature has been favorable, for the most part, to the use of interjurisdictional certification.[27] Proponents point to the following factors in support of interjurisdictional certification:

- Certification promotes comity and cooperative federalism by allowing the highest court of each state to develop governing principles of state substantive law.[28]
- Certification avoids judicial guesswork and the concomitant risk that the federal court will incorrectly determine the rule of decision.[29]

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detailed survey of this considerable body of legal scholarship is beyond the scope of this Article. The reader is referred to the American Judicature Society Report, Goldschmidt, *supra* note 9, which has not only assembled in Appendix B a bibliography of certification literature, but has also provided a short synopsis of each article.

[27] *See, e.g.*, Medina, *supra* note 12, at 103 n.21 (collecting favorable articles); Note, *Civil Procedure*, *supra* note 17, at 1156 n.11 (collecting favorable articles).

[28] *See, e.g.*, Brown, *supra* note 26, at 455 (suggesting that certification allows state courts to formulate important public policy determinations affecting state interests); LaBel, *supra* note 26 (arguing that the rule of decision should be determined by the court system in which it is to have effect); McKusick, *supra* note 12 (maintaining that certification promotes comity, reduces friction of the dual-court system and maintains the diversity jurisdiction goal of reducing bias against out-of-state litigants by retaining federal fact finding but allowing the state Supreme Court to fashion an appropriate rule of decision); Medina, *supra* note 12, at 164 (listing the fact that Arkansas courts would be able to make definitive determination of state law as a benefit of adopting interjurisdictional certification procedure in Arkansas); Robbins, *Proposal for Reform*, *supra* note 12, at 134.

[29] *See* Braun, *supra* note 12, at 936-38 (summarizing cases in which federal courts incorrectly predicted state law); Clark, *supra* note 26, at 223 (arguing that federal courts under *Erie* are apt to impose their values or commit error in determining state law); Corr & Robbins, *supra* note 26, at 414 & n.11 (collecting cases in which state Supreme Courts have rejected federal court rulings on state law issues of first impression); Levin, *supra* note 8, at 350 (opining that certification prevents federal encroachment upon state law-making); Sloviter, *supra* note 26, at 92 (collecting cases in which federal courts have incorrectly predicted Pennsylvania law); Smetanka, *supra* note 12, at nn. 24-96 (analyzing Third Circuit cases that incorrectly predicted course of Pennsylvania law). The common law is not a brooding omnipresence in the sky, but rather a set of judge-made rules created in part based on individual and institutional experience, intuition, and cultural bias. This institutional bias creates a systemic federal distortion in the development of state law that is contrary to fundamental principles of federalism. As Judge Becker put it: "States like New Jersey lacking certification procedures face the threat that federal courts will misanalyze the state's law, already open to varied interpretations, by inadvertently viewing it through the lens of their own federal jurisprudential assumptions." Hakimoglu v. Trump Taj Mahal Assoc., 70 F.3d 291, 302 (3rd Cir. 1995) (Becker, J., dissenting). In *Hakimoglu*, for example, Judge Becker argued that the majority, which had concluded that the state's extensive regulation of the casino industry precluded a common law cause of action advanced by an intoxicated casino patron, reached the wrong result by misapplying an essentially federal view of preemption — viz., that common law causes of action are preempted when state regulation "occupies the

- Certification furthers the underlying principle of *Erie* — elimination of forum shopping — through the development of a single definitive statement of state substantive law.[30]
- Certification realizes the goals of *Pullman* abstention — deference to state determination of state law issues — while avoiding the delays that accompany this procedure.[31]

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field" — lacking a developed state law counterpart. New Jersey federal courts have, on occasion, incorrectly predicted the course of New Jersey law or have disagreed with intermediate state appellate courts addressing the same issues. In *Nemtin v. Zarin*, 577 F. Supp. 1135 (D.N.J. 1983), the court interpreted New Jersey's Casino Control Act, N.J. STAT. ANN. §§ 5:12-1 to -14 (West 1996), as permitting only casino licensees or persons licensed under the act to extend credit to gamblers. *See Zarin*, 577 F. Supp. at 1145. Two years later, a New Jersey appellate division court considered the same issue, declined to follow *Zarin*, and reached the opposite result. *See* Gottlob v. Lopez, 205 N.J. Super. 417, 420, 501 A.2d 176, 177 (App. Div. 1985) (loans by nonlicensees are beyond the scope of the Casino Control Act), *certif. denied*, 104 N.J. 373, 517 A.2d 384 (1986). In *Kowalsky v. Long Beach Township*, 72 F.3d 385 (3rd Cir. 1995), the Third Circuit held that, for purposes of New Jersey's Tort Claims Act, N.J. STAT. ANN. §§ 59:1-1 to -12 (West 1996), the beaches on Long Beach Island, New Jersey constituted unimproved property, and that the governmental defendants were therefore immune from liability. *See Kowalsky*, 72 F.3d at 388 (citing N.J. STAT. ANN. § 59:4-8 ("[N]either a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any . . . beach.")). A New Jersey appellate court considered the issue two years later and reached the opposite result, specifically rejecting the holding in *Kowalski*. *See* Fleuhr v. City of Cape May, 303 N.J. Super. 481, 697 A.2d 182 (App. Div.), *certif. granted*, 152 N.J. 12, 702 A.2d 351 (1997). Of course, it goes without saying that New Jersey federal judges have also correctly predicted the course of New Jersey law. *See, e.g.*, Itzkoff v. F & G Realty of New Jersey Corp., 890 F. Supp. 351 (D.N.J. 1995) (correctly predicting that New Jersey's entire controversy doctrine would bar litigation of a claim that could have been brought in an earlier proceeding in New York); Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co., 142 N.J. 336, 662 A.2d 536 (1995) (same).

[30] *See* Scanelli, *supra* note 26, at 641 (certification promotes the "spirit" of *Erie* by encouraging consistency of result).

[31] *See, e.g.*, Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1073 (1997) ("Certification procedure, in contrast [to *Pullman* abstention], allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing delay, cutting the cost, and increasing the assurance of gaining an authoritative response."); Corr & Robins, *supra* note 26, at 416-17 (stating that certification avoids delays associated with abstention because, unlike in *Pullman* abstention, litigants need not try their case in the lower state courts before obtaining a definitive answer from the highest state court); Note, *Civil Procedure*, *supra* note 17 (arguing that certification avoids burdensomeness of abstention). *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) holds that the federal court should not decide issues of federal constitutional law if there are unsettled questions of state law that resolve the case without the necessity of deciding the constitutional issue. *See id.* If the federal court orders abstention, the litigants are required to commence an action in state court for a declaratory judgment on the state law issues. *See* WRIGHT, FEDERAL COURTS, *supra* note 5, at 324. While the *Pullman* doctrine serves to support important principles of federalism, it often results in substantial delay and expense. *See, e.g.*, Belotti v. Baird, 428 U.S. 132, 150-51 (1975) (advocating the use of certifica-

Federal judges echo this enthusiastic endorsement of the certification procedure. The certification of questions of state law from a federal court to the highest court of the state first caught national attention in *Clay v. Sun Insurance Office, Ltd.*[32] *Clay* involved a suit on an insurance contract brought in a diversity action in Florida. The policy had a provision, valid in Illinois where the contract was made, that prohibited suits brought more than twelve months after discovery of the loss. By statute, Florida prohibited such contractual limitations. Rather than deciding whether the Florida statute applied to a contract in Illinois, the Fifth Circuit held, as a matter of federal constitutional law, that the Florida statute could not be applied to contracts made elsewhere. *Clay* presented many of the standard features of *Pullman*-type abstention.[33] The constitutional issue would not have to be reached if, under Florida law, the Florida statute did not apply to the Illinois contract. Further, any decision by the federal court regarding the applicability of the Florida statute would not be an authoritative statement of Florida law. Finally, no authoritative statement from the Florida Supreme Court governed interpretation of the statute at issue. The United States Supreme Court, speaking through Justice Frankfurter, acknowledged the Florida Legislature for its "rare foresight" in authorizing the Florida Supreme Court to adopt rules allowing it to receive questions of state law certified to it by a federal appellate court and directed that the procedure be used.[34]

Certification achieved a more prominent role in the federal courts in 1974 when the United States Supreme Court endorsed the use of certification in a diversity case that raised no constitutional is-

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tion rather than *Pullman* abstention in part because of the delay inherent in the abstention process). Certification is seen as a remedy to this delay since it routes the litigants directly to the state Supreme Court rather than to the state's trial court with its subsequent appeals. *See* Eichelberger, *supra* note 26; Piersol, *supra* note 26.

[32] 363 U.S. 207 (1960).

[33] *Clay* differed somewhat from typical *Pullman* abstention cases in that it was an action at law between private parties. *See supra* notes 6 & 31 and authorities cited therein for a discussion of *Pullman* abstention. *See generally* WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, *supra* note 6, § 4248 at 162.

[34] *See Clay*, 363 U.S. at 212. After receiving the Supreme Court's endorsement, the Fifth Circuit enthusiastically availed itself of the procedure. *See* WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, *supra* note 6, § 4248 at 162 (discussing the Fifth Circuit's development of certification jurisprudence). Recognizing the potentially broad ambit of certification, the Fifth Circuit has since certified state law questions not only where federal constitutional issues can be avoided, as under traditional *Pullman* abstention, but also in diversity cases lacking a federal issue. *See id.*; *see also* Brown, *supra* note 26, at 455 (discussing the use of certification in "plain vanilla" diversity cases that do not raise federal constitutional issues). Judge Brown was, at the time the article was written, the Chief Judge of the Fifth Circuit.

sues.[35] In *Lehman Brothers v. Schein*,[36] the Supreme Court discussed the propriety of certification in the context of a shareholder's derivative suit brought in federal court under the diversity statute. The district court in New York, interpreting Florida law, found no liability.[37] The Second Circuit reversed, reasoning that, in the absence of controlling Florida authority, the Florida Supreme Court would "probably" adopt the New York rule, which provided for a rule of liability under the circumstances of the case.[38] The United States Supreme Court vacated the judgment and remanded the case to the Second Circuit to consider whether it should avail itself of Florida's certification procedure.

Justice Douglas, however, strongly suggested that the Second Circuit take advantage of Florida's certification procedure:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.
>
> Here resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant state. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.[39]

In 1976, the United States Supreme Court again expressed its enthusiasm for the certification process in *Bellotti v. Baird*.[40] This case fit the *Pullman*-type abstention doctrine since the constitutionality of an unconstrued state statute requiring parental consent for an abortion for minor unmarried daughters might be avoided or affected depending on how a court construed the statute. Noting that delay might mitigate against abstention, the Supreme Court reembraced certification, rather than *Pullman* abstention, as a means to obtain a

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[35] *See* CARROLL SERON, CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES (Federal Judicial Center Staff Paper 1983); *see also* Note, *Civil Procedure*, *supra* note 17, at 1175 (showing that the Supreme Court's *Lehman Brothers* decision "encouraged" increased use of certification).

[36] 416 U.S. 386 (1973).

[37] *See id.* at 388.

[38] *See* Schein v. Chasen, 478 F.2d 817, 822-23 (2d Cir. 1973).

[39] *Lehman Bros.*, 416 U.S. at 390-91.

[40] 428 U.S. 132 (1976).

definition of state law from the appropriate judicial office.[41] In directing the District Court to utilize Massachusetts's certification procedure, the Supreme Court, through Justice Blackman, observed:

> The importance of speed in resolution of the instant case is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis.[42]

The United States Supreme Court's most recent approval of the certification process came in the 1997 case, *Arizonans for Official English v. Arizona*,[43] a case involving a challenge to an Arizona constitutional amendment purporting to make English the official language of the state; the District Court declared the statute overbroad.[44] In so doing, the District Court broadly construed the statute in question to prohibit any use of the English language by Arizonan officials and explicitly declined to seek a more narrow (and possibly constitutionally permitted) construction of the statute from the Arizona Supreme Court using the certification procedure.[45] The Ninth Circuit adopted the District Court's construction of the Arizona statute, and, like the District Court, explicitly declined to certify the matter to the Arizona Supreme Court.[46] The Supreme Court ultimately held that the case had become moot during its pendency and vacated the judgments of the lower courts.[47] The Supreme Court, however, went on to criticize the District Court and Ninth Circuit for failing to avail themselves of Arizona's certification procedure:

> Both lower federal courts in this case refused to invite the aid of the Arizona Supreme Court because they found the language of Article XXVIII "plain . . . ." A more cautious approach was in order . . . . Novel, unsettled questions of state law . . . not "unique circumstances," are necessary before federal courts may avail themselves of state certification procedures. These procedures do not entail the delays, expense, and procedural complexity that generally attend abstention decisions . . . . The course of Yniguez's case was complex. The complexity might have been avoided had the District Court, more than eight years ago, ac-

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[41] *See id.* at 150-51.
[42] *Id.* at 151.
[43] 117 S. Ct. 1055 (1997).
[44] *See id.* at 1062.
[45] *See id.*
[46] *See id.* at 1066.
[47] *See id.* at 1072.

> cepted the certification suggestion made by Arizona's Attorney General.[48]

Third Circuit jurisprudence is equally supportive of the certification process.[49] In *Hakimoglu v. Trump Taj Mahal Associates*,[50] the Third Circuit was forced to predict whether the New Jersey Supreme Court would recognize a right to recover from a casino for gambling losses resulting from the casino's continued service of alcohol to an intoxicated patron.[51] The majority predicted that the New Jersey Supreme Court would not recognize recovery of this sort and affirmed the dismissal of the plaintiff's claims.[52] In his dissent, Judge Becker argued:

> The lack of a certification procedure disadvantages both New Jersey and the federal judiciary. Especially in cases such as this where little authority governs the result, the litigants are left to watch the federal court spin the wheel. Meanwhile, federal judges, by no means a high-rolling bunch, are put in the uncomfortable position of making a choice.[53]

Judge Becker argued that the absence of a certification procedure forces federal judges to formulate state policy in violation of fundamental principles of federalism and results in the distorted adjudication of state law issues when federal judges resolve unsettled state law issues by applying federal jurisprudential assumptions.[54]

New Jersey's federal district judges also have expressed their support for a certification procedure. In *Tyson v. Cigna Corp.*,[55] the

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[48] *Id.* at 1074-75.

[49] Other Circuit Courts have also expressed enthusiasm for the certification process. *See, e.g.*, Green v. American Tobacco Co., 325 F.2d 673, 674 (5th Cir. 1963) (publicly expressing appreciation for answer to certified question and noting that the "answer has saved this Court, through the writer as its organ, from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice"); *see also* Braun, *supra* note 12, at 935-40 (compiling federal cases supporting the use of the certification process). This Article will focus on Third Circuit jurisprudence in this area.

[50] 70 F.3d 291 (3rd Cir. 1995).

[51] *See id.* at 292.

[52] *See id.* at 294.

[53] *Id.* at 302 (Becker, J., dissenting). Though Judge Becker wrote in dissent, the two other judges on the panel, Judge Alito and Judge Nygaard, both "enthusiastically" joined the portion of Judge Becker's dissent discussing certification. *See id.* at 293 & n.2; *see also* Failla v. City of Passaic, 146 F.3d 149, 155 n.4 (3rd Cir. 1998) ("This case again demonstrates the difficulties associated with the lack of a certification procedure in New Jersey.").

[54] *See id.* at 302 (Becker, J., dissenting). This issue is discussed *supra* at text accompanying note 29.

[55] 918 F. Supp. 836 (D.N.J. 1996).

plaintiff brought claims under, among other provisions, the New Jersey Law Against Discrimination (LAD).[56] After dismissing the federal claims against the individual defendants, the remaining question before the District Court was whether the LAD permitted claims against individual, as opposed to corporate, defendants — an issue as to which no dispositive authority existed. According to Judge Irenas:

> This determination will involve us in a close analysis of a vague state statute. It is yet another example of the desirability of implementing a procedure which would permit New Jersey's federal courts to certify important, unresolved issues of state law to state courts so that New Jersey itself is given the opportunity to resolve the ambiguities of its laws.[57]

Judge Orlofsky has, on several occasions, urged the New Jersey Supreme Court to adopt a certification procedure. In *Hulmes v. Honda Motor Co.*,[58] Judge Orlofsky had to predict how the New Jersey Supreme Court would decide the question of "whether the entire controversy doctrine bars a second action when the first suit, a 'John Doe' action, was inadvertently dismissed with prejudice one week after it was filed."[59] Judge Orlofsky, who ultimately decided that the entire controversy doctrine did not apply, urged New Jersey to adopt a certification procedure to answer questions such as the one raised by this case.[60] Later in the same litigation, Judge Orlofsky was again confronted by an unsettled question of state law, specifically, whether evidence regarding the plaintiff's blood alcohol level constituted admissible evidence under New Jersey law.[61] Once again, Judge Orlofsky strongly urged adoption of a certification procedure in New Jersey.[62]

The experience of both federal and state judges familiar with certification, as evidenced by numerous empirical studies of certification, also supports the conclusion that certification is the most effec-

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[56] N.J. STAT. ANN. §§ 10:5-10 to -49 (West 1996).

[57] *Tyson*, 918 F. Supp. at 838-39 n.3.

[58] 924 F. Supp. 673 (D.N.J. 1996).

[59] *Id.* at 678.

[60] *See id.*

[61] *See* Hulmes v. Honda Motor Co., 936 F. Supp. 195, 198 (D.N.J. 1996).

