A Certification Rule for California

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I. INTRODUCTION

At least forty states have a procedure which allows a federal court, uncertain about a point of state law that could determine the outcome of a case before it, to certify that question to the state's highest court and receive an authoritative answer. This relieves the federal court of the need to speculate about state law, and protects the state from having its law misinterpreted or misapplied in a potentially influential federal decision.¹

However, certification requires an enabling procedure permitting the state court to receive and answer the certified question.² Many states have adopted the Uniform Certification of Questions of Law Act,³ and other states have established certification procedures by statute or by rule. California alone among the states in the Ninth Circuit has no such procedure.⁴ Federal courts considering questions of Califor-

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2. See, e.g., Tahoe Regional Planning Agency v. McKay, 769 F.2d 534, 541 n.12 (9th Cir. 1985) (noting certification unavailable where Nevada had no enabling mechanism). Nevada has since adopted such a mechanism by rule. See Nev. R. App. P. 5.
nia law are therefore unable to certify them to the California Supreme Court.

This lack of a certification procedure is a regrettable gap in California law. This article proposes a draft rule [hereinafter "Proposed Rule"] establishing a California certification procedure, with commentaries on its particular provisions and on certain other aspects of the proposal. The Proposed Rule, in substantially the same form, was presented to the California State-Federal Judicial Council on April 7, 1994, was endorsed by the Ninth Circuit Senior Advisory Board, and has since been submitted informally to justices of the California Supreme Court. In October of 1995, the Conference of Delegates of the State Bar of California recommended that the Supreme Court "adopt a draft rule," and that the legislature adopt a constitutional amendment, permitting a certification procedure, and that the California Supreme Court also adopt another "draft rule" in substantially the same language as the Proposed Rule presented here. These events, although no doubt helpful, do not appear yet to have brought adoption of a certification procedure appreciably closer. Accordingly, this article is intended to bring a broader understanding of the virtues of the Proposed Rule to the California bench and bar, and perhaps generate sufficient support to bring the proposal nearer to fruition.

After a discussion of the desirability and constitutional-ity of a certification provision and possible methods of adoption, this article presents the full text of the Proposed Rule and a detailed commentary on each of its provisions. The Proposed Rule has several especially distinctive features, including: (1) a limitation restricting the power of certification to the United States Supreme Court and United States Courts of Appeals [section 1]; (2) a requirement that the certifying court include an analysis showing that the question certified is truly contested, has no controlling precedent in state law, and is potentially determinative of the cause [section 3(d)]; (3) a list of factors for the state supreme court to consider in exercising its absolute discretion to accept or reject a certified question [section 6]; (4) a provision permitting the

5. The version recommended by the Conference of Delegates differed from the original proposal in that it would have extended the power of certification to "any" federal court, including district courts, and would have withheld from the California Supreme Court the power to restate a certified question.
state supreme court to restate the question [section 7]; and 
(5) a provision permitting intervention by the state attorney 
general at the court's invitation if the validity of a state statute is called into doubt [section 9].

II. THE DESIRABILITY OF THE PROPOSED RULE
A. Advantages of Certification

When a court has to determine the law of another jurisdiction on a given point, and the law in that jurisdiction is unclear on that point, the court is obliged to speculate about what the highest court of the other jurisdiction would decide. As Judge Friendly of the Second Circuit put it: "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."7

Especially since the Erie decision,8 federal courts have had frequent occasion to determine state law, and they have not always been right. For example, in the classic case of Green v. American Tobacco Co.,9 the Fifth Circuit affirmed a products liability judgment for a tobacco company, against a plaintiff with lung cancer, on the basis that Florida law required knowledge of the defect or condition for a defendant to be held liable on an implied warranty.10 When one judge on the panel dissented, the court granted rehearing to permit certification of this question to the Florida Supreme Court. The Florida court replied that Florida law was otherwise.11 Judge Rives began his second opinion by saying:

First, to the Justices of the Supreme Court of Florida we wish to express publicly and with deep sincerity our appreciation for their answer to the question which we certified to that Court. That 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

6. See discussion infra part V.
9. 304 F.2d 70 (5th Cir. 1962), certifying question to 154 So. 2d 169 (Fla.), and conformed to answer, 325 F.2d 673 (5th Cir. 1963), cert. denied, 377 U.S. 943 (1964).
10. Green, 304 F.2d at 73.
a grave miscarriage of justice. The Supreme Court of Florida has been a very real help in the administration of justice.\footnote{12}

\textit{DeWeerth v. Baldinger}\footnote{13} is a particularly poignant case. DeWeerth owned a painting by Monet that was stolen in Germany at the close of World War II.\footnote{14} When DeWeerth learned of its whereabouts many years later, she sued for its return.\footnote{15} The federal district court in New York held the action timely and ordered the painting returned.\footnote{16} But, the Second Circuit reversed, imposing a diligence requirement it believed existed under state law.\footnote{17} The circuit court refused to certify the diligence question to New York's high court, on the ground that "that valuable procedure should be confined to issues likely to recur with some frequency."\footnote{18} Four years later, in \textit{Solomon R. Guggenheim Foundation v. Lubell},\footnote{19} on nearly identical facts, New York's highest court decided the diligence question exactly the opposite way, noting that "the issue has recurred several times in the three years since \textit{DeWeerth} was decided."\footnote{20} DeWeerth then went back to the federal district court and asked the same judge who had originally ordered the painting returned to grant her relief from the judgment under Federal Rule of Civil Procedure 60.\footnote{21} The judge granted relief on the ground that federalism confided this issue to state law and DeWeerth should not be penalized for bringing a meritorious action in a federal court which misconstrued it, rather than in a state court which would have held correctly.\footnote{22} But, the Second Circuit reversed again, holding that their earlier decision, although wrong,
had at least the virtue of finality. And so, even though her action had been timely all along, DeWeerth never got her Monet back because an available certification procedure was not used.

Many similar examples exist. For instance, a study by the Federal Judicial Center describes the case of a district judge who decided, with a memorandum opinion, a case turning on a question of state law. The study quotes the judge as follows:

Then, I discovered a district judge was permitted to certify a question, vacated my order, obtained the necessary forms from the [state] supreme court, and sent the question to that tribunal. After full briefing and oral argument, the [state] supreme court decided the question. As you might have suspected, the court's resolution of the issue was opposite to mine. Thus, had there been no certification procedure, the only case in the books upon which counsel and parties might rely for the interpretation of that provision of law would have been a district court opinion from [another] district by a district judge who had never practiced in the district courts nor sat as a judge in that state. Presumably, when the issue finally reached the courts, that state's supreme court would have resolved it contrary to the district judge's resolution and the parties that had relied upon that federal court interpretation in the meantime would have acted contrary to law.

Thus, from a federal court's point of view, allowing certification of an uncertain point of state law avoids both the necessity of time-consuming speculation on the unfamiliar law of a foreign jurisdiction and the possibility of embarrassing

24. I am grateful to Simon J. Frankel, Esq., of San Francisco, for bringing the DeWeerth cases to my attention.
27. Id. at 13-14 (deleting the name of the state to preserve the judge's anonymity).
By certifying a question of state statutory interpretation, a federal court can also sometimes avoid deciding a constitutional issue without abstaining.  

From a state court's point of view, certification is an important instrument in preventing confusion about the state's law due to incorrect federal court determinations. It strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to rule on an undecided or unclear issue (certification is only used when state law on a given issue is unclear or nonexistent). Allowing federal courts to defer to state courts in such cases reinforces the federal judiciary's acknowledgment of state sovereignty and fosters values of federalism and comity in a way beneficial to state interests.  

In Scott v. Bank One Trust

28. See, e.g., Grover v. Eli Lilly & Co., 33 F.3d 716 (6th Cir. 1994). "Certification has proved to be an important tool for federal courts sitting in diversity, since it frees them from having to speculate how state courts will decide important questions of state law." Id. at 719.

Indeed, once an answer is received the federal court is obliged to follow it as law of the case. A federal court that certifies a question of state law should not be free to treat the answer as merely advisory unless the state court specifically contemplates that result. Cf. Sifers v. General Marine Catering Co., 892 F.2d 386, 391 (5th Cir. 1990) (holding parties are bound by an answer to a certified question because it is the law of the case). When a state supreme court accepts a certified question, it voluntarily undertakes a substantial burden and its resolution of the issue must not be disregarded. Id. Accord Longway v. Jefferson County Bd. of Supervisors, 24 F.3d 397, 401 (2d Cir. 1994). If a state refuses a certified question, the federal court has no choice but to make an "Erie guess." See Naquin v. Prudential Assurance Co., 71 F.3d 512 (5th Cir. 1995). And, if emergency action is required during the pendency of the certification, for example where injunctive relief is requested, the federal court may act on its provisional interpretation of the law. See A Woman's Choice — East Side Medical Clinic v. Newman, 904 F. Supp. 1434, 1442 n.2, 1468, 1474 (S.D. Ind. 1995).


