

NOTE

You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts

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ABSTRACT

While exercising diversity or supplemental jurisdiction, federal courts often confront cases where the applicable state law is unclear. Certification procedures provide federal courts with the ability to ascertain the meaning of unclear state law by asking the state supreme court. Despite these procedures, federal courts generally will not certify a question to the state supreme court—even when the state law is genuinely unclear—unless they conclude that the question of state law involves important policy choices that state courts are better situated to make. This Note argues that this consideration poses theoretical, practical, and constitutional problems under the Erie doctrine. This Note then proposes a model certification rule under which federal courts' decision to certify a question does not depend on federal courts' consideration of a state's policy interests.

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INTRODUCTION

Ross Paul Yates was found dead, tied to a wall in the Baldwin County jail in Alabama on May 30, 2006.¹ Yates, who had no prior criminal history, was arrested for alleged burglary and theft.² Yates had been released on bail in March 2005, but was booked as a pretrial detainee on May 27, 2006.³ On the day he died, Yates exhibited symptoms of alcohol withdrawal.⁴ The jail medical staff prescribed Yates three doses of medication and placed him under observation.⁵ Yates returned to his cell after receiving the first dose, but never received

1 See *LeFrere v. Quezada (LeFrere I)*, 582 F.3d 1260, 1262 (11th Cir. 2009).

2 *Id.*; Complaint ¶ 10, *LeFrere v. Baldwin Cty. Comm’n*, No. CV-07-661 (S.D. Ala. 2007), 2007 WL 4739843.

3 *LeFrere I*, 582 F.3d at 1262.

4 *Id.*

5 *Id.*

the second and third doses at the scheduled times.⁶ Subsequently, Yates became unruly and agitated.⁷ Instead of giving him his medication, however, Corrections Officer Jorge Quezada “removed Yates from his cell, handcuffed his hands behind his back, and fastened him to a D-ring on a wall.”⁸ D-rings “force[] prisoners to stand, handcuffed to a metal ring or rail inside a cell with their hands behind their backs,” and are used to control and subdue unruly inmates.⁹ Yates was forced to stand tied to the wall for nearly four hours.¹⁰ During this time, Quezada failed to give Yates his medication or observe him as prescribed.¹¹ Yates died from alcohol withdrawal that night.¹²

Yates’s estate sued Quezada in the United States District Court for the Southern District of Alabama under federal and state law.¹³ Plaintiffs brought two federal claims against Quezada under 42 U.S.C. § 1983 for violations of Yates’s civil rights and also brought one state claim of negligent or wanton breach of duties.¹⁴ Quezada asked the federal district court to dismiss the state law claim against him.¹⁵ Quezada argued that jailers had absolute immunity under Alabama law and therefore could not be sued.¹⁶ Quezada’s claim of absolute immunity, however, had no basis in Alabama’s constitution, statutes, or court cases. The Alabama constitution provided immunity for the State of Alabama alone.¹⁷ The Alabama legislature, at the time, had not enacted any statute granting immunity to jailers.¹⁸ The Alabama Supreme Court had extended immunity to several of Alabama’s pub-

⁶ *Id.*

⁷ *See id.*

⁸ *Id.*

⁹ *See Corrections Officer Fired After Death of Inmate*, DECATUR DAILY NEWS (Aug. 22, 2006), <http://legacy.decaturdaily.com/decaturdaily/news/060822/officer.shtml> [<https://perma.cc/XNS6-4JP4>].

¹⁰ *Id.*

¹¹ *LeFrere I*, 582 F.3d at 1262.

¹² *Id.*

¹³ *Id.* Plaintiffs Suzanne LeFrere and Elaine Garner were appointed personal representatives of the Estate of Yates. Complaint, *supra* note 2, ¶ 4. Plaintiffs initially named the County, the County sheriff, and the County corrections officer chief as defendants, but the suits against these parties were dismissed because they properly invoked the absolute immunity defense. *LeFrere I*, 582 F.3d at 1262–63.

¹⁴ *Id.* at 1262. The two federal claims alleged deliberate indifference to Yates’s serious medical needs and cruel and unusual punishment. The sole state claim alleged negligent or wanton breach of duties to Yates. *Id.*

¹⁵ *Id.* at 1263.

¹⁶ *Id.*

¹⁷ *See* ALA. CONST. art. I, § 14 (“That the State of Alabama shall never be made a defendant in any court of law or equity.”).

¹⁸ *See generally Ex parte Shelley*, 53 So. 3d 887 (Ala. 2009), *superseded by statute*, Jailer

lic officials,¹⁹ but not to jailers.²⁰ In fact, the Alabama Supreme Court had never even addressed the question of whether jailers had absolute immunity.²¹ Nevertheless, federal courts in Alabama at the time had recognized absolute immunity for jailers.²²

This anomaly was a product of the *Erie* doctrine.²³ doctrine. Under *Erie*, federal courts must apply state law in cases that are not governed by federal law, but are strictly prohibited from creating the state law.²⁴ Federal courts face a dilemma when the state law does not exist or is unclear. State courts can “fill in the gap” by creating or clarifying the state law, but federal courts cannot.²⁵ Federal courts, which have the duty to decide the pending cases,²⁶ have two options: (1) ask the state supreme court for an authoritative answer that will be binding in state and federal courts (certification); or (2) make an educated guess that is not binding in state courts but binding only in federal courts (*Erie*-guess).²⁷

When the United States Court of Appeals for the Eleventh Circuit first faced the question of jailer immunity in 1997, neither the Alabama Supreme Court nor Legislature had provided an answer.²⁸ The Eleventh Circuit made an *Erie*-guess that Alabama law would shield jailers from lawsuits: “We *believe* the Alabama Supreme Court would accord the same treatment to . . . claims of negligence and wrongful death against the jailers that it has given claims against sher-

Liability Protection Act, 2011 Ala. Laws 2067 (codified at ALA. CODE § 14-6-1), for discussion of immunity for Alabama officers.

¹⁹ Sheriffs and deputies have absolute immunity. *Ex parte* Sumter Cty., 953 So. 2d 1235, 1239 (Ala. 2006). The Governor, Lieutenant Governor, Attorney General, Secretary of State, and Commissioner of Agriculture and Industries have absolute immunity. *E.g.*, *Parker v. Amer-son*, 519 So. 2d 442, 443–46 (Ala. 1987).

²⁰ See *Ex parte* Shelley, 53 So. 3d at 897.

²¹ See *id.*

²² See *Lancaster v. Monroe Cty.*, 116 F.3d 1419, 1431 (11th Cir. 1997), *overruled by LeFrere I*, 588 F.3d 1317 (11th Cir. 2009).

²³ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²⁴ See *id.* at 78–79.

²⁵ See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1471–72 (1997).

²⁶ See 28 U.S.C. § 1331 (2012) (“The district courts *shall* have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” (emphasis added)); 28 U.S.C. § 1332 (2012) (“The district courts *shall* have original jurisdiction of all civil actions where the matter in controversy . . . is between citizens of different States.” (emphasis added)).

²⁷ See Clark, *supra* note 25, at 1461, 1465–66, 1523 (“[F]ederal-court predictions of state law are not *binding* in state court.”).

²⁸ See *Lancaster v. Monroe Cty.*, 116 F.3d 1419, 1431 (11th Cir. 1997), *overruled by LeFrere I*, 588 F.3d 1317 (11th Cir. 2009).

iffs and deputy sheriffs. Accordingly, we hold that those claims are barred by Alabama's absolute sovereign immunity."²⁹ The Eleventh Circuit's "belief" had an enormous impact. This belief became a precedent for lower federal courts in Alabama.³⁰ In federal courts, jailers had win after win not only in dismissing state claims against them, but also in dismissing even the federal claims that necessarily implicated the state law of immunity.³¹

But this time, the federal district court had a different belief.³² Based on the recent development in other areas of Alabama law, although the Alabama Supreme Court still had not addressed the question of jailer immunity, the federal district court now believed jailers were not entitled to absolute immunity.³³ The Eleventh Circuit, on appeal, similarly questioned whether its previous decision was valid.³⁴ So the Eleventh Circuit used certification and asked the Alabama Supreme Court whether jailers had absolute immunity under Alabama law.³⁵ Coincidentally, in a case wholly unrelated to Yates's and the Eleventh Circuit's certified question, the Alabama Supreme Court finally addressed the issue of jailer immunity in *Ex parte Shelley*.³⁶ Contrary to the Eleventh Circuit's previous belief, the Alabama Supreme Court held that jailers do not have absolute immunity under Alabama law.³⁷ Based on the Alabama Supreme Court's authoritative decision, the Eleventh Circuit did not allow Quezada's defense to stand.³⁸

The Alabama jailer immunity cases illustrate several important points.³⁹ Federal courts need authoritative state law in the course of

²⁹ *Id.* (emphasis added).

³⁰ See, e.g., *Vinson v. Clarke Cty.*, 10 F. Supp. 2d 1282, 1302–03 (S.D. Ala. 1998) (holding jailers, like sheriffs, are officers and have immunity under Alabama law).

³¹ See, e.g., *Kirkland v. Cty. Comm'n of Elmore Cty.*, No. 2:08cv86-MEF, 2009 WL 773205, at *3, *5 (M.D. Ala. Mar. 18, 2009) (dismissing federal claims against jailer); *Vinson*, 10 F. Supp. 2d at 1302–03 (dismissing the federal § 1983 claim against jailers because they were immune under state law, and § 1983 left that immunity intact).