[62] *See id.* at 211 n.2. Judge Orlofsky has expressed similar sentiments in several other published decisions. *See generally* Singer v. Land Rover North America, Inc., 955 F. Supp. 359 (D.N.J. 1997) (deciding whether former lessee can recover from manufacturer of automobile under New Jersey's "Lemon Law"); Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 963 F. Supp. 395 (D.N.J. 1997) (determining whether funding mechanism for highway and tunnel project in Atlantic City, New Jersey violated the casino gambling amendment to the New Jersey Constitution).

tive and efficient means to ensure that the proper tribunal decides unsettled issues of state law. The first systematic empirical analysis of judicial experience with certification processes was conducted in 1983 by the Research Division of the Federal Judicial Center (FJC). The study's mission was to evaluate the effectiveness of certification procedures and to determine whether their advantages outweighed their disadvantages.[63]

The results of the study indicate wide acceptance and approval of the certification process among federal circuit and district judges. The study polled forty-nine district and appellate judges from nine circuits encompassing twenty-four states and the Commonwealth of Puerto Rico — the jurisdictions that at the time allowed certification in some form — about their experience with certification.[64]

The overwhelming majority of the judges surveyed found that the certification procedure, "appropriately used, is a useful and effective mechanism for resolving state questions that arise in federal courts."[65] The study concluded that "judges use the procedure as it was originally intended, namely, to afford state courts a first opportunity to interpret their own laws, to avoid federal-state conflict, and to provide definitive precedent in both systems."[66] Further, while the study acknowledged that the certification procedure adds an appreciable delay to individual proceedings in which it is utilized, the disadvantage of delay is outweighed by the procedure's advantages — viz., obtaining an accurate answer from the appropriate tribunal and improving relations between state and federal courts.[67]

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[63] *See* SERON, *supra* note 35.

[64] *See id.* at v, 21-23. The study polled the following Circuits: First (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island); Fourth (Maryland, West Virginia); Fifth (Louisiana, Mississippi); Sixth (Kentucky); Seventh (Indiana); Eighth (Iowa, Minnesota, North Dakota); Ninth (Hawaii, Montana, Washington); Tenth (Colorado, Kansas, New Mexico, Oklahoma, Wyoming); Eleventh (Alabama, Florida, Georgia).

[65] *Id.* at 10.

[66] *Id.* at 12-13.

[67] *See id.* at v, 11. The study concluded that the average delay occasioned by invoking the certification process was approximately six months. *See id.* at 16. The study also concluded that this delay was outweighed by the benefits of certification mentioned above. *See id.* Further, this six-month period overstates the actual delay caused by certification in that it fails to account for the time that would be required by the federal court to research and answer the question certified to the state Supreme Court, which, due to the federal judiciary's relative lack of familiarity with state law, could take longer for the federal judge than his state counterpart. *See id.* at 15-16. Finally, since an answer to a certified question represents a definitive statement of state law from the state's highest court, certification expedites the resolution of other cases that may arise in either federal or state court that involve the same or related questions of state law. *See id.* at 17.

In 1988, Professors Corr and Robbins conducted a broader-based empirical study of both federal *and state* judges and their respective experiences with the certification process.[68] Consistent with the findings of the FJC study conducted five years earlier, the Corr-Robbins survey reflected overwhelming support for the certification process among both the federal and state judiciaries.[69] The study concluded:

> The federal and state judges who responded to the survey generally indicated overwhelming judicial support for the certification process. A large majority of the federal judges found the process to be a convenient and appropriate method for ascertaining controlling state law. The state judges agreed that certification affords the state courts their appropriate decisionmaking role. Although both federal and state judges acknowledged the burden that certification may impose on litigants, the burden proved to be much less important than commentators had initially anticipated and simply did not outweigh the tangible benefits of certification.[70]

In 1994, the American Judicature Society conducted a similar empirical study that reached similar results.[71] In particular, the study noted that eighty percent of the state Supreme Court Justices surveyed stated that their courts were "willing" or "very willing" to answer certified questions posed to them by federal courts.[72] Furthermore, eighty-eight percent of the state judges surveyed disagreed with the proposition that answering certified questions from other courts consumes an inordinate amount of their court's time.[73] Finally, eighty-three percent of circuit judges, sixty-seven percent of district court judges, and seventy-six percent of state judges surveyed disagreed with the proposition that the delay and expense of certification made it an impractical procedure for litigants.[74]

In short, as the Corr-Robbins study concluded:

> The problems associated with certification probably have been overstated, while the promised benefits of the process in a federal-

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[68] *See* Corr & Robbins, *supra* note 26. The study polled 66 state Supreme Court justices, of whom 31 responded, and 64 federal judges, of whom 18 responded. *See id.* at 445.

[69] In particular, the study indicated that a great majority of federal and state judges did not find that the delays and expenses associated with the certification process made it an impractical procedure for the courts or litigants. *See id.* at 449, 456.

[70] *Id.* at 457.

[71] *See* Goldschmidt, *supra* note 9.

[72] *See id.* at 46.

[73] *See id.* at 74.

[74] *See id.* at 67.

state context has been substantially achieved in those cases in which certification was tried.[75]

C. *Whither Certification: The New Jersey Supreme Court Considers Whether to Adopt a Certification Procedure*

In addition to the *cris du coeur* from the Third Circuit Court of Appeals and judges in the District Court of the District of New Jersey,[76] the New Jersey Supreme Court has been urged to adopt a certification procedure on numerous occasions. In the Fourth Annual Assessment (1995) of the Civil Justice Expense and Delay Reduction Plan for the Implementation of the Civil Justice Reform Act of 1990, the United States District Court for the District of New Jersey adopted the Advisory Committee's recommendation that the New Jersey Supreme Court be encouraged to adopt a certification procedure.[77]

Chief Judge Thompson transmitted this recommendation to Chief Justice Wilentz as well as to his successor, Chief Justice Poritz.[78] Subsequently, Chief Judge Thompson met with Chief Justice Poritz and discussed the issue of certification.[79] In December of 1996 the United States District Court adopted a resolution that urged the New Jersey Supreme Court to establish a certification procedure by adoption of the Uniform Certification of Questions of Law [Act] [Rule] (1995).[80] This resolution, together with a memorandum discussing certification in some detail, was also transmitted to the New Jersey Supreme Court.[81] In March of 1997, Chief Justice Poritz advised Chief Judge Thompson that, after review and discussion, the New Jer-

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[75] Corr & Robbins, *supra* note 26, at 457-58.

[76] *See supra* text accompanying notes 49-62.

[77] *See* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FOURTH ANNUAL ASSESSMENT OF THE CIVIL JUSTICE EXPENSE & DELAY REDUCTION PLAN FOR THE IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT OF 1990, 28-29 (May 28, 1996) [hereinafter Fourth Annual Assessment].

[78] *See* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FIFTH ANNUAL ASSESSMENT OF THE CIVIL JUSTICE EXPENSE & DELAY REDUCTION PLAN FOR THE IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT OF 1990, 31 (June 20, 1997) [hereinafter Fifth Annual Assessment].

[79] *See id.* at 32.

[80] *See id.* The National Conference of Commissioners on Uniform State Laws "has promulgated the Uniform Act/Rule for certified questions in a form which can be enacted by a legislature or adopted by a court as a rule. In some jurisdictions, action by the highest court will suffice with no legislative action required." UNIF. CERTIF. OF QUESTIONS OF LAW [ACT] [RULE] (1995), 12 U.L.A. 70 (1996).

[81] *See* Fifth Annual Assessment, *supra* note 78, at 32.

sey Supreme Court had elected not to consider adoption of a certification procedure.[82]

In 1996, the Executive Committee of the State Bar Association met with members of the New Jersey Supreme Court to urge the Court to adopt a certification procedure.[83] Shortly thereafter, the Supreme Court Committee on Civil Practice provided the New Jersey Supreme Court with recommendations as to whether the Court should adopt a rule that would provide for a certification procedure.

The Subcommittee on Certification issued a Majority and a Minority Report[84] on April 7, 1997. The Majority Report recommended the adoption of a rule that would allow the New Jersey Supreme Court to accept certified questions from federal circuit courts of appeals and the highest appellate courts of other states.[85] The Minority Report recommended against the adoption of a certification rule, citing to concerns that a certification rule would create undue delay

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[82] *See id.* The report noted: "Both the Court and the Advisory Committee regret this decision. We trust that, in the future, the New Jersey Supreme Court will again address this issue and provide a means by which questions may be certified to it." *Id.*

[83] The New Jersey State Bar Association has been lobbying for a statute adopting a certification procedure. *See* MINORITY REPORT OF THE SUBCOMMITTEE ON CERTIFICATION (citing Hulmes v. Honda Motor Co., 924 F. Supp. 673, 678 n.6. (D.N.J. 1996)).

[84] *See* SUPREME COURT COMMITTEE ON CIVIL PRACTICE, REPORT OF THE SUBCOMMITTEE ON CERTIFICATION OF QUESTIONS OF LAW TO THE SUPREME COURT (Apr. 7, 1997) (including the minority and majority reports of the subcommittee, [hereinafter "Minority Report" and "Majority Report" respectively]).

[85] *See* Majority Report, *supra* note 84. The subcommittee prepared the following draft on the basis of certain sections of the Uniform Certification of Questions of Law [Act][Rule] (1995). The proposed rule stated:

> 2:2-2A Answering Certified Questions of Law
>
> (a) The Supreme Court may answer a question of law certified to it by any appellate court of the United States, or by the highest court of another state, if the answer would be determinative of a pending litigation in the certifying court and New Jersey law on the issue is unsettled.
>
> (b) The Supreme Court may reformulate a question of law certified to it.
>
> (c) A certification shall contain:
>
> (i) The question or questions to be answered.
>
> (ii) A statement of the facts relevant to the question.
>
> (iii) The names and addresses of the counsel of record and of parties appearing without counsel.
>
> (d) The Supreme Court may require the certifying court to supply it with the record of the matter certified, or a portion thereof.
>
> (e) No papers, other than those described in subsections (c) and (d) of this rule may be filed in connection with a certification, except by leave of court.
>
> (f) [Reserved]

Majority Report, *supra* note 84, at 13.

and expense, needlessly burden the New Jersey Supreme Court, and require the Court to issue advisory opinions inconsistent with its normal appellate function.[86] The main objection of the Minority Report, however, concerned the constitutional authority of the New Jersey Supreme Court to consider and answer questions of law certified to it.[87]

Although the Majority Report recommended approval of the certification procedure, it stated that it shared the concern of the Minority Report that certification may not be possible under New Jersey's Constitution without amendment.[88] The full committee, which was evenly divided on the issue of providing for a certification procedure, voted in favor of making no recommendation as to the constitutionality of a certification procedure.

II.

The literature critical of certification echoes the concerns raised by the Minority Report.[89] Critics of interjurisdictional certification point to:

- The potential for certification to cause unnecessary expense and delay.[90]
- The potential for certification to clog state dockets with federal cases.[91]

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[86] *See id.* at 5-6.

[87] *See* Minority Report, *supra* note 84, at 8. The Minority Report's constitutional concerns, and responses thereto, are discussed in greater detail in Section II(B), *infra.*

[88] *See* Majority Report, *supra* note 84, at 2-3 ("All of the subcommittee members, albeit to various degrees, have concerns about the constitutionality of such a Rule.").

[89] *See generally* Mattis, *supra* note 26; Robertson, *supra* note 26; Yonover I, *supra* note 26; Yonover II, *supra* note 26. *See also* 43 A.L.I. PROC. at 371-88 (1966) (transcript of debate before the American Law Institute regarding adoption of certification rule).

[90] *See* Yonover I, *supra* note 26, at 332-33 (noting that certification can delay cases up to 15 months). Indeed, in the first United States Supreme Court case to utilize interjurisdictional certification, *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207 (1960), Justice Douglas dissented in part because certification would, in his view, condone a "practice of making litigants travel a long, expensive road in order to obtain justice." *Id.* at 227. Justice Douglas subsequently modified his position on certification when he authored the Supreme Court's opinion in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), which strongly endorses the use of certification in diversity suits raising novel issues of state law. *See id.* at 390-91.

[91] *See, e.g.*, Yonover I, *supra* note 26, at 318 ("Perhaps the fact that such populous states as California, Pennsylvania, and New Jersey have not yet adopted certification procedures can be explained by the relatively large number of federal district court filings and an unwillingness to add to already overburdened state supreme court dockets."). Since the publication of the Yonover article, California has promulgated

- The potential for certification to frustrate the salutary effects of diversity jurisdiction on the development of state law.[92]
- The argument that answers to certified questions constitute advisory opinions,[93] or that certified questions are too abstract for judicial resolution.[94]
- State constitutional provisions that arguably restrict state Supreme Courts from exercising "jurisdiction" over certified questions.[95]

Neither these abstract concerns nor the specific objections identified in the Minority Report pose insurmountable obstacles to the creation of a certification procedure in New Jersey.

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a rule providing for certification and the Pennsylvania Supreme Court has adopted a certification procedure on a trial basis. *See supra* note 9.

[92] *See, e.g.*, Yonover I, *supra* note 26, at 334-42; *cf.* David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317 (1977). The supposed benefits of federal adjudication of state law issues of first impression are discussed *infra*, notes 123-40 and accompanying text.

[93] *See* Corr & Robbins, *supra* note 26, at 419-22.

[94] *See id.* at 422-24.

[95] *See, e.g.*, Robbins, *Proposal for Reform*, *supra* note 12, at 166-73 (discussing New York's constitutional provisions); Goldschmidt, *supra* note 9, at 93-99 (summarizing case law regarding the constitutionality of various certification procedures under state law and concluding, "[c]onstitutional challenges to the certification process have centered around the jurisdiction of state high courts to hear a certified question and their judicial power to enact certification procedures."); Minority Report, *supra* note 84, at 9 (discussing the constitutional limitations on New Jersey Supreme Court jurisdiction); SUPREME COURT OF CALIFORNIA, INTERNAL MEMORANDUM, ADOPTION OF A "CERTIFICATION PROCEDURE" 6 (April 9, 1997) (redacted version on file with authors) [hereinafter CALIFORNIA MEMORANDUM] (discussing California constitutional restraints on the exercise of certification "jurisdiction"). The constitutional issue, though it takes different forms depending on the state constitutional provision in question, generally relates to whether the state constitution in question provides the Supreme Court of the state with jurisdiction to entertain a certified question. As discussed below, this Article argues that answering a certified question does not constitute the exercise of original jurisdiction within the meaning of the New Jersey Constitution. *See infra* note 168 and accompanying text; Bonner v. Oklahoma Rock Corp., 863 P.2d 1176 n.3 (Okla. 1993) (rejecting the constitutional argument in part because certification does not involve the exercise of jurisdiction by the answering court); *see also* Scott v. Bank One Trust Co., 577 N.E.2d 1077, 1079-80 (Ohio 1991) (same). Even among those states that have perceived a constitutional issue precluding the adoption of a certification process, several, including New York, have concluded that the benefits of interjurisdictional certification — viz., obtaining a definitive answer to unsettled state law issues from the most authoritative source — were great enough to warrant amending their respective constitutions. *See* Robbins, *Proposal for Reform*, *supra* note 12, at 166-70 (discussing New York's experience in enacting a certification procedure, including amendment of the New York Constitution); *see also* NEW YORK LAW REVISION COMMISSION, MEMORANDUM RELATING TO CERTIFICATION OF QUESTIONS OF LAW TO THE COURT OF APPEALS, A. 5453-65[B], 208th Sess., *reprinted in* 1985 N.Y. Laws 707-934 (recommending that New York amend its constitution to provide for certification to avoid "federal invasion of the state law making function" and resultant "federal-state friction").

A. *The Potential for Certification to Cause Unwarranted Expense, Delay, and Inundation of the Supreme Court Docket*

The fear that allowing federal courts to certify questions of state law to the state's highest court will cause delay, expense, and an explosion in the state court docket has failed to materialize in the states that have adopted a certification procedure. There is little reason to suspect New Jersey's experience would be any different. Therefore, this concern should not pose a serious obstacle to adoption of a certification procedure in New Jersey. That this fear has failed to materialize is due to: (1) comity (federal judges have been circumspect and cautious with respect to the use of the certification process), and (2) discretion (the state's highest court maintains complete discretion to accept or reject the certified question).

As an initial matter, there is no doubt that the certification process creates an additional element of delay in the adjudication of diversity cases in federal court.[96] The most comprehensive empirical study of delay caused by certification is contained in the 1983 study conducted by the FJC, which concluded that the median delay is approximately six months.[97]

Several points might be made concerning this delay. First, the six-month figure overstates the delay resulting from the certification

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[96] Of course, this delay in itself creates disincentives for federal judges to abuse the certification process. Federal judges are no less concerned about docket control than their state counterparts, and the prospect of adding an additional six months to their disposition statistics while the certified question is being answered provides a built-in mechanism to limit misuse of the certification process.

[97] *See* SERON, *supra* note 35; *see also* Goldschmidt, *supra* note 9, at 42 (noting that circuit judges waited average of 6.6 months to receive answer and district judges waited average of 8.2 months). Critics of certification have cited to longer delays, *see, e.g.*, Mattis, *supra* note 26 (reciting anecdotal evidence of a three-year delay caused in part by certification proceedings in *Green v. Tobacco Co.*, 391 F.2d 97 (5th Cir. 1962)), but this evidence is unconvincing when compared to the empirical studies conducted by the Federal Judicial Center. The authors' own research provides further confirmation that the delays associated with certification are not nearly as dire as the rather stale predictions contained in the Mattis article. *See* Letter from Debbie Causseaux, Chief Deputy Clerk, Florida Supreme Court, to the Hon. William G. Bassler, U.S.D.J. (Jul. 20, 1998) (on file with the authors) ("The average time for disposition from the date filed in this Court is ten-twelve months. Approximately five to six months of this time is spent receiving briefs and scheduling oral argument."); *see also* Corr & Robbins, *supra* note 26, at 453 (surveying state Supreme Court clerks who provided the following statistics regarding delay: Iowa (9-12 months); Maryland (6-9 months); Kansas, North Dakota, West Virginia, and Wisconsin (3-6 months)). *See, e.g.*, NEW YORK LAW REVISION COMMISSION, MEMORANDUM RELATING TO CERTIFICATION OF QUESTIONS OF LAW TO THE COURT OF APPEALS, A. 5453-65[B], 208th Sess., *reprinted in* 1985 N.Y. Laws 707-934, at 2584 ("[T]he Commission would note that, based on recent correspondence with state courts that have certification statutes, delay has not been a problem.").

process itself; the time spent by the parties briefing the issues, and by the Court in deciding them, would be duplicated were the issue to be determined by the federal court sitting in diversity.[98] Second, obtaining a conclusive answer to an unsettled question of state law provides broad benefits to future litigants and parties that seek to conform their conduct to the rule of law. Not only does certification expedite the resolution of other cases that may arise either in state or federal court that raise the same issues of law,[99] but it also results in the elimination of transaction costs that inevitably result when citizens of the state attempt to conform their conduct either to disparate rules emanating from the state courts and federal courts[100] or to the non-precedential opinion of a federal court.

