

INTERACTIVE JUDICIAL FEDERALISM AND THE CERTIFICATION OF STATE LAW QUESTIONS IN DIVERSITY CASES

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I. INTRODUCTION

On August 29, 2005, Hurricane Katrina struck Louisiana and Mississippi. In the aftermath of the hurricane, the city of New Orleans flooded when levees along three major canals ruptured.¹ At one point, approximately eighty percent of New Orleans was under water.² Homeowners, renters and commercial property owners suffered tremendous property damage as a result of the New Orleans flood. Because insurance policies typically contain exclusions for damage caused by “flood,” however, many of these property owners and renters were denied coverage. Despite the flood exclusions in their insurance policies, many of those who were denied coverage sued to recover their losses.

One set of these consolidated cases, *In re Katrina Canal Breaches Litigation*, recently reached the U.S. Court of Appeals for the Fifth Circuit.³ In that set of cases, the plaintiffs argued that “the massive inundation of water into [New Orleans] was the result of the negligent design, construction, and maintenance of the levees and that the policies’ flood exclusions in this context were ambiguous because they [did] not clearly exclude coverage for an inundation of water induced by negligence.” They asserted that “because their policies [were] ambiguous, [the Fifth Circuit] must construe them in their favor to effect coverage for their losses.”⁴

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¹ *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 195 (5th Cir. 2007), cert. denied sub nom. *Xavier Univ. v. Travelers Cas. Prop. Co.*, 128 S. Ct. 1230 (2008).

² *Id.* at 196.

³ 495 F.3d 191 (5th Cir. 2007).

⁴ *Id.* at 196.

The parties agreed that Louisiana substantive law applied to the cases.⁵ The Fifth Circuit recognized, however, that the Louisiana Supreme Court had “not interpreted a flood exclusion in the context of breached levees.”⁶ Although several of the plaintiffs filed motions asking the Fifth Circuit to certify to the Louisiana Supreme Court the question of whether the flood exclusions in their policies were ambiguous, in a footnote the Fifth Circuit denied the motions.⁷ In doing so, the court acknowledged that it would have to “make an *Erie* guess and determine, in [its] best judgment,” how the Louisiana Supreme Court would decide the issue.⁸ The Fifth Circuit ultimately held that the policies were unambiguous, that the damage caused by the New Orleans flood was excluded from coverage, and that the plaintiffs were not entitled to recover.⁹ The plaintiffs whose motions to certify had been denied then filed petitions for writs of certiorari in the Supreme Court.¹⁰ The sole question raised by the petitions was whether the Fifth Circuit erred when it failed to certify the state law question before it to the Louisiana Supreme Court.¹¹ In their petitions, the plaintiffs pointed out that at the time the Fifth Circuit denied their motions to certify, numerous state district courts had already ruled differently than the Fifth Circuit and that at least one of those cases was on appeal.¹² Nevertheless, the Supreme Court denied the petitions.¹³

Thirteen years ago, a federal judge stated: "Federal courts evince no clear understanding of when . . . to certify."¹⁴ This Article argues that federal courts today still do not demonstrate a clear understanding of certification and addresses the question of when a federal court should

⁵ *Id.* at 206.

⁶ *Id.* at 208.

⁷ *Id.* at 208 n.11.

⁸ *See id.* at 208.

⁹ *Id.* at 221

¹⁰ *E.g. In re Katrina Canal Breaches Litigation*, 2007 WL 4207148 (Nov. 26, 2007).

¹¹ *E.g. id.*

¹² *In re Katrina Canal Breaches Litigation*, 2007 WL 4207148 (Nov. 26, 2007).

¹³ *Xavier Univ. v. Travelers Cas. Prop. Co.*, 128 S. Ct. 1230 (2008).

¹⁴ Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 Suffolk U. L. Rev. 677, 691 (1995).

certify an unclear question of state law and when it should decide the issue itself. The United States Supreme Court has said that the certification of unsettled state law questions by federal courts “may ‘hel[p] build a cooperative judicial federalism.’”¹⁵ The Court, however, has not provided the lower federal courts with any real guidance regarding how or when they should use certification to foster intersystemic collaboration. Thus, in the diversity context, the circuit courts have developed a variety of approaches to certification.¹⁶ This Article first examines whether these approaches in fact exemplify cooperative judicial federalism in action. This Article concludes that while some circuits may use certification cooperatively, several circuits approach certification as an exercise in dualist federalism.

This Article asks whether cooperative or dualist federalism is the appropriate federalism lens through which to view certification. Employing a series of articles written by Professor Robert A. Schapiro,¹⁷ this Article argues that certification today can best advance the goals of federalism and achieve other important benefits if it is viewed as an exercise in interactive, rather than cooperative or dualist, federalism. Using the values of interactive federalism, this Article proposes a new functional standard for the certification of state law questions by federal courts in diversity cases.

Part II discusses dualist, cooperative and interactive approaches to federalism. Part III explains intersystemic adjudication and argues that the interpretation of state law by federal courts can be a positive good rather than a necessary evil. This part also explains how Professor

¹⁵ *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 77 (1997) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

¹⁶ See Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 Rutgers L.J. 847, 874-84 (2007).

¹⁷ See Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 Emory L.J. 1 (2006); Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 Fordham L. Rev. 2133 (2006); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 243 (2005); Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 Wm. & Mary L. Rev. 1399 (2005); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 Cal. L. Rev. 1409 (1999).

Schapiro has applied the theory of interactive federalism to dual state and federal constitutional challenges that are brought in federal court. Part IV discusses certification and analyzes the differing approaches the federal appellate courts take to certification. Part V classifies the circuit courts' approaches to certification as representative of either cooperative or dualist federalism and explains why, from an interactive approach to federalism, these approaches are flawed. Part V then sets forth a new approach to certification based on Professor Schapiro's theory of interactive federalism and applies this approach to the Katrina Canal Breaches Cases. Part V concludes that, from an interactive perspective, the Fifth Circuit correctly denied the motions to certify in those cases.

II. FEDERALISM

A. DUALIST FEDERALISM

Federalism concerns, in pertinent part, the allocation of power between the federal government and the states.¹⁸ Today, “[t]he federal government and the states have extensive areas of concurrent authority.”¹⁹ Federal and state laws often regulate the same conduct,²⁰ and concurrent jurisdiction in the federal and state court systems is the norm.