³² *LeFrere I*, 582 F.3d 1260, 1263 (11th Cir. 2009).

³³ *Id.*

³⁴ *Id.* at 1268.

³⁵ *Id.* at 1268–69.

³⁶ 53 So. 3d 887, 890–91 (Ala. 2009), *superseded by statute*, Jailer Liability Protection Act, 2011 Ala. Laws 2067 (codified at ALA. CODE § 14-6-1).

³⁷ *Id.* at 896–97.

³⁸ See *LeFrere v. Quezada (LeFrere II)*, 588 F.3d 1317, 1318 (11th Cir. 2009).

³⁹ The subsequent development of jailer immunity in Alabama is a great illustration of *Erie* and certification in practice. First, state legislatures can change the state law by overriding the state court decisions. Shortly after the Alabama Supreme Court decided *Ex parte Shelley*, the Alabama Legislature enacted the Jailer Liability Protection Act, 2011 Ala. Laws 2067 (codified at ALA. CODE § 14-6-1). This Act states that the individuals employed by the sheriff to work in jails "shall be entitled to the same immunities and legal protections granted to the sheriff." ALA.

their duty.⁴⁰ However, state courts sometimes do not have the chance to address novel issues of state law for a long time, because litigants end up in federal courts instead. Federal courts, when faced with the novel state law issue, can either use certification to let state courts declare what the law is or make educated—but sometimes erroneous—guesses.⁴¹

Erie-guesses, not certification, still remain federal courts' preferred method of ascertaining the meaning of unclear state law. This is difficult to understand when one considers stories like the Alabama jailer immunity cases and the superiority of certification to *Erie*-guesses. This Note examines federal courts' current certification practices and finds that federal courts consider many factors before deciding to certify a question to state courts. This Note highlights the finding that the majority of the circuits consider whether the state has an important or substantial policy interest in the question of state law before certifying the question to state courts. After analyzing theoretical, practical, and constitutional problems associated with this practice, this Note proposes a model rule under which federal courts' decision to certify a question does not depend on the consideration of a state's policy interests.

This Note proceeds in four Parts. Part I explains background information regarding choice-of-law principles, the *Erie* doctrine, certification, and *Erie*-guesses. Part II reports this Note's finding of federal courts' current certification practices and highlights the substantial policy interest requirement. Part III assesses the theoretical, practical, and constitutional problems associated with considering policy interests in determining whether to use certification. Part IV proposes a model certification rule that cures these defects.

CODE § 14-6-1. Second, this change in state law can create new uncertainty for federal courts. In jailer immunity cases, federal courts now had a state statute as a guide but found its meaning unclear. See *Young v. Myhrer*, 651 F. App'x 878, 880–81 (11th Cir. 2016). Finally, state supreme courts can decline certified questions from federal courts. The Eleventh Circuit and federal district courts in Alabama laudably certified questions to the state supreme court regarding the meaning of the phrases in the Jailer Liability Protection Act. *E.g.*, *Johnson v. Conner* (*Johnson I*), 720 F.3d 1311, 1316 (11th Cir. 2013). But the Alabama Supreme Court declined to answer. *Johnson v. Conner* (*Johnson II*), 754 F.3d 918, 919 n.1 (11th Cir. 2014). The state court's discretion to answer certified questions is discussed further in Part IV of this Note.

⁴⁰ See 28 U.S.C. § 1652 (2012) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

⁴¹ See *infra* Section I.C.

I. STATE LAW IN FEDERAL COURTS

This Part lays the foundation of the necessary background law for this Note's argument to proceed. Section I.A explains the choice-of-law principles. Section I.B explains the *Erie* doctrine in light of the preceding *Swift* doctrine.⁴² Section I.C describes the two major methods of ascertaining the meaning of unclear state law (certification and *Erie*-guess) and establishes that certification is preferable to *Erie*-guess.

A. Choice of Law

Courts settle disputes and adjudicate cases. To settle disputes and adjudicate cases, courts look to a body of law to guide their decisions. The question of which law governs the case can often be a difficult task,⁴³ as there are countless bodies of law in existence: laws of the fifty U.S. states, federal law, international law, transnational law, religious law,⁴⁴ and laws of 195 countries.⁴⁵ "In any system with multiple sources of law, courts will face questions of *choice of law*."⁴⁶ In criminal cases, determining which law governs is fairly simple: the law of the sovereign whose law has been violated.⁴⁷ At least in the common law tradition, criminal offenses were regarded as a "transgression of a law," and "an offense against the sovereignty of the government."⁴⁸ The sovereign whose law was violated "vindicat[es] its sovereign authority through enforcement of its laws."⁴⁹

In civil actions, however, the answer is not always so clear.⁵⁰ Civil actions normally involve disputes among private parties and their affairs. "Events and transactions occur, and issues arise, that may have a

⁴² *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

⁴³ See Janet V. Hallahan, *The Case of the Missing Decision: When Will Pennsylvania Solve the Mystery of Its "Flexible" Choice-of-Law Analysis?*, 69 TEMP. L. REV. 655, 655 (1996) (calling the choice-of-law problem "one of the great unsolved mysteries of the legal world").

⁴⁴ Courts have approved the use of the Bible as governing law in religious arbitrations. See Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html?_r=0 [<https://perma.cc/UCZ4-457Q>].

⁴⁵ According to the CIA World Factbook, there are 195 countries in the world. Presumably, the governments of these countries have distinct laws. *The World Factbook*, Cent. Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html> [<https://perma.cc/8FAH-4WBT>] (last visited Nov. 17, 2016).

⁴⁶ THOMAS D. ROWE, JR. ET AL., *CIVIL PROCEDURE* 595 (3d ed. 2012).

⁴⁷ See *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (reasoning "crime [is] an offense against the sovereignty of the government").

⁴⁸ *Id.*

⁴⁹ *Id.* at 93.

⁵⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (AM. LAW INST. 1971).

significant relationship to more than one state, making necessary a special body of rules and methods for their ordering and resolution.”⁵¹ For example, in 2015, the Supreme Court of Delaware had to determine whether Texas’s law or Mexico’s law governed the case involving a helicopter crash, when the helicopter crashed in Mexico but was manufactured in Texas by a company incorporated in Delaware.⁵² It is a common and laborious task for state courts to determine which law governs the case before them.⁵³ This is called a *horizontal* choice-of-law question—choice among the laws of equal sovereigns.⁵⁴ Litigants care deeply about choice of law, because it can mean winning or losing their cases.⁵⁵ State *A*’s law may favor the plaintiff over the defendant, but State *B*’s law may favor the defendant over the plaintiff. For example, in an episode of a popular TV thriller, *The Good Wife*, the attorneys argue over whether the prenuptial law of California or Texas applies.⁵⁶ The California law would have favored the bride-to-be, so the groom-to-be’s lawyers resist it vehemently.⁵⁷

Choice-of-law issues are further complicated in the United States because of *federal* courts.⁵⁸ Federal courts, just like state courts, face

⁵¹ *Id.* Here, the Restatements speaks of “state” not just in the sense of a U.S. state, but as “a territorial unit with a distinct general body of law.” *Id.* § 3.

⁵² *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1047–48, 1060 (Del. 2015). Here, the injured parties were Mexican citizens. *Id.* at 1049. Although the helicopters were manufactured in Texas, presumably because the helicopter manufacturer was a Delaware corporation, for jurisdictional reasons, the plaintiffs brought the suit in Delaware. *See id.* at 1048–49. Finding that Delaware had no public policy interest in this case other than curtailing forum-selection, the Supreme Court of Delaware analyzed the choice-of-law question under the Restatements of Conflict of Laws. *See id.* at 1051–60. The court concluded that the Restatements favored the application of Mexico’s laws in this case. *Id.* at 1060.

⁵³ Many state courts follow the Second Restatement of Conflict of Laws approach which involves the balancing of multiple factors:

- (a) the needs of the interstate and international system,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (AM. LAW INST. 1971).

⁵⁴ ROWE, *supra* note 46, at 595.

⁵⁵ *See Bell Helicopter*, 113 A.3d at 1058. Under Mexico law, plaintiffs who were nonmarried partners to the deceased could recover survivor benefits. *Id.* However, under Texas law, they could not. *Id.*

⁵⁶ *The Good Wife: The Seven Day Rule* (CBS television broadcast Jan. 27, 2013).

⁵⁷ *Id.*

⁵⁸ *See* ROWE, *supra* note 46, at 595.

choice-of-law questions. When federal courts hear cases under federal question jurisdiction,⁵⁹ choice of law is not an issue.⁶⁰ They look to federal law for guidance, because federal question jurisdiction concerns matters arising under federal law.⁶¹ But a *vertical* choice-of-law question arises when federal courts hear civil cases under diversity jurisdiction.⁶² Federal courts can hear cases on diversity jurisdiction where there is a suit between citizens of different states.⁶³ The Constitution creates diversity jurisdiction, so federal courts can serve as a neutral forum between litigants by minimizing “possible unfairness by state courts, state judges and juries, against outsiders”⁶⁴ and potential interference by state legislatures.⁶⁵ Diversity jurisdiction raises choice-of-law questions because the Constitution does not specify which law federal courts should use⁶⁶ and, by definition, involves matters not governed by federal law. What law governs in a diversity action between a Virginia citizen and a South Carolina citizen concerning interpretation of a contract?

⁵⁹ U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made”); 28 U.S.C. § 1331 (2012) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

⁶⁰ See 28 U.S.C. § 1331; ROWE, *supra* note 46, at 595.