30. The same considerations apply to determinations of state law by the courts of other states, for example in conflict of laws cases.

the Ohio Supreme Court upheld the state certification procedure and stated that:

[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. 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. In that way, the federal court has, at least temporarily, made state law of which the state would have disapproved, had its courts had the first opportunity to pass on the question.

. . . . . Points of state law that seem unclear to federal courts may be quite clear to [informed local courts, which may find meaning not discernible to the outsider. . . .

. . . [W]e strongly believe in the importance of accurately applying Ohio law in federal courts.33

Certification can also avoid conflicts between state and federal courts, and "does in the long run save time, energy and resources and helps build a cooperative federalism."34

Certification can also forestall needless litigation. "By providing a procedure by which the state court can interpret a statute before the federal court considers the statute's constitutionality, certification permits states and federal courts to collaborate in the wise endeavor to avoid constitutional adjudications unless they are indispensable for resolving the controversy."35

This is especially true in the area of Pullman abstention.36 In Pullman cases, a federal court abstains from deciding a case where a state law is challenged on federal constitu-

33. Scott, 577 N.E.2d at 1080 (citations and quotation marks omitted).
tional grounds if a court determination of an unsettled point of state law could dispose of the matter and make a constitutional decision unnecessary.\textsuperscript{37} Permitting certification in such cases short-circuits the process and makes state litigation unnecessary, with a consequential saving of state trial and appellate court resources.\textsuperscript{38} Settling an important but unclear point of state law can also independently reduce state litigation and prevent or resolve conflicts among state courts.

It is worth noting that as long ago as 1983, a committee of the American Bar Association urged each state to adopt a procedure whereby the highest court of the state may answer a question of state law certified by an Article III court of the United States, when the answer will be controlling in an action in the certifying court and cannot in the opinion of the certifying court be satisfactorily determined in light of state authorities.\textsuperscript{39}

B. Fear of Inundation

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. As a result, the state supreme court will spend an inordinate amount of time answering questions of concern to people litigating elsewhere, at the expense of its own litigants.

Upon closer scrutiny, however, this [concern] appears to have little weight. In the nearly half-century history of the interjurisdictional-certification process, only a handful of questions have been certified. \ldots None of the forty jurisdictions with certification procedures has reported


\textsuperscript{38} There are savings at the trial and intermediate appellate stages because a new state action is avoided entirely. Although the certified question will require a state supreme court adjudication, this requires fewer resources than appellate review of an entire state action because only one point need be determined.

being overburdened by the number of certified questions, despite the prevalent fear of inundation.\(^40\)

The number of questions certified has always been quite small. For example, during 1990 and 1991, certified questions comprised only about one-third of one percent of the total filings in state supreme courts in the Ninth Circuit.\(^41\)

Many factors operate to make inundation very unlikely. First, questions are not certified unless state law is unclear.\(^42\) Second, questions are not certified (and certainly should not be accepted) unless the answer might determine the outcome of the case.\(^43\) Section 3(d) of the Proposed Rule requires statements by the certifying court on both these points.\(^44\)

Third, United States courts have historically been quite conservative in matters of certification, and have been scrupulous to limit their use of this procedure even beyond what state procedures require. As one circuit judge wrote, "we use much judgment, restraint and discretion in certifying. We do not abdicate."\(^45\) For example, in Woodbridge Place Apartments v. Washington Square Capital, Inc.,\(^46\) the


\(^{41}\) See infra Appendix I.

\(^{42}\) See Snow v. Harnischfeger Corp., 12 F.3d 1154, 1161 (1st Cir. 1993) (refusing certification because sufficient guidance available in state decisions), cert. denied, 115 S. Ct. 56 (1994); Koffski v. Village of North Barrington, 988 F.2d 41, 45 n.8 (7th Cir. 1993); cf. Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370, 372 (6th Cir. 1995) (concluding that "well-established principles" of state law were sufficient even without case governing exact point); Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559, 564 (5th Cir. 1992) (holding that a state statute was sufficiently clear even without state decisional interpretation). Especially notable is Gould v. Mutual Life Ins. Co., 735 F.2d 1165, 1167-68 (9th Cir. 1984), cert. denied, 471 U.S. 1017 (1985), where the Ninth Circuit refused certification on the ground that state law was not unsettled, even though the state supreme court had just granted reconsideration of a recent decision involving the disputed rule.

\(^{43}\) See, e.g., In re McLinn, 744 F.2d 677, 681-82 (9th Cir. 1984), cert. denied sub nom. Churchill v. F/V Fjord, 497 U.S. 1025 (1990) (refusing certification where unresolved factual issue could be dispositive); Boyter v. Commissioner, 668 F.2d 1382 (4th Cir. 1981) (refusing certification where undecided federal issue could be dispositive); see also Retail Software Servs., Inc. v. Lashlee, 525 N.E.2d 737 (N.Y. 1988) (refusing to address the question as it did not satisfy state constitutional requirement that it "may be determinative of the cause").

\(^{44}\) See infra part V.3.d.

\(^{45}\) Barnes v. Atlantic & Pac. Life Ins. Co., 514 F.2d 704, 705 n.4 (5th Cir.), certifying question to 325 So. 2d 143 (Ala. 1975), and conformed to answer, 530 F.2d 98 (5th Cir. 1976).

\(^{46}\) 965 F.2d 1429 (7th Cir. 1992).
Seventh Circuit refused to certify a question on the ground that "fact specific, particularized decisions that lack broad general significance are not suitable for certification." Moreover, in *Mount Vernon Fire Insurance Co. v. Creative Housing, Ltd.*, the court noted that the probable frequent recurrence of the disputed point and its implication of "important values" in the evolution of state law "weigh in favor" of certifying a question. In *McLinn*, the Ninth Circuit stated that "particularly compelling reasons must be shown when certification is requested for the first time on appeal by a movant who lost on the issue below." In *Fischer v. Bar Harbor Banking & Trust Co.*, the First Circuit denied certification to a plaintiff who could have sued in state court, but instead elected a federal forum on the ground of diversity. The federal case law contains many other examples of such self-restraint.

47. *Woodbridge Place Apartments*, 965 F.2d at 1434.
48. 70 F.3d 720 (2d Cir. 1995).
52. *Fischer*, 857 F.2d at 8. "[O]ne who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification. We do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort." *Id.* (quoting *Cantwell v. University of Mass.*, 551 F.2d 879, 880 (1st Cir. 1977)). *See also* National Bank of Wash. v. *Pearson*, 863 F.2d 322, 327 (4th Cir. 1988) (holding that certification was inappropriate on motion of one who had removed case from state court after losing on issue before state judge. *"If Pearson had wanted the Maryland Court of Appeals to rule on the matter, he should not have removed the action to federal court."*)
53. For a thoughtful list of criteria to be considered by federal courts in deciding whether to certify a question, see *Rowson v. Kawasaki Heavy Indus.*, 866 F. Supp. 1221 (N.D. Iowa 1994).

A court may consider the following factors in determining whether to certify a question to the state supreme court: (1) the extent to which the legal issue under consideration has been left unsettled by the state courts; (2) the availability of legal resources which would aid the court in coming to a conclusion on the legal issue; (3) the court's familiarity with the pertinent state law; (4) the time demands on the court's docket and the docket of the state supreme court; (5) the frequency that the legal issue in question is likely to recur; and (6) the age of the
Fourth, under the Proposed Rule, the California Supreme Court would have \textit{absolute discretion} to accept or decline certification.\textsuperscript{54} Section 6 of the Proposed Rule lists many criteria for accepting or declining a question, but there is no \textit{obligation} to accept a question under any circumstances. Should the court receive more certified questions suitable for answer than anticipated, it need accept only those it wishes to answer and can answer conveniently. The California Supreme Court has not hesitated to use its discretionary power over appellate review as an instrument of docket control, and there is no reason to expect that it would do otherwise with certified questions.

Finally, the Proposed Rule would limit certification to United States Courts of Appeals and the United States Supreme Court. It would thereby eliminate most of the likely certifying jurisdictions, the district courts.

\section*{III. Methods of Adoption}

There are three methods by which California could adopt a certification procedure: by rule, by statute, and by popular vote.

\subsection*{A. By Rule}

The best method would be for the supreme court (or the Judicial Council) to adopt a procedure by rule. This would be by far the fastest route, and would reserve maximum control over the specifics of the procedure to the judicial branch. As discussed below, it seems clear that the California Supreme Court, like most others that have considered the matter, has the constitutional authority to adopt a certification procedure by rule.\textsuperscript{55} For these reasons, the Proposed Rule has been cast as a Supreme Court Rule.

\subsection*{B. By Statute}

In the alternative, the state legislature could establish a certification procedure by statute. However, passing a statute would be time consuming, would remove the fashioning of

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\textsuperscript{54} See infra part V.