Despite the modern reality of state-federal interaction, however, Professor Schapiro contends that both the United States Supreme Court and scholars focus on how best to divide power between the federal government and the states rather than on how to exploit the actual overlap of power.²¹ Professor Schapiro terms this type of federalism “dualist” federalism.²²

While “[d]ualist federalism acknowledges substantial areas of concurrent jurisdiction,” it

¹⁸ Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 243, 254 (2005); *see also* Black's Law Dictionary (defining “federalism” as including the “relationship between the states and the federal government”) Need a current Black's cite. My Black's is out of date.

¹⁹ Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 Iowa L. Rev. 243, 246 (2005).

²⁰ *Id.* (“In many realms, from narcotics trafficking to securities trading to education, federal and state laws regulate the very same conduct.”).

²¹ Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 Fordham L. Rev. 2133, 2134 (2006).

²² *Id.*

“defines some activities as inherently local and beyond the reach of federal power and other areas as inherently national and beyond the authority of state regulation.”²³ Federalism thus “becomes an exercise in line-drawing, determining which kinds of activities belong to the state or federal regions and deciding where the boundary lies.”²⁴

1. Dualist Federalism and the Supreme Court

With regard to the Supreme Court, Professor Schapiro explains that in recent years a majority of the Court has used the local/national distinction to limit federal power under the Interstate Commerce Clause, the Tenth Amendment, and the Eleventh Amendment.²⁵ For example, in seeking to separate the “truly local” from the “truly national” in the Interstate Commerce Clause area, the Court has “fastened on to the distinction between ‘commercial’ and ‘noncommercial’ activity as a defensible boundary for an enclave of exclusive state control.”²⁶ At the same time, the Court has used the local/national distinction to limit state regulatory power through its federal preemption and Dormant Commerce Clause jurisprudence.²⁷

According to Professor Schapiro, the Court’s approach to federalism is flawed because defining the contours of the local/national boundary presents a “vexing problem.”²⁸ Indeed, the Court “has admitted that the lines it draws may be arbitrary.”²⁹ Nevertheless, because drawing and policing lines are functions well-suited to courts, the Court has insisted on this categorical

²³ Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 Fordham L. Rev. 2133, 2134 (2006)

²⁴ See Schapiro, *supra* note 2, at 251.

²⁵ Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 Emory L.J. 1, 6 (2006); see also Schapiro, *supra* note 3, at 2136-37 (stating that a majority of the Court has “asserted that the constitutional principle of federalism requires drawing a line between the local and the national”).

²⁶ Schapiro, *supra* note 2, at 247.

²⁷ *Id.* at 247-48 (“In areas in which the ‘commercial’ frontier has no application, the Court has shown little concern with preserving a role for state authority. The doctrine of federal preemption, in particular, raises serious questions about the proper scope of state and federal power, but those questions cannot be answered by reliance on the distinction between ‘commercial’ and ‘noncommercial’ activity. . . . This dualist approach has led the Court to apply a broad doctrine of preemption with the effect of forestalling a variety of state regulatory efforts. The Court has deployed the Dormant Commerce Clause with a similarly wide effect in limiting state regulation.”)

²⁸ Schapiro, 74 Fordham L. Rev. at 2134.

²⁹ Schapiro, *supra* note 3 at 2137; see also Schapiro, *supra* note 2, at 247 (“The concept of ‘commercial activity’ . . . provides little determinate guidance.”)

method of enforcing federalism.³⁰ As a result, “the Court in many instances has refused to countenance an overlap of state and federal authority,”³¹ even in areas, like federal preemption, that involve both state and federal regulation.³²

2. Dualist Federalism and Scholars

Professor Schapiro contends that, like the Court, scholars often take a dualist approach to federalism.³³ Thus, the federalism literature focuses primarily on the “potential benefits” of dividing state from federal power.³⁴ Specifically, scholars typically contend that defining protected enclaves of state authority leads to “efficient and responsive governance, participatory self-government, and protection against tyranny.”³⁵

First, federalism allegedly promotes efficient and responsive government by “act[ing] as a constitutional antitrust principle, preventing the federal government from interfering with interstate competition. Federalism thus ensures that certain [policy] decisions must be made on a state-by-state basis, with the attendant benefits of choice, innovation, and competition.”³⁶

³⁰ Schapiro, *supra* note 3, at 2137; Schapiro, *supra* note 2, at 294.

³¹ Schapiro, *supra* note 2, at 247-48.

³² *Id.* at 252 (“Mired in dualism, the courts have been unable to articulate coherent principles for areas, such as federal preemption, that inevitably involve the interplay of state and federal law.”). Furthermore, in applying the local/national distinction, “the Court has ended up limiting both state and federal activities in ways that make little sense from the perspective of a normative theory of federalism. The much-noted tension between the Rehnquist Court’s professed solicitude for states in its Commerce Clause and Tenth and Eleventh Amendment cases and its constriction of state authority in its preemption cases provides one illustration of the normative difficulties.” Schapiro, *supra* note 3, at 2134-35.

³³ Schapiro, *supra* note 2, at 264.

³⁴ *Id.*; *see also* Schapiro, *supra* note 3, at 2138-39 (“[T]he most prominent theoretical defenses of federalism also operate within a fundamentally dualist framework. For most scholars, the dominant problem of federalism remains how to divide state and federal spheres of authority.”)

³⁵ Schapiro, *supra* note 2, at 248. Professor Schapiro groups the alleged benefits of federalism into these three categories. He explains that “[e]ach category embodies a linked set of conceptions, including an implied political theory and an implied understanding of the states. Each category also constitutes an attempt to justify dividing state and federal authority.” *Id.* at 266.

³⁶ *Id.* at 267. As Professor Schapiro explains in more detail, federalism is thought to promote economic efficiency by permitting each state to act as an independent firm and make its own policy decisions regarding the packages of taxes, services, and regulations that it will offer its citizens. *See id.* at 266-67. “The possibility of people and businesses moving into or out of the state provides an incentive for the states to design the best packages. States in this sense compete for population and economic resources.” *Id.* This competition, in turn, “spur[s] efficiency and innovation.” *Id.* at 266. “In the famous phrase, states can act as ‘laboratories’ in which different policies can be

Second, federalism is thought to result in participatory self-government because it “reserves certain decisions for . . . state-by-state determination” and therefore may encourage individuals to actively engage in the political process at the state level.³⁷ Finally, federalism is said to prevent tyranny “[b]y dividing power between the states and the national government” and thereby “mak[ing] it more difficult for any one center of power to gain complete domination and oppress the people.”³⁸ Accordingly, federalism is believed to allow states to “protect citizens from the overwhelming power of the national government.”³⁹ Thus, for scholars, the perceived benefits of federalism are obtained by drawing clear borders between state and federal power.⁴⁰

Professor Schapiro argues, however, that given the “dualist orientation” of federalism scholarship, it suffers from the same deficiencies as the Court’s approach to federalism.⁴¹ First, the lines that scholars draw to divide state from federal power, like the lines drawn by the Court, are arbitrary and may result in harm to society rather than the benefits scholars attribute to

tested on a small scale.” Furthermore, by making different packages available to their citizens, “states provide people choice and the opportunity to realize their subjective preferences.” In this model, “federalism ensures competition and innovation by prohibiting the federal government from creating a monopoly. Federalism functions only because states are prevented from colluding and freeing policy choices from regulatory competition. The policies must be defined by subject area. The areas of permissible and impermissible federal regulation must be defined.” *Id.* at 274.