⁶¹ See U.S. CONST. art. III, § 2; 28 U.S.C. § 1331; ROWE, *supra* note 46, at 595.

⁶² See U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases . . . to Controversies . . . between Citizens of different States”); 28 U.S.C. § 1332(a)(1) (“The district courts shall have original jurisdiction of all civil actions . . . between citizens of different states”). According to the Administrative Office of the United States Courts, diversity suits made up about a quarter (105,471 out of 426,654) of the district courts’ caseload between 2013 and 2014. See *Federal Judicial Caseload Statistics 2014*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014> [https://perma.cc/F6YF-4DGD] (last visited Nov. 7, 2016).

⁶³ U.S. CONST. art. III, § 2; 28 U.S.C. § 1332(a)(1). § 1332(a) additionally imposes an amount-in-controversy requirement on litigants to invoke federal courts’ diversity jurisdiction. Congress controls that amount, and the current threshold is set at \$75,000.

⁶⁴ Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1672 (1992) (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 336–37 (1943) (Frankfurter, J., dissenting)).

⁶⁵ There is a body of scholarly research by reputable jurists like Justice Felix Frankfurter and Judge Henry Friendly that “casts some doubt as to whether prejudice [against outsiders] actually existed in state courts” at the time of the Framing. Jennifer Walker Elrod, *Don’t Mess with Texas Judges: In Praise of the State Judiciary*, 37 HARV. J.L. & PUB. POL’Y 629, 632 (2014). “[A] careful reading of the arguments of the time will show that the real fear was not of state courts so much as of state legislatures.” *Id.* (quoting Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495 (1928)).

⁶⁶ See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 (1842) (noting that federal courts were “without rules of decision in the cases that would arise”).

B. Erie Doctrine

The vertical choice-of-law question brings us to the *Erie* doctrine, which commands federal courts to apply state law and prohibits federal courts from creating state law by exercising “independent judgment.”⁶⁷ In 1789, Congress enacted the Rules of Decision Act: “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”⁶⁸ Under this Act, federal courts are to apply state law in diversity cases. The Rules of Decision Act, however, did not solve all choice-of-law problems. While it was clear that federal courts were to apply the “laws of the several states” in diversity cases, what constituted the “laws of the several states” became an issue.⁶⁹

The Supreme Court first addressed this phrase in *Swift v. Tyson*,⁷⁰ which was a defensible decision at the time but later became problematic.⁷¹ *Swift* held that “the laws of the several states” were only “local statutes” or “long established local customs having the force of laws.”⁷² *Swift*, however, held that federal courts were not bound by state courts’ decisions regarding general law.⁷³ Both state and federal courts in the eighteenth century decided numerous commercial cases not as a matter of state or federal law, but as a matter of general law.⁷⁴ General law “did not appear to consist of sovereign commands,”⁷⁵ and was neither state nor federal law.⁷⁶ General law was “based on the commercial customs and practices of merchants and was applied by all ‘civilized’ nations to resolve disputes among merchants from different countries.”⁷⁷

It was understood that courts of each sovereign were “free to exercise independent judgment” in matters of general law, but also that

⁶⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

⁶⁸ 28 U.S.C. § 1652 (2012).

⁶⁹ See *Swift*, 41 U.S. (16 Pet.) at 18.

⁷⁰ 41 U.S. (16 Pet.) 1 (1842).

⁷¹ The following discussions are heavily influenced by Professor Bradford R. Clark’s work. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1278–81 (1996).

⁷² *Swift*, 41 U.S. (16 Pet.) at 18.

⁷³ *Id.* at 19.

⁷⁴ Clark, *supra* note 71, at 1279–80, 1282.

⁷⁵ *Id.* at 1283.

⁷⁶ *Id.* at 1280.

⁷⁷ *Id.* at 1281.

each court's decision would not bind a different court.⁷⁸ If general law was not the law of any sovereign, but a mere transcendental body of law, then federal courts were as well situated as state courts to rely on "general reasoning and legal analogies" to determine what the law is and should be.⁷⁹ Under this reasoning, *Swift* then correctly stated that only state statutes, but not state court decisions involving general law, were "the laws of the several states" under the Rules of Decision Act that bound federal courts.⁸⁰

Swift, however, became unrecognizable and uncontrollable over time. One important development was that state courts began deciding cases as a matter of state law.⁸¹ General law started disappearing.⁸² Nevertheless, federal judges invoked *Swift* and continued to disregard state court decisions as though under general law, even though state courts decided cases as a matter of state law.⁸³ Federal judges also increasingly exercised their independent judgment and applied general law not only in commercial cases but also in property and tort cases, which have never been subject to general law.⁸⁴ Consequently, federal judges often made laws that contradicted state court decisions, and federal courts applied a set of laws different from the set of laws that was being applied in state courts.⁸⁵

The Supreme Court strongly rebuked what *Swift* had become in *Erie Railroad Co. v. Tompkins*.⁸⁶ Holding that state court decisions that were decided as a matter of state law were also "laws of the several states" that bound federal courts, the Court recounted *Swift*'s federalism, forum shopping, and inequitable administration of justice problems.⁸⁷

Federal courts' invocation of *Swift* and general law in creating substantive rules of decision raised federalism concerns. *Erie* emphatically held that "[t]here is no federal general common law."⁸⁸ There is no "transcendental body of law outside of any particular State," and

⁷⁸ *Id.* at 1283.

⁷⁹ See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842).

⁸⁰ See *id.* at 18–19; Clark, *supra* note 71, at 1278–81.

⁸¹ Clark, *supra* note 71, at 1290.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1290–91.

⁸⁵ See, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 526–27, 530 (1928).

⁸⁶ 304 U.S. 64 (1938).

⁸⁷ See *id.* at 74–75, 78–80.

⁸⁸ *Id.* at 78.

law “does not exist without some definite authority behind it.”⁸⁹ Law exists by the authority of the state alone: “[T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.”⁹⁰ It was reserved to the states to “declare substantive rules of common law applicable in a State.”⁹¹ The Court further concluded that federal courts’ exercise of “an independent judgment on matters of general law” amounts to “an invasion of the authority of the State and, to that extent, a denial of its independence.”⁹² The Constitution does not even “purport[] to confer such a power upon the federal courts,” but rather it “recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments.”⁹³

The *Swift* era was also riddled with forum shopping and inequitable administration of justice. Federal courts were not bound by state court decisions, and they created their own rules of decision as a matter of general law, which often contradicted state court decisions.⁹⁴ *Erie* itself addressed this phenomenon. Tompkins sued the Erie Railroad for injury.⁹⁵ The Erie Railroad argued that, under Pennsylvania law, Tompkins was a trespasser and so it was not liable for his injuries except in cases of willful or wanton negligence.⁹⁶ Tompkins, however, argued that, as a matter of general law, the Erie Railroad owed him an ordinary care of duty and was liable for his injuries.⁹⁷ The disparity between the law in federal court and state court caused litigants to shop for the forum that was most favorable to them.⁹⁸ Forum shopping rendered the administration of justice inequitable.⁹⁹ Out-of-state litigants used diversity jurisdiction to evade state courts’ substantive law and gained an upper hand over in-state litigants in federal courts

⁸⁹ *Id.* at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

⁹⁰ *Id.* (second alteration in original) (quoting *Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting)).

⁹¹ *Id.* at 78.

⁹² *Id.* at 79 (quoting *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)); see also Clark, *supra* note 25, at 1471–72 (interpreting *Erie* as prohibiting federal courts from exercising independent judgment and engaging in substantial policymaking).

⁹³ *Erie*, 304 U.S. at 78–79 (quoting *Balt. & Ohio R.R.*, 149 U.S. at 401 (Field, J., dissenting)).

⁹⁴ See, e.g., *Black & White Taxicab*, 276 U.S. at 530–31.

⁹⁵ *Erie*, 304 U.S. at 69.

⁹⁶ *Id.* at 70.

⁹⁷ *Id.*

⁹⁸ See, e.g., *Black & White Taxicab*, 276 U.S. at 523–24.

⁹⁹ *Erie*, 304 U.S. at 74–76.

where general law applied.¹⁰⁰ Diversity jurisdiction, which was meant to serve justice by providing a neutral forum for out-of-state litigants, became an avenue for injustice.¹⁰¹

Erie addressed these problems by commanding federal courts to apply state court decisions as “laws of the several states.”¹⁰² Federal courts’ diversity jurisdiction no longer threatened states’ independence, because they were no longer permitted to create their own substantive rules of decision.¹⁰³ The only authority was the state, and federal courts were bound by state court decisions. Because the same law applied in both federal and state courts, one of the incentives to forum shop dissipated. *Erie*, however, did not address what federal courts should do when state law is unclear or does not exist.

C. *Methods of Ascertaining the Meaning of Unclear State Law*

Federal courts have been faithful to *Erie*’s command and apply both state statute and court decisions as binding law in diversity cases when the applicable state law is clear.¹⁰⁴ Federal courts face an *Erie* problem, however, when the applicable state law is unclear.¹⁰⁵ When state law is unclear or does not exist, federal courts are without a law to guide their decision. Unlike state courts, which can clarify the unclear state law or create new state law, *Erie* forbids federal courts from creating state law.¹⁰⁶ To overcome this problem, federal courts generally ascertain the meaning of the unclear state law through either making an “*Erie*-guess”¹⁰⁷ or certifying a question to the state supreme court. Certification seems to be a superior method in light of the values underlying *Erie*.¹⁰⁸

State law—or any law for that matter—can be unclear for a number of reasons.¹⁰⁹ First, the question of state law could be a question of

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 78–79. *But see* Clark, *supra* note 25, at 1464–65 (noting that forum shopping can still be an issue even after *Erie*).