\textsuperscript{55} See infra part IV.
the provisions from the court's control, and would expose the adoption process to external influences. The statutory approach is also clearly constitutional.\textsuperscript{56}

If the statutory method is used, it would be best to participate in the Uniform Certification of Questions of Law Act.\textsuperscript{57} Uniform state laws are good things in themselves and it would be beneficial to further that effort. Also, California would be able to benefit directly from the experience and interpretation of other jurisdictions. Other solutions are of course possible, and some states (such as New York) have passed their own statutes without explicit reference to the Uniform Act. Most of the states that have adopted the Uniform Act have made some variation in it. Although the Proposed Rule is based in large part on the text of the Uniform Act, the most useful features of each state's peculiar variations have been assimilated into it.

C. \textit{By Popular Vote}

The Proposed Rule could also be adopted by the people at an election through initiative or referendum, either as a statute or as a constitutional amendment. This method is the least attractive alternative. It would take the longest time, and would be the most expensive and most politicized method of adoption. The initiative would require a yes or no vote without opportunity for amendment. The popular vote would also subject a technical and specialized legal procedure to the determination of the voters at large, who have neither the interest nor the qualifications to make an appropriately reasoned and considered judgment. Adopting a certification procedure by constitutional amendment would certainly remove any question about its constitutionality, but no such question is sufficiently substantial to require such a cumbersome method of adoption.

IV. CONSTITUTIONALITY OF THE PROPOSED RULE

This section examines the constitutionality of certification procedures. As California has no such procedure, there is no domestic law on the question, and accordingly, frequent reference is made to the constitutional decisions of other

\textsuperscript{56} See infra part IV.

\textsuperscript{57} See supra note 3 and accompanying text.
states. Appendix II contains the full text of the relevant constitutional provisions in California and selected other states, with constitutional analysis from the supreme courts of the states concerned.\textsuperscript{58}

A. Advisory Opinions

The Proposed Rule has been carefully drafted to guarantee: (1) that the court will only address issues presented on a fully developed factual record; (2) that the court will only address issues that are truly contested between the parties; (3) that the answer will be dispositive of the issue; (4) that settling the issue may determine the outcome of the entire action; and (5) that the answer will be res judicata between the parties. Most state courts that have considered the issue have held these provisions sufficient to prevent an answer to a certified question from being an advisory opinion.\textsuperscript{59}

B. Constitutionality of Adoption by Supreme Court Rule

There is no doubt that answering certified questions is an exercise of the judicial function.\textsuperscript{60} It can therefore be done only by the judiciary, as the entire judicial power is vested in the supreme court and the inferior courts.\textsuperscript{61} Because certification requires a definitive statement by the highest state court, the California Supreme Court is the only judicial organ suitable for (or capable of) answering certified questions.

\textsuperscript{58} See infra Appendix II.

\textsuperscript{59} See, e.g., Schlieter v. Carlos, 775 P.2d 709, 710 (N.M. 1989); In re Elliott, 446 P.2d 347, 354-355 (Wash. 1968); cf. In re Richards, 223 A.2d 827, 832 (Me. 1966) (certification by federal court becomes, by the force of the certification statute itself, "the jurisdictional vehicle for placing the matter before the court for its action"); Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 633 (Or. 1991).

\textsuperscript{60} See, e.g., Bodinson Mfg. Co. v. California Employment Comm., 109 P.2d 935, 939 (Cal. 1941) (ultimate interpretation of statute is an exercise of judicial power); People v. Bird, 300 P. 23, 26 (Cal. 1931) (judicial function is to declare the law and define the rights of the parties under it); Quinchard v. Board of Trustees, 45 P. 856 (Cal. 1896) (determination of rights of individual under existing laws is exercise of judicial power). A number of hoary definitions of the judicial power are usefully collected in Marin Water & Power Co. v. Railroad Comm'n, 154 P. 864, 866-87 (Cal. 1916).

\textsuperscript{61} CAL. CONST. art VI, § 1. See also Strumsky v. San Diego County Employees Retirement Ass'n, 520 P.2d 29, 39 (Cal. 1974) (stating that Article VI disposes of all judicial power not expressly disposed of elsewhere in the state constitution, leaving the entire judicial power concentrated in the state court system and constitutional agencies).
Ohio adopted certification by Supreme Court Rule, and the question arose whether such a rule was constitutional. The Ohio Supreme Court resolved the constitutional issue as follows:

In our view, [the] power [to decide certified questions] 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.62

It seems clear that when a federal court misinterprets California law, in a decision lying beyond California Supreme Court review, it complicates the work of the California judiciary. As a Texas Supreme Court justice stated:

We encourage federal courts to inquire concerning the resolution of doubtful questions of state law which are critical to the outcome of pending litigation. Certainly we have a strong preference for this approach rather than the alternative — an incorrect federal surmise regarding how we would resolve a matter of disputed Texas law. Such federal errors would only serve to make our work more difficult by leading to misreliance on federal precedents by both the bench and bar.63

The California Supreme Court, like all other state supreme courts, has inherent power (absent a constitutional restriction) to aid and protect the exercise of its judicial power.

By providing for certification, California would preserve its sovereignty, reinforce the primacy of the supreme court in interpreting California law, protect California law from misinterpretation, reduce demands on state judicial resources, and improve the administration of justice. It is accordingly

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63. Amberboy v. Société de Banque Privée, 831 S.W.2d 793, 799 (Tex.) (Doggett, J., concurring in part and dissenting), conformed to answer sub nom. Ackerman v. F.D.I.C., 973 F.2d 1221 (5th Cir. 1992).
within the province of a state supreme court to provide for certification by court rule. Of the forty jurisdictions that have adopted certification procedures, at least nine have proceeded by court rule alone without an enabling statute or constitutional amendment.\textsuperscript{64} Where the power of the state supreme court to adopt a certification rule has been challenged and litigated, the court’s power has usually been upheld. It seemed sufficiently obvious to the Montana Supreme Court that it had the power to answer a certified question, even in the absence of a statute, that it asserted this power summarily.\textsuperscript{65} And the Washington Supreme Court, considering this question in \textit{In re Elliott},\textsuperscript{66} noted that:

So patent is the power of a court to render an opinion in response to a certified question that New Hampshire has adopted the practice by court rule, not waiting for an expression of legislative approval of the idea. Supreme Court Rule 21 . . . is treated by the New Hampshire court as a rule of procedure, that court obviously finding no constitutional impediment to the adoption of such a rule.

This court, under its rule-making power . . . could do as the Supreme Court of New Hampshire has done. It could also accept a certified question and respond to it even if there were no implementing statute or rule. 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.\textsuperscript{67}

The Idaho Supreme Court followed the Washington precedent in \textit{Sunshine Mining Co. v. Allendale Mutual Insurance Co.},\textsuperscript{68} holding that it had the power to entertain certified questions “by exercise of its judicial power.”\textsuperscript{69} The Idaho court held explicitly that certification was within its inherent

\textsuperscript{64} The jurisdictions are Colorado, Kentucky, Massachusetts, Michigan, Mississippi, Montana, North Dakota, Rhode Island and Puerto Rico. \textit{See} Robbins, \textit{supra} note 40, at 160 n.270.


\textsuperscript{66} 446 P.2d 347 (Wash. 1968).

\textsuperscript{67} \textit{In re Elliott}, 446 P.2d at 358. \textit{Cf.} Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 742 (Fla. 1961) (holding that absent a constitutional provision to the contrary, a state may adopt a certification procedure “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’”).

\textsuperscript{68} 666 P.2d 1144 (Idaho 1983).

\textsuperscript{69} \textit{Sunshine Mining Co}, 666 P.2d at 1147 (citing \textit{In re Elliott}, 446 P.2d 347 (Wash. 1968) and Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 742 (Fla. 1961)).
power to make the judicial power effective in the administration of justice.\textsuperscript{70}

The Ohio Supreme Court also did not hesitate to uphold Ohio’s adoption of certification by rule.

To the extent that a federal court applies different legal rules than the state court would have, the state’s sovereignty is diminished; . . . the federal court has made state law. From the state’s viewpoint, losing part of its sovereignty is no small matter, especially since a federal court’s error may perpetuate itself in state courts until the state’s highest court corrects it.