Finally, if, as has been argued earlier in this Article,[101] obtaining an answer concerning unsettled state law from the appropriate state court is a desirable result, the only alternative to certification — abstention — results in considerably greater delay, expense, and inconvenience, and it is generally available only in a subset of cases — viz., those raising federal constitutional issues.[102] The saga of Sally Frank, a Princeton University student who sought judicial assistance in gaining admittance to Princeton University's (formerly) all-male eating clubs, is illustrative of the delays associated with *Pullman* abstention.

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[98] *See* SERON, *supra* note 35, at 15-16. The Federal Judicial Center staff paper explained:

> Although the time required to obtain the state court answer, a median of six months, is clearly a delay occasioned by the certification process, that time must be set off against the time that would be required for the federal court to research and reach its own answer to the question certified to the state court.

Id.; *see also* Lillich & Mundy, *supra* note 16, at 909 ("[A]t least part of the time required for obtaining the state court decision would be necessary for the federal court to make its own determination.").

[99] *See, e.g.*, Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1075 (1997) (suggesting that once a state Supreme Court adjudicates an issue certified to it, resolution of the issue in subsequent litigation "may indeed become greatly simplified"); *see also* Corr & Robbins, *supra* note 26, at 430 (arguing that "consistency in the law and finality of state pronouncements that makes it unnecessary for future parties to litigate the same issue" outweighs inconvenience of delay to litigants involved in particular case).

[100] *See supra* note 29 (discussing the development of parallel lines of authority emanating from federal and state courts purporting to govern same legal issue).

[101] *See supra* notes 28-31.

[102] *See Arizonans for Official English*, 117 S. Ct. at 1073 (stating that certification provides benefits of state-court adjudication of novel state law issues without delay concomitant to *Pullman* abstention); *see also, e.g.*, Eichelberger, *supra* note 26, at 1341 (same); Lillich & Mundy, *supra* note 16, at 890 n.22 (same).

Frank filed a complaint in December of 1979 with New Jersey's Division on Civil Rights (the Division), alleging that the Ivy Club violated the New Jersey Law Against Discrimination (LAD).[103] The Division initially held that it lacked jurisdiction to hear the cause, but the Appellate Division of the Superior Court of New Jersey reversed and remanded to the Division for further factual findings and reconsideration of its jurisdictional determination.[104] Seven years later, in 1986, the Division determined that it had jurisdiction to hear the case and ruled that the LAD prohibited the eating clubs from excluding women.[105] Also in 1986, the club filed a federal lawsuit seeking a declaratory judgment that application of the LAD would violate its First Amendment associational rights.[106]

Applying *Pullman*, the District Court stayed the federal action to allow the state courts to determine whether the LAD applied to the eating clubs.[107] Meanwhile, the clubs pursued their state claims in the state court and explicitly reserved their federal claims to litigate in the stayed federal proceeding.[108] On July 3, 1990, the New Jersey Supreme Court affirmed the Division's determination that it had jurisdiction and ordered the club to admit women.[109] On August 24, 1990, the club moved to reopen its federal action originally commenced in 1986.[110] On October 15, 1990, the District Court certified to the Third Circuit the question of whether the club had in fact waived its right to litigate its federal claims by failing to raise them in the parallel state action.[111] On August 21, 1991, twelve years and three college careers after the litigation had been commenced, the Third Circuit concluded that the federal claims had not been waived and remanded the case to the District Court to determine the federal issues.[112] The experience of other federal courts invoking *Pullman* abstention corroborates the rather bleak experience of Frank.[113]

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[103] N.J. STAT. ANN. §§ 10:5-1 to -49 (West 1996); *see also* Ivy Club v. Edwards, 943 F.2d 270, 273 (3rd Cir. 1991).

[104] *See Ivy Club*, 943 F.2d. at 273-74.

[105] *See id.* at 274.

[106] *See id.*

[107] *See* Tiger Inn v. Edwards, 636 F. Supp. 787, 792 (D.N.J. 1986).

[108] *See Ivy Club*, 943 F.2d at 275.

[109] *See* Frank v. Ivy Club, 120 N.J. 73, 111, 576 A.2d 241, 261 (1990).

[110] *See Ivy Club*, 943 F.2d at 275.

[111] *See id.*

[112] *See id.* at 283-84.

[113] In *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3rd Cir. 1994), for example, the plaintiff initially filed in state court, from which the action was removed in 1989. *See id.* at 816. The defendant argued that application of the New Jersey Franchise Practices Act (NJFPA), N.J. STAT. ANN. §§ 56:10-1 to -15 (West

That the certification floodgates have not opened as feared[114] can also be attributed to the self-restraint exercised by the federal judiciary with respect to the certification process.[115] Unlike the typical certiorari process, which is initiated by the litigants on motion to the certiorari court, in the typical interjurisdictional certification process questions of law are propounded by the certifying *court*.[116] As the experience of the numerous state courts that have adopted certification procedures has shown,[117] the federal judiciary has consistently heeded the call to restraint raised by commentators and the case law and has, in practice, certified questions sparingly.[118] Empirical studies provide

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1989), to foreign corporations would violate the "dormant" Commerce Clause of the United States Constitution. *See Instructional Systems*, 35 F.3d. at 816-17. The District Court abstained pursuant to the *Pullman* doctrine to allow the chancery division to determine whether the NJFPA applied to out-of-state activities. *See id.* at 817. After four years of litigation in the state courts, the state courts concluded that the NJFPA applied to the conduct of the defendant. *See id.* at 817-18. The District Court then resumed consideration of the case. *See id.* at 818. The case was ultimately appealed to the Third Circuit, which, on September 16, 1994, determined that application of the NJFPA to activities outside of New Jersey did not offend the United States Constitution. *See id.* at 828.

[114] *See* Braun, *supra* note 12, at 942 ("One constraint on adoption of certification procedures has been the fear of inundation. The concern is that if other jurisdictions are permitted to refer questions of state law to the state supreme court, they will do so unreasonably often as a way of delegating or evading their own responsibilities.").

[115] *See, e.g.*, Barnes v. Atlantic & Pac. Life Ins. Co., 514 F.2d 704, 705 n.4 (5th Cir. 1975) ("[W]e use much judgment, restraint and discretion in certifying. We do not abdicate."), *certifying question to* 325 So. 2d 143 (Ala. 1975), *conformed to answer*, 530 F.2d 98 (5th Cir. 1976); Hakimoglu v. Trump Taj Mahal Assoc., 70 F.3d 291, 303 (3rd Cir. 1995) (stating in response to suggestion that certification causes delay that "this is an argument for exercising the authority wisely — not for denying it altogether").

[116] *See, e.g.*, UNIF. CERTIF. OF QUESTIONS OF LAW [ACT] [RULE] (1995) § 3, 12 U.L.A. 73 (1996) ("The [Supreme Court] of this State may answer a question of law certified to it *by a court of the United States.*") (emphasis added).

[117] *See* Letter from Debbie Causseaux, Chief Deputy Clerk, Florida Supreme Court, to the Hon. William G. Bassler, U.S.D.J. (July 20, 1998) (on file with the authors) (stating that Florida Supreme Court received one certified question from Fifth Circuit federal courts in 1995 (.046% of filings), five in 1996 (.20% of filings), and seven in 1997 (.24% of filings) with an approximate disposition time of 10 to 12 months from the date the certified question is filed with the Court); Letter from Sherie M. Welch, Clerk of the Georgia Supreme Court, to the Hon. William G. Bassler, U.S.D.J. (July 30, 1998) (detailing the number of cases certified each calendar year to Georgia Supreme Court by Eleventh Circuit Court of Appeals: 1991 (5), 1992 (7), 1993 (3), 1994 (7), 1995 (3), 1996 (7), 1997 (7)); *see also* Braun, *supra* note 12, at 967 app. I (compiling statistics on certification questions for state courts within the Ninth Circuit and indicating that from 1990-91, the average percentage of certified questions as total of docket was .35%).

[118] *See, e.g.*, Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358, 1368 (1960) (certification "should be used only in situations of genuine perplexity concerning state law; it must not become a substitute for conscientious and

further evidence that the federal judiciary has, in practice, limited certification to a subset of unsettled questions that may arise — those that concern matters of importance to the state involved.[119]

The complete discretion vested in the state's highest court to accept or reject certified questions provides another means of defanging the docket control monster conjured by the critics of certification. In both the Uniform Certification of Questions of Law Act and the draft certification rule forwarded to the New Jersey Supreme Court by the Supreme Court Committee on Civil Practice, the state's highest court retains the power to accept or reject a certified question.[120] Indeed, the California Supreme Court, which recently adopted a certification procedure, dismissed concerns that it would lose control over its docket by citing to the unfettered discretion the Court would retain to decline to answer certified questions.[121]

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independent [judicial] adjudication"); McKusick, *supra* note 12, at 39 (warning against over-enthusiastic use of a certification procedure); *see also* Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1973) ("[M]ere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit."); *Hakimoglu*, 70 F.3d at 303-04 ("[A] federal court should be authorized to certify a question of law to the state court when: (1) the issue is one of importance; (2) it may be determinative of the litigation; and (3) state law does not provide controlling precedent through which the federal court could resolve the issue."); Corr & Robbins, *supra* note 26, at 450 (noting that federal and state judges responding to the survey listed the following four factors as having "great weight" in deciding whether to certify a question: (1) whether question involved construction of new or previously unconstrued statute, (2) the closeness of state law question, (3) the strength of the state court's interest in the legal issue, and (4) potential to avoid inconsistency with later state court decisions). The judicious use of the certification procedure by federal judges also stems from mechanisms built into the certification process that deter its abuse. Courts of appeal, to which litigants may appeal as of right, *see* 28 U.S.C. § 1291 (1994), normally carry a heavy docket. To avoid having cases linger on the appellate docket, circuit judges naturally would hesitate to utilize the procedure except where important issues of state law are concerned.

[119] *See, e.g.*, Goldschmidt, *supra* note 9, at 44 (polling federal judges and finding that certification is employed "sparingly," only when "important state court issues" are involved, and upon a "convincing" demonstration that "the criteria for certification [have] been met").

[120] *See* UNIF. CERTIF. OF QUESTIONS OF LAW [ACT][RULE] (1995) § 3, 12 U.L.A. 73 (1996) ("The [Supreme Court] of this State *may* answer a question of law certified to it by a court of the United States . . . ") (emphasis added); COMMITTEE REPORT, *supra* note 11, at 13 app. 1, Draft Certification Rule 2:2-2A ("The Supreme Court may answer a question of law certified to it by any appellate court of the United States."); *see also* UNIF. CERTIF. OF QUESTIONS OF LAW [ACT][RULE] (1995) § 3 cmt., 12 U.L.A. 73 (1996) ("Ultimately, the receiving court retains the power to accept or reject a certified question so that it can control its docket."); Braun, *supra* note 12, at 945 (citing discretion to deny certification as factor allaying docket control concerns).

[121] *See* CALIFORNIA MEMORANDUM, *supra* note 95 at 7-8. The memorandum stated:

> I agree with the memos that the fears of some that this court would be unduly burdened by requests for certification appear to be unfounded. Pursuant to section 2 of the proposed rule, only certain

In light of the restraint exercised by the federal judiciary and the relatively minuscule impact certification has had in fact on state dockets, it is not surprising that ninety-five percent of United States circuit judges, ninety percent of United States district judges, and eighty-seven percent of state court judges were satisfied with the certification process in their respective jurisdictions.[122] Neither delay nor loss of docket control should deter adoption of a certification procedure in New Jersey.

B. The Purported Benefits of "Cross-Pollination" Should Not Prevent Adoption of a Certification Procedure

Several commentators have argued that certification would stymie the positive benefits supposedly flowing from federal court adjudication of novel issues of state law. According to this line of thought, determination by a separate federal system "cross-pollinates" the development of state law by "reconciling or distinguishing existent precedent [and] synthesizing and analyzing state law."[123] Some commentators also suggest that the absence of a certification procedure impacts positively on the development of state law because, in their view, federal judges are simply more competent than state judges, even in determining issues of state law.[124]

As an initial matter, permitting federal courts to request a certified answer from the New Jersey Supreme Court would not necessar-

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> named *courts* — and not any party to any litigation — would be permitted to *request* certification. Pursuant to section 6 of the proposed rule, we would retain our normal and broad 'rule 29 discretion' to deny requests for certification.

Id.

[122] *See* Goldschmidt, *supra* note 9, at 15-17.

[123] *See* Shapiro, *supra* note 92, at 326; *see also* William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. LEGAL STUD. 367, 372, 386 (1980); Yonover I, *supra* note 26, at 340 ("When these federal courts do 'anticipate,' their pronouncements of state law echo beyond the case at hand and influence positively the course of state law development.").

[124] *See, e.g.*, Yonover I, *supra* note 26, at 336-37. Yonover stated:

> [I]nsofar as federal judges are perceived as having greater technical competence and are more insulated from majoritarian pressures, they have the freedom to render decisions, which may be socially and politically controversial, without fear of electoral reprisal. It has even been suggested that some attorneys believe that "federal judges are more familiar with the relevant substantive law," even when the issues posed are ones of state substantive law.

Id. (quoting Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 434 (1992)). Needless to say, this is a view with which the authors, including the one having the most pertinent experience (Judge Bassler has sat both as a federal judge and as a judge of the Superior Court of New Jersey), strongly disagree.

ily spell an end to "cross-pollination." As one commentator noted: "Federal courts may continue to predict. The Supreme Court may decline certification even when asked."[125]

Furthermore, a federal court is by no means obliged to certify a novel issue of state law even when one arises,[126] and experience has shown that federal judges tend to certify only those unsettled questions that impact major policy concerns of the state.[127] Certification procedures would allow for the New Jersey Supreme Court to control the cross-pollination process by exercising its discretion to determine which (if any) certified questions require answers. By identifying the issues that require its attention, the New Jersey Supreme Court would, in essence, extend its intra-state certification procedure to include important state law issues that, through the accident of diversity jurisdiction, arise in federal court.

The authors' objection to the cross-pollination argument has a more substantive component as well. The dangers that inhere in federal development of state law, in the authors' view, simply outweigh the putative benefits associated with "cross-pollination." First and foremost, federal development of state law invades the sovereignty of the state whose law is being (mis)applied. As the Ohio Supreme Court stated in opining on the constitutionality of Ohio's certification procedure:

> The state's sovereignty is unquestionably implicated when federal courts construe state law. If the federal court errs, it applies law other than Ohio law, in derogation of the state's right to prescribe a rule of decision. By allocating rights and duties incorrectly, the federal court both does an injustice to one or more parties, and frustrates the state's policy that would have allocated the rights and duties differently.[128]

Second, while cross-pollination may sound attractive in the abstract, in reality, delegating authority to develop law simultaneously to dual sovereigns results in confused and fragmented legal norms that are befuddling to the citizens of the state obligated to obey them. The potential for development of parallel federal-state lines of authority in the absence of a certification procedure is fostered by the federal rules that have developed for determining how the state's

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[125] Smetanka, *supra* note 12, at 738.

[126] *See* Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1975) ("We do not suggest that where there is doubt as to local law and where the certification procedure is available resort to it is obligatory.").

[127] *See supra* text accompanying note 118.

[128] Scott v. Bank One Trust Co., 577 N.E.2d 1077, 1080 (Ohio 1991).

highest court would rule on a particular issue. Because the interpretative task facing the federal judge is to predict how the state's *highest* court would decide the issue,[129] a federal court must pay deference to, but is not bound by, the holdings of state intermediate appellate and trial level courts.[130] Decisions of intermediate state appellate courts, however, remain presumptive evidence of state law.[131] Nevertheless, the ability of federal judges to disagree with lower state courts when attempting to predict how the highest court would rule can and does lead to the development of parallel, but different, lines of authority between the federal and state systems.[132] This not only makes it more difficult for citizens to determine the proper rule governing their conduct, but also produces obvious incentives for litigants to choose the more favorable forum for their particular dispute.[133]

Even if parallel lines of conflicting authority fail to develop in a given instance, it is likely that the federal court's interpretation of state law, while technically not constituting binding authority, will serve *de facto* as the law of the state in the absence of an authoritative state court pronouncement, if, that is, the issue *ever* wends its way to

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[129] *See* 19 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4507 (2d ed. 1996) (instructing that in diversity actions, federal courts must determine the issue as would the state's highest court).

[130] *See* Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 113 (3rd Cir. 1992), *cert. denied*, 507 U.S. 1005 (1993); Aetna Cas. & Sur. Co. v. Farrell, 855 F.2d 146, 148-49 (3rd Cir. 1988); McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 661 (3rd Cir.), *cert. denied*, 449 U.S. 976 (1980).

[131] *See Aetna*, 855 F.2d at 148 ("serious consideration" may be given "to the opinion of an intermediate appellate court.").

[132] *See, e.g.*, Smetanka, *supra* note 12, at 731-35 (discussing development of parallel lines of authority between Pennsylvania federal and state courts).