¹⁰³ *See Erie*, 304 U.S. at 78–79.

¹⁰⁴ *See* Haley N. Schaffer & David F. Herr, *Why Guess? Erie Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1628 (2010) (“Obeying *Erie* is straightforward if state law is clear” (quoting Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 DUKE L.J. 69, 73 (2008))).

¹⁰⁵ *See* Clark, *supra* note 25, at 1461.

¹⁰⁶ *See id.*

¹⁰⁷ An *Erie*-guess is an educated guess that is not binding in state courts but binding only in federal courts. *See* Clark, *supra* note 25, at 1523; Schaffer & Herr, *supra* note 104, at 1626.

¹⁰⁸ *See* Clark, *supra* note 25, at 1550.

¹⁰⁹ *Id.* at 1468.

first impression.¹¹⁰ Federal courts may be asked to interpret an ambiguous or recently enacted statute that the state's supreme court has not yet interpreted.¹¹¹ Federal courts could also face a question of state law on which no state court precedent or legislatively-enacted statute exists because the question concerns a new social or political phenomenon.¹¹²

Second, there could be a conflict among the state's intermediate appellate courts.¹¹³ Many states have just one intermediate appellate court, but others have multiple intermediate appellate courts whose decisions may conflict with one another. Much like the "circuit splits" that could exist among federal courts of appeals, state appellate courts could conflict with one another. For example, Virginia has one Court of Appeals, so there will never be a "circuit split."¹¹⁴ On the other hand, Louisiana's Courts of Appeals are divided into five circuits, and one circuit's decision may conflict with that of another.¹¹⁵ Many federal courts consider the decisions of an intermediate state court as the best evidence of state law in the absence of a state supreme court precedent.¹¹⁶ However, when the decisions conflict, it becomes difficult for federal courts to apply the law.

Third, there could be a state supreme court decision, but persuasive evidence indicates that the state supreme court may revisit that decision.¹¹⁷ This occurs when the state supreme court's decision is an old one, but there have been new developments in society and law that would induce the court to revisit its old decision.¹¹⁸ This could

¹¹⁰ See *id.* at 1468 & n.40.

¹¹¹ See, e.g., *Gardner v. Ally Fin. Inc.*, 488 F. App'x 709, 713 (4th Cir. 2012) (holding state law is unclear because the Maryland Court of Appeals has not yet had the chance to construe the terms in the applicable state statute).

¹¹² See, e.g., *Gariety v. Vorono*, 261 F. App'x 456, 461–62 (4th Cir. 2008) (per curiam) (discussing whether to certify on what plaintiff's refer to as the "innocent beneficiary doctrine").

¹¹³ Clark, *supra* note 25, at 1468.

¹¹⁴ See VA. CODE. ANN. § 17.1-400 (2004) (creating one Court of Appeals whose judges are selected by the General Assembly).

¹¹⁵ See LA. CONST. art. V, § 8 (1974) (requiring *at least* four courts of appeals); *In re Katrina Canal Breaches Litig.*, 613 F.3d 504, 509–10 (5th Cir. 2010) (holding state law is unclear as to "whether the insurance contracts' anti-assignment clauses bar post-loss assignments to the State" because there was no precedent from the Louisiana Supreme Court and intermediate courts conflicted with each other).

¹¹⁶ *In re Katrina Canal Breaches Litig.*, 613 F.3d at 510.

¹¹⁷ See Clark, *supra* note 25, at 1468; see also *LeFrere I*, 582 F.3d 1260, 1268 (11th Cir. 2009) (holding state law is unclear because the court questioned whether the Alabama Supreme Court would grant absolute immunity for jailers based on the Alabama Supreme Court's decision in *Alabama Dep't of Corr. v. Thompson*, 855 So. 2d 1016, 1021 (Ala. 2003), which did not grant correctional officers state-agent immunity).

¹¹⁸ See Clark, *supra* note 25, at 1468–69.

also occur when the state supreme court has issued opinions containing dicta that hint at the possibility of changing an existing decision.

Unclear state law puts federal courts in a difficult position.¹¹⁹ Federal courts must adjudicate the cases before them and settle disputes,¹²⁰ but when the applicable state law is unclear, they are without a guide. When state courts face unclear law, they can clarify the law or *create* new law by engaging in the artistry of the common law—weighing various policy considerations and declaring laws that serve these policy goals.¹²¹ In a sense, there is never an “unclear” state law for state courts because they can fill the gap to clarify the law.¹²² Under *Erie*, this is not an option for federal courts. *Erie* forbids federal courts from creating, declaring, or adding to the state law, lest they usurp the state’s authority.¹²³

Federal courts generally have two primary methods of ascertaining the meaning of the unclear state law: “*Erie*-guess” and certification.¹²⁴ *Erie*-guess, also known as the prediction method,¹²⁵ “attempts to forecast the development of state law by asking what rule of decision the state’s highest court is likely to adopt in the future.”¹²⁶ Under this approach, federal courts are not exercising independent judgments because they are not using general reasoning and logic to make a policy determination.¹²⁷ Rather, federal courts rely on the existing state court precedents, data to which the state court typically refers, and methods state courts generally use to make a prediction about the future state law.¹²⁸ Federal courts’ predictions do not bind state courts,¹²⁹ but may bind lower federal courts.¹³⁰ This approach can be beneficial because it allows federal courts to fulfill their duty to hear cases on diversity jurisdiction and to respond to the changing circumstances that may warrant a changing law.¹³¹

¹¹⁹ *Id.* at 1461.

¹²⁰ See 28 U.S.C. § 1332 (2012).

¹²¹ Clark, *supra* note 25, at 1461, 1471–72.

¹²² See *id.*

¹²³ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938).

¹²⁴ See generally Clark, *supra* note 25, for discussions of abstention and static-application in addition to prediction (*Erie*-guess) and certification.

¹²⁵ See *supra* note 107.

¹²⁶ Clark, *supra* note 25, at 1497.

¹²⁷ See *id.*

¹²⁸ See, e.g., *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 662–63 (3d Cir. 1980).

¹²⁹ E.g., *Stilp v. Commonwealth*, 905 A.2d 918, 977 n.44 (Pa. 2006) (“[D]ecisions of the lower Federal courts do not bind this Court, and particularly where the question is one of state law.”).

¹³⁰ See Clark, *supra* note 25, at 1494.

¹³¹ See *id.* at 1497.

Erie-guess, however, has serious practical and constitutional defects. In practice, federal courts quite often make incorrect predictions.¹³² State supreme courts have repudiated many of the federal courts' predictions.¹³³ Judge Dolores K. Sloviter candidly describes the Third Circuit's incorrect predictions in many cases:

Despite our best efforts to predict the future thinking of the state supreme courts within our jurisdiction on the basis of all of the available data, we have guessed wrong on questions of the breadth of arbitration clauses in automobile insurance policies (we predicted they would not extend to disputes over the entitlement to coverage, but they do), the availability of loss of consortium damages for unmarried cohabitants (we predicted they would be available, but they are not), the "unreasonably dangerous" standard in products liability cases (we predicted the Restatement would not apply, but it does), and the applicability of the "discovery rule" to wrongful death and survival actions (we predicted it would toll the statute of limitations, but it does not). And this list is by no means exhaustive.¹³⁴

Erie-guesses are also problematic because they introduce nonauthoritative law into society that "inevitably skew the decisions of persons and businesses who rely on them"¹³⁵ and mislead lower federal courts and sometimes state courts.¹³⁶ An incorrect *Erie*-guess may also go beyond simply misleading to substantively depriving the litigants of justice, where the litigants are denied "the accuracy of outcome" in a particular case.¹³⁷

Erie-guesses raise several constitutional problems as well. Judge Sloviter notes that "prediction of state law . . . often verges on the

¹³² See John L. Watkins, *Erie Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do About It*, 21 CONN. INS. L.J. 455, 459–60 (2015) (describing how federal courts predict wrongly and how federal judges have admitted that federal courts predict wrongly).

¹³³ Recall the Eleventh Circuit's erroneous prediction regarding Alabama law of absolute immunity in the Introduction of this Note. This is one of many incorrect predictions made by federal courts. For example, Judge John R. Brown observed how the state supreme courts of Texas, Alabama, and Florida have repudiated many of the Fifth Circuit's predictions: "And now that we have this remarkable facility of certification, we have not yet 'guessed right' on a single case." Watkins, *supra* note 132, at 459 (quoting *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486 (5th Cir. 1964) (Brown, J., concurring)).

¹³⁴ See Sloviter, *supra* note 64, at 1679–80 (citations omitted).

¹³⁵ *Id.* at 1681.

¹³⁶ See *id.* at 1679–81.