Certification ensures that federal courts will properly apply state law. It thus strengthens the “federalist structure of joint sovereigns,” and redeems “the promise of liberty” contained in the federal and Ohio Constitutions. We cannot doubt our power to protect Ohio’s sovereignty from inadvertent encroachments by federal courts. We therefore hold that Rule XVI is constitutional.\textsuperscript{71}

The only reported case holding it unconstitutional to adopt a certification procedure is \textit{Holden v. N.L. Industries, Inc.}\textsuperscript{72} Significantly, this case turned on specific exclusionary language in the Utah constitution to the effect that the Utah Supreme Court had original jurisdiction to issue five named writs, and “[i]n other cases the Supreme Court shall have appellate jurisdiction only . . . .”\textsuperscript{73} The Utah court held that this word prevented the supreme court from exercising jurisdiction over certified questions.\textsuperscript{74}

The comparable provision in most state constitutions omits the word only. In the absence of that negative, the constitutional conferral of appellate jurisdiction would be susceptible to the construction that the court’s jurisdiction could be enlarged by an exercise of legislative or judicial

\begin{itemize}
\item \textsuperscript{70} Id. at 1147-48.
\item \textsuperscript{71} Scott v. Bank One Trust Co., 577 N.E.2d 1077, 1079-81 (Ohio 1991) (citations omitted).
\item \textsuperscript{72} 629 P.2d 428, 432 (Utah 1981). Missouri has also held, in a series of unreported memoranda, that the jurisdiction provided for it under its state certification statute was beyond that constitutionally permitted. See, e.g., Grantham v. Missouri Dept of Corrections, No. 72576, 1990 WL 602159 (Mo. July 13, 1990).
\item \textsuperscript{73} \textit{Holden}, 629 P.2d at 430 (quoting UT\textit{AH CONST.}, art. VIII, § 4 (amended 1984)) (emphasis added).
\item \textsuperscript{74} Since \textit{Holden}, the Utah Constitution has been amended to permit the supreme court to accept certified questions. See UT\textit{AH CONST.}, art. VIII, § 3; UT\textit{AH CODE ANN.}, § 78-2-2 (Mitchie Supp. 1995); UT\textit{AH R. APP.}, P. 41.
\end{itemize}
power.... Such was the case in *In re Elliott*... where the Washington Supreme Court upheld the constitutionality of a statute providing for certification.\(^6\)

The absence of any such restriction in the California Constitution strongly suggests that the power of the California Supreme Court is not inhibited in this regard.\(^6\)

C. *Constitutionality of Adoption by Judicial Council*

Article VI, section 6 of the California Constitution permits the Judicial Council, in order to "improve the administration of justice," to adopt rules of practice and procedure not inconsistent with statute.\(^7\) This appears to be sufficient independent constitutional authority for the Council to adopt a certification rule.\(^8\)

D. *Constitutionality of Adoption by Statute*

In *Methodist Hospital v. Saylor*,\(^9\) the California Supreme Court set out the constitutional position as follows:

Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. In other words, "we

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\(^6\) *Holden*, 629 P.2d at 430 (emphasis added). The Court went on to say: The procedure devised to permit federal courts to certify questions of state law for state courts to answer is a commendable effort to further the interest of justice through cooperative efforts by state and federal courts. If our constitutional powers permitted us to be involved in that kind of cooperative effort... we would have no hesitancy. *Id.* at 431.

\(^7\) *Cf. In re Garner*, 177 P. 162 (Cal. 1918). The California Supreme Court stated that "[i]n the absence of a [statutory] provision... or where it is inadequate, no doubt but such a constitutional court by virtue of its inherent power, may itself prescribe appropriate provision for acquiring jurisdiction and adopt the procedure to be followed." *Id.* at 164 (emphasis added). *Garner* concerned the contempt power, but there is no reason to think the same principles do not apply to a fundamental judicial power such as stating the law. *See id.*

\(^8\) *Cf., e.g., Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 742 (Fla. 1961) (holding that the state supreme court could adopt a certification procedure by rule "if it is deemed to be a matter of 'practice and procedure'").

\(^9\) 488 P.2d 161 (Cal. 1971).
do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited."

Secondly, all intendments favor the exercise of the legislature's plenary authority: "If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used."\(^8\)

Under this reasoning, since the California Constitution does not prohibit establishing a certification procedure, the legislature may do so as long as the scheme it adopts keeps the actual decision of certified cases in the judicial branch.

There would indeed be serious constitutional problems if the legislature were to adopt a system under which it or the executive branch, or any agency was designated to decide certified questions. Accepting and deciding certified questions is an exercise of the judicial power,\(^8\) and the entire judicial power is vested in the supreme court and inferior courts.\(^8\) No such difficulty arises under the present proposal, as acceptance and decision are kept entirely under the control of the supreme court.

It is true that the power to accept and decide certified questions is not explicitly mentioned in Article 6 of the constitution. Furthermore, there is language in *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board*\(^8\) and in *Younger v. Superior Court*\(^8\) which appears at first glance to assume an enumerative view of the supreme court's constitutional jurisdiction. Closer study reveals, however, that these cases do not contradict the constitutional framework set out in *Methodist Hospital v. Saylor.*\(^8\)

Rather, they stand for the proposition that the legislature cannot expand the jurisdiction of the courts beyond what is permitted by the constitution. But, a legislatively enacted

\(^8\) See *Methodist Hosp.*, 488 P.2d at 164-65 (citations omitted).
\(^8\) See supra note 59.
\(^8\) Cal. Const. art. VI, § 1. See also *Strumsky v. San Diego City Employees Retirement Ass'n*, 520 P.2d 29 (Cal. 1974).
\(^8\) 595 P.2d 579, 586 (Cal. 1979).
\(^8\) 577 P.2d 1014, 1025 (Cal. 1978) (citing People *ex rel. Lynch v. Superior Court*, 464 P.2d 126 (Cal. 1970)).
\(^8\) 488 P.2d 161 (Cal. 1971).
certification procedure would not expand the judicial power at all. As the case law holds, the judicial power already includes the authority to declare the law of the state. A statute would only create a structure for the supreme court to exercise this pre-existing power. And, the prevailing constitutional jurisprudence holds that provisions enumerating the jurisdiction of a state supreme court does not affect the court's inherent power to accept certified questions.

E. Amendment of the Government Code

A useful short cut might be for the legislature to add a clause to California Government Code section 68070(a), so that it would read as follows (proposed language appears in italic):

(a) Every court may make rules for its own government and the government of its officers not inconsistent with law or the rules adopted and prescribed by the Judicial Council, and the Supreme Court shall [may] make rules for the decision of questions of state law certified by other judicial authorities.

That would provide explicit legislative authority for the supreme court to adopt a certification rule without having the rule itself drafted by the legislature.

V. Text of the Proposed Rule

[Proposed] Rule Governing Acceptance of Questions of State Law Certified by Federal Appellate Courts

1. The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States or by a United States Court of Appeals, provided that:
   a. such answer is requested by the certifying court;

86. See supra note 59.
87. Also, Younger, 577 P.2d at 1014, concerned advisory opinions. The Proposed Rule was carefully drafted to avoid the risk that a decision of a certified question could be considered an advisory opinion. See supra part IV.A.
88. As long ago as 1875, the California Supreme Court held that "the mere procedure by which jurisdiction is to be exercised may be prescribed by the legislature, unless, indeed, such regulations should be found to substantially impair the constitutional powers of the courts, or practically defeat their exercise." Ex parte Harker, 49 Cal. 465, 467 (1875).
89. See infra Appendix II.
90. CAL. GOV'T CODE § 68070(a) (West Supp. 1996).
b. the proceeding before the certifying court involves a question or questions of California law which may be determinative of the cause then pending therein; and

c. it appears to the certifying court that there is no controlling precedent concerning the certified question in the decisions of the California appellate courts.

2. This Rule may be invoked only by an order of a court referred to in section 1.

3. A certification order shall set forth:
   a. the style of the case, including names and addresses of counsel and parties appearing pro se;
   b. the question[s] of law to be answered;
   c. a statement (by stipulation of the parties subject to approval by the certifying court, or by the court itself if no such stipulation can be obtained) of all facts relevant to the certified question, and showing fully the nature of the controversy and the circumstances in which the question arose;
   d. an analysis by the certifying court showing that the question certified is truly contested and that there is no controlling precedent in California case law, and stating how an authoritative answer to the certified question might be determinative of the cause; and
   e. such additional material as the certifying court may deem relevant and useful.

4. Exhibits, excerpts from the record, a summary of the facts found by the trial court, and other documents may be furnished by the certifying court to the California Supreme Court along with the certification order, if in the opinion of the certifying court they may be helpful in providing an adequate understanding of the controversy. Such additional material may be furnished at the request of the California Supreme Court if in the opinion of the Court additional material may be necessary or useful in answering the certified question. The California Supreme Court may require the original or copies of all or any portion of the record before the certifying court to be filed with or in supplement to the certification order.
5. The certification order shall be prepared by the certifying court, signed by the judge presiding at the certification hearing (if any) or by the presiding judge of the court or panel certifying the question, and forwarded to the California Supreme Court by the clerk of the certifying court under its official seal.

6. It shall be within the sole and absolute discretion of the California Supreme Court whether to accept certification or answer a certified question. In exercising its discretion the Court may consider any factors, including without limitation:
   a. the existence of precedent in the California Supreme Court or in the California Courts of Appeal;
   b. the degree of uncertainty in the law;
   c. the importance of the question certified;
   d. whether answering the question will facilitate the functioning of the certifying federal court;
   e. whether answering the question will facilitate termination of existing litigation;
   f. considerations of comity with regard to the request of the certifying court;
   g. the procedural posture of the case;
   h. the extent to which a decision would turn on questions of fact;
   i. the extent to which an answer would be dispositive of the cause;
   j. matters ordinarily considered in deciding whether to grant review of a decision of a California Court of Appeal; and
   k. any other factors the Court may deem appropriate in the circumstances of the case.