[133] *See, e.g.*, Becker v. Interstate Properties, 569 F.2d 1203, 1206 (3rd Cir. 1977) ("[A] diversity litigant should not be drawn to the federal forum by the prospect of a more favorable outcome than he could expect in the state courts."), *cert. denied*, 436 U.S. 906 (1978)). One such example involving New Jersey law concerns the appropriate rule for damages for a bad faith refusal of an insurance claim. *Compare* Polito v. Continental Cas. Co., 689 F.2d 457, 463 (3rd Cir. 1982) (permitting consequential and punitive damages pursuant to breach of implied covenant of good faith theory) *with* Garden State Community Hosp. v. Watson, 191 N.J. Super. 225, 227, 465 A.2d 1225, 1226 (App. Div. 1982) (declining to follow *Polito* and allowing no punitive damages under New Jersey law for bad faith failure to pay insured's claim in timely manner). A federal district judge in New Jersey in *Wine Imports, Inc. v. Northbrook Property & Casualty Insurance Co.*, 708 F. Supp. 105, 107-08 (D.N.J. 1989), subsequently declined to follow the Third Circuit's holding in *Polito*, finding *Watson* to be controlling. Another federal court in *Carfagno v. Aetna Casualty & Surety Co.*, 770 F. Supp. 245, 246 (D.N.J. 1991) followed *Wine Imports*. The matter became more complicated when a New Jersey appellate court rejected *Wine Imports* as a misreading of *Watson* and subsequently adopted *Polito*'s reasoning! *See* Pickett v. Lloyds, 252 N.J. Super. 477, 485-86, 600 A.2d 148, 152-53 (App. Div. 1991).

the state's highest court.[134] This result exists in considerable tension with the teachings of *Erie*[135] and essentially abdicates responsibility for making important state policy to the federal judiciary, a body that lacks the requisite sanction to produce an authoritative statement of a separate sovereign's law.[136] As a matter of sound state policy, it is perverse for federal judges, who, at least in the case of circuit judges, may neither be residents of nor attorneys admitted to practice in New Jersey, to determine important areas of New Jersey policy. *Hakimoglu*,[137] for example, adopted a no-liability rule affecting one of New Jersey's most important industries, casino gambling.[138] Judge Alito of the Third Circuit recently expressed misgivings about the propriety of the federal judiciary ruling on areas of state policy when the Third Circuit was compelled, because of the lack of a certification procedure in New Jersey, to opine on a New Jersey statute allocating financial responsibilities between the state and its subdivisions.[139]

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[134] *See* Scott v. Bank One Trust Co., 577 N.E.2d 1077, 1080 (Ohio 1991) ("The frustration of the state's policy may have a more lasting effect, because other potential litigants are likely to behave as if the federal decision were the law of the state.").

[135] It is not necessary in evaluating the certification process to resolve the debate as to whether *Erie*'s holding depends on a commitment to legal positivism or instead on the allocation of lawmaking particularly between federal and state courts emanating from considerations of institutional design and political theory. *Compare* LaBel, *supra* note 26, at 1020 ("A state adopting a certification procedure, a federal court employing the certification technique, and a state supreme court answering a certified question are all engaged in an enterprise that implicitly assumes that the legal positivist tenet accurately states the nature of law.") *with* Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998).

[136] *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64, 79 (1938) (basing holding that federal court must apply state rule of decision in diversity cases on view that "law in the sense in which courts speak of it today does not exist without some definite authority behind it" and rejecting as "fallac[ious]" the natural law view that there is a "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute"); NEW YORK LAW REVISION COMMISSION, MEMORANDUM RELATING TO CERTIFICATION OF QUESTIONS OF LAW TO THE COURT OF APPEALS, A. 5453-65[B], 208th Sess., *reprinted in* 1985 N.Y. Laws 707-934, at 2580 (citing Schein v. Chasen, 478 F.2d 817, 821 (2d Cir. 1973) (applying New York common law principles to the application of Florida law), *reversed*, Lehman Bros. v. Schein, 416 U.S. 386 (1975) (rebuking the Second Circuit as "outsiders lacking the common exposure to local law which comes from sitting in the jurisdiction") as an example of the "federal invasion of the state law-making process").

[137] *See supra* notes 50-56 and accompanying text.

[138] *See* NEW JERSEY CASINO CONTROL COMMISSION, CASINO GAMBLING IN NEW JERSEY: A REPORT TO THE NATIONAL GAMBLING IMPACT STUDY COMMISSION (January 1998) (reporting that the casino industry grossed $3.79 billion in 1997, employed 48,755 as of November 17, 1997, with a total payroll of $1 billion, and generated $303.2 million in tax revenues in 1996); *see also* Knight v. Margate, 86 N.J. 374, 381, 431 A.2d 833, 836-37 (1981) (recognizing contribution of casino gaming to the tourist, resort, recreational, and convention industry of the state).

[139] *See* Michaels v. New Jersey, 150 F.3d 257, 259 (3rd Cir. 1998) Judge Alito la-

That state courts should determine state law seems an irrefutable proposition, and the only one in keeping with the constitutionally assigned responsibility of the New Jersey courts[140] to promulgate rules of decision to govern New Jersey's citizenry. Any perceived benefits stemming from "cross-pollination" simply cannot trump the paramount interest of the state and its citizenry to have the appropriate judicial entity define governing norms.[141]

C. *Answers to Certified Questions Do Not Constitute Advisory Opinions*

Opponents of the certification procedure often argue that answering certified questions would run afoul of the general rule against issuing advisory opinions. Related concerns have been expressed that certified answers will not be given res judicata effect. These concerns should not prevent adoption of a certification procedure in New Jersey for several reasons:

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mented:

> The question presented by this appeal — involving the interpretation of state statutes governing the allocation of certain financial responsibilities between the State and one of its subdivisions — is one that seems to us to be particularly inappropriate for resolution by a federal court . . . . However, because New Jersey does not permit certification, we have no choice but to 'predict' how the state supreme court would decide the question before us.

Id.

[140] *See* N.J. CONST. art. VI, § 1, para. 1 ("The judicial power shall be vested in a Supreme Court and in such inferior courts as from time to time may be established . . . ."). Both the United States Constitution, *see* Erie R.R. v. Tompkins, 304 U.S. 64, (1938), and the New Jersey Constitution assign the responsibility for developing state law on the state court. *See* N.J. CONST. art. VI. It is in keeping with the concept of a functional judicial federalism that the state court system adjudicate state law issues of first impression and thus avoid duplication of judicial effort. *See* William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources*, 48 RUTGERS L. REV. 1139, 1185-86, 1190-91 (1996) (advocating that federal and state courts should be conceptualized as a unitary system and adjudicatory responsibilities should be rationally assigned to the best-suited court so as to avoid duplication of effort). Certification is particularly appropriate to further a functional judicial federalism in light of the relative case loads of federal courts of appeal on the one hand, *see* Bassler, *supra*, at 1152, and those of the New Jersey Supreme Court on the other, *see* ADMINISTRATIVE OFFICE OF THE COURTS, STATE OF NEW JERSEY, SUPREME COURT STATISTICS 1 (1998) (indicating that from July 1, 1996 to June 30, 1997, the New Jersey Supreme Court heard a total of 132 appeals).

[141] *See* LaBel, *supra* note 26, at 1040 ("[T]he source of a legal rule is a matter of critical importance in the identification of that rule as a rule of a particular system and that the content of a particular rule may be more appropriately determined by a judicial decisionmaker located within the system.").

- The features of advisory opinions that make them objectionable as a matter of policy — their abstractness and their presentation outside the truth-seeking mechanism of the adversarial process — are not present in the certification procedure proposed for New Jersey.
- The New Jersey Constitution, unlike Article III of the United States Constitution, contains no "case or controversy" requirement, and does not prohibit courts, as a matter of constitutional law, from issuing advisory opinions. Moreover, the policy concerns that have motivated the New Jersey Supreme Court to decide cases even when the controversy underlying the litigation is moot,[142] are equally persuasive reasons for answering certified questions.
- Concerns that answers to certified questions will not have a binding effect are unfounded and can be alleviated by careful drafting of the certification rule and appropriate use of the resultant process.

First, answering a certified question contains none of the evils typically associated with rendering an advisory opinion. A normal advisory opinion arises where the governor or legislature seeks an opinion from the state's highest court concerning a question of law that arises independent from an adversarial process seeking to determine private rights.[143] The "pure" advisory opinion, in the federal system, is objectionable on two federal constitutional grounds: (1) advising the legislative branch impermissibly encroaches on the legislative prerogative, and (2) rendering an advisory opinion runs afoul of the Article III "case or controversy" requirement.[144] None of these

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[142] *See, e.g.*, State v. Gartland, 149 N.J. 456, 464, 694 A.2d 564, 568 (1997); *In re* Farrell, 108 N.J. 335, 347, 529 A.2d 404, 410 (1987); *see also infra* notes 146-51 and accompanying text (discussing *Gartland* and *Farrell*).

[143] *See* Levin, *supra* note 8, at 355-57.

[144] U.S. CONST. art. III, cl. 1; Flast v. Cohen, 392 U.S. 83, 96-97 (1968). The *Flast* Court stated:

> When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution .... [T]he rule against advisory opinions also recognizes that such suits 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.'

Id. (internal citation omitted); *see also* George N. Stevens, *Advisory Opinions — Present Status and an Evaluation*, 34 WASH. L. REV. 1, 13 (1959). Stevens suggested:

> The procedural objections go to the lack of adequate argument, oral

dangers are present in the certification procedure, however, for the obvious reason that the certified question *is* litigated in an adversarial posture. Since the certification procedure provides for filing of briefs and oral argument[145] with the receiving court having a specific question framed in a concrete factual setting, the proceeding bears the hallmarks of the adversarial system and the purported benefits that follow.[146]

Second, even accepting for the purposes of argument the analogy to advisory opinions, the New Jersey Constitution, unlike the United States Constitution, does not contain a case or controversy requirement and, therefore, would not erect any constitutional barrier to their adjudication by the state court.[147] The traditional reluctance to issue advisory opinions in New Jersey stems from prudential and policy concerns, not constitutional ones.[148] Indeed, the New Jer-

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> and written; burden on the judges, since they must do their own research in most instances; insufficient time to give the matter proper consideration, because the legislative body or executive officer wants an answer immediately; and the difficulties encountered in interpretation, because questions are presented in the abstract, rather than with reference to particular facts. The principal philosophical objection stems from the doctrine of separation of powers. The advisory opinion practice does place in the judges a degree of control over legislative and executive conduct, duties and obligations above and beyond the judicial and does have serious implications on the operation of government under the doctrine of separation of powers.

Id. Since the federal constitutional prohibition is explicitly tied to the Article III "case or controversy" requirement, it is not surprising that states whose constitutions lack the "case or controversy" requirement freely permit advisory opinions. *See, e.g., In re* Opinion of the Justices, 179 A. 344 (N.H. 1935). Relatedly, appellate courts from across the country regularly render a species of "advisory opinion" in certain situations, such as when a case becomes moot during the pendency of an appeal. *See, e.g., In re* Kiesha E., 859 P.2d 1290, 1294 n.5 (Cal. 1993); Dix v. Superior Court, 807 P.2d 1063, 1068 (Cal. 1991); *In re* Elliott, 466 P.2d 347 (Wash. 1968). For examples of this practice in New Jersey, *see infra* text accompanying notes 147-50.

[145] *See, e.g.*, FLA. R. APP. P. 4.61 (containing provisions for briefs and oral argument related to certified question).

[146] *See* Eichelberger, *supra* note 26.

[147] *Compare* U.S. CONST. art. III, cl. 1 *with* N.J. CONST. art. VI, § 1, para. 1. *See* State v. Gartland, 149 N.J. 456, 464, 694 A.2d 564, 568 (1997) ("Unlike the federal constitution, the New Jersey Constitution does not confine the exercise of the judicial power to actual cases and controversies."); *In re* Quinlan, 70 N.J. 10, 34, 355 A.2d 647, 660 (1976) ("[N]o express constitutional language limits judicial activity to cases and controversies."). The Majority Report is simply mistaken therefore when it concludes that "the Court has historically indicated that it is constitutionally forbidden from issuing advisory opinions." Majority Report, *supra* note 84, at 3.

[148] *See* Grunwald v. Bronkesh, 254 N.J. Super. 530, 537, 604 A.2d 126, 129 (App. Div. 1992) (recognizing "the wholesome *policy* considerations which confine courts to actual controversies and dissuade them from rendering abstract or advisory opinions") (emphasis added and citations omitted); *see also* Grand Union Co. v. Sills, 43 N.J. 390, 409, 204 A.2d 853, 863) (1964) (identifying policy of avoiding decision of

sey Supreme Court has recognized exceptions to the general rule limiting judicial consideration to live controversies. In *State v. Gartland*,[149] for example, the wife of an abusive husband was convicted of reckless manslaughter for killing her husband during an abusive episode. The New Jersey Supreme Court granted certification to opine on the statutory duty to retreat before resorting to deadly force, but before it could render a decision, the defendant died.[150] The Court iterated its general policy against advisory opinions, but considered the appeal anyway.[151]

The New Jersey Supreme Court's reasons for doing so are instructive and have resonance in the certification context. The Court reasoned that the appeal raised issues of great importance to the state that were "worth the judicial effort" to decide, even though the controversy was not justiciable within the contours of the federal case or controversy requirement.[152] The same policies counsel in favor of utilizing a certification procedure. Because the certification procedure would be limited to those cases that both the federal court and the New Jersey Supreme Court itself have identified as raising issues of significant enough concern to warrant the attention of the highest court in the state, answering certified questions would also be "worth the judicial effort" and would enable the New Jersey Supreme Court to define and decide issues of importance to the state.

Concerns that the New Jersey Supreme Court's answer would not be followed by the certifying court should not deter adoption of a certification rule for two reasons. First, a certification rule could be drafted to require explicitly that the parties will be bound by the New Jersey Supreme Court's determination of the certified question.[153]

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abstract issues as impetus for rule against issuance of advisory opinions).

[149] 149 N.J. 456, 694 A.2d 564 (1997).

[150] *See id.* at 460, 694 A.2d at 566.

[151] *See id.* at 466, 694 A.2d at 569.

[152] *See id.* at 465-66, 694 A.2d at 568-69; *see also* State v. Cannon, 128 N.J. 546, 549-50, 608 A.2d 341, 343 (1992) ("[S]ince [the defendant] has now successfully completed the Program and has served, in the aggregate, more real time than called for under her original sentence . . . the outcome of our decision will have no practical impact on defendant. The issues are of great importance, however, and should be disposed of."); *In re* Farrell, 108 N.J. 335, 347, 529 A.2d 404, 410 (1987) (rendering decision on merits in right to die case even though appellant died during pendency of appeal: "Because of the extreme importance of the issue and the inevitability of cases like this one arising in the future, we agree to render a decision on the merits") (citations omitted).

[153] *See, e.g.*, CALIFORNIA MEMORANDUM, *supra* note 95 at 8. The memorandum noted:

> The vast majority of out-of-state authority holds that a state high court's opinion answering a certified question is *not* an impermissible advisory opinion so long as: (i) the court addresses only *issues that are*

The authors, however, do not believe such language in the certification rule is necessary, because the customary language contained in the uniform act and the versions adopted by various states — which require a statement of the facts necessary to answer the question and allow the answer to be determinative of an issue in the case — sufficiently safeguard against the dangers associated with advisory opinions.[154] Second, as a practical matter and even without specific language in the certification rule as to the res judicata effect of the certified answer, federal judges are not likely, after expending the effort to prepare a certification request and compile a record to transmit to the New Jersey Supreme Court, to disregard the answer provided.[155] Indeed, a substantial body of federal case law has developed confirming the res judicata effect of certified answers.[156]

> *truly contested by the parties*; (ii) the court addresses only issues that are *presented on a fully developed factual record*; and (iii) the court's opinion on the certified question *may be dispositive of the cause (and will be res judicata between the parties.*

Id. In this regard, the certification rule adopted by California requires a statement by the certifying court that "the answer provided by the California Supreme Court will be followed by the certifying court." CAL. R. CT. 29.5(b)(4). New Jersey could allay fears that a decision would not be res judicata by including similar language in its certification rule.

[154] *See, e.g.*, Schleiter v. Carlos, 775 P.2d 709, 710 (N.M. 1989) (suggesting that the rule effectively avoids rendering advisory opinions by providing that a certification request set forth "either a statement by the certifying court of the facts relevant to the question certified, showing the nature of the controversy in which the questions arose, or a stipulation of such facts by the parties, which has been approved by the certifying court").

[155] *See* Goldschmidt, *supra* note 9, at 68 (noting that a strong majority of circuit and district judges agree that answers to certified questions should have the same issue and claim preclusive effect as other decisions); *see also* Sunshine Mining Co. v. Allendale Mut. Ins. Co., 666 P.2d 1144, 1148 n.7 (Idaho 1983) ("Certification would be a pointless exercise unless the state court's answers are regarded as an authoritative and binding statement of state law." (citing authorities)).

[156] *See* Grover v. Eli Lilly and Co., 33 F.3d 716, 719 (6th Cir. 1994) ("Having represented to the Ohio Supreme Court that its answer would be dispositive of the case, the district court was bound to follow state law as declared in the answer."). In *Sifers v. General Marine Catering Co.*, 892 F.2d 386, 391-92 (5th Cir. 1990), the court held:

> [W]e consider the state court's answer [to a certified question] to be binding in the proceedings between the parties to the certified case . . . . Ordinarily, a state court's answer to a certified question is final and binding upon the parties between whom the issue arose. Such an answer, therefore, generally is the "law of the case" in any further federal court proceeding involving those parties . . . . Further, because we consider the state court's answer to be binding in the proceedings between the parties to the certified case, that answer is now the law of this circuit. For that reason it is binding as well upon those parties in this appeal who were not parties to the certified case.

Id.; *see also* Tarr v. Manchester Ins. Corp., 544 F.2d 14, 14 (1st Cir. 1976) (declining the parties' invitation to "correct" the answer received from the state Supreme Court

Most states have found a way to accommodate their aversion to advisory opinions within their certification procedure.[157] As Corr and Robbins noted, "The clear preponderance of opinion that answers to the objection can be found . . . suggests that concerns about rendering advisory opinions will not be a significant barrier to certification in the future."[158] The absence of any constitutional barrier, as well as the practical reality that federal courts are not likely to certify questions of law only to disregard the answer they receive, rebuts concerns that certification invokes the evils of adjudicating advisory opinions.

D. Abstractness Concerns Should Not Prevent Adoption of a Certification Procedure

One of the major reservations concerning certification identified in the Minority Report is "whether the record of a case would be sufficiently developed before a question of law raised in that case would be certified to the Supreme Court of New Jersey."[159] Similarly, concerns have been raised that factual disputes in the case give rise to a record devoid of the factual concreteness necessary to render an opinion.[160]

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to the certified question: "No matter what the result [to the certified question], we cannot 'correct' a state court's interpretation of its own law."); National Educ. Assoc. v. Lee County Bd. of Educ., 467 F.2d 447, 450 (5th Cir. 1972) (determination of the state Supreme Court on a certified question "must necessarily be conclusive . . . a Federal court does not second-guess a State's application of its own law"); Thompson v. Ramirez, 597 F. Supp. 730, 732 (D.P.R. 1984) ("It has been unquestionably held that an opinion of a state Supreme Court issued in response to a question certified by a federal court, is final and binding on the parties as to the issue of state law, to be given full res judicata effect by the federal court.").