¹³⁷ Schaffer & Herr, *supra* note 104, at 1626.

lawmaking function of that state court.”¹³⁸ Federal courts are making predictions in “areas of law that define one citizen’s rights and obligations . . . , a function traditionally associated with state sovereignty.”¹³⁹ Professor Bradford Clark notes that when federal courts predict a new cause of action or defense, they are essentially “declar[ing] substantive rules of common law applicable in a State” and unconstitutionally usurping a power reserved to the states.¹⁴⁰ Furthermore, *Erie*-guesses increase the likelihood that the law in federal court will be different from the law in state court and revives the *Erie* concerns regarding forum shopping and inequitable administration of justice.¹⁴¹

The alternative to *Erie*-guess is certification. Certification is a procedure in which a federal court retains jurisdiction over the case, but submits the question of state law to the state’s highest court for an authoritative answer.¹⁴² The state court’s answer to the certified question becomes binding law for future cases in both federal and state courts.¹⁴³ The advantage of certification is that federal courts can “avoid *Erie* guesses and thus avoid errors while at the same time providing litigants with a correct and more efficient determination of their legal rights.”¹⁴⁴ As the United States Supreme Court noted, in many instances, certification could promote efficiency and save time and money.¹⁴⁵ Certification gives the state courts the opportunity to update or change existing law to reflect the changing circumstances of society.¹⁴⁶ At the same time, federal courts can fulfill their obligation to oversee diversity cases.¹⁴⁷

Certification allows federal courts to avoid *Erie* problems regarding federalism, forum shopping, and inequitable administration of justice. Certification removes federalism concerns because state courts are pronouncing the law.¹⁴⁸ A state court’s answer to certified questions binds both federal and state courts, reducing the likelihood of forum shopping for more advantageous law.¹⁴⁹ It removes the possibil-

¹³⁸ See Sloviter, *supra* note 64, at 1682.

¹³⁹ *Id.*

¹⁴⁰ Clark, *supra* note 25, at 1508 (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

¹⁴¹ Watkins, *supra* note 132, at 473.

¹⁴² Clark, *supra* note 25, at 1544.

¹⁴³ See *id.* at 1544, 1552.

¹⁴⁴ Schaffer & Herr, *supra* note 104, at 1627.

¹⁴⁵ *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

¹⁴⁶ Clark, *supra* note 25, at 1464–65.

¹⁴⁷ *Id.*

¹⁴⁸ See *id.* at 1550.

¹⁴⁹ Cf. Watkins, *supra* note 132, at 474–75.

ity that the federal court will make the wrong prediction regarding litigants' substantive rights.¹⁵⁰

II. CURRENT FEDERAL COURT CERTIFICATION PRACTICES

Federal courts' certification practices vary materially from circuit to circuit. As an initial matter, despite the superiority of certification over *Erie-guess*, *Erie-guess* remains the predominant method of ascertaining state law.¹⁵¹ Certification nevertheless has become increasingly popular not only among state courts but also among federal courts.¹⁵² Now, forty-nine states, the District of Columbia, and Puerto Rico permit certification.¹⁵³ The United States Supreme Court has endorsed and encouraged the use of certification.¹⁵⁴ Although the Supreme Court has committed the use of certification to federal courts' discretion, it has not provided a uniform guidance to lower federal courts in deciding whether to use certification.¹⁵⁵ This lack of a uniform guidance, combined with idiosyncrasies of various state and federal courts, has led to various practices among the circuits. Federal courts have had different experiences with certification and have also developed different postures and attitudes toward it, but largely consider similar factors in deciding whether to use certification.¹⁵⁶

A. Differences in Federal Courts' Certification Practices

Federal courts' experiences with certification vary from circuit to circuit, partially because of the varying certification practices in state courts. For example, the Eleventh Circuit has the longest history with certification because the Florida Supreme Court was the first state supreme court to allow certification from federal courts.¹⁵⁷ The Third Circuit, on the other hand, has a relatively nascent experience with certification because Pennsylvania, New Jersey, and Delaware enacted

¹⁵⁰ See *id.* at 473.

¹⁵¹ See Clark, *supra* note 25, at 1495 (stating that most federal courts use the predictive approach).

¹⁵² Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN. ST. L. REV. 377, 384–85 (2010).

¹⁵³ See *id.*

¹⁵⁴ Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (“[Certification] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.”).

¹⁵⁵ See *Arizonans for Official Eng. v. Arizona*, 520 U.S. 43, 75–80 (1997); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1118–19 (7th ed. 2015).

¹⁵⁶ See *infra* notes 169–77 and accompanying text.

¹⁵⁷ See Acquaviva, *supra* note 152, at 382–83.

their certification procedures only recently.¹⁵⁸ Additionally, the circuit courts will have varying wait time depending on which state supreme court they are dealing with. Generally, federal courts wait about six months for an answer.¹⁵⁹ The Ninth Circuit waits, on average, about a year before the California Supreme Court grants certification—largely because the California Supreme Court has a burgeoning caseload.¹⁶⁰ In contrast, the Third Circuit will hear back from the Pennsylvania Supreme Court within sixty days.¹⁶¹ Also, “a substantial minority allow certification only from federal appellate courts,” but do not allow federal district courts to certify a question to the state supreme court.¹⁶²

Different federal courts of appeals have different approaches to certification as well. Some circuits have expressly praised certification.¹⁶³ Three circuits have adopted local rules regarding certification.¹⁶⁴ On the other hand, some circuits have expressed hesitance towards certification.¹⁶⁵ This is due in part to fear that the overuse of certification will burden state courts, and state courts could get rid of certification in response.¹⁶⁶ Other federal courts have expressed hesitance towards certification because they view their job as to predict the unclear state law rather than to ask the state court.¹⁶⁷ Some federal judges and commentators have even expressed the view that federal judges provide a service to state courts when they make a prediction of state law by giving them the quality analysis of the federal court.¹⁶⁸

¹⁵⁸ See *id.* at 380–81.

¹⁵⁹ FALLON, *supra* note 155, at 1116 n.8.

¹⁶⁰ See *Kremen v. Cohen*, 325 F.3d 1035, 1051–52 (9th Cir. 2003) (Kozinski, J., dissenting).

¹⁶¹ PA. SUPREME COURT INTERNAL OPERATING PROCEDURES § 8 (“Every Certification Petition should be decided within sixty (60) days.”).

¹⁶² Clark, *supra* note 25, at 1557.

¹⁶³ See, e.g., *Michaels v. New Jersey*, 150 F.3d 257, 259 (3d Cir. 1998) (venturing an *Erie*-guess only because New Jersey did not provide for certification: “As long as diversity jurisdiction is retained, certification provides the best way to alleviate [the federalism concerns of *Erie*-guesses].”).

¹⁶⁴ 10TH CIR. L.R. 27.2(A) (2016); 7TH CIR. L.R. 52 (2014); 3D CIR. L.A.R. Misc. 110 (2011).

¹⁶⁵ E.g., *Spurlock v. Townes*, 594 F. App’x 463, 465 n.1 (10th Cir. 2014) (“Guided by circuit precedent discouraging the routine invocation of the certification procedure, we exercise appropriate restraint . . .” (citation omitted)); *Wiltz v. Bayer CropScience, Ltd. P’ship*, 645 F.3d 690, 703 (5th Cir. 2011) (“We are ‘chary about certifying questions of law absent a compelling reason to do so.’” (quoting *Jefferson v. Lead Indus. Ass’n*, 106 F.3d 1245, 1247 (5th Cir. 1977))).

¹⁶⁶ *Free v. Abbott Labs., Inc.*, 164 F.3d 270, 274 (5th Cir. 1999).

¹⁶⁷ *McCarthy v. Olin Corp.*, 119 F.3d 148, 154 (2d Cir. 1997) (“Because it is our job to predict how the forum state’s highest court would decide the issues before us, we will not certify questions of law where sufficient precedents exist for us to make this determination.”).

¹⁶⁸ “Professor William Landes and Judge Richard Posner have written that the ‘significant

B. *Similarities in Federal Courts' Certification Practices*

While federal courts' practice of and posture toward certification may vary from circuit to circuit, federal courts consider similar factors and requirements in deciding whether to certify a question to state courts. These factors and requirements serve as gatekeepers to certification. Some common factors include whether the question of state law is genuinely uncertain and determines the outcome of the case, the identity of the party seeking certification, whether the case is too fact-specific, and whether the question of state law implicates a state's important policy interest.

All federal courts require *genuine uncertainty* in state law as a prerequisite for certification, although the level of tolerance for uncertainty varies from circuit to circuit.¹⁶⁹ For example, the D.C. Circuit concludes that, even if there is no controlling precedent, the state law is not genuinely uncertain “[i]f . . . there is a discernible path for the court to follow.”¹⁷⁰ On the other hand, the Eleventh Circuit seems to have a low threshold for finding genuine uncertainty. If there is “*any doubt* as to the application of state law,” then the Eleventh Circuit would rather certify the question than make “unnecessary *Erie* ‘guesses.’”¹⁷¹ All federal courts similarly require that the question of state law must determine the outcome of the case.¹⁷²

contribution’ to state common law made by federal courts casts doubt on the wisdom of abolishing diversity jurisdiction.” Sloviter, *supra* note 64, at 1687 (quoting William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction: A Comment*, 9 J. LEGAL STUD. 367, 386 (1980)); see also Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 269–71 (2005/06).

¹⁶⁹ See, e.g., Metz v. BAE Sys. Tech. Sols. & Servs. Inc., 774 F.3d 18, 20 (D.C. Cir. 2014) (refusing to certify because question of state law was not “genuinely uncertain”); Temple v. McCall, 720 F.3d 301, 308 (5th Cir. 2013) (“[A]bsent genuinely unsettled matters of state law, [this court has been] reluctant to certify.” (quoting *Jefferson*, 106 F.3d at 1247)); New ex rel. D.J.M. v. Astrue, 374 F. App’x 416, 421 (4th Cir. 2010) (per curiam) (resorting to certification “[o]nly if the available state law is clearly insufficient” (alteration in original) (quoting *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994))); *In re Engage, Inc.*, 544 F.3d 50, 53 (1st Cir. 2008) (certifying because state law was not “sufficiently clear to allow [the court] to predict its course”).