³⁷ *Id.* at 270. According to Professor Schapiro, this model “understands federalism as guaranteeing meaningful self-governance by ensuring that certain decisions are made at the local level. Certain topics must be reserved for non-national decisions so as to safeguard meaningful political participation. . . . [T]he areas reserved for local control must be defined. *Id.* at 274; *see also* Schapiro, *supra* note 3, at 2139.

³⁸ Schapiro, *supra* note 3, at 2139.

³⁹ Schapiro, *supra* note 2, at 272; *see also id.* at 274 (“[This] model prevents tyranny by prohibiting the federal government from intruding into certain policy matters. Defining the realm in which state action must be protected – so as to prevent national tyranny – becomes crucial.”).

⁴⁰ Schapiro, *supra* note 3, at 2139. Professor Schapiro further explains: “People cannot enjoy the benefits of choice and variety offered by interstate competition if the federal government imposes a single, uniform regulatory product. The policy products also must be clearly branded so that citizen/consumers know who is responsible for what regulations. Clear lines allow citizen/consumers to be good policy shoppers. Republican self-governance can flourish only if states have real control over certain areas. Again, citizens must know which level of government has responsibility for which areas so that they can exercise their self-governance responsibly. From a liberal perspective, without a distinctive state sphere, the dual protection against tyranny ceases. Clear lines ensure against creeping encroachment.” *Id.* at 2139-40.

⁴¹ Schapiro, *supra* note 2, at 300.

federalism.⁴² Second, like the Court, scholars have largely failed to address the potential benefits and costs of overlapping state and federal authority.⁴³

Thus, from Professor Schapiro's perspective, the main problem with dualist federalism is that it can only "move the line between state and federal authority in one direction or another"

⁴² Schapiro, *supra* note 3, at 2140; *see also* Schapiro, *supra* note 2 at 265 ("[T]he lines demarcated in the analyses of federalism are fundamentally contestable. Dividing state from federal power advances certain goals, but impedes others. In some areas, it is not even clear that constructing a protected realm of state authority promotes, rather than hinders, the very values that federalism is supposed to serve."). For example, limiting federal power in order to promote efficient and responsive governance may come at the expense of individual rights, Schapiro, *supra* note 3, at 2140, and "impair the recognition of privileges of national citizenship," Schapiro, *supra* note 2, at 269. If a state prefers to discriminate on the basis of race, "[i]s racial discrimination just another item in a basket of state policies that state may be free to offer or not?" *Id.* at 268. Or, does being a citizen of the United States "give one the privilege of not being subject to racial discrimination anywhere in the nation"? *Id.* at 269. The economic theory for dividing state and federal power "has little to say about the major conflict between local policy choice and rights of national citizenship." *Id.*

Similarly, limiting federal power may not actually result in participatory self-governance because "[r]eal opportunities for participation . . . cannot occur at the state level[] given the relatively vast scale of most states." Schapiro, *supra* note 3, at 2140-41. Professor Schapiro explains: "At the framing of the Constitution, some feared that republican values could not thrive in such a large area. Today, about half of the states have populations larger than that of the entire United States in 1787. Meaningful direct participation is very difficult on that scale. Direct involvement in state governance may be easier than participation in national governance, but opportunities for active engagement remain attenuated. To ensure real opportunities for citizen participation, decisions must be made in counties, towns, or cities. The central government, just as well as the states, could allocate decisions to localities. If the ultimate goal is meaningful local participation, then it would seem that the constitutional protection of localism, rather than federalism, would be the most direct path. Federalism might be a second-best solution, not as good as localism, but preferred to a unitary nationalism – but only if states are more likely than the federal government to foster local decision-making." Schapiro, *supra* note 2, at 271. Thus, the concept of dividing state and federal authority does not correspond to the realization of the ideals of participatory democracy in contemporary society." *Id.* at 272.

Finally, limiting federal power may not protect citizens against tyranny because "to the extent that federalism provides a protected realm for state activity, federalism creates a realm protected for tyranny." *Id.* at 273. As history has shown, state can tyrannize their own citizens, and it may be necessary for the federal government to act in order to protect individuals from state oppression. Schapiro, *supra* note 3, at 2141.

⁴³ Schapiro, *supra* note 2, at 265. Professor Schapiro suggests that dualist federalism suffers from another deficiency because it presumes that states are "distinctive communities of value" in order "[t]o justify separating state and federal realms and creating enclaves protected from federal regulation." *Id.* at 275. He explains: "The distinctiveness of state communities . . . help[s] to justify both the need to draw lines between state and federal authority and the particular locations of the boundaries. A community is defined by reference to other communities. With regard to at least some issues, those inside a state's boundaries generally share values that differ from those of outsiders, people in other states. From this communal perspective, the goal of federalism is to identify the issues characterized by internal homogeneity and external difference. These distinguishing issues help to define the boundaries of state authority. Matters of distinctive local concern are assigned to state governments, and federal intrusion in these areas is prohibited. In this conception, the states constitute separate spaces of value, and their boundaries must be respected. *Id.* at 275-76; *see also* Schapiro, *supra* note 3, at 2140. Professor Schapiro argues, however, that because the "evidence of state distinctiveness appears hopelessly ambiguous," it is impossible to determine with any certainty whether states are in fact "distinctive communities of value." Schapiro, *supra* note 2, at 277-78. Given the "ambiguity of the concept of state distinctiveness," Professor Schapiro contends that it is "useless as a guide to demarcating zones of state and federal authority. Arguments about state character cannot yield determinate boundaries between state and federal power." *Id.* at 277-78.