[157] *See, e.g.*, Spencer v. Aetna Life & Cas. Ins. Co., 611 P.2d 149, 151 (Kan. 1980) (concluding that a certified question "arises from an actual case and controversy and although presented as a question of law, it neither violates the case or controversy requirement nor the separation of powers doctrine on advisory opinions"); *see also* Wolner v. Mahaska Indus., Inc., 325 N.W.2d 39, 41 (Minn. 1982) (rejecting the argument that answers to certified questions are advisory opinions and holding that certified answers represent "a pronouncement of law with the same effect as our pronouncements of law in cases arising in the courts of this state").

[158] Corr & Robbins, *supra* note 26, at 422.

[159] Majority Report, *supra* note 84, at 3. The Majority Report concluded that such concerns should not deter adoption of a certification procedure, as long as only federal appellate courts, as opposed to district courts, have the power to request certification. *See id.* ("The Subcommittee felt that such dangers would be minimized by limiting certification to cases referred to the Supreme Court by *appellate* courts.") (emphasis in original). The issue of whether both district and appellate courts should be able to request a certified answer is discussed *infra* in Section III of this Article.

[160] *See, e.g.*, Schlieter v. Carlos, 775 P.2d 709, 712 (N.M. 1989) (declining to answer a certified question because of unresolved factual issues).

Abstractness focuses on the concern that questions certified by federal courts would compel the state courts to give an "academic answer . . . which is void of any factual surroundings."[161] The proposed certification rule, like the Uniform Certification of Questions of Law Act, contains several procedural provisions that effectively safeguard against the abstractness problem. Under the proposed rule, the New Jersey Supreme Court would: (1) require a statement of the facts relevant to the question;[162] (2) require the certifying court to supply the Supreme Court of New Jersey with the record, or any portion of it;[163] (3) allow the New Jersey Supreme Court to reformulate the question posed to it;[164] and (4) vest the Supreme Court of New Jersey with discretion to decline to answer a question for any reason, including its determination that the case is not presented with the requisite degree of factual clarity.[165]

As it is with the issue of advisory opinions, commentators have noted that this objection has not proved to be a serious problem in actual practice.[166] The commentators' views have been corroborated by the empirical studies of the issue.[167] Abstractness concerns, therefore, should not pose an obstacle to the adoption of a certification procedure.

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[161] Kaplan, *supra* note 26, at 431.

[162] *See* Proposed Certification Rule § 2:2-2A(c)(ii) (quoted in full *supra* note 85). The Uniform Certification of Questions of Law Act similarly resolves this problem by requiring that the certification order set forth "a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the question arose."

[163] *See id.* § 2:2-2A(d).

[164] *See id.* § 2:2-2A(b).

[165] *See id.* § 2:2-2A(a).

[166] *See* Eichelberger, *supra* note 26, at 1354 n.92 (citing Kaplan, *supra* note 26, at 431; Lillich & Mundy, *supra* note 16, at 900; Levin, *supra* note 8, at 351 n.54); *see also* Scanelli, *supra* note 26, at 636-38. The author asserted:

> The problems of abstractness and advisory opinions have become even more unconvincing in light of the strict requirements of most certification procedures. These procedures generally require that the contents of the certification order contain a statement of all facts relevant to the questions certified and fully show the nature of the controversy in which the question arose.

Scanelli, *supra* note 26, at 637.

[167] *See* Goldschmidt, *supra* note 9, at 42. 78% of circuit judges and 99% of district judges felt that a final statement of facts accompanying certified question was adequate to decide the issue. *See id.* Most circuit (91%), district (81%), and state court (64%) judges disagree with the statement that certification "impermissibly limits the answering court's ability to consider the totality of the facts of a case." *Id.* at 68 The vast majority of state and federal judges disagree with the proposition that courts should decide entire cases, not isolated legal issues. *See id.* at 69.

E. *Answering a Certified Question Does Not Constitute the Exercise of Original Jurisdiction, and is Therefore Not Forbidden by the New Jersey Constitution*

The chief objection to the certification process in New Jersey is the view that answering a certified question would contravene the limited grant of original jurisdiction to the New Jersey Supreme Court by the New Jersey Constitution.[168] This concern is misplaced. Certification is a sui generis process that does not constitute the exercise of original jurisdiction because, quite simply, the referring court never cedes control of the reins of judicial power — viz., the authority to enter judgment and grant relief to the parties before the court. Other characteristics of the judicial process in general and the certification procedure more specifically to which certification's opponents have ascribed jurisdictional significance, such as the stare decisis effect of the answer to the certified question, are the product of judge-made rules and lack jurisdictional significance. The constitutional limitations on the New Jersey Supreme Court's original jurisdiction, therefore, do not preclude the Court from answering a question certified to it from the federal courts. Further, the New Jersey Constitution affirmatively grants the New Jersey Supreme Court power to formulate rules to govern practice and procedure and the administration of justice, a provision sufficiently broad to encompass the authority both to promulgate a certification rule and to answer certified questions. For these reasons, this section will argue that the constitutional concerns raised by the New Jersey Committee on Civil Practice should not bar adoption of a certification rule.

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[168] See Minority Report, *supra* note 84, at 8 ("The minority of the subcommittee believes that constitutional problems raised by the proposed certification remedy are too serious and the benefits of the procedure too insignificant to justify the Committee in recommending any change."). Although the Majority Report recommended approval of the certification procedure, it stated that it shared the concern of the Minority Report that certification may not be possible under New Jersey's Constitution without a constitutional amendment and that it would not recommend adopting a certification procedure if the New Jersey Supreme Court ultimately determines that a constitutional amendment would be required. *See* Majority Report, *supra* note 84, at 3 ("If a constitutional amendment is indeed required to establish a certification process, the Subcommittee *unanimously* disfavors the pursuit of such an amendment. This issue is not of such importance to warrant such a major undertaking.") (emphasis in original). Notably, however, other states have reached the opposite conclusion about the relative importance of certification and have amended their constitutions to provide explicitly for the ability of their highest courts to consider questions of law certified to them by other sovereign courts. *See* NEW YORK LAW REVISION COMMISSION, MEMORANDUM RELATING TO CERTIFICATION OF QUESTIONS OF LAW TO THE COURT OF APPEALS, A. 5453-65[B], 208th Sess., *reprinted in* 1985 N.Y. Laws 707-934, at 2585-89 (concluding that an amendment to the New York Constitution was warranted in light of the friction caused by federal courts making state law).

1. Summary of Pertinent New Jersey Constitutional Provisions

The New Jersey Constitution divides the subject matter jurisdiction of the New Jersey Supreme Court into two broad categories: appellate and original jurisdiction. Appellate jurisdiction is provided in Article VI, which states in pertinent part:

> The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution. . . . Appeals may be taken to the Supreme Court:
>
> (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;
>
> (b) In causes where there is a dissent in the Appellate Division of the Superior Court;
>
> (c) In capital causes;
>
> (d) On certification by the Supreme Court to the Superior Court and, where provided by the rules of the Supreme Court, to the county courts and the inferior courts; and
>
> (e) In such causes as may be provided by law.[169]

The New Jersey Constitution also provides for the exercise of original jurisdiction in limited circumstances:

> The Supreme Court and the Appellate Division of the Superior Court may exercise such original jurisdiction as may be necessary to the complete determination of any cause or review.[170]

Finally, the New Jersey Constitution grants the New Jersey Supreme Court "jurisdiction over the admission to the practice of law and the discipline of persons admitted."[171]

In addition to thus defining the New Jersey Supreme Court's original and appellate jurisdiction, the New Jersey Constitution contains a broad grant of rulemaking authority to the Court. Article VI,

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[169] N.J. CONST. art. VI, § II, para. 2 & § V, para. 1.

[170] *Id.* § V, para. 3.

[171] *Id.* § II, para. 3; *see also In re* LiVolsi, 85 N.J. 576, 584, 428 A.2d 1268, 1271-72 (1981) (discussing original jurisdiction over the discipline of attorneys admitted to practice in New Jersey). Though the constitutional grant speaks only to the admission and discipline of New Jersey lawyers, the New Jersey Supreme Court determined that it had jurisdiction pursuant to section II, paragraph 3 to determine the constitutionality of the mandatory fee arbitration rule it had promulgated. *See id.* No other provision in the constitution grants power to the New Jersey Supreme Court other than article VI, section VI, paragraph 3, providing for the power to commence disciplinary proceedings against a sitting judge or justice by certifying his incapacity to the governor.

section II, paragraph 3 provides the rulemaking and administrative jurisdiction of the Court and reads:

> The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts.[172]

2. Views of Other State Courts

The remainder of this section will discuss the possible sources of constitutional support for the adoption of a certification rule identified above: (1) the grant of original jurisdiction to the New Jersey Supreme Court, and (2) the grant of rulemaking power to the New Jersey Supreme Court. To place these issues in a larger jurisprudential context, however, this Article will first discuss the responses of other states' highest courts addressing the constitutional issue.

Whether certification can be put into place by a rule of court or by legislative enactment is of course not a question that is unique to New Jersey. The question has been asked in other jurisdictions and received varying answers depending, as one might expect, on the language of the particular constitution in question and the jurisprudential views of the court providing the answer. While these variations distinguish the experiences of other states to some degree, the threshold constitutional issue in New Jersey — whether answering a certified question constitutes the exercise of original jurisdiction — has been addressed by other state Supreme Courts and their views therefore serve to illuminate the same issue under the New Jersey Constitution.[173]

Most state high courts to consider the issue found that they have constitutional authority to answer certified questions. They have advanced two chief rationales for recognizing this authority: (1) the state Supreme Court's inherent judicial power to determine the course of state law, and (2) a jurisdictional grant beyond the explicit grants of original and appellate jurisdiction contained in the state constitutions.

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[172] N.J. CONST. art. VI, § II, para. 3; *see also* Winberry v. Salisbury, 5 N.J. 240, 244-45, 74 A.2d 406, 408-09 (1950) (discussing the rulemaking authority of the New Jersey Supreme Court).

[173] *See* WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, *supra* note 6, § 4248 at 168-70; *see also* Braun, *supra* note 12, at 968-81 (1996) (discussing constitutional provisions of other states with certification procedures and urging California to adopt the same).

a. Inherent Power

The Oklahoma Supreme Court found that the "court needs no explicit grant of jurisdiction to answer certified questions from the federal court; such power comes from the United States Constitution's grant of state sovereignty."[174] The Ohio Supreme Court reached a similar conclusion:

> In our view, such a power exists by virtue of Ohio's very existence as a state in our federal system. We begin with a truism: the Ohio Constitution permits the state to exercise its own sovereignty as far as the United States Constitution and laws permit. Since federal law recognizes Ohio's sovereignty by making Ohio law applicable in federal courts, the state has the power to exercise and the responsibility to protect that sovereignty. Therefore, if answering certified questions serves to further the state's interests and preserve the state's sovereignty, the appropriate branch of state government — this court — may constitutionally answer them.[175]

The Washington and Idaho Supreme Courts have also found that their state constitutions gave them inherent power to answer certified questions without a specific constitutional provision authorizing the process.[176] The Montana Supreme Court simply announced that it had the authority to answer certified questions, without discussing the basis for its decision.[177]

b. Jurisdictional Grant from Legislature in Addition to Explicit Constitutional Grant

The Florida and Washington Supreme Courts have held that, in the absence of an explicit constitutional jurisdictional grant, residual jurisdictional grants of judicial power to entertain certified questions can be assigned to the state's highest court by the state legislature without offending any constitutional principles.

The first state court to opine on the constitutionality of considering certified questions was the Florida Supreme Court, which

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[174] Shebster v. Triple Crown Insurers, 826 P.2d 603, 606 n.14 (Okla. 1992).

[175] Scott v. Bank One Trust Company, 577 N.E.2d 1077, 1079-80 (Ohio 1991).

[176] *See In re* Elliott, 446 P.2d 347, 358 (Wash. 1968) ("It is within the inherent power of the court as the judicial body authorized by the constitution to render decisions respecting the law of this state."); Sunshine Mining Co. v. Allendale Mut. Ins. Co., 666 P.2d 1144, 1147 (Idaho 1983) ("We hold that this Court has inherent power to render decisions regarding Idaho law.").

[177] *See* Irion v. Glens Falls Ins. Co., 461 P.2d 199, 202-03 (Mont. 1969); *see also* WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, *supra* note 6, § 4248 at 168-70. For a more detailed discussion of the constitutional provisions of other states with a comparison to the California Constitution, see Braun, *supra* note 12, at 968-81.

raised the issue sua sponte in *Sun Insurance Office, Ltd. v. Clay*.[178] Florida's certification rule was promulgated by the Florida Supreme Court, in the exercise of its rulemaking power,[179] and was also authorized pursuant to a statutory grant from the Florida Legislature.[180] The *Clay* Court first considered whether it had constitutional power to promulgate its certification rule and concluded that such power emanated from the grant of rulemaking authority in the Florida Constitution: "[Adoption of a certification rule] was a valid exercise of our organic power and provided a procedure for assisting, in a spirit of comity, the Federal Appellate system in questions of state jurisprudence, no other forum for so doing having been established by the laws of Florida."[181]

The Court next addressed what it considered the separate constitutional issue — viz.,

> whether Section 4 of Revised Article V of our Constitution, adopted in 1956, which delineates the appellate jurisdiction of this court and provides for the issuance by it of named writs, should be construed as prohibiting this court from exercising any judicial powers other than those expressly provided for therein.[182]

The Court concluded that exercising the judicial powers associated with certification would offend no constitutional principle. First, unlike the United States Constitution which, because it defines legislative prerogative in a government of limited, express powers, the Florida Constitution acted as a limitation, rather than a grant, of legislative power. As a consequence, the Florida Legislature, as agent of the people, retained all residual sovereign power, including judicial power, and could delegate it to the Florida Supreme Court if it so chose.[183] The Court next reasoned:

> With respect to legislation involving the judicial power inherent in the state, it has been many times held by this court that, while the Legislature cannot restrict or take away jurisdiction conferred by the constitution, constitutional jurisdiction "can be enlarged by

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[178] 133 So. 2d 735, 739 (Fla. 1961) ("At the risk of unduly lengthening this opinion, we deem it appropriate to note that we have also considered, sua sponte, the question of our jurisdiction constitutionally to entertain the subject proceeding under the authority to do so contained in [Florida's certification rule].").

[179] *See id.* at 740 (quoting FLA. CONST. art. V, § 3 ("The practice and procedure in all courts shall be governed by rules adopted by the supreme court.")).

[180] *See id.* at 739 (quoting FLA. STAT. ANN. § 25.031 (West 1997) ("The supreme court of this state may, by rule of court, provide [for a certification procedure].").

[181] *Id.* at 741.

[182] *Id.*

[183] *See* Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 742 (Fla. 1961) ("[A]ll power not limited by a state constitution inheres in the people of that state.").

> the legislature in all cases where such enlargement does not result in a diminution of the constitutional power of some other court, or where such enlargement is not forbidden by the constitution."[184]

The Court concluded that answering certified questions would not offend the Florida Constitution:

> We have concluded that, in the absence of a constitutional provision expressly or by necessary implication limiting the jurisdiction of the Supreme Court to those matters expressly conferred upon it, and in the absence of a constitutional provision expressly conferring upon another court jurisdiction to exercise the judicial power which is the subject matter of § 25.031 and Rule 4.61, and in the light of the well settled rule that all sovereign power, including the judicial power, not limited by a state constitution inheres to the people of the state, such power may be granted to this court by statute if it is deemed to be a substantive matter, or by a rule of this court if it is deemed to be a matter of "practice and procedure."[185]

The Washington Supreme Court adopted the same reasoning seven years later in *In re Elliott*:[186] "This court has recognized that the legislature can confer jurisdiction on the courts or provide for statu-

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[184] *Id.* (quoting Chapman v. Reddick, 25 So. 673, 677 (Fla. 1899)).

[185] *Id.* at 743 (internal quotations omitted). Significantly, the Florida Supreme Court distinguished an earlier Florida Supreme Court case, *City of Dunedin v. Bense*, 90 So. 2d 300, 302 (1956), which declared unconstitutional a statute that purported to confer original jurisdiction to issue a writ of injunction — a writ not listed among those that the Florida Constitution expressly enumerated. The *Clay* opinion first quotes the *Bense* opinion at length:

> [J]urisdiction of the Supreme Court is conferred by the Constitution itself. It is not endowed with any common-law prerogative outside of the boundaries established by organic law. Certainly, the appellate jurisdiction is clearly defined. Its original jurisdiction is stated with equal clarity. The ancillary constitutional writs referred to as those "necessary or proper to the complete exercise of its jurisdiction" are writs which are incidental to the jurisdiction, either appellate or original, otherwise delineated by the Constitution.

Clay, 133 So. 2d at 742 (quoting *Bense*, 90 So. 2d at 302). The *Clay* Court distinguished *Bense* on the grounds that certification, to the extent it could be considered jurisdictional, was not an exercise of original jurisdiction and therefore did not encroach upon the constitutional jurisdiction of another court, *see id.* at 742-43 (noting "absence of a constitutional provision expressly conferring upon another court jurisdiction to exercise the judicial power which is the subject matter of § 25.031"), or expand the expressly enumerated powers of the Florida Supreme Court. *See id.* at 741. In light of this, the *Clay* Court concluded that, because the Florida Constitution simply never assigned the judicial power to answer a certified question, it could be assigned as an incident of sovereignty retained by the people of Florida. *See id.* at 743.