¹⁷⁰ Metz, 774 F.3d at 23 (alterations in original) (quoting *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1047 (D.C. Cir. 2011)).

¹⁷¹ Pendergast v. Sprint Nextel Corp., 592 F.3d 1119, 1122 (11th Cir. 2010) (emphasis added) (quoting *CSX Transp., Inc. v. City of Garden City*, 325 F.3d 1236, 1239 (11th Cir. 2003)).

¹⁷² E.g., *Gardner v. Ally Fin., Inc.*, 488 F. App’x 709, 712–13 (4th Cir. 2012); *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423, 430 (7th Cir. 2012) (per curiam) (“[C]ertification is appropriate . . . where resolution of the question to be certified is outcome determinative of the case . . .” (first alteration in original) (quoting *Cedar Farm, Harrison Cty., Inc. v. Louisville Gas & Elec. Co.*, 658 F.3d 807, 812–13 (7th Cir. 2011))); *New ex rel. D.J.M.*, 374 F. App’x at 421 (resorting to certification “[o]nly if the available state law is clearly insufficient” (alteration in original) (quoting *Roe*, 28 F.3d at 407)).

Many federal courts also consider the identity of the party seeking the certification as a factor. Although not dispositive, federal courts tend to disfavor certification when the party who seeks the certification is the one who invoked federal jurisdiction in the first place.¹⁷³ These courts posit that “[a] litigant who wants an adventurous interpretation of state law should sue in state court”¹⁷⁴ Furthermore, federal courts of appeals disfavor certification when the appellant who never sought certification below is asking for one on appeal for the first time.¹⁷⁵ In fact, in some circuits, this is a *per se* ground for denying a certification request.¹⁷⁶

The federal court may also conclude that the case is not a proper vehicle for certification because the case is so intensively tied to the specific facts of the case.¹⁷⁷ Finally, many circuits consider whether the state has an important policy interest in the law in question when deciding whether certification is appropriate.

C. *Consideration of State Policy Interest*

Remarkably, seven of the thirteen federal courts of appeals, and accordingly the lower federal courts in those circuits, have considered whether the state has an important policy interest in the question of state law in deciding whether to certify. In these circuits, genuine uncertainty in the state law alone is not a sufficient reason for certification.¹⁷⁸ There has to be a compelling reason to certify—namely that, in the federal court’s view, the state has an important public policy interest in the state law.¹⁷⁹

For example, the First Circuit has considered whether the question of state law “may hinge on policy judgments best left to the [state] court.”¹⁸⁰ The Second Circuit has considered whether the question of state law “reflects value judgments and important public policy choices that the [state court] is better situated than [federal courts] are

¹⁷³ *Doe v. City of Chicago*, 360 F.3d 667, 672 (7th Cir. 2004).

¹⁷⁴ *Id.*

¹⁷⁵ *E.g.*, *City of Columbus v. Hotels.com, L.P.*, 693 F.3d 642, 654 (6th Cir. 2012).

¹⁷⁶ *See Enfield ex rel. Enfield v. A.B. Chance Co.*, 228 F.3d 1245, 1255 (10th Cir. 2000).

¹⁷⁷ *See Craig*, 686 F.3d at 430.

¹⁷⁸ *See, e.g.*, *Wiltz v. Bayer CropScience, Ltd. P’ship*, 645 F.3d 690, 703 (5th Cir. 2011) (“[T]he mere ‘absence of a definitive answer from the state supreme court on a particular question is not sufficient to warrant certification.’” (quoting *Jefferson v. Lead Indus. Ass’n*, 106 F.3d 1245, 1247 (5th Cir. 1997))).

¹⁷⁹ *See Metz v. BAE Sys. Tech. Sols. & Servs., Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014) (“Not only is the question Metz poses insufficiently uncertain, it is also insufficiently significant.”).

¹⁸⁰ *In re Engage, Inc.*, 544 F.3d 50, 53 (1st Cir. 2008).

to make.”¹⁸¹ The Fifth Circuit has considered whether “important state interests are at stake.”¹⁸² The Seventh Circuit has considered whether the question of state law concerns “a matter of vital public concern” such that “the [state court] is in a better position than [federal courts] to say what [state] law is.”¹⁸³ The Ninth Circuit has considered whether the question of state law presents “important public policy ramifications.”¹⁸⁴ The Tenth Circuit has considered whether there are “important state policy interests at play.”¹⁸⁵ The D.C. Circuit has considered whether the question of state law is a matter of “‘extreme public importance’ in which the District of Columbia has a ‘substantial interest.’”¹⁸⁶

III. PROBLEMS WITH CONSIDERING A STATE’S POLICY INTERESTS BEFORE CERTIFYING A QUESTION

As noted above, in deciding whether to certify a question, federal courts consider whether the question of state law involves important policy choices that state courts are better situated than federal courts to make. This consideration poses theoretical, practical, and constitutional difficulties.

A. *Theoretical Problems*

Federal courts’ consideration of whether the state has an important policy interest in the question of state law raises a theoretical problem, because *every* substantive law reflects a state’s important policy choice. Justice Benjamin Cardozo, in comparing common law judges to legislators, describes the judicial process as a process akin to a policy deliberation:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must de-

¹⁸¹ *Giordano v. Mkt. Am., Inc.*, 599 F.3d 87, 101 (2d Cir. 2010).

¹⁸² *In re Katrina Canal Breaches Litig.*, 613 F.3d 504, 509 (5th Cir. 2010) (quoting *Free v. Abbott Labs., Inc.*, 164 F.3d 270, 274 (5th Cir. 1999)).

¹⁸³ *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423, 430–31 (7th Cir. 2012) (per curiam).

¹⁸⁴ *Munson v. Del Taco, Inc.*, 522 F.3d 997, 1003 (9th Cir. 2008) (quoting *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003)).

¹⁸⁵ *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1120 (10th Cir. 2008).

¹⁸⁶ *E.g., Metz v. BAE Sys. Tech. Sols. & Servs., Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014) (quoting *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 564 (D.C. Cir. 1993)).

pend largely upon the *comparative importance or value of the social interests that will be thereby promoted or impaired*.¹⁸⁷

While the legislator creates the law and the judge “legislates only between gaps,” both decide which social interests should outweigh others based on thorough considerations of “experience and study and reflection.”¹⁸⁸ Law—whether created by a legislator or a judge—is the product of a difficult process that requires a “legislator’s wisdom,”¹⁸⁹ and, in many instances, additionally involves hard-forged political compromises.¹⁹⁰ In this sense, *every* substantive law reflects an important policy choice of a sovereign, either through decisive deliberation or as a result of a political compromise.¹⁹¹ There is a theoretical redundancy in searching for importance in something that, in its nature, is important. There is also a theoretical problem in finding something unimportant, when it, in its nature, is important.

B. Practical Problems

In addition to theoretical problems, federal courts’ consideration of whether the state has an important or substantial policy interest in the question of state law raises two practical problems. First, there is no workable definition of “important” or “substantial.” Second, this requirement creates a high bar to certification.

1. Defining Important or Substantial

In practice, litigants and federal courts have no workable standard to determine what makes a state’s policy interest “substantial” or “important.” An obvious difficulty is that a federal judge “who may not even be a citizen of the state involved, is certainly not likely to be as attuned as a state judge is to the nuances of that state’s history, policies, and local issues.”¹⁹² Federal judges do not have a systematic method to judge a state’s policy interests. While some circuits have found a state’s policy interest substantial in cases that involve complex

¹⁸⁷ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 70 (2010) (emphasis added).

¹⁸⁸ *Id.* at 71.

¹⁸⁹ *Id.* at 73.

¹⁹⁰ First, statutes “are always the legislative response to problems identified by legislative bodies as needing resolution in a particular fashion. Every statute has a story behind it, although (unlike a judicial decision) its story is usually untold in the statutory language. Often the story is quite dramatic. Second, statutes are almost always the products of compromise.” ABNER J. MIKVA & ERIC LANE, *AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS* 1 (1997).

¹⁹¹ See CARDOZO, *supra* note 187, at 71–73; MIKVA & LANE, *supra* note 190, at 1.

¹⁹² Sloviter, *supra* note 64, at 1682.

insurance schemes,¹⁹³ employer-employee relationship,¹⁹⁴ and law enforcement liability,¹⁹⁵ these cases do not even purport to provide a coherent standard for litigants or courts to determine what constitutes “substantial” or “important.”

One may observe that federal courts are already in the business of judging the states’ interests through its tier-review system. Through tier-review, federal courts determine whether a state’s interest is compelling, important, or legitimate in the course of scrutinizing the constitutionality of the state action.¹⁹⁶ From this, one could assert that federal courts are capable of judging the state’s interest in deciding whether to certify a question of state law. That cannot be true for two reasons.

First, federal courts’ role under *Erie* overseeing diversity jurisdiction is different from its role in judicial review scrutinizing the constitutionality of the state law. Under *Erie*, federal courts sitting on diversity jurisdiction have a duty to accept the state’s public policy choice as a given.¹⁹⁷ In conducting a judicial review, the real question is whether the state law even exists. If the state law violates a provision in the Federal Constitution, then the state had no power to enact such a law and the law therefore cannot exist.¹⁹⁸ But if a valid state law exists, then federal courts under *Erie* have a duty to accept it and its policy choices.¹⁹⁹ Any further scrutiny of states’ policy interests by federal courts sitting in diversity actions—and not reviewing the constitutionality of the state law—is in tension with *Erie* and the Rules of Decisions Act.