7. It shall be within the discretion of the California Supreme Court to restate the certified question as it deems appropriate. Any such answer shall be limited to questions of California law.

8. Notice of the California Supreme Court's decision whether to answer the question will be given by its Clerk to the certifying court. Thereafter:
   a. proceedings in the California Supreme Court on any certified question shall by as provided in the California Rules of Court and the California Supreme Court's Rules for briefing, argument, and conduct of
civil appeals, unless otherwise provided by the Court or by the Judicial Council;
b. fees and costs shall be the same as in civil appeals docketed before the California Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its certification order, or by the California Supreme Court;
c. if certification was initiated by a party to the federal cause, that party shall be the petitioner on the certified question; but if certification was initiated upon the federal court's own motion, the appellant in the federal cause shall be the petitioner on the certified question unless the certifying court shall specify otherwise in its order; and
d. the California Supreme Court may in its discretion assign a certified question such priority on its docket as considerations of fairness, exigency and comity may require.

9. If the certified question calls into doubt the constitutionality of any California statute, the Court may in its discretion notify the California Attorney General and permit him or her to intervene.

10. The written opinion of the California Supreme Court stating the law governing the certified question shall be sent by the clerk to the certifying court, and to the parties, under the seal of the Supreme Court.

11. The California Supreme Court may in its discretion refer a certified question to an intermediate appellate court or other referee for a preliminary or advisory determination, but only the California Supreme Court may answer a certified question. In case of any such reference the California Supreme Court shall review the response of such court or referee; upon such review the California Supreme Court shall either adopt (or modify) the determination of the intermediate court or referee by its own opinion or order, or substitute its own determination of the question. An order of the California Supreme Court adopting or modifying a determination of an intermediate court or referee shall include the text of any such determination, and shall constitute the written opinion of the California Supreme Court contemplated by section 10 above.
12. The California Supreme Court's answer to a certified question shall have the same authority and precedential force as any other decision of the Court, and shall be published in the Official Reports. It shall be res judicata as to the parties to the cause.

13. The Judicial Council may adopt procedures governing practice under this Rule.

VI. COMMENTARY ON THE PROPOSED RULE

The Proposed Rule, like the certification procedure in almost every state, whether adopted by statute or rule, is based on the Uniform Certification of Questions of Law Act. The operative statute or rule in nearly every state with a certification procedure has been consulted, and variations from several states have been adapted where they appeared to make the procedure better suited to California concerns.

A. Section 1

1. United States Courts

Many states' versions permit certification not only from the United States Supreme Court and United States Courts of Appeals, but also from United States District Courts and other specialized federal courts. This Proposed Rule, similar to those in eight other states, excludes district courts. Permitting district courts to certify questions would further California's objective of preventing incorrect determinations of state law. By reducing the need for Pullman abstention, it would also cause a slight consequent reduction on the state trial court caseload. On the other hand, confining certification to the appellate level would assure that certified questions will have a fully developed factual record, and would reduce the absolute number of certified questions.

It appears that many jurisdictions which exclude district courts from certification have done so because they feared an avalanche of certified questions. The literature indicates that certification has been used very sparingly, and that there has been no avalanche even in those states which permit district

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court certification.\textsuperscript{93} Although allowing district court certifications seems preferable as a matter of public policy, the Proposed Rule excludes them in deference to concerns expressed informally by members of the supreme court. When, however, the State Bar Conference of Delegates modified this Proposed Rule prior to recommending its adoption in October 1995, they broadened the scope of certification authority to include "any federal court."\textsuperscript{94} Beyond accommodating the concerns of some justices then sitting, there is no principled reason to prefer their position to the bar's more expansive view. Because certification would be so helpful a device at the district court level, even if the more restrictive approach were taken at first, the exclusion of district courts might usefully be revisited after the procedure had been in operation for a time.

2. \textit{State Courts}

A number of jurisdictions follow the Uniform Act by permitting certification to and from the highest (and sometimes intermediate) appellate courts of other states. This procedure would be a very useful device in conflict of laws cases. It appears from the literature, however, that interstate certification has never been used in any reported case in the entire history of certification procedures.\textsuperscript{95} There seems, therefore, to be little practical loss in excluding interstate certification from the Proposed Rule. Thus, this type of certification is excluded both in the interest of simplicity and to reassure those who fear an inundation of certified questions. Proposals for reform of the Uniform Act have focused on the potential utility of interstate certification, however, and this issue could also be revisited at some appropriate future time.

3. \textit{Determinative of the Cause}

This formulation is the method usually applied. It is necessary in order to avoid the possibility that an answer might otherwise be an advisory opinion or that the case might not present a true controversy. The intention of this Proposed Rule is that the certified question will be determinative of at least one issue in the case and \textit{may} therefore determine the

\textsuperscript{93} See discussion supra part II.B.
\textsuperscript{94} See supra note 5 and accompanying text.
\textsuperscript{95} Robbins, supra note 40, at 136.
outcome. Requiring that the question *will definitely* be dispositive of the *entire* cause would be so restrictive as to render the whole procedure useless. In *Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.*, the court explicitly rejected the narrower view and required only that an answer "have the potential to determine at least one claim in the case."

The discretion of the certifying court, and the requirement in section 3(d) that the certifying court state "how an authoritative answer to the certified question might be determinative of the cause," should ordinarily prove sufficient to avoid certification of questions which would not be determinative of an important and perhaps pivotal issue in a case. Should such a question be certified anyway, the California Supreme Court could appropriately decline to answer it.

The proposed standard permits the supreme court, if it decides to answer the question, to focus on the substantive issue without needless involvement in procedural matters and abstract predictions about the eventual outcome of the federal case.

4. **Controlling Precedent**

Some states (e.g., Alabama and Indiana) limit certification to situations where there is no controlling precedent in the state supreme court, thereby excluding cases controlled by precedent in intermediate appellate courts. This Proposed Rule permits certification if there is no controlling precedent in the "California appellate courts." This conforms to the federal rule, which requires that where state law provides the rule of decision, and there is no controlling decision in the state supreme court, federal courts are obliged to follow the decisions of intermediate state courts in the absence of convincing evidence that the state supreme court would decide the question differently. If there were no supreme court precedent, but an intermediate precedent appeared to control the case, the supreme court could decline to answer or note in

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96. 811 P.2d 627 (Or. 1991).
97. *Western Helicopter Servs., Inc.*, 811 P.2d at 630 & n.4.
its memorandum that no answer was necessary in view of the intermediate court decision. Alternatively, if it felt the lower court decision was incorrect, the court could as a discretionary matter accept the question in order to overrule the decision.

If there were no supreme court precedent, and intermediate decisions conflicted, certification would be permitted under this Proposed Rule because neither intermediate decision could be said to be "controlling" in the presence of the other. In such a case, the supreme court might wish to accept certification because accepting the question would not only clarify California law, but would also avoid requiring the federal court to choose between two conflicting intermediate court holdings and possibly embed an incorrect choice. This is a classic example of the utility of the certification procedure.

Some states require that there be no "clear" controlling precedent. The Proposed Rule omits this additional word as surplusage, and because it has the potential for involving the supreme court in unnecessary and distracting determinations of whether controlling precedent is "clear" or not.

B. *Section 2: Invocation*

This section makes it clear that the parties to a federal case cannot invoke certification without an order of the certifying court. Some states' versions appear to permit a certification rule to be invoked by a party to the federal court action, or limit it to the court's own motion. This Proposed Rule requires the court of appeal to decide for itself whether to issue the order, regardless of whose idea it originally was, without suggesting that a party to a federal cause has a right to invoke certification on its own motion.99

99. The Ninth Circuit has made it clear that, while a party may move to certify a question, the decision to certify must lie within the discretion of the federal court. *In re McLinn*, 744 F.2d 677, 681 (9th Cir. 1984), *cert. denied sub nom.* Churchill v. F/V Fjord, 497 U.S. 1025 (1990). For a good example of a court of appeals certifying a question on its own motion, see Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 40 F.3d 18 (1st Cir. 1994) (holding that, where parties bypassed state procedure which would have permitted the state court to decide state law issue of first impression, certification was appropriate to promote federal-state comity), *certifying question to 659 N.E.2d 710* (Mass. 1996). *See also* Nuccio v. Nuccio, 62 F.3d 14, 17-18 (1st Cir. 1995) (certifying on own motion question of "considerable prospective importance").
CERTIFICATION RULE

C. Section 3

1. Contents of Certification Order

This section combines features of various state procedures, with some new clarifying language.

2. Statement of Facts

This provision assures that any question certified will be decided in a clearly expressed factual context. This would simplify the work of the supreme court by requiring that the parties and the certifying court provide a ready-made and conveniently stated factual matrix; rather than requiring the supreme court to deduce the facts from a possibly lengthy record. It also helps guarantee that the answer will not be an abstract legal statement or an advisory opinion, but will be grounded in the facts of an actual controversy.

3. Analysis by the Court

Like the statement of facts, this requirement helps assure that the answer will be dispositive of a contested issue possibly determinative of the cause, and is therefore not an advisory opinion.