and thereby award a subject area to the state or federal realm.⁴⁴ It has no resources to address the overlap of state and federal authority,⁴⁵ to “mediate the conflicts” that may arise when the state and federal governments operate in the same arena,⁴⁶ or “to harness the dynamic interaction of state and federal power” in order to promote the goals of federalism.⁴⁷

B. FROM DUALIST FEDERALISM TO INTERACTIVE FEDERALISM: COOPERATIVE FEDERALISM

Professor Schapiro notes that scholars have tried to develop alternative theories to replace dualist federalism, including cooperative federalism.⁴⁸ He contends, however, that these attempts have failed. Cooperative federalism, which is of particular relevance here, “acknowledges the close relationship between the state and national governments in a variety of areas, and it endorses these relationships.”⁴⁹ Thus, [c]ooperative federalism seeks to legitimate in theory the state-federal partnerships that in fact pervade governmental operations.⁵⁰ In the cooperative approach to federalism, strict lines no longer demarcate the boundary between state and federal power.⁵¹ Instead, the states and the federal government work together cooperatively as partners.⁵² “In the paradigmatic instance of cooperative federalism, the federal government

⁴⁴ Schapiro, *supra* note 2, at 252; *see also* Schapiro, *supra* note 3, at 2141 (“Dualism can urge that the line between state and federal authority be drawn in one place rather than another, but it offers little assistance in sorting out the inevitable overlap of state and federal authority.”).

⁴⁵ Schapiro, *supra* note 3, at 2141.

⁴⁶ Schapiro, *supra* note 2, at 252.

⁴⁷ *Id.* at 275.

⁴⁸ In addition to cooperative federalism, Professor Schapiro explores process federalism and empowerment federalism. Process federalism “emphasizes procedural instead of substantive protections of federalism.” *Id.* at 278. According to Professor Schapiro, however, process federalism fails because it “merely cloak[s] dualism in procedural garb.” *Id.* Empowerment federalism “seeks to magnify state and federal power without limiting either,” but does not adequately replace dualism because it “provide[s] little guidance to Congress or the courts in addressing state-federal tensions that inevitably arise.” *Id.* For a more in-depth discussion of process and empowerment federalism, *see id.* at 278-83.

⁴⁹ *Id.* at 284.

⁵⁰ *Id.*

⁵¹ Schapiro, William & Mary at 1403-04.

⁵² *Id.*

would design regulatory goals, and the states would implement regulations in accordance with the overall federal plan.”⁵³

Professor Schapiro acknowledges that “the concept of cooperative federalism . . . offers a more accurate description of the actual interaction of federal and state governments.”⁵⁴

Nevertheless, he argues that the theory of cooperative federalism is flawed because it “blesses the voluntary interaction of state and national governments” but offers no prescription for resolving state-federal conflicts.⁵⁵ “The interaction of state and national authority may be competitive or even confrontational. Cooperative federalism contributes little to an understanding or resolution of these conflicts.”⁵⁶ “Because cooperative federalism accepts the general notion of a federal-state partnership, but does not provide for rules of engagement, the theory provides no resources for monitoring federal-state relations.”⁵⁷

C. INTERACTIVE FEDERALISM

Professor Schapiro contends that contemporary federalism “is best understood as ensuring the existence of dual modes of realizing largely shared goals.”⁵⁸ He bases this view on the conclusion that people in the United States today share a set of core values,⁵⁹ and therefore state and federal governments ultimately are working towards the same ends.⁶⁰ Given this consensus, Professor Schapiro asserts that the “the promise of federalism lies in the creative

⁵³ *Id.*

⁵⁴ Schapiro, *supra* note 2, at 248.

⁵⁵ *Id.* at 284.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ William & Mary at 1406.

⁵⁹ *Id.* at 1404 (“Another important component of contemporary federalism stems from the relative homogeneity of values in the United States today. . . . [Interactive] federalism corresponds to a more cohesive understanding about fundamental values, an assumption of basic consensus on the outlines of human rights.”); *see id.* at 1405-06. Professor Schapiro thus rejects the dualist view that states are “distinctive communities of value.” Schapiro, *supra* note 3, at 2141; *see supra* note 29.

⁶⁰ William & Mary at 1406 (“The means may be state or federal; the ends are not.”).

interaction of federal and state authority, rather than in the doomed effort to divide the two.”⁶¹ He argues that “a theory of how the federal and state governments can best interact”⁶² is needed in order to “move[] beyond outmoded doctrinal categories, such as “truly local” and “truly national,”⁶³ and inadequate alternatives to dualism, such as cooperative federalism. Thus, Professor Schapiro has developed an alternative theory of federalism: interactive federalism.⁶⁴ “Rather than asking whether some activity belongs on the state or federal side of a line, [interactive] federalism asks how the overlapping power of the state and federal governments can best address a particular issue.”⁶⁵ More precisely, interactive federalism reflects the following four related concepts.

1. First Concept

First, interactive federalism rejects the drawing of lines between state and federal power and therefore any categorical attempt to distinguish between the “truly local” and the “truly national.”⁶⁶ “In the first instance, any matter is presumptively within the authority of the federal government and of a state government.”⁶⁷ Thus, in both the regulatory and judicial arenas “[f]ull

⁶¹ Schapiro, *supra* note 8, at 1, 3.

⁶² Schapiro, *supra* note 2, at 257.

⁶³ *Id.* at 1, 3.

⁶⁴ Professor Schapiro initially called this theory “polyphonic federalism.” Explain why he called it polyphonic federalism. *Id.* at 252. In later articles, however, he seems to have settled on the term “interactive federalism.” See, e.g., ????

⁶⁵ Schapiro, *supra* note 2, at 286. “As in dualist conceptions of federalism, the allocation of authority between the states and the national government has constitutional status. That allocation differs between the [interactive] and dualist approach, but the constitutional recognition of independent state and federal authority remains. The [interactive] approach does not derive directly from the text of the Constitution. . . . [S]tructure, not text, provides the primary constitutional foundation.” *Id.* at 299.

⁶⁶ See Schapiro, *supra* note 3, at 2143; see also Schapiro, *supra* note 2, at 287 (“Today, vast realms of crucial activity lie in areas of concurrent state-federal jurisdiction. The ‘commercial/noncommercial’ or ‘local/national’ or any other test that could be applied does not track areas of important authority.”).