Second, tier-review itself does not provide coherent guidance to litigants and courts. As then-Associate Justice William Rehnquist noted:

How is this Court to divine what objectives are important?
How is it to determine whether a particular law is “substan-

¹⁹³ *In re Katrina Canal Breaches Litig.*, 613 F.3d 504, 511 (5th Cir. 2010) (certifying a question as to how to interpret an insurance policy in the aftermath of Hurricane Katrina).

¹⁹⁴ *Kilby v. CVS Pharmacy, Inc.*, 739 F.3d 1192, 1196 (9th Cir. 2013).

¹⁹⁵ *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 564 (D.C. Cir. 1993).

¹⁹⁶ See *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) (discussing the Court’s “two-tiered” approach to equal protection claims).

¹⁹⁷ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938).

¹⁹⁸ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“[A]n act of the legislature, repugnant to the constitution, is void.”).

¹⁹⁹ “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” 28 U.S.C. § 1652 (2012); see also *Erie*, 304 U.S. at 78–79.

tially” related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at “important” objectives or, whether the relationship to those objectives is “substantial” enough.²⁰⁰

As in tier-review, in the context of *Erie* and certification, the substantial public policy requirement is wrought with potential gaps where subjective judgments, preferences, or prejudices can seep in.²⁰¹

2. *Creating a High Bar for Certification*

By imposing the substantial policy interest requirement, federal courts impose an additional requirement to what state courts typically require, creating a high bar for certification. The Uniform Certification of Questions of Law Act, recommended for adoption in all states, only imposes very few requirements on receiving certified questions from federal or sister-state courts. The purpose of the Act is “to promote the widest possible use of the certification process in order to promote judicial economy and the proper application of a particular jurisdiction’s law in a foreign forum.”²⁰² The text of the Act reflects this purpose by only requiring that the state law in question is genuinely uncertain and that it would determine the outcome of the case.²⁰³ Federal courts’ imposition of additional requirements, particularly the requirement of substantial policy interests, creates more obstacles to certification.²⁰⁴

C. *Constitutional Problems*

Federal courts’ consideration of whether the state has an important policy interest in the question of state law raises several constitutional concerns under *Erie*. First, federal courts should not be the judge of what policy interests are important for states or whether state courts are better situated than them to make certain policy choices. Not only are state courts *always* better situated than federal courts to make policy choices implicated in the state law, but the Constitution

²⁰⁰ *Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting).

²⁰¹ *See id.*

²⁰² UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3 cmt. (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1995).

²⁰³ *See id.* § 2.

²⁰⁴ *See supra* Part II.

recognizes state courts as “the authority and only authority” to “declare substantive rules of common law” through making policy choices.²⁰⁵ If state courts are the only entities that the Constitution recognizes to declare substantive law, then federal courts cannot deny them this exercise of power by simply stating that some policy questions are not important enough for state courts. Second, the high bar to certification could increase the frequency of *Erie*-guesses. As noted in Section III.B, the consideration of whether the state has important policy interests in the state law creates a high barrier to certification.²⁰⁶ This high barrier is one of the factors that perpetuate federal courts’ presumption in favor of prediction or *Erie*-guess.²⁰⁷ As fully discussed in Section I.C, *Erie*-guesses raise many concerns with regards to federalism, forum shopping, and inequitable administration of justice.²⁰⁸

Finally, some federal courts’ increasing self-confidence that they are as well-situated as state courts to make policy choices threatens the preservation of federalism values underlying *Erie*. Federal courts’ practice of considering a state’s policy interest reveals the increasing self-confidence in their competence to address policy questions implicated in unclear state law.²⁰⁹ Federal courts certify a question, if they conclude that the state has an important policy interest for which state courts are better situated to address.²¹⁰ The subtle implication of denying certification and venturing an *Erie*-guess on a question of unclear state law is that federal courts do not conclude that state courts are better situated than they are to make a certain policy choice. Federal courts have ventured an *Erie*-guess into areas of state law that implicate a great amount of policy such as state constitutional law,²¹¹ public

²⁰⁵ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting)).

²⁰⁶ See *supra* Section III.B.2.

²⁰⁷ See Clark, *supra* note 25, at 1495 (stating that most federal courts use the predictive approach); *supra* Section III.B.2.

²⁰⁸ See *supra* notes 132–41 and accompanying text.

²⁰⁹ “[T]he judge who is here sitting is thoroughly persuaded by his thirty-one years of trial and appellate practice in the Alabama courts as a private practitioner and by his six (plus) years of federal judicial experience sitting in the Northern District of Alabama that he can reasonably predict the opinion and holding of Alabama’s highest court” Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 157 (2003) (alterations in original) (quoting *State Auto Mut. Ins. Co. v. McIntyre*, 652 F. Supp. 1177, 1195 (N.D. Ala. 1987)).

²¹⁰ See *supra* notes 179–86 and accompanying text.

²¹¹ Ronald T. Gerwatowski, *Of Comity and Common Sense: The Need for Federal Courts to Certify Questions of Unsettled State Constitutional Law*, 75 MASS. L. REV. 3, 3 (1990).

officials' tort liability and claims of immunity,²¹² interpretation of complex insurance contract clauses, and creation of new tort causes of action.²¹³ The areas of state law in which federal courts would find state courts better-situated to make a policy judgment seems to be shrinking. This subtle implication seems reminiscent of the *Swift*-era of federal general law, where federal courts felt as well-situated as state courts to decide what the law should be.²¹⁴

Even assuming *arguendo* that federal courts can benefit the development of state law,²¹⁵ this is not a job reserved for federal courts or an endeavor that they should actively pursue. Federal courts must heed *Erie*'s prohibition: "the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word."²¹⁶ "[R]egardless of their relative importance" and regardless of whether federal courts can better address the policy questions, the Constitution reserves the lawmaking power to state courts.²¹⁷

IV. PROPOSED CERTIFICATION RULE

Federal courts should adopt the rule proposed by this Note into the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure to cure the defect in current certification practices. Section IV.A provides and explains the text to be adopted. Section IV.B defends the proposed rule against some potential criticisms.

A. *The Proposed Rule*

This Note proposes that federal courts adopt a rule that will apply uniformly to all federal courts. As an initial matter, the adoption of a federal rule is especially appropriate to address the problems regarding certification. Although the Supreme Court could create a uniform standard for lower federal courts by deciding a case, it is unlikely that a case that decisively turns on the interpretation of a state law and involves the lower court's declination to certify a question to a state

²¹² *Lancaster v. Monroe Cty.*, 116 F.3d 1419, 1431 (11th Cir. 1997), *overruled by LeFrere II*, 588 F.3d 1317 (11th Cir. 2009).

²¹³ See Sloviter, *supra* note 64, at 1679–80.

²¹⁴ See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

²¹⁵ See Sloviter, *supra* note 64, at 1677–80.

²¹⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting)).

²¹⁷ Clark, *supra* note 25, at 1523.

supreme court will reach the Supreme Court.²¹⁸ The certification issue continues to vex lower federal courts without a good opportunity for the Supreme Court to address it. Therefore, the Supreme Court should rely on its rulemaking power under the Rules Enabling Act to fashion a federal rule.

Under the Rules Enabling Act, the Supreme Court has the power “to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.”²¹⁹ Various committees of the Judicial Conference exercise the delegated authority from the Supreme Court to promulgate rules of procedure.²²⁰ Once a rule is proposed, it is then submitted to the Supreme Court, which, if it concurs, officially promulgates the rule by order.²²¹ The proposed rule becomes effective unless Congress acts to modify or reject it.²²² This rulemaking process allows the Supreme Court to pronounce a rule without waiting for, and deciding, a case.

The Supreme Court, through the appropriate rulemaking committees, should adopt the text below:

Rule XX. Certification of Question of State Law.

- (a) If the application of the state law, which will determine the outcome of the case, is genuinely uncertain, then the court, *sua sponte* or by motions of the parties, shall certify the question of state law to the state’s highest court in pursuance of the state’s rules, unless the court determines
 - (i) certification could be misused to unduly delay the proceedings, or
 - (ii) the question of law arises from a heavily fact-specific case such that the state court would not properly declare a consequential rule of law.
- (b) The court may, without exercising its own independent judgment, predict the course in which the state’s highest court would rule only if

²¹⁸ Priority for the Supreme Court review is given to cases involving a federal question, such as a lower federal court decisions that conflicts with other lower federal courts over a federal question, a state court decision that conflicts with other federal or state courts over a federal question, and a federal question that has not yet been addressed by the Supreme Court. *See* U.S. SUP. CT. R. 10.

²¹⁹ 28 U.S.C. § 2072(a) (2012).

²²⁰ *See How the Rulemaking Process Works*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> [<https://perma.cc/FRX2-7M89>] (last visited Nov. 26, 2016).