D. Section 4: Record and Exhibits

This combines provisions from various states' versions of certification rules, and it is designed to assure the supreme court access to as much of the record as it may require.

E. Section 5: Transmission of Certification Order

This section, adapted from the Uniform Act, recites the technical requirements for preparation and authentication of the certification order.

F. Section 6: Discretion to Accept or Decline Certification

This section makes it clear that the supreme court need never accept any certified question unless it wishes to do so. It further suggests factors which may (but need not) influence the court's decision. The list of factors, which is of course not exclusive, is adapted from *Western Helicopter Services, Inc. v. Rogerson Aircraft Corp.*

The court's absolute discretion in this area is necessary for docket control and to avoid ceding any sovereign power to another entity. Because the supreme court's discretion is absolute, it need never justify its decision to decline to answer or force its decision within any technical exception to the Proposed Rule. This section alone would be sufficient authority for declining. But, if the court should decline a question, an opinion or memorandum stating its reasons for doing so would be useful in guiding the practice of future certifying courts, and it would help confine future certifications to questions the court is likely to accept.

G. Section 7

1. Discretion to Restate

This provision, added by courts in some states, is a very useful feature. By explicitly reserving to the court the right to restate the question as it deems proper, it ensures the court maximum flexibility in fashioning its response. The Ninth Circuit has expressly recognized this discretion.

2. Questions of California Law

It seems self-evident that a question of federal law should not be certified to a state court, and federal appellate

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103. *See, e.g.*, Kincaid v. Mangum, 432 S.E.2d 74, 82-83 (W. Va. 1993).
courts are usually vigilant to avoid this. There are, however, some reported cases where a federal court has asked a state court whether a state statute can be read to avoid repugnance to the federal constitution, or made some other inquiry about federal law. This provision is included to discourage such abuses.

H. Section 8

1. Practice Under the Rule

Many of these provisions are adapted from the Uniform Act or from the rules of various states. Most states' versions of certification rules either provide only for splitting fees and costs evenly, or permit variance at the option of the certifying court. This Proposed Rule extends the option to vary to the supreme court as well.

2. Briefing and Argument

Some states are quite specific about briefing schedules, size of briefs, number of copies, and other technical details. These issues seem better treated by reference to the ordinary rules of court for California and particular problems can be addressed if they arise. The Judicial Council is specifically included, pursuant to California practice.

3. Petitioner

Advance specification of who is the moving party, an attractive feature of some states' rules (e.g., Maine, Mississippi, Oregon), is adopted here to anticipate a potential procedural problem. The style "Petitioner" is chosen as less confusing than "Appellant," following Oregon practice.

4. Priority

Some states give priority to certified questions. While this may be desirable (as certification involves delays for the litigants and for the certifying court), it involves corresponding delays for other supreme court litigants. This decision is best made on a case-by-case basis. Accordingly, the Proposed

105. See, e.g., Imel v. United States, 523 F.2d 853, 857 (10th Cir. 1975) (disapproving district court certification of question whether disposition of property following divorce was a "taxable event").

Rule gives the Court the option to grant priority without requiring it to do so.

I. Section 9: Intervention by Attorney General

Although this is not part of the Uniform Act, some states (e.g., Maine, Louisiana) have such a provision in their rules. This rule gives the court the option to offer intervention without requiring that it do so.

J. Section 10: Transmission of Answer

Like section 5, this section is technical in nature, and sets out the procedure for transmitting the answer to a certified question.

K. Section 11: Reference

Obviously, certification is useless unless the end product is an opinion of the receiving state's highest court. This section is included to take account of earlier proposals and concerns of the state bar. To make it explicit that even if the supreme court, having received a certified question, should make a reference to a lower court, its end product would still be a holding by the supreme court. Reference could of course be made without the authority of this section. The provision in section 10, requiring transmission of the "written opinion of the California Supreme Court," would in any case itself require that the end product be the opinion of the supreme court.

The purpose of this section is to provide assurance that reference, if used, would not be abused, and that any answered question would have the authority of the supreme court. Reference would be of little value anyway, as there would be no need for fact-finding (if the factual record were not already adequate, the question would not ordinarily be accepted), and the legal determination would have to be reviewed by the supreme court in any event.

107. "Certification would be a pointless exercise unless the state court's answers are regarded as an authoritative and binding statement of state law." WRIGHT ET AL, supra note 37, § 4248.

108. See, e.g., Eley v. Pizza Hut of Am., Inc., 500 N.W.2d 61, 64 (Iowa 1993) (declining to accept question where stated facts were in conflict).
L. Section 12

1. Authority and Force

This is an essential element of any certification procedure.

2. Judicata

This provision, found in the laws of some states (e.g., Alaska, Minnesota) specifies that the answer binds the parties in their specific dispute, and helps prevent the answer from being considered an advisory opinion.

M. Section 13: Judicial Council

This provides for Judicial Council participation in future rulemaking.

N. Omitted Sections

1. Power to Certify

Unlike the versions adopted in most states, this Proposed Rule does not contain a provision for certifying questions from California to another state. The “State Courts” commentary to section 1, dealing with certification from other states' courts, applies here as well.¹⁰⁹

2. Severability

A severability clause is contained in the Uniform Act and in most state statutes, providing that if a given section should be found unconstitutional the remainder of the law would survive as much as possible. As this certification procedure is designed to be adopted by Supreme Court Rule, a severability provision does not appear to be required. Such a clause should be added to the text in the event a certification procedure should be adopted by statute.

3. Uniformity

As this Proposed Rule is not intended as a statute, and differs in many important respects from the Uniform Act, the Act's provision that it should be interpreted so as to effectuate the purpose of uniformity among the states has little application. As with severability, a suitable uniformity clause

¹⁰⁹. See discussion supra part VI.A.2.
should be added in the event the legislature adopts the Uniform Act or a variation of it.

VII. Conclusion

A certification procedure is long overdue. In a state whose law is relevant to cases and transactions all over the country, it is absurd that federal courts should have to guess California law when a tested procedure exists for our own supreme court to state it authoritatively. Such a procedure, ideally following the text of the above proposal, should be adopted as a rule without delay by either the California Supreme Court or the Judicial Council. Failing that, the legislature should either amend the California Government Code and direct the supreme court to adopt a certification rule or adopt a certification procedure by statute (ideally based on this proposal and denominated to take its place within the Uniform Act).
The following table shows certifications to state supreme courts in the Ninth Circuit for the years 1990 and 1991, as a proportion of the total filing on those courts. The figures are not entirely comparable — the certification figures contain approximations, and the figures for total filings reflect differing compilation methods. Nevertheless, they are sufficient to provide a general view of the volumes in Ninth Circuit states.

<table>
<thead>
<tr>
<th>State/Year</th>
<th>Certifications</th>
<th>Total Filings</th>
<th>Certifications as % of Total Filings</th>
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</thead>
<tbody>
<tr>
<td>Alaska 1990</td>
<td>3</td>
<td>578</td>
<td>0.0051</td>
</tr>
<tr>
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<td>0.0049</td>
</tr>
<tr>
<td>Arizona 1990</td>
<td>3</td>
<td>1194</td>
<td>0.0025</td>
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<tr>
<td>Arizona 1991</td>
<td>3</td>
<td>1179</td>
<td>0.0025</td>
</tr>
<tr>
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<td>755</td>
<td>0.0052</td>
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<tr>
<td>Idaho 1990</td>
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<td>541</td>
<td>0</td>
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<tr>
<td>Idaho 1991</td>
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<td>570</td>
<td>0</td>
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</tr>
<tr>
<td>Washington 1991</td>
<td>2</td>
<td>1026</td>
<td>0.0019</td>
</tr>
</tbody>
</table>

The average percentage, excluding years with no certifications, was 0.0035; the average including years with no certifications was 0.0028. Thus, a third of a percent is a good figure for rough reckoning.

In 1990, there were 3409 filings in the California Supreme Court, and in 1991 there were 3505. Applying the average figure of a third of a percent to these totals yields an extrapolated figure of eleven to twelve certifications a year. The true figure would probably be lower (especially as district courts would not be able to certify under the Proposed Rule), and of course all certified questions need not be accepted.
Summary

A number of state supreme courts have ruled that accepting certified questions, or prescribing a certification procedure by supreme court rule, did not offend their state constitutions. The material in this appendix examines the state constitutional context for those decisions. It shows the dominant majority rule among the states to be that a judiciary article, specifying the jurisdiction and powers of the state supreme court in enumerative fashion without specifically restricting the power to accept and decide certified questions, does not limit the power of the court to adopt a certification provision by rule or to answer certified questions under a procedure adopted by statute.

California

The arguably relevant portions of the California Constitution are Article VI, sections 10 through 12. They read in pertinent part as follows:

Section 10. The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. Superior Courts have original jurisdiction in all causes except those given by statute to other trial courts.

Section 11. The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.