⁶⁷ Schapiro, *surpa* note 2, at 285.

concurrent power is the norm.”⁶⁸ In this way, interactive federalism embraces “the vast overlap of state and federal power that characterizes the operation of government in the United States.”⁶⁹

2. Second Concept

Second, Professor Schapiro maintains that promoting the overlap of state and federal authority is more likely to result in efficient and responsive governance, participatory self-government, and the prevention of tyranny than a dualist approach to federalism.⁷⁰ He reasons that removing dualist barriers between state and federal power will ultimately empower states by giving them more real policy discretion in all areas.⁷¹

Moreover, once the concurrent exercise of power is embraced and encouraged, federalism can become the source of three key benefits: plurality, dialogue, and redundancy.⁷² First, when both state and federal governments address a problem, they are likely to identify a variety of potential solutions to it given their different institutional perspectives and their

⁶⁸ See Schapiro, *supra* note 2, at 285; see also Schapiro, *supra* note 3, at 2141 (“Interactive federalism supports concurrent power both in the areas of regulatory jurisdiction and judicial jurisdiction. In this conception, the domains of state and federal laws overlap and so do the domains of state and federal courts.”).

⁶⁹ Schapiro, *supra* note 3, at 2141.

⁷⁰ See *id.* at 2143.

⁷¹ Schapiro, *supra* note 2, at 297-98. The states, for example, might engage in greater interstate competition since they would no longer be barred from areas that were formerly within the national government’s exclusive control. See *id.* at 297-98.

In addition, Professor Schapiro asserts that “maintaining the state policymaking apparatus serves as a crucial element” of interactive federalism. *Id.* He insists that “[s]tates must have their own voices” and that the interactive approach offers states “more real power” to achieve their policy preferences. *Id.* He recognizes that because barriers do not limit federal power by subject area under the interactive approach, “[t]he federal government could undertake its preferred initiatives, no matter what the outcome of local deliberations. No constitutional barrier would prevent broad federal programs that would render the state legislature a debating society with little policy control.” *Id.* Nevertheless, because interactive federalism encourages and embraces overlap, rather than fearing it, Professor Schapiro contends that states will end up with more real policy discretion. See *id.* For example, because the overlap of state and federal regulations would no longer be problematic in most instances, a much “narrower view” of federal preemption would prevail and “would almost certainly lead to much greater real policy discretion.” *Id.* at 298. Thus, the interactive approach is more likely than dualism to lead to actual participatory self-governance at the state level.

Perhaps most importantly, by eliminating the protection for state tyranny created by dualism, the interactive approach to federalism would promote the protection of individual rights. See *id.* Thus, the interactive approach is in accord with the modern reality that “the actual protection against governmental overreaching has come from the individual rights portions of the United States Constitution rather than from any limits on the scope of federal power.” *Id.*

⁷² *Id.* at 288-90.

different geographical scope.⁷³ This plurality of approaches “may yield a better overall regulatory scheme.”⁷⁴ Second, the overlap of state and federal power creates the opportunity for dialogue between the different sovereigns.⁷⁵ Communication, in turn, “increases the value of plural approaches. The various officials and institutions can inspire each other to adopt better solutions, as they learn from each other’s experiences.”⁷⁶ Finally, the overlap of state and federal authority may lead to redundant forms of relief under federal and state law.⁷⁷ Remedial redundancy “constitutes a fail-safe mechanism – an additional source of protection if one or the other government should fail to offer adequate safeguards.”⁷⁸

While interactive federalism offers benefits that dualism does not, Professor Schapiro acknowledges that embracing the overlap of state and federal authority also has costs. Plurality, dialogue and redundancy come at the expense of uniformity, finality and hierarchical accountability.⁷⁹ First, uniformity in law is an important value.⁸⁰ The plurality of laws contemplated by interactive federalism, however, increases the opportunities for federal/state conflict at both the intra- and interstate levels.⁸¹ A lack of uniformity in federal and state laws “may lead to confusion and inefficiency as people try to figure out which laws apply to them.”⁸² Individuals may be “subject to conflicting duties” if divergent state and federal laws apply to

⁷³ *Id.* at 288; *see also* Schapiro, *supra* note __, at 8-9 (“Multiple regulators mean that different officials, with different institutional perspectives, will review a problem. This diversity of perspectives may produce a broader variety of potential solutions.”); *Id.* at __ (stating that interactive federalism “contemplates a variety of federal and state laws, addressing similar topics, coexisting within a given jurisdiction and across jurisdictions”).

⁷⁴ Schapiro, *supra* note 3, at 2142.

⁷⁵ Schapiro, *supra* note 2, at 288.

⁷⁶ Schapiro, *supra* note __ at 8-9 (Emory)

⁷⁷ Schapiro, *supra* note 2, at 289.

⁷⁸ *Id.* at 290. “The lapse may occur because one government does not address an issue at all or because it fails to enforce regulations that facially apply.” *Id.*; *see also* Schapiro, *supra* note __, at 8-9 (Emory) (“The existence of concurrent state and federal regulation offers the related advantage of redundancy. If one level of government defaults in its task, the other remains available to come to the aid of citizens.”).

⁷⁹ Schapiro, *supra* note 2, at 290.

⁸⁰ Schapiro, *supra* note 2, at 290.

⁸¹ *See* Schapiro, *supra* note 2, at 290-91; Schapiro, *supra* note __, at __ (Emory).

⁸² Schapiro, *supra* note __, at __ (Emory).

them.⁸³ Thus, “[t]he burden of complying with concurrent regulatory regimes may be excessive.”⁸⁴

Second, finality, like uniformity, is an important legal value.⁸⁵ Dialogue between the state and federal realms, however, “represents suspension of finality.”⁸⁶ The result is uncertainty for those involved in disputes⁸⁷ and in the law generally.

Finally, the redundancy created by an interactive approach to federalism “may blur lines of accountability.”⁸⁸ If neither the state nor the federal government has exclusive authority, citizens may not be able to determine which government is responsible for a policy to which they object.⁸⁹ They may become confused if they cannot determine where to place blame and therefore unable to hold either government accountable.⁹⁰

3. Third Concept

The third concept in Professor Schapiro’s interactive theory of federalism is that “conflicts between state and federal authority should generally be resolved by well-functioning political bodies, rather than by the courts.”⁹¹ Courts may be well-suited to drawing lines between state and federal authority based on formal dualist criteria such as the “truly local” and the “truly national.”⁹² Professor Schapiro argues, however, that Congress generally is the proper

⁸³ Schapiro, *supra* note 2, at 290-91.

⁸⁴ Schapiro, *supra* note 3, at 2142-43.

⁸⁵ Schapiro, *supra* note 2, at 291.

⁸⁶ Schapiro, *supra* note 2, at 291.