²²¹ *Id.*

²²² *Id.*

- (i) the state court does not provide for a certification procedure,
- (ii) state court declines to answer the certified question, or
- (iii) certification is or becomes unavailable for any other reason.²²³

This rule will cure the defect—largely caused by federal courts’ consideration of a state’s policy interest—by accomplishing several things. First, the rule removes states’ policy interests as a consideration for deciding whether to certify a question. The rule cures the theoretical, practical, and constitutional defects of federal courts’ certification practices caused by their consideration of a state’s policy interest.²²⁴ Instead, the proposed rule recognizes state courts as the proper institutions to make the judgment regarding the relative importance of the state’s public policy interest in a particular state law.²²⁵ For example, if a federal court certifies a question, then the state court can always conclude that it does not have an important enough of a policy interest and decline to answer the certified question.²²⁶ State courts retain significant discretion in deciding whether to entertain a certified question from federal courts.²²⁷ The state supreme court may determine that its judicial resources would be better utilized if it declined to answer the certified question, but simply allow the federal court to venture an *Erie*-guess.²²⁸

The rule, through a liberal use of certification and minimization of unfettered *Erie*-guesses, increases the likelihood that a state law being applied in federal court will be the same as the state law being applied in state court.²²⁹ State courts will have increased opportunities to declare an authoritative law.²³⁰ Federal courts sitting in diversity will subsequently make fewer mistakes of wrongly predicting the con-

²²³ The text of the rule is modeled after Rule 56 of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 56. The rule incorporates federal courts’ best practices.

²²⁴ See *supra* Part III.

²²⁵ See *Arizonans for Official Eng. v. Arizona*, 520 U.S. 43, 77–78 (1997).

²²⁶ See UNIF. CERTIFICATION OF QUESTION OF LAW ACT § 3 cmt. (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1995); Cochran, *supra* note 209, at 160.

²²⁷ See Cochran, *supra* note 209, at 160.

²²⁸ See *Doyle v. City of Medford*, 565 F.3d 536, 544 (9th Cir. 2009) (“If the court decides that the question presented in this case is inappropriate for certification, or if it declines the certification for any other reason, it should so state and we will resolve the question according to our best understanding of Oregon law.”).

²²⁹ See Watkins, *supra* note 132, at 456, 458.

²³⁰ See Clark, *supra* note 25, at 1550.

tents of the state law.²³¹ Society and future litigants will also have the benefit of adjusting their primary behaviors based on authoritative law, not a mere guess.²³² The proposed rule, therefore, will reduce inequitable administration of justice and forum shopping as *Erie* envisioned.²³³

Second, the rule leaves federal courts' discretion to certify largely intact through nonpolicy considerations. This is consistent with the Supreme Court's *Lehman Brothers v. Schein*²³⁴ holding, which grants discretion to federal courts to decide whether to certify a question.²³⁵ The rule fully incorporates two of the considerations of the Uniform Certification of Questions of Law Act—genuine uncertainty and outcome determinativeness.²³⁶ Also, federal courts can still consider whether certification is being misused for delay tactics by considering factors such as the identity of the party seeking certification.²³⁷ Federal courts can also exercise their judgment as to whether the case at bar is too fact-dependent such that state courts would not be able to issue a good precedent.²³⁸ As noted above, federal courts already look to these nonpolicy considerations.²³⁹

Third, the rule establishes a presumption in favor of certification.²⁴⁰ The rule textually—through Subsection (a)'s "shall" and Subsection (b)'s precedent conditions on *Erie*-guess—creates a default posture of certifying the questions of state law. Subsection (a)'s "shall" makes ambiguity in state law the primary consideration in certifying the question to state courts. Subsection (b) significantly restricts federal courts from venturing an *Erie*-guess to ascertain the meaning of unclear state law. *Erie*-guesses are permitted *only if* certification procedure is unavailable.²⁴¹ This is similar to the Ninth Circuit's practice in which it certifies a question, but if the state court

231 See Schaffer & Herr, *supra* note 104, at 1627.

232 See Sloviter, *supra* note 64, at 1681.

233 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938).

234 416 U.S. 386 (1974).

235 *Id.* at 394–95.

236 UNIF. CERTIFICATION OF QUESTION OF LAW ACT § 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1995).

237 See *City of Columbus v. Hotels.com, L.P.*, 693 F.3d 642, 654 (6th Cir. 2012); *Doe v. City of Chicago*, 360 F.3d 667, 672 (7th Cir. 2004).

238 See *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423, 430 (7th Cir. 2012) (per curiam).

239 See *supra* notes 169–77 and accompanying text.

240 See Clark, *supra* note 25, at 1556–57.

241 See *id.* at 1557.

declines to answer, then the Ninth Circuit resorts to an *Erie*-guess.²⁴² An *Erie*-guess under this circumstance, or a “Subsection (b) *Erie*-guess,” does not raise the usual federalism concerns like other *Erie*-guesses, because federal courts are offering state courts the first bite at the apple.²⁴³ By certifying a question, federal courts are deferring to state courts to weigh in on their own policy interests and declare the law. When state courts *decline* to weigh in on a particular issue, they are making a policy decision not to address that issue now.²⁴⁴ Silence is as much a policy decision as speaking directly.²⁴⁵

Fourth, the rule creates a uniform guidance to all federal courts. This uniform rule will ensure that *all* litigants in diversity actions, regardless of which circuit their litigation is pending, will “receive the constitutional benefits of certification.”²⁴⁶ Perhaps, a uniformly liberal federal certification rule could also persuade state courts to become more liberal toward certification. Currently, a sizeable number of states only answer certified questions from federal circuit courts, but not from federal district courts.²⁴⁷ Subsequently, federal district courts often do not receive the benefit of certification. Under the rule, federal district courts can and will venture an *Erie*-guess if certification is not available. This could incentivize state courts, jealous of their prerogatives, to liberalize their certification procedure toward federal district courts.²⁴⁸

B. Counterarguments

The rule can survive some of the criticisms that are often raised against the increased use of certification: (1) state courts will no longer make certification available if federal courts overuse certification, and (2) certification will create delay and inefficiency in litigation. The proposed rule was designed with proper exceptions and

²⁴² See *Doyle v. City of Medford*, 565 F.3d 536, 544 (9th Cir. 2009) (“If the court decides that the question presented in this case is inappropriate for certification, or if it declines the certification for any other reason, it should so state and we will resolve the question according to our best understanding of Oregon law.”).

²⁴³ See *Burford v. Sun Oil Co.*, 319 U.S. 315, 332 (1943) (preferring abstention over prediction because it gave “the Texas courts the first opportunity to consider” the “basic problems of Texas policy”).

²⁴⁴ See Bill Kerin, *Leadership in Action with Nate Fick ‘99*, NELSON A. ROCKEFELLER CTR. (Nov. 7, 2015, 2:14 PM), <http://rockefeller.dartmouth.edu/news-events/leadership-action-nate-fick-99> [<https://perma.cc/AL79-EHQH>] (“Indecision is a decision.”).

²⁴⁵ See *id.*

²⁴⁶ *Watkins*, *supra* note 132, at 481.

²⁴⁷ *Clark*, *supra* note 25, at 1557.

²⁴⁸ See *id.* at 1561–62.

safety valves to withstand these criticisms and address the valid points they raise.

As an initial matter, the overuse argument is not a persuasive one because it omits a crucial fact that state courts retain significant discretion to decline to answer a certified question.²⁴⁹ In any event, the proposed rule provides four gatekeepers to eliminate frivolous certification requests by litigants and to establish a minimum threshold for federal courts to satisfy. For example, the proposed rule establishes a higher threshold than the Uniform Certification of Questions of Law Act. The Act lists two gatekeepers in state courts—genuine uncertainty and outcome-determinativeness—in receiving certified questions.²⁵⁰ The proposed rule lists four gatekeepers in federal courts in sending certified questions in the first place: genuine uncertainty, outcome-determinativeness, consideration of undue delay, and fact-intensiveness.

The proposed rule can also withstand the criticism associated with increased cost, delay, and inefficiency.²⁵¹ The four gatekeepers can similarly be used to limit undue delay in litigation, as much as it can limit overuse. The Subsection (b) *Erie*-guess provisions also permit federal courts to venture an *Erie*-guess as a last resort when or if state courts decline to answer.²⁵² This safety valve provision will minimize some inefficiency or delay. It is true that there will be some unavoidable delay in time and inefficiency associated with transferring paperwork back and forth between state and federal courts.²⁵³ However, the societal benefit of ascertaining an authoritative law, minimizing federal intrusion on state prerogatives, and reducing inequitable administration of justice and forum shopping outweighs the cost of delay in litigation, which is already mitigated by the rule's gatekeepers and safety valve provisions.²⁵⁴

CONCLUSION

Ascertaining the meaning of unclear state law will always be a difficult task for the federal courts. This task is made easier as state

249 See UNIF. CERTIFICATION OF QUESTION OF LAW ACT § 3 cmt. (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1995); Cochran, *supra* note 209, at 160.

250 See UNIF. CERTIFICATION OF QUESTION OF LAW ACT § 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1995).

251 See Clark, *supra* note 25, at 1560.

252 See Doyle v. City of Medford, 565 F.3d 536, 544 (9th Cir. 2009).

253 See Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 332–33 (1994).

254 See Schaffer & Herr, *supra* note 104, at 1636–37.

courts avail themselves through certification to resolve difficult issues of state law for federal courts. Certification is becoming increasingly popular among state and federal courts. The United States Supreme Court has praised its use and committed its use to federal courts' discretion. These are laudable developments in our federal judicial system. However, as this Note argues, federal courts' current certification is not without fault, particularly when federal courts consider states' policy interests in deciding whether to certify a question to state courts. Federal courts can prudently make increased use of certification by adopting a rule that uses nonpolicy gatekeepers. Certification is beneficial for federal courts and litigants because it gives them an authoritative law and for state courts because they get to address the policy issues that would not have come to them. Its increased use will improve diversity jurisdiction and judicial federalism.