[186] 446 P.2d 347 (Wash. 1968).

tory procedures for the exercise of jurisdiction by the court, provided the court exercises only judicial power."[187]

Having concluded, as did the Florida Supreme Court, that the power to entertain certified questions could be conferred by the Legislature consistent with the Washington Constitution, the Washington Supreme Court upheld the statute providing for a certification procedure.[188]

c. States that Have Held that Certification is not a Jurisdictional Act

The Ohio and Oklahoma Supreme Courts concluded that a Court does not exercise jurisdiction by answering a certified question and that, therefore, any jurisdictional provisions in their respective constitutions were irrelevant to the source of their authority to proclaim state law pursuant to the certification mechanism.

The Ohio Supreme Court addressed this issue in *Scott v. Bank One Trust Co.*[189] A federal district court in Ohio included as one of its certified questions whether the certification rule was constitutional under the provision of the Ohio Constitution defining the Ohio Supreme Court's jurisdiction.[190] The Ohio Supreme Court first noted that, unlike the situation in Florida and Washington, "neither statute nor rule of court can expand our jurisdiction beyond the constitutional grant."[191] The Court nevertheless concluded that it had the authority to entertain and answer the questions certified to it:

> [J]urisdictional analysis is irrelevant to Rule XVI's constitutionality, for a court does not exercise jurisdiction by answering a certified question. "Jurisdiction" means "[t]he power to hear and determine a cause . . . ." *Sheldon's Lessee v. Newton* (1854), 3 Ohio St. 494, 499. By answering a state law question certified by a federal court, we may affect the outcome of the federal litigation, but the federal court still hears and decides the cause. Therefore, answering a certified question is not an exercise of jurisdiction.[192]

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[187] *Id.* at 351 (citing Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, (Fla. 1961), for this proposition).

[188] *See id.* at 358.

[189] 577 N.E.2d 1077 (Ohio 1991).

[190] *See id.* at 1079.

[191] *Id.*

[192] *Id.* The Ohio Supreme Court went on to hold that the judicial power to answer the question flowed not from its constitutional jurisdictional grant, but rather from the state's sovereign existence in a federal system. *See id.* at 1079-80; *supra* text accompanying note 175.

The Oklahoma Supreme Court reached the same conclusion, for essentially the same reasons, in *Bonner v. Oklahoma Rock Corp.*:[193]

> This court needs no explicit grant of jurisdiction to answer certified questions from a federal court, such power comes from the United States Constitution's grant of state sovereignty. By answering a state-law question certified by a federal court, we may affect the outcome of federal litigation, but it is the federal court who hears and decides the cause.[194]

d. States that Have Required a Constitutional Amendment

While the majority of state high courts to have considered the issue have concluded that certification is proper under their constitutions, certification procedures have required constitutional amendments in a number of states. In *Holden v. NL Industries*,[195] the Utah Supreme Court struck down as unconstitutional its court rule providing for certification. It determined that the certification rule did not fall within the Utah Constitution's grant of original jurisdiction, which is limited to issuance of writs such as mandamus and certiorari.[196] The Court further noted that the Utah Constitution's conferral of appellate jurisdiction, which provides: "In other cases the Supreme Court shall have appellate jurisdiction only," was not capable of an interpretation providing for the enlargement of the Utah Supreme Court's appellate jurisdiction.[197] Finally, the Utah Supreme Court noted that because federal courts are not "inferior courts" in Utah's judicial system, the court's answer to a certified question in a case to be adjudicated in a federal court is not an exercise of "appellate jurisdiction" within the meaning of the Utah Constitution.[198]

The Missouri Supreme Court, in an unpublished opinion, held that notwithstanding a statutory provision authorizing certification, the Missouri Constitution did not expressly or impliedly grant the Court original jurisdiction to render opinions on questions certified

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[193] 863 P.2d 1176, 1178 n.3 (Okla. 1993).

[194] *Id.* at 1178 n.3; *see also* Shebester v. Triple Crown Insurers, 826 P.2d 603 (Okla. 1992).

[195] 629 P.2d 428 (Utah 1981).

[196] *See id.* at 430.

[197] *Id.*

[198] *See id.* at 431. The Utah Constitution has since been amended and now explicitly authorizes the Utah Supreme Court to accept certified questions from federal courts. *See* UTAH CODE ANN. § 78-2-2 (1995) and UTAH R. APP. P. 41.

by federal courts. The Supreme Court of Missouri also held that the Legislature could not expand the scope of the court's jurisdiction.[199]

A New York law revision committee similarly concluded that an amendment to the New York Constitution would be necessary to implement a certification procedure.[200] The Commission noted:

> Unlike other states, where their state constitutions are not deemed to preclude the legislature from conferring additional jurisdictional power upon their appellate courts . . . [in New York] the powers of the Court of Appeals stem from the Constitution of the State. The court does not have, nor can it be invested with, wider powers than are there given . . . . Art. 6, § 3 of the Constitution of the State of New York provides, with two exceptions not relevant here, that the jurisdiction of the court of appeals shall be limited to the review of questions of law in certain enumerated cases. None of the situations could be construed to permit the court to answer a question certified by a federal court or court of another state. Thus, since it is clear that the Legislature does not possess inherent power to expand the court's power . . . a constitutional amendment is necessary if New York is to have a certification procedure.[201]

3. The Constitutionality of a Certification Rule Under New Jersey's Constitution

As discussed above, three possible sources of power to answer a certified question exist under the New Jersey Constitution: (1) the New Jersey Supreme Court's original jurisdiction, (2) its appellate jurisdiction, or (3) its rulemaking authority. This section of this Article will first summarize the views of the Minority Report concerning these available constitutional sources and then discuss whether any of these provisions provide a constitutionally sound basis for the adoption of a certification rule in New Jersey.

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[199] *See* Grantham v. Missouri Dep't of Corrections, No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990) *relied on by* Zeman v. V.F. Factory Outlet, Inc. 911 F.2d 107, 109 (8th Cir. 1990).

[200] *See* NEW YORK LAW REVISION COMMISSION, MEMORANDUM RELATING TO CERTIFICATION OF QUESTIONS OF LAW TO THE COURT OF APPEALS, A. 5453-65[B], 208th Sess., *reprinted in* 1985 N.Y. Laws 707-934, at 2577-91.

[201] *Id.* at 2586. In 1985, New York amended its Constitution to allow for certification. For further discussion of the New York experience with certification, see Richard A. Nessler, *Interjurisdictional Certification in New York*, 209 N.Y.L.J. 53, at 1 (Mar. 22, 1993) and Note, *New York's Certification Procedure: Was It Worth the Wait?*, 63 ST. JOHN'S L. REV. 539 (1989).

a. The Minority Report

The Minority Report rejected each of the three identified constitutional provisions as being insufficient to give the New Jersey Supreme Court the authority to hear certified questions or promulgate a certification rule. Further, it rejected the proposition that the New Jersey Legislature and/or the New Jersey Supreme Court through its rulemaking authority can provide for the authority to consider certified questions.

The Minority Report first rejected the grant of appellate jurisdiction in article VI, section V, paragraph 1.[202] While conceding that subparagraph (e) of that provision[203] "could be read to mean Rule of Court as well as statute," the Minority Report ultimately concluded that certification does not involve an "appeal" in the ordinary sense of the word and that the grant of appellate jurisdiction, even though capable of providing for appellate jurisdiction of kinds not enumerated in the state constitution, simply did not apply.[204]

The Minority Report next rejected the suggestion that the grant of original jurisdiction contained in article VI, section V, paragraph 3 could provide a constitutional basis for the adoption of a certification procedure.[205] Citing to *In re LiVolsi*,[206] the Minority Report stated that the New Jersey Constitution grants the state's highest court "'original jurisdiction only over matters related to causes already before [the court].'"[207]

The Minority Report also rejected the constitutional grant of authority to "make rules . . . subject to law, governing practice and procedure"[208] as providing a sufficient basis to adopt a certification procedure.[209] The Minority Report states:

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[202] *See* Minority Report, *supra* note 84, at 8-9.

[203] N.J. CONST. art. VI, § V, para. 1(e) provides that appeals may be taken to the New Jersey Supreme Court "in such cases as may be provided by law."

[204] *See* Minority Report, *supra* note 84, at 9 ("[T]his reading would do violence to the ordinary meaning of the word 'appeal,' because the Supreme Court would not be called upon to revise errors of law or fact made in a judgment reached below or issue a mandate binding an inferior court."). *But see In re* Elliott, 446 P.2d 347, 352 (Wash. 1968) (explaining that the state may adopt a certification by "statute if it is deemed to be a substantive matter, or by a rule of this court if it is deemed a matter of 'practice and procedure'"). The authors agree that the Supreme Court's appellate jurisdiction does not include the power to hear certified questions.

[205] *See* Minority Report, *supra* note 84, at 9.

[206] 85 N.J. 576, 428 A.2d 1268 (1981).

[207] Minority Report, *supra* note 84, at 9 (quoting *LiVolsi*, 85 N.J. at 583, 428 A.2d at 1271).

[208] N.J. CONST. art. VI, § II, para. 3.

[209] *See* Minority Report, *supra* note 84, at 9-10.

> There is a third granting clause in par. 3, authorizing the Court to "make rules . . . subject to law, governing practice and procedure." Might that clause be the source of a third kind of original jurisdiction, in which certifications might be heard? We believe not . . . . The practice and procedure power is explicitly subject to (substantive) law, and any original jurisdiction arising under it would be limited to adjective matters. Certifications, by definition, involve questions of substantive state law.[210]

Finally, the Minority Report rejected the contention that the New Jersey Legislature could enlarge the New Jersey Supreme Court's jurisdiction as a means of empowering it to answer certified questions, reasoning that "[u]nder our constitution any legislative attempt to enlarge the original jurisdiction of the Supreme Court diminishes the constitutional jurisdiction of another court."[211]

The Minority Report brushed aside the suggestion that the essence of state sovereignty in a federal system contains an implicit grant of authority to the states' judicial bodies to determine state law.[212]

The views expressed in the Minority Report should not preclude the adoption of a certification procedure in New Jersey. As discussed further below, this Article suggests that, because answering a certified question is not a jurisdictional act at all, the "practice and procedure" provision provides the requisite authority for the promulgation of a certification rule by the New Jersey Supreme Court, just as similar constitutional provisions have accomplished in Idaho and Ohio.[213] Moreover, the New Jersey Supreme Court's power to administer the

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[210] *Id.*

[211] *Id.* at 12. While the Minority Report concludes that granting the New Jersey Supreme Court power to answer certified questions would impinge on the constitutional jurisdiction of another court, *see id.*, the report does not appear to reject the rationale of *Sun Insurance Office, Ltd. v. Clay*, 133 So. 2d 735, 742 (Fla. 1961), namely that "constitutional jurisdiction can be enlarged by the legislature in all cases where such enlargement does not result in a diminution of the constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the constitution." *Id.*

[212] *See* Minority Report, *supra* note 84, at 11. The report stated,

> We are not convinced that the New Jersey Supreme Court would regard *Erie* as an affirmative grant of power to it from the federal government. Even if it were to do so, it is unclear where the Court would get the capacity to accept such a gift from a foreign sovereign.

Id. (rejecting Scott v. Bank One Trust Co., 577 N.E.2d 1077, 1079-80 (Ohio 1991)).

[213] *See* Sunshine Mining Co. v. Allendale Mut. Ins. Co., 666 P.2d 1144, 1148 (Idaho 1983) (noting that the Idaho Supreme Court's "rule-making power" incident to its duty to administer justice under the Idaho Constitution provided authority to adopt a certification rule); *Scott*, 577 N.E.2d at 1079 (upholding the constitutionality of a certification procedure adopted by rule of the Ohio Supreme Court).

court system within the state provides an adequate basis for promulgation of a certification rule. These bases separately would provide ample constitutional support for the authority of the Court to answer certified questions; taken together, they belie the contention that the New Jersey Supreme Court is powerless to provide for a procedural mechanism definitively to pronounce New Jersey law.

b. The Supreme Court's Original Jurisdiction Does Not Provide a Source of Authority to Answer Certified Questions

As might be gathered from the preceding summary, the authors agree with the Minority Report's conclusion that the grant of original jurisdiction found in article VI, section V, paragraph 3, of the New Jersey Constitution cannot serve as a basis for the promulgation of a certification rule. Therefore, if answering a certified question were deemed to be an exercise of original jurisdiction, the New Jersey Constitution would clearly forbid the Supreme Court of New Jersey from doing so.[214]

As a matter of black letter constitutional law, the New Jersey Legislature is precluded from providing the New Jersey Supreme Court with original jurisdiction beyond the explicit grant found in the New Jersey Constitution. In *Brady v. New Jersey Redistricting Commission*,[215] the Supreme Court of New Jersey considered the constitutionality of a provision in the statute creating the New Jersey Redistricting Commission.[216] One provision of the act purported to confer "original and exclusive jurisdiction" upon the New Jersey Supreme Court "to consider any case brought upon the petition of a legally qualified voter of the State and to grant relief appropriate to the cause."[217] The Court rejected this legislative attempt to create a new category of original jurisdiction:

> Although section 5, paragraph 3 of [article VI] grants this court such original jurisdiction "as may be necessary to the complete determination of any cause on review," the Court may exercise that jurisdiction only in a case already before it. Because *Brady* was not properly before the Court on appeal, we had no power to exercise original jurisdiction through that clause. Our State Constitution therefore prohibits the Legislature from granting origi-

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[214] As is discussed further below, however, answering a certified question cannot properly be considered an exercise of original jurisdiction.

[215] 131 N.J. 594, 622 A.2d 843 (1992).

[216] *See* N.J. STAT. ANN. §§ 19:46-6 to -24 (West 1996); *Brady*, 131 N.J. at 600, 622 A.2d at 846.

[217] *Brady*, 131 N.J. at 605, 622 A.2d at 848.

> nal jurisdiction to this Court to decide challenges to the Redistricting Commission's actions.[218]

Given the holding in *Brady* and the fact that the New Jersey Constitution plainly does not enumerate original jurisdiction to answer certified questions, the authority to do so, if it exists, must be found elsewhere.[219]

c. The Supreme Court's Rulemaking Authority

The thesis of this Section is that the certification process is not an act of jurisdiction and that the constitutional provisions regarding the jurisdiction of the New Jersey Supreme Court and the inferior New Jersey courts are irrelevant to ascertaining the source of judicial power to answer a certified question. Rather, certification is a mechanism related to the administration of justice within the state — in essence providing for a procedural alternative to the customary practice of filing a declaratory judgment action in the superior court when a federal court abstains. When certification is understood as such, it is clear that the New Jersey Supreme Court's rulemaking authority provides a sufficient basis for adopting of the rule.

i. The Metaphysics of Jurisdiction

The Minority Report's conclusion that *Brady* forecloses the New Jersey Supreme Court from considering certified questions assumes two critical facts: (1) that answering a certified question is jurisdictional; and (2) that, furthermore, it is an act of *original* jurisdiction. Both of these implicit premises are incorrect.

Implicit in the Minority Report's conclusion that certification necessarily invokes the court's original jurisdiction is the conclusion that jurisdiction is, in its essence, the ability of a court to declare the substantive law. While this power may be a necessary element of jurisdiction, without more it cannot be said to constitute the exercise of jurisdiction. Jurisdiction entails not only the discernment of substantive legal principles, but also the inherent authority to find facts (at least in the case of original jurisdiction), to enter judgment, and to enforce that judgment.[220]

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[218] *Id.* at 606, 622 A.2d at 848-49.

[219] This conclusion is not problematic. As discussed further below, answering a certified question, to the extent it is jurisdictional at all, cannot be said to constitute the exercise of 'original' jurisdiction. The explicit limits on the New Jersey Supreme Court's original jurisdiction, therefore, are of little consequence to the ultimate determination of the Court's authority to hear and answer questions certified to it.

[220] *See, e.g.*, Epstein v. Bendersky, 130 N.J. Eq. 180, 186, 21 A.2d 815, 818 (Ch. 1941). The *Epstein* court defined jurisdiction:

Aside from discerning the pertinent principles of substantive law, certification contains none of the attributes incident to the exercise of jurisdiction. In the certification process, unlike the declaratory judgment action following *Pullman* abstention, where the state court is expected to find facts and render judgment, the facts are determined by the federal court before submission to the state high court.[221] It is the federal court's subject matter jurisdiction (usually its Article III diversity jurisdiction) that is invoked by the parties and that is the ultimate source of power to enforce the judgment entered. Accordingly, the federal court would enter judgment, the federal court would entertain motions to execute on the judgment, and the United States Marshall would be called upon, if necessary, to enforce the judgment. Put simply, it is the federal court that determines and enforces the rights and obligations of the parties. It is not surprising, therefore, that the Ohio and Oklahoma Supreme Courts have determined that certification simply is not jurisdictional and that any explicit limitations on the constitutionally assigned original jurisdiction of their respective Supreme Courts did not impact on their authority to entertain certified questions.[222]

There is a second layer to the Minority Report's analysis that merits discussion. In citing to *Brady* as imposing a limitation on the ability of the New Jersey Legislature to provide for additional categories of original jurisdiction beyond those explicitly enumerated in the constitution, the Minority Report assumes that certification would entail the exercise of *original* jurisdiction. Original jurisdiction connotes two elements that are not present in the certification process: (1) on a literal level that the proceeding have commenced in the particular court in question;[223] and (2) on a more substantive level, that

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> When we speak of the jurisdiction of a court under our constitution, as I now do, we refer to its power to entertain a certain class of litigation, or a particular cause, and to render a judgment therein which will be binding on the parties who are lawfully before the court.

Id.; *see also* Police Comm'r of Boston v. Mun. Court of the Dorchester Dist., 374 N.E. 272, 285 (Mass. 1977) ("Jurisdiction concerns and defines the power of courts, encompassing the power to inquire into facts, apply the law, make decisions, and declare judgment."); State v. Osborne, 32 N.J. 117, 122, 160 A.2d 42, 45 (1960) ("Jurisdiction . . . is the power . . . to hear *and* determine causes.") (emphasis added).

[221] *See, e.g.*, UNIF. CERTIF. OF QUESTIONS OF LAW [ACT][RULE] (1995) § 6(a)(2), 12 U.L.A. 75 (1996) (requiring the certifying court to submit a statement of "the facts relevant to the question").