Section 12. (a) The Supreme Court may, before decision, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another.
(b) The Supreme Court may review the decision of a court of appeal in any cause.\textsuperscript{110}

These provisions are relevant only on the theory that the power to accept and decide certified questions is \textit{ultra vires} unless explicitly provided for in the state constitution. The prevailing constitutional theory does not require a specific grant of jurisdiction, but relies instead on the inherent power of the judicial department to implement its portion of the sovereign powers of the state. One of these powers is to declare the law of the state when requested by another sovereign. Article IV, section 1 (analogous to similar provisions in virtually every state constitution) states that:

The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. All courts are courts of record.\textsuperscript{111}

It follows from this that, as answering certified questions is an exercise of the judicial power of the state, it \textit{must} be vested in one or more of these courts.\textsuperscript{112} Because of the nature of certification, this can only mean the supreme court.

Note also that Article VI, section 6, establishing the Judicial Council, provides that:

To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute.\textsuperscript{113}

Because answering certified questions is part of the judicial power of the state, this section empowers the judicial council to adopt a rule of practice and procedure for that purpose provided the rule is not inconsistent with statute.\textsuperscript{114}

\textsuperscript{110} \textit{Cal. Const.} art VI, §§ 10-12.

\textsuperscript{111} \textit{Id.} § 1.

\textsuperscript{112} \textit{See} Strumsky v. San Diego County Employees Retirement Ass'n, 520 P.2d 29, 39 (Cal. 1974) (indicating that Article VI disposes of all judicial power not expressly disposed of elsewhere in state constitution, leaving entire judicial power concentrated in state court system and constitutional agencies).

\textsuperscript{113} \textit{Cal. Const.} art. VI, § 6.

\textsuperscript{114} It is doubtful, given this theory of constitutionality, whether the legislature could lawfully restrict the power of the supreme court or the Judicial Council to answer certified questions. But, as it has made no such attempt to do so, the issue has not arisen.
The constitutionality of a certification procedure, adopted either by rule or by statute, is discussed more fully in the text of this article.\textsuperscript{115}

Ohio

Ohio adopted a certification procedure in 1988 by Supreme Court Rule.\textsuperscript{116} In the leading case of \textit{Scott v. Bank One Trust Co.},\textsuperscript{117} the Ohio Supreme Court considered whether the rule "is consistent with the Ohio Constitution[, with] focus on whether we have jurisdiction under Section 2, Article IV of the Constitution to answer certified questions."\textsuperscript{118} The pertinent portion of that section is subsection (B), which read at the time as follows:

\begin{itemize}
  \item [(B)(1)] The supreme court shall have original jurisdiction in the following: (a) Quo warranto; (b) Mandamus; (c) Habeas corpus; (d) Prohibition; (e) Procedendo; (f) In any cause on review as may be necessary to its complete determination; (g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.
  \item [(2)] The supreme court shall have appellate jurisdiction as follows: (a) In appeals from the courts of appeal as a matter of right in the following: (i) Cases originating in the courts of appeals; (ii) Cases in which the death penalty has been affirmed; (iii) Cases involving questions arising under the constitution of the United States or of this state. (b) In appeals from the courts of appeals in cases of felony on leave first obtained. (c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law. (d) in cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals. (e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4)\textsuperscript{119} of this article.
\end{itemize}

\textsuperscript{115} See discussion supra part IV.
\textsuperscript{117} 577 N.E.2d 1077 (Ohio 1991).
\textsuperscript{118} \textit{Scott}, 577 N.E.2d at 1079.
\textsuperscript{119} This reference is obscure since the present section 3 has no such subsection. See \textit{Ohio Const. art. IV, § 2(B)(3)}. 
(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.120

Because this constitutional passage contains many very precise specifications of jurisdiction, it is susceptible to the interpretation that the court’s only powers are those that are enumerated. It is even more precise in this regard than the California Constitution. Nevertheless, the Ohio Supreme Court took the position that “jurisdictional analysis is irrelevant” to the rule’s constitutionality.121 The Ohio Court put it this way:

In our view, [the] power [to decide certified questions] 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.122

Oklahoma

Article VII, section 4 of the Oklahoma Constitution specifies the jurisdiction of the supreme court in the enumerated format.

The appellate jurisdiction of the Supreme Court shall be coextensive with the State and shall extend to all cases at law and in equity; except that the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases until otherwise provided by statute and in the event there is any conflict as to jurisdiction, the Supreme Court shall determine which court has jurisdiction and such determination shall be final. The original jurisdiction of the Supreme Court shall extend to a general supervising control over all inferior courts and all Agencies, Commissions and Boards created by law. The Supreme

120. Id. § 2(B).
121. Scott, 577 N.E.2d at 1079.
122. Id. at 1079-80.
Court, Court of Criminal Appeals, in criminal matters and all other appellate courts shall have power to issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law and may exercise such other and further jurisdiction as may be conferred by statute. . . . The appellate and the original jurisdiction of the Supreme Court and all other appellate courts shall be invoked in the manner provided by law. 123

As to whether this limited the capacity of the Oklahoma Supreme Court to answer certified questions, the court took the same position as the Ohio Supreme Court.

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. "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state." Certification assures that the federal courts are apprised of the substantive norms of the Oklahoma legal system. 124

Florida

Florida adopted a certification procedure by statute in 1945, and the supreme court promulgated a rule implementing the procedure. 125 In 1956, the Florida Constitution was revised, and the jurisdiction of the supreme court was set out in the familiar enumerated variety. 126 The 1956 constitutional provision read in pertinent part as follows:

2. Jurisdiction. . . . The supreme court may issue writs of mandamus and quo warranto when a State officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when

questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right. The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.127

In *Sun Insurance Office, Ltd. v. Clay*,128 the Florida Supreme Court considered whether that section, "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."129

The court concluded that the enumeration did not restrict the court’s power to accept certified questions. The court further held there was

a fundamental principle of constitutional law that each department of government ... has, without any express grant, the inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the 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 rule of this court if it is deemed to be a matter of “practice and procedure.”130

127. *Id.* Although this provision has been superseded by two later constitutional revisions, the text as it stood in 1961 is the relevant one for understanding the Florida court’s constitutional holding. The current Florida Constitution expressly provides for the supreme court to accept certified questions. *Id.* § 3(b)(6).

128. 133 So. 2d 735 (Fla. 1961).

129. *Sun Ins. Office, Ltd.*, 133 So. 2d at 741.

130. *Id.* at 742-43. The court specifically distinguished City of Dunedin v. Bense, 90 So. 2d 300 (Fla. 1956). In that case, the court held unconstitutional a legislative attempt to grant the court original jurisdiction to issue a writ of injunction, when the then constitutional provision granted a lower court “exclu-
Washington

The Washington legislature enacted a certification procedure in 1965.\textsuperscript{131} In \textit{In re Elliott},\textsuperscript{132} the Washington Supreme Court was asked to decide whether "the enactment of RCW 2.60 was not within the power of the state legislature because it requires of the court a function which it cannot constitutionally perform" under Article IV, section 4 of the Washington Constitution.\textsuperscript{133} That section read in pertinent part as follows:

The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars ($200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary to the complete exercise of its appellate and revisory jurisdiction.\textsuperscript{134}

The Washington Supreme Court noted the similarity of its constitutional provision to that of Florida. Relying on the reasoning of the Florida court in \textit{Sun Insurance Office, Ltd. v. Clay},\textsuperscript{135} the court held the certification statute constitutional.\textsuperscript{136} The court went on to hold that its right to accept a certified question was inherent.

So patent is the power of a court to render an opinion in response to a certified question that New Hampshire has adopted the practice by court rule, not waiting for an expression of legislative approval of the idea. Supreme Court Rule 21... is treated by the New Hampshire court...
as a rule of procedure, that court obviously finding no constitutional impediment to the adoption of such a rule.

This court, under its rule-making power . . . could do as the Supreme Court of New Hampshire has done. It could also accept a certified question and respond to it even if there were no implementing statute or rule. 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.\textsuperscript{137}

\section*{Idaho}

The Idaho Constitution's treatment of the supreme court's jurisdiction also follows the traditional enumerated pattern. Article V, section 9, reads as follows:

The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges thereof, and any order of the public utilities commission, and any order of the industrial accident board: the legislature may provide conditions of appeal, scope of appeal, and procedure on appeal from orders of the public utilities commission and of the industrial accident board. On appeal from orders of the industrial accident board the court shall be limited to a review of questions of law. The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction.\textsuperscript{138}

Nevertheless, the Idaho Supreme Court followed the Washington and Florida precedents in \textit{Sunshine Mining Co. v. Allendale Mutual Insurance Co.},\textsuperscript{139} and held that it had the power to entertain certified questions "by exercise of its judi-

\textsuperscript{137} \textit{Id.} The New Hampshire Constitution apparently does not now have an enumerated article specifying the jurisdiction of the supreme court, but only a general article stating that "[t]he judicial power of the state shall be vested in the supreme court, a trial court of general jurisdiction known as the superior court, and such lower courts as the legislature may establish . . . ." N.H. \textit{Const. pt. 2, art. 72-a. See also id. art. 73-a (permitting the supreme court to establish rules of practice and procedure which was added in 1978 after the Washington court's decision in \\textit{Elliott}).