⁸⁷ *Id.* (“A definite and certain resolution of regulatory disputes enables individuals and firms to continue to lead their lives, free from legal uncertainty.”).

⁸⁸ Schapiro, *supra* note 3, at 2142-43.

⁸⁹ *See* Schapiro, *supra* note 2, at 291.

⁹⁰ *See id.* According to Professor Schapiro, Justice of the Supreme Court “have asserted that this blurring of lines of accountability becomes particularly acute with regard to areas that traditionally have been subject primarily to state rather than federal regulation, such as family law, education, and crime. In these fields, citizens expect that states will retain ultimate control. Federal regulation in these areas stands a substantial danger of confusing citizens and undermining governmental accountability.” *Id.*

⁹¹ Schapiro, *supra* note 3, at 2143.

⁹² *See* Schapiro, *supra* note 2, at 294.

branch of government to balance the functional considerations involved in managing the overlap of state and federal power.⁹³

This does not mean that courts have no role to play in interactive federalism. They “retain an important role in enforcing and protecting the policies decided by political bodies and in guarding against malfunctions of the political system.”⁹⁴ Furthermore, and more importantly for purposes of this Article, because concurrent authority is the norm in state and federal courts, courts can serve as “agents” of interactive federalism.⁹⁵ As is discussed more fully in Part III, federal courts often must decide whether to address a question of state law or leave determination of the issue to a state court. In making this decision, they can apply the theory of interactive federalism to harness the dynamic interaction of state and federal power and promote the goals of federalism.

4. Fourth Concept

The final link in interactive federalism theory is that when state/federal conflicts arise, they should be resolved by balancing the benefits of plurality, dialogue and redundancy against the need for uniformity, finality, and accountability.⁹⁶ Interactive federalism recognizes the tension among these values, but it “embraces the tension” and seeks “a functional balance of

⁹³ *Id.* (“The substitution of functional for formal criteria entails a diminished role for courts.”). Furthermore, as Professor Schapiro explains, “Because the interactive perspective does not understand states to constitute distinctive communities of value, Congress does not stand as a hostile, self-interested force. To the extent that states and the national government are engaged in a joint effort to realize a shared core of common values, the national government becomes a sensible focus of coordination.” Schapiro, *supra* note 3, at 2143.

⁹⁴ Schapiro, *supra* note 3, at 2143. “Some state-federal interactions, however, demand judicial supervision. Preemption and Dormant Commerce Clause issues arise when Congress has not clearly spoken. In such instances, the courts must interpret a statutory scheme or the constitutional principle of a national market. Indeed, these kinds of controversies currently constitute the bulk of the federal cases in the courts. In a polyphonic conception, courts would still have to review these alleged state infringements on national prerogative. The standard that the courts would apply, however, would be much more sympathetic to concurrent state regulation.” Schapiro, *supra* note 2, at 295.

⁹⁵ Schapiro, *supra* note 2, at 249; *see also id.* at 301 (“An important element of [interactive federalism] is a recognition of the significant role of courts in realizing the promise of federalism. The presumption of concurrence applies to courts as well. In the judicial arena, too, the interaction of state and federal authority promotes the goals of federalism.”).

⁹⁶ *See* Schapiro, *supra* note 3, at 2143.

state and federal authority.”⁹⁷ Thus, the body resolving the conflict “should apply a background presumption that state power and federal power can coexist.”⁹⁸ It should ask if and how both sets of values can best be accommodated and whether one set outweighs the other.⁹⁹ It should not resort to drawing lines between state and federal authority based on “abstract categories of ‘truly local’ or ‘truly national’ activity” in order to avoid conflict.¹⁰⁰ In this way, interactive federalism can promote the goals of federalism.¹⁰¹

Professor Schapiro writes that “[f]rom the interactive perspective, the key question is how to enjoy the benefits of plurality, dialogue, and redundancy, without undermining important principles of uniformity, finality, and accountability.”¹⁰² He states that the “critical research need is for scholars to explore how these benefits and burdens can be managed in different situations” to produce the best results.¹⁰³ The remainder of this Article explores how federal courts can maximize the benefits and minimize the burdens of overlapping state and federal authority in the context of intersystemic adjudication in general and in the use of certification in diversity cases in particular.

⁹⁷ Schapiro, *supra* note 2, at 300.

⁹⁸ See Schapiro, *supra* note 2, at 295.

⁹⁹ See *id.* at 300 (Doctrinal structures can accommodate plurality, dialogue and redundancy, while also fostering uniformity, finality, and hierarchical accountability. The overlap of state and federal authority can be managed so as to recognize both sets of values. Indeed, in some instances, one set of values can be promoted without threatening the other.”) *Id.*

¹⁰⁰ See Schapiro, *supra* note 3, at 2143.

¹⁰¹ See *id.*; see also Schapiro, *supra* note 2, at 301 (“State and federal interaction and confrontation are part of the system; they are harnessed to advance the goals of federalism.”).

¹⁰² 56 Emory L.J. 10.

¹⁰³ *Id.*; see also *id.* at 17-18 (“Once one recognizes the reality of interactive federalism, the question becomes how can the overlap of state and federal power best be managed[?] How can this creative interaction produce the best possible policies, benefiting from plurality, dialogue, and redundancy, while avoiding the attendant risks of undermining uniformity, finality, and accountability?”).

III. INTERSYSTEMIC ADJUDICATION

A. DEFINITION

Professor Schapiro defines “intersystemic adjudication” as “the interpretation by a court operating within one political system of laws of another political system.”¹⁰⁴ Because the United States has both state and federal court systems and their jurisdictions overlap “extensively,” intersystemic adjudication is common.¹⁰⁵ Federal courts interpret and apply state law and state courts interpret and apply federal law. Despite the existence of concurrent jurisdiction and the availability of intersystemic adjudication, federal courts do not always decide questions of state law that come before them. Several devices exist that enable federal courts to direct state-law issues to state courts, including abstention, declining supplemental jurisdiction, and certification. The question that arises is: Under what circumstances should federal courts decide questions of state law and when should they direct those questions to state courts?

B. NECESSARY EVIL OR POSITIVE GOOD?

Scholars have often viewed intersystemic adjudication as a “necessary evil” because it leads to nonauthoritative interpretations of state law.¹⁰⁶ “[G]iven the existence of diversity jurisdiction and supplemental jurisdiction, scholars generally do not claim that federal courts should never interpret state law. Some scholars do urge, though, that federal court interpretation of state law should be minimized through devices such as abstention and certification.”¹⁰⁷ From an interactive approach to federalism, however, intersystemic adjudication is a positive good in

¹⁰⁴ William & Mary 1400

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1401 (“The verbal formulas vary somewhat, but these scholars express a preference for the courts of a particular legal system interpreting the law of that jurisdiction.”) (citing . . .); *see also id.* at 1436-37.