[222] *See supra* text accompanying notes 188-93.

[223] *See* Handleman v. Marwen Stores Corp., 53 N.J. 404, 412, 251 A.2d 122, 126-27 (1969) ("We interpret 'exclusive original jurisdiction' as used in N.J.S.A. 34:15-49 to mean only that workmen's compensation cases must arise in the first instance in the Workmen's Compensation Division.").

the court having original jurisdiction, in contradistinction to appellate jurisdiction, act as the finder of fact or oversee that process.[224] Of course, neither of these essential attributes is present in the certification process. The case originates in federal court, and, as adverted to earlier, the federal court retains the power to resolve the factual disputes among the parties.

The Minority Report considered and rejected the argument that certification is not jurisdictional:

> It seems to us that two things are wrong with this position. The first is that "jurisdiction" is not just the issuance of a coercive final order. We believe "simply answering specific legal questions," should properly be considered as much an exercise of jurisdiction in connection with certifications as it is with declaratory judgments .... This is particularly true when certification answers are to be given the effect of binding precedent, as the Majority Report advocates.[225]

In the authors' view, these arguments do not alter the conclusion that certification is not jurisdictional. In a declaratory judgment action, the state court enters judgment, and if the judgment is disobeyed, state mechanisms are invoked to enforce it.[226] In a certification procedure, however, there exists a clear division of authority between determining the applicable law, on one hand, and applying and enforcing it on the other.[227]

The precedential effect of the state court's answer is irrelevant to the question of jurisdiction. The effect given the judgment entered by courts in either subsequent litigation between the parties or between other parties that raise the same issue is the result of judge-made rules of convenience and judicial economy and has little to do with the essence of jurisdiction — power to enter a conclusive judgment between the parties before the court.[228] Indeed, it is possible to

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[224] *See* BLACK'S LAW DICTIONARY 1099 (6th ed. 1990) (defining original jurisdiction as "[j]urisdiction to take cognizance of a cause at its inception, try it, and pass judgment upon the law and facts").

[225] Minority Report, *supra* note 84, at 10 (citations omitted).

[226] *See, e.g.*, N.J. CT. R. 4:59-1 (setting forth procedure for enforcing judgment).

[227] *See supra*, text accompanying notes 219-21.

[228] *See, e.g.*, Helvering v. Hallock, 309 U.S. 106, 119 (1940) ("Stare decisis is a principle of policy."); People v. Cuevas, 906 P.2d 1290, 1301 (Cal. 1995) (policy of stare decisis "'based on the assumption that certainty, predictability and stability in the law are the major objective of the legal system'") (citation omitted); People v. Bing, 558 N.E.2d 1011, 1014 (N.Y. 1990) ("Although a court should be slow to overrule its precedents, there is little reason to avoid doing so when persuaded by the lessons of experience and the force of better reasoning."); Otter Tail Power Co. v. Von Bank, 8 N.W.2d 599, 607 (N.D. 1942) ("Stare decisis is a rule of policy

conceive of a judicial universe without these judge-made doctrines, where a decision would only be binding on the parties before the court, and then only if not overturned by a subsequent court ruling. While such a system would no doubt be extremely inefficient, there would be no cause to question the validity of the first court's judgment or its ability to enforce it as the prevailing norm between the parties.

ii. The Scope of the Supreme Court's Rulemaking Authority: The *Winberry* Decision

If not exercising jurisdiction, what then would the New Jersey Supreme Court be doing if it responded to a question of law submitted by a federal court? This Article submits that the answer to this question is two-fold. First, through its unquestioned exclusive and plenary power under the New Jersey Constitution to make rules governing practice and procedure, it would be providing for, and acting upon, a procedure for cooperation between state and federal courts to assist the federal court in meeting its obligation under *Erie* to apply New Jersey substantive law. Second, through its exclusive administrative power over the New Jersey court system, it would be providing a procedural alternative for pronouncing New Jersey substantive law that avoids the delays and expenses attendant to the typical declaratory judgment action filed when a federal court abstains pursuant to *Pullman*. Both of these powers are subsumed within the New Jersey Supreme Court's rulemaking authority, which is discussed below.

The New Jersey Constitution provides: "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts."[229] In *Winberry v. Salisbury*,[230] the New Jersey Supreme Court had to decide whether a statute enacted prior to the adoption of the 1947 Constitution, allowing one year for taking appeals, preempted the rules promulgated by the Court limiting the time for taking appeals to forty-five days. The Court interpreted article VI's "subject to law" limitation to refer to laws "substantive in content," but not to the court's powers of rulemaking with respect to practice and procedure.[231] The New Jersey Supreme Court held this power to be exclu-

grounded on the theory that when a legal principle is accepted and established, rights may accrue under it and security and certainty require that the principle be recognized and followed thereafter even though it later be found to be not legally sound.").

[229] N.J. CONST. art. 6, § 2, para. 3.

[230] 5 N.J. 240, 74 A.2d 406 (1950).

[231] *See id.* at 247-48, 74 A.2d at 410.

sively its own. The Court concluded that "the rulemaking power of the Supreme Court is not subject to overriding legislation, but that it is confined to practice, procedure and administration as such."[232] Within this province, as *Winberry* made clear, the New Jersey Supreme Court's power is absolute. There is no authority on the part of the other branches of government to deal with the subject.

The procedural aspect of certification was recognized by the first Supreme Court to adopt such a rule — Florida's — and the last to do so — California's. The Florida Supreme Court's decision in *Clay* upheld the constitutionality of its rule of court providing for certification based on the provision of the Florida Constitution giving the Florida Supreme Court the power to promulgate rules governing practice and procedure:

> The statute authorized this court to provide, by rule of court, for the certification to it by federal appellate courts of questions of state law determinative of a cause pending in a federal court, "which certificate the supreme court of this state, by written opinion, may answer." Rule 4.61 of the Florida Appellate Rules was adopted by this Court "pursuant to the power vested in this Court under Article V of the Florida Constitution, F.S.A. to adopt rules governing the practice and procedure in all courts of this State . . . ." The Rule re-stated the provisions of the statute and added details relating to the form and content of the certificate. Its adoption was a valid exercise of our organic power and provided a procedure for assisting, in a spirit of comity, the Federal Appellate system in questions of state jurisprudence, no other forum for so doing having been established by the laws of Florida.
>
> It is obvious, therefore, that we need not concern ourselves with the question of whether this court derives its authority to entertain the subject proceeding from the statute or from the rule since, in either case, we have it.[233]

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[232] *Id.* at 255, 74 A.2d at 414; *see also* Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234 (1951); Eli L. Warach, Note, *The Rule-Making Power: Subject to Law?*, 5 RUTGERS L. REV. 376 (1950). For further discussion of the rules of court and the *Winberry* decision, see *Conversations with Morris M. Schnitzer*, 47 RUTGERS L. REV. 1391 (1995); Robert J. Kerekes, *The Crisis of Congested Courts: One Potential Solution*, 18 SETON HALL LEGIS. J. 489, 499-502 (1994); Hon. Marie L. Garibaldi, *The New Jersey Experience: Accommodating the Separation Between the Legislature and the Judiciary*, 23 SETON HALL L. REV. 3 (1992).

[233] Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 741 (Fla. 1961); *see also In re* Florida Appellate Rules, 127 So. 2d 444, 444 (Fla. 1961). The Court stated,

> Pursuant to the power vested in this Court under Article V of the Florida Constitution, F.S.A. to adopt rules governing the practice and procedure in all courts of this State and in recognition of the Provisions of

The Minority Report's implicit conclusion, therefore, that the Florida certification rule is premised upon an extra-constitutional grant of jurisdiction to entertain certified questions[234] is only partially correct. As the above quote demonstrates, the Florida Supreme Court found the constitutional grant of rulemaking authority to be a sound basis upon which to rest its certification procedure separate and apart from any jurisdictional grant from the Florida Legislature.

The California Supreme Court, one of the most recent high courts to adopt a certification procedure by rule, was more explicit in basing its authority to adopt a certification procedure on its rulemaking authority.[235] In a detailed internal memorandum, the California Supreme Court first considered whether a certification procedure was desirable in the abstract.[236] In concluding that a certification procedure was desirable, the memorandum noted that certification promotes comity and protects state sovereignty.[237] The memorandum also rejected the concerns that certification would unduly burden the Court[238] and that California's "case law" rule against advisory opinions precluded adoption of the procedure.[239] The memorandum next considered whether adoption of a certification rule would offend the California Constitution, and concluded that article VI, section 1[240]

> Section 25.031, Florida Statutes 1959, F.S.A., the Florida Appellate Rules, 31 F.S.A. are hereby amending in the following respects [provisions regarding certified questions, etc.].

Id.; *see also* Note, *Certifying Questions To State Supreme Courts As a Remedy To The Abstention Doctrine*, 9 S.D. L. REV. 158, 170 (1964) (discussing the procedural nature of certification).

[234] *See* Minority Report, *supra* note 84, at 11.

[235] *See* CAL. R. CT. 29.5 (adopted effective January 1, 1998). The Pennsylvania Supreme Court adopted an interim certification procedure by rule on October 28, 1998. *See supra*, note 9.

[236] *See* CALIFORNIA MEMORANDUM, *supra* note 95, at 6.

[237] *See id.* at 7.

[238] *See id.* at 7-8 ("I agree with the memos that the fears of some that this court would be unduly burdened by requests for certification appear to be unfounded.") (internal citations omitted).

[239] *See id.* at 8. The memorandum instructed:

> The vast majority of out-of-state authority holds that a state high court's opinion answering a certified question is *not* an impermissible advisory opinion so long as: (i) the court addresses only *issues that are truly contested by the parties*; (ii) the court addresses only issues that are *presented on a fully developed factual record*; and (iii) the court's opinion on the certified question *may be dispositive of the cause (and will be res judicata between the parties)*. Because the proposed rule would include and impose these conditions, an opinion on certification would not be an impermissible "advisory opinion."

Id.

[240] *See* CAL. CONST. art. VI, § 1 (providing that "[t]he judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, and municipal

provided "inherent judicial power" to consider certified questions.[241] Finally, the memorandum discussed the authority of the California Supreme Court to adopt a certification procedure by court rule,[242] rather than by statute or legislative enactment. The following observation is relevant to the question whether the New Jersey Supreme Court can adopt the procedure by rule:

> [I]f we were to support adoption of a certification procedure, it would be preferable to select the course taken by many of our sister states, and seek implementation of a certification procedure by rule enacted by the Judicial Council pursuant to its constitutional authority to create rules for court administration (see art. VI, § 6), rather than by a statute enacted by the Legislature, or by constitutional amendment. The Judicial Council is the entity charged by the Constitution with authority to consider and enact rules of judicial practice and procedure, and is equipped to address issues such as this.[243]

In addition to falling within the New Jersey Supreme Court's broad rulemaking authority with respect to practice and procedure, the proposed certification rule falls within the article VI mandate to promulgate rules regarding the administration of the courts. In the

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courts, all of which are courts of record").

[241] The memorandum suggests that answering a certified question is a jurisdictional act. *See* CALIFORNIA MEMORANDUM, *supra* note 95, at 9 ("I believe that it would be possible, in a future opinion of this court, to . . . articulate a reasoned basis on which we might conclude that exercise of jurisdiction over a certified question is a proper attribute of 'inherent judicial power.'"). The authors, as stated above, disagree with the view that answering a certified question requires a jurisdictional grant, inherent or explicit. The New Jersey Supreme Court, therefore, need not search the New Jersey Constitution for an implied grant of power to answer certified questions, because it can utilize the explicit grant of power to promulgate rules of administration and procedure to achieve this end. *See supra* notes 228-31 and accompanying text.

[242] *See* CAL. CONST. art. VI, § 6:

> To improve the administration of justice, the council [consisting of two Supreme Court Justices and a number of lower court judges] shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and the Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute.

[243] CALIFORNIA MEMORANDUM, *supra* note 95, prepared for California's Supreme Court with respect to the Court's consideration of a certification rule (on file with the authors). In *In re Elliott*, 446 P.2d 347, 358 (Wash. 1968), the Washington Supreme Court also emphasized the essentially procedural nature of certification even though the certification procedure there was enacted by statute. *See id.* at 350 (discussing the burden placed on litigants and courts by abstention and characterizing certification as "a procedure whereby litigants in federal court actions might obtain answers, in an expeditious manner, to questions of state law").

absence of a certification procedure, federal courts are forced to hazard a guess at the state's substantive law, or abstain. Insofar as the federal courts avail themselves of the latter option, the administration of justice within New Jersey is undoubtedly and profoundly affected. As the Washington Supreme Court stated:

> The great burden created by the abstention doctrine is the matter of delay. If the doctrine is invoked, the parties may appeal to the United States District Courts of Appeal and possibly to the United States Supreme Court. If the case is stayed or dismissed, the litigant must bring the case in the state courts. The parties must obtain a decision from the highest state court.
>
> The delay and expense give advantage to a financially-endowed litigant, and he may be able to control the forum. He can intentionally choose federal adjudication in a case reasonably certain to be sent back to the state court. In this way the adversary who is less able financially may be forced to settle or abandon his suit.
>
> Thus the legislature, in enacting Laws of 1965, ch. 99, sought to afford a procedure whereby litigants in federal court actions might obtain answers, in an expeditious manner, to questions of state law which controlled the disposition of their cases. The procedure is a shortcut, eliminating the necessity of instituting a declaratory judgment action in the superior court and taking an appeal to this court. The statute is not designed to increase the work load of this court, but rather to simplify the procedure for obtaining decisions on state questions which are relevant in federal court suits.[244]

Because a certification procedure would be enacted to ease the burden of the state's trial courts in this manner, it clearly falls within the ambit of the New Jersey Supreme Court's article VI power. In *State v. Leonardis*,[245] for example, the Supreme Court of New Jersey considered whether its adoption by court rule of a pretrial intervention program in criminal cases in lieu of prosecution fell within the court's article VI power. It held that, because the rule was designed to minimize the impact of an increasing caseload on the administration of criminal justice, the rule was properly promulgated.[246] Since a certification rule would provide a procedural alternative to the costly process incident to *Pullman* abstention — a declaratory action filed first in the state's trial courts, which must then wend through the in-

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[244] *Elliott*, 446 P.2d at 349-50.

[245] 71 N.J. 85, 363 A.2d 321 (1976) *on reh'g* 73 N.J. 360, 375 A.2d 607 (1977).

[246] *See id.* at 108-10, 363 A.2d at 333-34.

termediate appellate courts and ultimately to the state's highest court — it would undoubtedly impact the caseload of the lower courts in New Jersey.[247] It would also relate to the administration of justice by avoiding the evils identified by the *Elliott* Court — forum shopping by deep-pocketed litigants.[248] Accordingly, promulgation of a certification rule falls squarely within the administrative province of the New Jersey Supreme Court.

Considered either as a procedure arising out of comity, or as a means of effectively reducing adjudicative burdens in the state, certification can and should be promulgated by rule of the New Jersey Supreme Court pursuant to its article VI rulemaking power.

III.

The remainder of this Article will discuss the proposed certification rule attached to the Majority Report prepared by the Subcommittee on Certification. This Article will suggest that federal district courts, in addition to federal appellate courts, should be given the authority to propose certified questions to the New Jersey Supreme Court. In addition, this Article will propose certain modifications to the rule proposed by the subcommittee, which it will incorporate into a proposed rule in Section III(D).

The Majority Report contains a proposed draft model rule for certification, which reads as follows:

> 2:2-2A Answering Certified Questions of Law
>
> (a) The Supreme Court may answer a question of law certified to it by any appellate court of the United States, or by the highest

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[247] In providing for this procedural alternative to filing a declaratory judgment action, a certification rule would not run afoul of *Brady* by conferring original jurisdiction upon the Supreme Court. Certification, as discussed above, does not entail the typical fact-finding incidents of original jurisdiction, and therefore cannot properly be considered the exercise of such. The Supreme Court, by accepting the federal court's findings of fact and articulating the law of New Jersey, engages in a process of cooperative federalism that relieves the state trial courts and intermediate appellate courts of the burdens associated with fact finding and substantive law determination incident to *Pullman* abstention.

[248] *See supra* text accompanying note 244. The Minority Report disputes the contention that the New Jersey Supreme Court's rulemaking authority confers upon it the power to promulgate a certification rule. *See* Minority Report, *supra* note 84, at 10 ("The practice and procedure power is explicitly subject to (substantive) law, and any original jurisdiction arising under it would be limited to adjective matters. Certifications, by definition, involve questions of substantive state law."). In the authors' view, the Supreme Court's rulemaking authority, as exemplified by the *Leonardis* decision, which upheld the constitutionality of a rule creating a pre-trial alternative to incarceration, is broader than that identified by the Minority Report and can involve "substantive" matters within the scope of judicial administration.

court of another state, if the answer would be determinative of a pending litigation in the certifying court and New Jersey law on the issue is unsettled.

(b) The Supreme Court may reformulate a question of law certified to it.

(c) A certification shall contain:

(i) The question or questions to be answered.

(ii) A statement of the facts relevant to the question.

(iii) The names and addresses of the counsel of record and of parties appearing without counsel.

(d) The Supreme Court may require the certifying court to supply it with the record of the matter certified, or a portion thereof.

(e) No papers, other than those described in subsections (c) and (d) of this rule may be filed in connection with a certification, except by leave of court.

(f) [Reserved]

A. *The Proper Scope of Inter-Jurisdictional Certification: District Courts Should Be Permitted to Propound Certified Questions*

The authors' most fundamental objection to the proposed rule is its restrictive scope, at least as it regards federal courts.[249] Federal district courts should be given the authority to propound questions to the New Jersey Supreme Court for several reasons. First, many important issues arise in district court proceedings, and, for whatever reason, are not the subject of an appeal; the New Jersey Supreme Court should have the discretionary power to identify serious state law issues that arise in this manner and shape the state's substantive law accordingly. Second, while development of a factual record is sometimes desirable, there are often times when a purely legal issue is presented. Waiting until the case has been tried and appealed in such cases results in an unnecessary burden on both the litigants and the judiciary.[250] Third, and somewhat relatedly, since the New Jersey Supreme Court retains complete discretion over which certified

[249] In the authors' view, the proposed rule appropriately recognizes the importance of state-to-state certification of questions of New Jersey law by allowing the highest courts of other states to request answers to certified questions. For a thorough and compelling presentation outlining the benefits of interstate certification, and lamenting its under use, see Robbins, *Interstate Certification*, *supra* note 7.