\textsuperscript{138} \textit{Idaho Const.} art. V, § 9. Furthermore, Article V, § 10 provides that "[t]he Supreme Court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the legislature for its action." \textit{Id.} § 10.

\textsuperscript{139} 666 P.2d 1144 (Idaho 1983).
cial power.”¹⁴⁰ The Idaho court held explicitly that doing so was within its inherent power to make the judicial power effective in the administration of justice.¹⁴¹

Maine

Like Washington and Idaho, Maine also followed Florida precedent in holding a certification statute¹⁴² constitutional. Unlike those states, however, the Maine constitution contains no specific enumeration of powers for the Supreme Judicial Court, providing only (as do virtually all state constitutions) that the judicial power of the state is vested in that court and in inferior courts.¹⁴³ In In re Richards,¹⁴⁴ the court held as follows:

In holding that it had constitutional sanction to participate in the certification procedure, [the Florida Supreme Court] rested its position squarely upon the concept of the reservoir of power of the people of a state . . . . We conclude as did the Florida court that our participation in the certification procedure will constitute a valid exercise of our “judicial power.”¹⁴⁵

Montana

Like those of New Hampshire and Maine, the Montana Constitution does not have an enumerated listing of the powers of the state supreme court, but only a standard general article vesting the judicial power in that court and inferior courts. When the court accepted a certified question, and the constitutionality of its doing so was questioned, the court responded very summarily. “Glens Falls now argues that this Court, under [Supreme Court] Rule 1, lacks authority to entertain such a certification. . . . We shall merely say that we do have such authority and that this is a proper case to exercise the authority.”¹⁴⁶

¹⁴⁰. Sunshine Mining Co., 666 P.2d at 1147 (citing In re Elliott, 446 P.2d 347 (Wash. 1968) and Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961)).
¹⁴¹. Id. at 1147-48.
¹⁴². ME. REV. STAT. ANN. tit. 4, § 57 (West 1965).
¹⁴³. See ME. CONST. art VI, § 1.
¹⁴⁴. 223 A.2d 827 (Me. 1966).
¹⁴⁵. In re Richards, 223 A.2d at 832.
New Mexico

Article VI of the New Mexico Constitution provides for supreme court jurisdiction in the enumerated format.

Sec. 2. Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal.

Sec. 3. The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have a superintending control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. Such writs may be issued by direction of the court, or by any justice thereof. Each justice shall have power to issue writs of habeas corpus upon petition by or on behalf of a person held in actual custody, and to make such writs returnable before himself or before the supreme court, or before any of the district courts or any judge thereof. 147

The New Mexico Supreme Court has not found this an impediment to accepting certified questions. In Schlieter v. Carlos, 148 the leading state case on the question, the court assumed the basic constitutionality of the procedure and considered only whether the question met the procedural requirement 149 that the answer be "determinative" of the cause. 150 Although it did not accept the question, the opinion leaves little doubt that they would have accepted a question presented in the appropriate posture. 151

order an appeal may be taken" to the Montana Supreme Court, and makes no mention of certified questions. The rule was amended in 1986, after the Irion decision, and is now called Montana Rules of Appellate Civil Procedure Rule 1. See Mont. R. App. Civ. P. 1. There is no reason to think the amendment affected the constitutionality of certification.

147. N.M. Const. art VI, §§ 2-3.
150. Schlieter, 775 P.2d at 710.
151. The New Mexico Supreme Court has since accepted many certified questions. See, e.g., Archibeque v. Moya, 866 P.2d 344 (N.M. 1993).
Utah

The only reported case holding it unconstitutional to adopt a certification procedure is *Holden v. N.L. Industries, Inc.*\textsuperscript{152} This case turned on specific exclusionary language in the Utah Constitution. At the time of the decision, the Utah Constitution read as follows: “The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus. . . . In other cases the Supreme Court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction.”\textsuperscript{153}

The Utah court held that the word “only” prevented the supreme court from exercising jurisdiction over certified questions.

The Wyoming Supreme Court also rejected a certified question as premature without suggesting that the constitution prohibited accepting it in an appropriate posture. *See In re Certified Question*, 549 P.2d 1310 (Wyo. 1976). Wyoming has since entertained certified questions without any suggestion that the procedure is unconstitutional. *See*, e.g., Sinclair Oil Co. v. Columbia Casualty Co., 682 P.2d 975 (Wyo. 1984). Article V, § 3 of the Wyoming constitution is an enumerative provision, reading in pertinent part as follows:

The supreme court shall have original jurisdiction in quo warranto and mandamus as to all state officers, and in habeas corpus. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.

WYO. CONST. art. V, § 3.

The Oregon Supreme Court has likewise entertained certified questions without the constitutionality of its doing so having been questioned. *See*, e.g., Western Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627 (Or. 1991) (enumerating factors to guide the discretion of a state supreme court in considering whether to accept a certified question). The Oregon constitutional provision is not enumerative. *See* OR. CONST. art. VII, § 2.

The Georgia Constitution now specifically provides for acceptance of certified questions. *See* GA. CONST. art. VI, § 6, ¶ 4. But, even before this provision was in effect, the Georgia Supreme Court “impliedly concluded” without constitutional analysis that it had such jurisdiction “by adopting appropriate rules” and by its prior acceptance of a certified question. Miree v. United States, 249 S.E.2d 573, 577 (Ga. 1978). *See also* McClintock v. General Motors Acceptance Corp., 241 S.E.2d 831, 832 (Ga. 1978).

\textsuperscript{152} 629 P.2d 428, 432 (Utah 1981).

\textsuperscript{153} UTAH CONST. art. VIII, § 4 (amended 1984) (emphasis added). The omitted portion dealt with procedural aspects of habeas corpus. The Utah Constitution has since been amended (presumably in response to the *Holden* case), and now explicitly authorizes the supreme court to accept certified questions from federal courts. *See* id. § 3; UTAH CODE ANN. § 78-2-2 (Michie Supp. 1995); UTAH R. APP. P. 41.
The comparable provision in most state constitutions omits the word only. In the absence of that negative, the constitutional conferral of appellate jurisdiction would be susceptible to the construction that the court's jurisdiction could be enlarged by an exercise of legislative or judicial power. Such was the case in In re Elliott . . . where the Washington Supreme Court upheld the constitutionality of a statute providing for certification.154

The absence of any such restriction in the California Constitution strongly suggests that the power of the California Supreme Court is not inhibited in this regard.155

Missouri

Missouri follows the extremely restrictive theory that any power not specifically mentioned is withheld. Its supreme court has held, in a series of unreported memoranda, that the jurisdiction provided for it under its state certification statute was beyond that permitted by its state constitution.156 The relevant portion of the Missouri Constitution reads as follows:

Section 1. The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts. Section 2. The supreme court shall be the highest court in the state. Its jurisdiction shall be coextensive with the state. Its decisions shall be controlling in all other courts.

Section 3. The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state of-


Such a limitation is absent from article 5, section 9 of the Idaho Constitution. Thus, the Holden rationale does not persuade us that I.A.R. 12.1 [the certification rule] is unconstitutional. We may therefore construe our constitution in a manner similar to the construction placed by the Washington Supreme Court upon their constitution.

Id. at 1147 (citation omitted).
156. See, e.g., Grantham v. Missouri Dep't of Corrections, No. 72576, 1990 WL 602159 (Mo. 1990).
fice and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

Section 4. The supreme court shall have general superintending control over all courts and tribunals. Each district of the court of appeals shall have general superintending control over all courts and tribunals in its jurisdiction. The supreme court and districts of the court of appeals may issue and determine original remedial writs. Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power.

Section 5. The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights.

Any rule may be annulled or amended in whole or in part by a law limited to the purpose. 157

There is nothing in this constitutional language which either restricts or enables the Missouri Supreme Court with regard to certified questions. The Missouri Supreme Court appears to have an extremely narrow view of its powers and not to have taken into account the inherent powers implied by Article 1. California need not accept this approach, but remains free to adopt the more expansive majority view, articulated most clearly by Ohio and Washington.

Other States

A number of other states have adopted certification procedures by rule or statute, but the constitutionality of their doing so has not been questioned in any reported case. The constitutions of some of these states enumerate powers of their supreme courts; 158 others merely have a general section vesting judicial power. 159 At least one appears on its face to restrict the supreme court to strictly appellate jurisdiction. 160 In the absence of judicial interpretation, these procedures

159. See, e.g., N.D. Const. art. VI, § 2.
160. See Ky. Const. § 110(2)(a), which provides: "The Supreme Court shall have appellate jurisdiction only, except it shall have the power to issue all writs
must be presumed constitutional in accordance with the majority rule. The rule, that answering questions of state law certified by a federal court is an expression of state sovereignty and an inherent power of the judicial department of the state, leaves the constitutionality of a certification procedure unaffected by any constitutional language short of a specific prohibition.