¹⁰⁷ Wm & Mary at 1426

certain circumstances because it can advance the goals of federalism¹⁰⁸ and leads to the additional benefits of plurality, dialogue and redundancy.

1. Advancement of the Goals of Federalism

Federal court interpretation of state law can lead to efficient and responsive governance by fostering “intrastate competition between the state and federal courts.”¹⁰⁹ The state supreme court will eventually provide an authoritative interpretation of the state law at issue. Until that happens, however, “the state and federal courts can attempt their own constructions of [state law]. The dual court systems can serve as laboratories in which different interpretations of the same provision are tested.”¹¹⁰

Intersystemic adjudication can also promote participatory self-government. Federal courts often interpret state statutory provisions. State statutes are the product of citizens’ participation in the democratic process.¹¹¹ From the citizens’ perspective, what is most important is that their statutes are interpreted correctly.¹¹² When a question arises about the proper interpretation of a state statute, the state high court will eventually provide the final interpretation that both state and federal courts must follow. Any court, even the state supreme court, can misinterpret state law, however.¹¹³ Intersystemic adjudication allows federal courts to participate along with state courts in interpreting state law. Together, they can produce the best

¹⁰⁸ Fordham at 2153-54 (“[I]ntersystemic adjudication provides a significant opportunity to advance the goals of federalism.”).

¹⁰⁹ Iowa at 314-15.

¹¹⁰ *Id.*

¹¹¹ *See id.* at 315. Professor Schapiro has examined how intersystemic adjudication can promote the goals of federalism in the context of state constitutional provisions. He writes that “the state constitution represents the product of participatory self-governance. Citizens deliberate over their communal interests and then enshrine important principles in the state constitution.” *Id.*

¹¹² *See id.* (“What is most important from the republican perspective is that the state constitution be interpreted correctly.”).

¹¹³ *See id.* at 315.

possible interpretation.¹¹⁴ This federal-state interaction thus promotes participatory self-government by helping to ensure that citizens’ preferences – as represented by their state laws – find actual expression in the judicial interpretation of those laws.

Finally, intersystemic adjudication can prevent tyranny. For example, while state constitutional provisions are “a prime way in which the people of the state protect themselves from the power of the state government,” the electoral accountability of state judges may result in tepid enforcement of state constitutional provisions that protect individuals from the majority.¹¹⁵ “In these circumstances, the more insulated federal judiciary may provide a valuable alternative perspective on a state constitutional issue. By participating in the process of state constitutional interpretation, federal courts can help to prevent state tyranny.”¹¹⁶

2. Benefits of Intersystemic Adjudication: Plurality, Dialogue and Redundancy

In addition to advancing the goals of federalism, from an interactive perspective intersystemic adjudication also results in the added benefits of plurality, dialogue and redundancy. Intersystemic adjudication creates an opportunity for dialogue between the state and federal courts regarding the proper interpretation of state law, and this in turn results in a plurality of approaches to a particular problem.¹¹⁷ State laws may be subject to a variety of interpretations. Through intersystemic adjudication, federal courts can add their opinions regarding the appropriate way to interpret a state law to those of the lower state courts. Federal and state courts can thereby “engage in an independent search for the best interpretation of the

¹¹⁴ *See id.* (“Producing the best interpretation is the best realization of republican values.”).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 311.

state provision.”¹¹⁸ A federal court cannot provide the authoritative interpretation of the state law, but it can contribute to the discussion about the best way to realize the policies behind the law.¹¹⁹ When the state supreme court does ultimately provide an authoritative resolution to the interpretive problem, it can “benefit from the plurality of interpretations.”¹²⁰

A federal court’s contribution to the conversation may be “especially valuable”¹²¹ because “[f]ederal judges are rooted in a different institutional context than state judges.”¹²² Article III judges are nominated by the President and confirmed by the Senate, and they enjoy life tenure. State judges, on the other hand, are often elected and subject to “electoral accountability.”¹²³ Thus, federal judges can “offer a perspective that differs from that of state judges.”¹²⁴ Furthermore, the political insulation of federal courts may enable them to provide

¹¹⁸ *Id.* “The possibility of “cross-pollination” between the state and federal judicial systems constitutes another benefit often attributed to diversity jurisdiction. Federal judges sitting in diversity may provide valuable contributions to the development of state law. Federal opinions will never be the last word on the content of state law (except for the litigants in a particular case), but they may offer significant additional perspectives on complex problems. “ Cal. L. Rev. at 1444. Federal courts could assist in the percolation of state constitutional issues in a manner not possible within a state judicial system. The United States Supreme Court often allows issues to percolate in various circuits and in various states before it chooses to resolve the matter. . . . In most state systems, such percolation cannot occur. States normally have a unitary appeals system; once the intermediate state court decides the matter, the ruling will bind all other courts in the state unless and until it is overruled by the highest state court. The federal courts could provide an additional source of percolation, and their different institutional perspective would add an important element to the dialogue that is missing even in state court systems that are divided into different judicial districts or departments. 1444-45. Authoritative adjudication provides a definitive resolution to a question, and some questions may indeed demand such resolution. . . . Recent scholarship continues to support the importance of judicial silence, emphasizing the significance of promoting democratic debate about vital issues. Particularly in a diverse, pluralistic society, courts can promote deliberative dialogue by avoiding . . . decisions that might terminate public debate. 1446 Because the federal court cannot authoritatively construe state law, arguments about the meaning of the law outlast the court’s decision. Authority may be desirable, but so is debate.” 1447 Avoiding authoritative constitutional decisions allows courts, as well as legislators and citizens, to continue to debate important constitutional values. Judicial opinions on constitutional issues play a valuable role in shaping public discourse, but authoritative decisions may end the opportunity for discussion. . . . Significantly, however, federal adjudication of state constitutional issues advances debate about important constitutional values, but cannot end it. 1448-49

¹¹⁹ Cal. L. Rev. at 1416-17.

¹²⁰ Iowa at 311.

¹²¹ *Id.*

¹²² Cal. L. Rev. at 1418; *see* Iowa at 311.

¹²³ Iowa at 311.