[250] *See* Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1073 (1997) (rebuking federal district court for failing to certify purely legal question of Arizona law).

questions to answer, it can weed out cases that are factually underdeveloped and maintain control over its docket by answering only those certified questions the Court itself identifies as sufficiently pressing and factually developed.

Allowing a district court to propound certified questions avoids the delays associated with *Pullman* abstention. The United States Supreme Court recently opined on this issue, and indirectly endorsed district court certification, in *Arizonans for Official English v. Arizona*.[251] In that case, a state employee brought suit against Arizona, its governor and attorney general, and various governmental agencies seeking an injunction against enforcement of an amendment to the Arizona Constitution purporting to make English the state's official language. Despite several requests from the parties during the eight years the case was litigated, the District Court and the Ninth Circuit declined to seek an authoritative construction of the scope of the amendment through the state's certification procedure. (A narrow construction might have avoided finding the amendment violative of the United States Constitution). Rejecting the narrow construction of the amendment offered by Arizona's Attorney General, both the District Court and the Ninth Circuit found the amendment overbroad and facially invalid. The United States Supreme Court ultimately vacated the lower courts' determination that the amendment violated the United States Constitution, because the named plaintiff had resigned her position and the controversy had therefore become moot. The opinion, nevertheless, discussed the availability of certification in Arizona, and admonished both the Ninth Circuit *and* the District Court for their failure to utilize it:

> Both lower federal courts in this case refused to invite the aid of the Arizona Supreme Court because they found the language of Article XXVIII "plain," and the Attorney General's limiting construction unpersuasive . . . . A more cautious approach was in order . . . .
>
> The course of [plaintiff's] case was complex. The complexity might have been avoided had the *District Court*, more than eight years ago, accepted the certification suggestion made by Arizona's Attorney General.[252]

The lack of a certification procedure for district courts also pressures district courts to abstain pursuant to *Pullman*, thus causing unwarranted delays and expense for litigants and both the federal and

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[251] 117 S. Ct. 1055 (1997).

[252] *Id.* at 1073-75 (emphasis added).

state systems.[253] Allowing district courts the option of propounding certified questions, therefore, would obviate the tortuous *Pullman* process and alleviate the burdens on state trial courts of litigating declaratory judgment actions initiated there after the federal court abstains.[254]

In addition to reducing delays, allowing federal district courts to propound certified questions permits the New Jersey Supreme Court to identify and adjudicate important issues of state law. Since most district court judgments are not appealed,[255] a rule preventing federal district judges from propounding certified questions would reduce the pool of certified issues arbitrarily to a subset of questions that have been appealed by litigants. There is no logical reason that this subset should correlate with those issues that are necessarily of importance to the state; rather, they most likely correlate to the litigiousness of the parties and/or their financial resources. In any event, placing this kind of artificial constraint on the universe of eligible certification issues makes little sense and reduces the ability of the New Jersey Supreme Court to define the substantive law of the state.

The issue that seems most prominent in the minds of opponents of federal district court certification is the fear of docket inundation. The simple answer is that it has not been a problem in the jurisdictions that allow district courts to propound certified questions, and there is little reason to believe the experience in New Jersey would be different.[256] Even if federal district judges were prone to overusing the certification device, the New Jersey Supreme Court would retain ultimate control of the process and could limit its interjurisdictional

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[253] *See* Braun, *supra* note 12, at 957 ("Permitting district courts to certify questions would . . . reduc[e] the need for *Pullman* abstention [and cause] a consequent reduction on the state trial court caseload.").

[254] *See Arizonans for Official English*, 117 S. Ct. at 1073 ("Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.").

[255] *See, e.g.*, Goldschmidt, *supra* note 9, at 59 (quoting a federal district judge: "I'm a district court judge — 80% of my litigated cases are not appealed — only 10% of my cases are litigated. It's important that my decisions are just; that means deciding correctly according to governing law of the governing jurisdiction — the procedure should be available to me.").

[256] *See* Braun, *supra* note 12, at 957-58 ("The literature indicates that certification has been used very sparingly, and that there has been no avalanche even in those states which permit district court certification."); Medina, *supra* note 12, at 114 ("Empirical evidence from states which permit district court certification shows that state appellate dockets are not flooded by questions certified from district courts.").

certification docket just as it limits its intrajurisdictional certification docket.

Another oft-repeated concern is that the factual record will not be sufficiently developed in the lower court seeking to certify state law questions. Two answers to this perceived dilemma are readily apparent. First, as a practical matter, the New Jersey Supreme Court can simply decline to answer the certified question if the factual record is insufficiently developed (or for any reason at all). Second, the proposed rule, at paragraph (c)(2), would require a statement of the facts, which should allay concerns that the legal issues are being presented in a factual vacuum.[257]

Most importantly, however, allowing district courts to propound certified questions allows the state judiciary to define the substantive rules that govern New Jersey citizens regardless of whether the issues survive the trial court gauntlet and receive appellate review. Allowing district courts to propound certified questions recognizes that it is not the origin of the question that matters, but rather its substance.[258] If the record is sufficiently developed at the trial level (as with purely legal questions), and the question is important enough for Supreme Court attention, it would be counterproductive to decline to entertain the question because it is propounded by a district judge, rather than an appellate panel.

B. "Would Be" vs. "May Be:" The Proposed Rule's Overly Restrictive Determinativeness Requirement

The draft certification rule included with the Majority Report proposes to limit certification to instances in which the certified answer "would be" determinative of the litigation in the certifying court. This language would be unique to New Jersey's certification procedure, would encourage undue litigation regarding whether a question is determinative of the entire litigation, would restrict the scope of certification to a small subset of legal issues that would dispose of an entire litigation, and would frustrate the promotion of a uniform certification procedure.[259] For these reasons, the authors recom-

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[257] *See* Medina, *supra* note 12, at 114 ("The fear that district court certification will be particularly conducive to abstract state opinions is similarly unfounded. All certification procedures require either a statement of facts or a stipulation of facts; thus, a factual record will exist.").

[258] *See* Robbins, *Proposal for Reform*, *supra* note 12, at 134-36 (arguing that allowing district courts to certify is important to resolve major issues early in the litigation, to avoid loss of decision when a party fails to appeal, and to provide uniformity and fair judicial decisions).

[259] *See* UNIF. CERTIF. OF QUESTIONS OF LAW [ACT] [RULE] (1995), Prefatory Note, 12

mend that the New Jersey Supreme Court adopt a rule providing for the authority to certify when a question "may be" determinative of an issue in the litigation.

The phrase "would be determinative of a pending litigation," while not completely clear, most likely is meant to mean that the certified issue be potentially dispositive of the entire litigation when it is applied in the future by the certifying court, although this meaning would have been better conveyed by the phrase "will be determinative of a pending litigation." In this sense, the proposed language is closest to the minority of jurisdictions that require that the certified answer "is" determinative of the underlying litigation.[260] In the authors' view, this language unduly restricts the ability of the certifying court to propound questions and is unnecessary in light of the discretion retained by the New Jersey Supreme Court to reject any certified questions propounded to it.

The determinativeness requirement is designed to avoid the "advisory opinion" dilemma by ensuring that the certified question, if answered, actually will be given effect in the pending litigation.[261] The "may be determinative" language is sufficient to guard against the evils of quasi-advisory opinions without unduly restricting the ability of certifying courts to propound, and answering courts to answer, important issues of state law that may or may not, depending on the answer, dispose of all aspects of the litigation.[262] Requiring that the answer to the certified question "would be" determinative of the pending litigation would "spawn satellite controversies over whether

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U.L.A. 69 (1996) (explaining that the inconsistency of statutory language among states has significantly impeded use of certification). The benefits of adopting a uniform statute in the certification context have been noted by the Oregon Supreme Court. *See* Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 629 n.2 (Or. 1991) ("Because our statute is based on a uniform law there exist useful commentary on the Uniform Act, instructive case law from other uniform-law jurisdictions, and informative academic treatment of the subject.") (citing 12 U.L.A. 49 (1975 & Supp. 1990); WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, *supra* note 6, § 4248).

[260] *See* Goldschmidt, *supra* note 9, at 18-19 (listing states that use "is determinative" language).

[261] *See* Robbins, *Proposal for Reform*, *supra* note 12, at 148 (maintaining that the "may be determinative" language "ensures that resolving the state law is necessary to the resolution of the federal-court case").

[262] *See* Schleiter v. Carlos, 775 P.2d 709, 710 (N.M. 1989) (enunciating that a rule providing that certification request set forth "either a statement by the certifying court of the facts relevant to the question certified, showing the nature of the controversy in which the questions arose, or a stipulation of such facts by the parties, which has been approved by the certifying court" effectively avoids rendering advisory opinions).

the question was properly certified in light of the ultimate outcome of the underlying litigation."[263]

For similar reasons, the authors recommend against the proposed language requiring the answer to be determinative of a "pending litigation." Requiring the answer to be potentially dispositive of the entire litigation, rather than an issue in it, is unduly restrictive and likely to lead to unproductive bickering regarding issues collateral to the issue of law presented by the certified question. The authors would recommend instead the following language: "may be determinative of an issue in the pending litigation."[264]

C. *"Unsettled" vs. "No Controlling Precedent:" The Proposed Rule's Ambiguous Precedential Requirement*

The draft certification rule also proposes to limit certification to instances where New Jersey law is "unsettled." This language has no clear analogues in any of the various states to have adopted a certification procedure. It is bound, therefore, to derail efforts to promote a uniform certification procedure and to engender litigation regarding what legal questions are "unsettled." The authors propose to limit the availability of certification to those legal issues regarding which there is no controlling New Jersey Supreme Court decision, New Jersey constitutional provision, or New Jersey statute.

Some states (such as California), and the 1995 Uniform Certification of Questions of Law Rule, limit the authority to certify to instances where there is no controlling appellate precedent, either from the state's highest court or the state's intermediate appellate courts. In the authors' view, it is unnecessary to preclude certifying courts from propounding certified questions when there are intermediate appellate court decisions on point. As set forth above, a federal court applying state law is *not* obligated to apply a decision of an intermediate appellate court[265] and, therefore, the intermediate ap-

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[263] UNIF. CERTIF. OF QUESTIONS OF LAW [ACT] [RULE] (1995) § 2 cmt., 12 U.L.A. 73 (1996); *see also* Robbins, *Proposal for Reform*, *supra* note 12, at 180. The "must be determinative" standard

> leads to counterproductive battles concerning which questions should be answered. The answering and certifying courts then become bogged down in procedural rather than substantive determinations. The 'must be determinative' language shackles certifying court, placing procedural locks on certification of the question when the process requires openness in order to function properly.

Id.

[264] UNIF. CERTIF. OF QUESTIONS OF LAW [ACT] [RULE] (1995) § 2(2), 12 U.L.A. 72 (1996).

[265] *See supra*, text accompanying notes 129-31.

pellate decision cannot be said to be controlling of the parties' rights. The New Jersey Supreme Court would, under the proposed rule, maintain complete discretionary authority to decline to answer the certified question. Therefore, if there were no precedent from the state's highest court, but the intermediate appellate decision appeared to control, the Supreme Court of New Jersey could decline to answer or, if it felt the intermediate court's decision was incorrect, could overrule the decision.[266] Given the discretion inherent in the rule, it simply is not necessary to place overly restrictive barriers on the certifying court's ability to *request* an answer from the New Jersey Supreme Court.

D. A Proposed Model Rule

The certification rule proposed here by the authors is modeled after the 1995 Uniform Certification of Questions of Law Rule.[267] While other certification procedures have been adopted and could provide a helpful model,[268] in the interests of uniformity, the authors believe it would be desirable to adopt the 1995 uniform rule,[269] with certain minor adjustments.[270]

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[266] *See* Braun, *supra* note 12, at 959-60.

[267] UNIF. CERTIF. OF QUESTIONS OF LAW [ACT][RULE] (1995) §§ 1-14, 12 U.L.A. 71-79 (1996).

[268] In particular, California's recently adopted rule, while it strays from the uniform rule in many respects, is comprehensive and has been analyzed usefully in the literature. *See* Braun, *supra* note 12.

[269] There are, in fact, two uniform rules at present, one promulgated in 1967 and the second in 1995. The majority of adopting jurisdictions have enacted variants of the 1967 uniform act, therefore making it an attractive candidate for adoption by New Jersey. To date, only two states, Maryland and West Virginia, have adopted the 1995 uniform act. *See* MD. CODE ANN., CTS & JUD. PROC., §§ 12-601 to -603 (1996); W. VA. CODE §§ 51-1A-1 to -13 (1996). Nevertheless, the authors feel that the 1995 act refines the 1967 uniform act in desirable ways, and therefore would recommend its adoption over the 1967 uniform act.

[270] Two of these variations become readily apparent. The first two sections of the 1995 uniform act, dealing with definitions of states and Native American tribes (Section 1) and the power of the state Supreme Court to certify questions to other state courts (Section 2), are, in the authors' view, unnecessary, and are therefore not reproduced. Section 7 of the uniform act, which is designed to afford docket priority to certified questions, is also, in the authors' view, an unnecessary intrusion into the internal operations of the New Jersey Supreme Court, and is therefore not reproduced in the authors' proposed rule. Sections 12, 13, and 14, which respectively proscribe uniformity of application and construction, provide for a short title, and provide for an effective date, are similarly omitted as being unnecessary.

Text of Proposed Rule:

2:2-2A. Answering Certified Questions of Law

(a) The Supreme Court of this State may answer a question of law certified to it by any appellate or district court of the United States, or by the highest court of another state, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling Supreme Court[271] decision, constitutional provision, or statute of this State.

(b) The Supreme Court may reformulate a question of law certified to it.

(c) The court certifying a question of law to the Supreme Court shall issue a certification order and forward it to the Supreme Court. Before responding to a certified question, the Supreme Court may require the certifying court to deliver all or part of its record to the Supreme Court.

(d) A certification order must contain:
  (1) the question(s)[272] of law to be answered;
  (2) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose;
  (3) a statement acknowledging that the Supreme Court, acting as the receiving court, may reformulate the question; and
  (4) the names and addresses of counsel of record and parties appearing without counsel.[273]

(e) The Supreme Court shall issue an order accepting or denying the request for an answer to the certified question(s). If the Supreme Court accepts the request, it shall announce that deter-

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[271] The uniform rule here reads "no controlling appellate decision." The authors reasons for rejecting this language are set forth above. *See supra* text accompanying notes 264-65.

[272] The uniform rule contains only the singular. The authors' language clarifies that one certification request may seek the answers to more than one legal question.

[273] The uniform rule contains an additional subparagraph, which reads:

> (b) If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as part of the certification order.

UNIF. CERTIF. OF QUESTIONS OF LAW [ACT] [RULE] (1995) § 6(b), 12 U.L.A. 75 (1996). In the authors' view, this additional provision is confusing, in that it implies that the statement of facts in the certification order is not necessarily crafted by the certifying court. In order to avoid contentiousness, the statement of facts in the certification order should always be crafted by the certifying court; to the extent the certifying court wishes to adopt procedures to encourage stipulations of the facts by the parties, it should do so. The rule adopted by the answering court, however, should not confuse the issue by injecting this element of potential confusion into the process.

mination in the manner that it announces the acceptance of cases for review.[274]

(f) After the Supreme Court has accepted a certified question, the New Jersey Rules of Court for briefing, argument, and conduct of appeals shall govern further proceedings, unless the Supreme Court otherwise provides.[275]

(g) The Supreme Court shall state in a written opinion the law answering the certified question and send a copy of the opinion to the certifying court, counsel of record, and parties appearing without counsel.[276]

(h) Fees and costs are the same as in civil appeals docketed before the Supreme Court and must be equally divided between the parties unless otherwise ordered by the certifying court.

IV.

A certification procedure should be adopted by the New Jersey Supreme Court for both philosophical and practical reasons. Certification advances cooperative judicial federalism and allocates the responsibility for adjudicating state law appropriately to the judicial body most suited to the task. It advances the interests of New Jersey's citizens and judiciary by placing the responsibility for deciding important state issues, and charting important state policy, where it belongs — with the highest court of the state. It serves the interest of litigants and the courts by improving the litigation process, providing authoritative and binding pronouncements of state law, and reducing the delays and costs resulting from *Pullman* abstention. The practical concerns that have been raised are red herrings. The experiences of other populous states, such as California, Florida, and New York,

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[274] This section, modeled after CAL. R. CT. 29.5(g), is designed to replace Section 7 of the uniform rule, which, as noted above, injects an undesirable element of control over the New Jersey Supreme Court's docket.

[275] The language in this section differs slightly from the language in the uniform act, and adheres more closely to the California certification rule. *See* CAL. R. CT. 29.5(g)(1). The only substantive departure is the elimination of the following language from the uniform act's section: "Procedures for certification from this State to a receiving court are those provided in the rules and statutes of the receiving forum." In the authors' view, this language is not necessary and is therefore eliminated from their proposed rule.

[276] To allay any fears that the certifying court would not follow the certified answer, the New Jersey rule could, just as its California counterpart, include an explicit provision mandating that the certifying court follow the answer. *See* CAL. R. CT. 29.5(b)(4) ("[T]he answer provided by the California Supreme Court will be followed by the certifying court."). For the reasons set forth earlier in this Article, however, the authors do not believe that this language is necessary to compel certifying courts to accept the certified answer. *See supra* text accompanying notes 152-55.

demonstrate that the docket control pit bull is, in reality, a tame lap dog. There is no reason to believe that the New Jersey dog would be any more vicious.

The New Jersey judiciary's reluctance to adopt a certification procedure is difficult to harmonize with its long-standing position as a legal innovator. Certification has received the almost universal blessing of scholars and state and federal judges who have utilized it. It has been analyzed academically and tested in state and federal courthouses across the county and has been found to function properly. Certification works, and New Jersey should join its sister states in adopting this useful procedure.