¹²⁴ Cal. L. Rev. at 1418.

state law interpretations that are less susceptible to geographical, political or social bias than the opinions offered by more politically vulnerable state judges.¹²⁵

From a dualist perspective, intersystemic adjudication constitutes a “suspect exercise” because it leads to non-authoritative interpretations of state law.¹²⁶ Because dualists divide state and federal power into separate realms, they view state and federal courts “as agents of different sovereigns.” When a federal court interprets the law of a different sovereign, “questions of legitimacy” arise.¹²⁷

Dualists contend that intersystemic adjudication is not “a legitimate exercise of judicial power in our constitutional system” because it violates the spirit of *Erie Railroad v. Tompkins*.¹²⁸ More specifically, scholars derive the following three principles from *Erie* and combine them to “indict” intersystemic adjudication.¹²⁹ First, all law must be either state or federal.¹³⁰ As such, only state courts can authoritatively interpret state law and only federal courts can authoritatively interpret federal law.¹³¹ Second, courts do make law.¹³² Thus, the law found in a state’s judicial opinions is part of that state’s law.¹³³ Third, state and federal courts are agents of separate sovereigns.¹³⁴ If a federal court ignores a state court’s interpretation of state law and interprets

¹²⁵ See Cal. L. Rev. at 1442-43. This argument in favor of intersystemic adjudication derives from the primary rationale for diversity jurisdiction, which was and continues to be the need for a “more impartial tribunal” “to protect outsiders against bias from local state judges.” *Id.* “State and federal courts are different, and diversity jurisdiction recognizes that these differences may make the federal forum more suitable for the adjudication of a particular state-law claim, even if the governing law remains the same.” *Id.*

¹²⁶ See Fordham at 2154; see Cal. L. Rev. at 1445-46.

¹²⁷ Fordham at 2154.

¹²⁸ See *Wm & Mary* at 1401-02; see also *id.* at 1424 (stating that for critics of intersystemic adjudication, “[w]hat stands in [its] way . . . is not *Erie*, but the larger jurisprudential commitments that *Erie* is understood to embody”).

¹²⁹ *Id.*; see also *id.* at 1423 (“[C]ommentators have found *Erie* to embody three principles that individually and in combination could be understood to oppose intersystemic adjudication. These principles are positivism, realism, and federalism.”).

¹³⁰ *Id.* at 1424-25.

¹³¹ *Id.*

¹³² *Id.* at 1425.

¹³³ *Id.* These first two principles are based on “certain versions of legal positivism and legal realism that *Erie* arguably presupposes.” *Id.*

¹³⁴ *Id.*

the law for itself, then the federal government has improperly entered the state government's territory.¹³⁵

Professor Schapiro asserts that scholars use these principles in combination to “argue that federal courts interpreting state law represents exactly the kind of federal intrusion into state affairs that *Erie* sought to end. Intersystemic adjudication in this view is equivalent to the federal government setting up mini-legislatures to create state law.”¹³⁶ Because federal courts have no authority to make state law, when a federal court interprets state law it is usurping state power and “operating with a major legitimacy deficit.”¹³⁷ Thus, from a dualist perspective, intersystemic adjudication is problematic because it “involves the agents of one sovereign making the law of a different sovereign.”¹³⁸

Professor Schapiro rejects the dualist argument that, under *Erie*, federal courts inappropriately cross a line into a protected state realm when they interpret state law and thereby usurp state power.¹³⁹ He recognizes that *Erie* does stand for the proposition that a state's highest court is the *authoritative* final interpreter of state law.¹⁴⁰ He asserts, however, that “[n]either *Erie*, nor a broader notion of the spirit of *Erie*” make a state's highest court “the exclusive

¹³⁵ *Id.*

¹³⁶ *Id.* at 1424-25 (citing Bradford Clark for the proposition that “federal courts interpreting state law is like the Swift era practice of federal courts making general common law: “In either case, a federal court's practice of ‘indulg[ing] in lawmaking by decisions’ necessarily interferes with the sovereign prerogative of the states to decide both whether or how to regulate the conduct of the parties.”).

¹³⁷ *Id.* at 1427.

¹³⁸ Fordham at 2154.

¹³⁹ *See id.* at 1429-31 (“*Erie* need not stand for the necessity of rigidly separating the appropriate domains of state and federal courts.”).

¹⁴⁰ *Id.* at 1429. “This result followed from particular understandings of federalism, probably buttressed by jurisprudential commitments to realism and positivism.” *Id.*

interpreter of state law.”¹⁴¹ Instead, *Erie* leaves open the possibility that state and federal courts can participate together in the development of state law.¹⁴²

Professor Schapiro reasons that the interpretation of state law by a state’s courts, even a state’s supreme court, may not be the best or even the correct interpretation.¹⁴³ Indeed, “error is part of any system.”¹⁴⁴ If state courts can err in their construction of state law, then one way to mitigate potential errors is “to create a role for additional interpreters,” such as the federal courts.¹⁴⁵ Thus, [t]hrough intersystemic adjudication, “federalism in the United States provides a powerful way to address . . . errors.”¹⁴⁶ In this way, intersystemic adjudication demonstrates the promise of interactive federalism.¹⁴⁷ Through the overlap of state and federal judicial power, state and federal courts can work together to achieve the best interpretation of state law.¹⁴⁸

Intersystemic adjudication also provides the benefit of redundant remedial options. If state courts fail to recognize or enforce rights that are available under state law, litigants can resort to federal courts and their power to interpret state law.¹⁴⁹ Thus, “[a]n interactive

¹⁴¹ *Id.*; see also *id.* at 1426-27 (“The key error of the critique of legitimacy of intersystemic adjudication lies in its false attribution of exclusivity to the role of state courts.”).

¹⁴² See *id.* at 1428 (“If, instead of equating state law with the opinion of the state court, one takes the slightly more modest position that state courts participate in the creation of state law, then there is nothing necessarily illegitimate about federal courts participating in the process as well.”).

¹⁴³ See *id.* at 1413, 1428. For example, “[f]ear of electoral repercussions . . . might shape a state court’s interpretation of the law. The opinion of a federal court interpreting the same item might provide a useful perspective, perhaps compensating for the perceived unpopularity of following a particular course. Potential bias does not make a decision less authoritative; it just makes it less likely to be correct. Federal courts are also subject to political pressures and have no monopoly on interpretive skill. The different perspective of the federal court, though, might assist the state court in its search for the best interpretation.” *Id.* at 1428.

¹⁴⁴ *Id.* at 1433.

¹⁴⁵ *Id.* at 1413.

¹⁴⁶ *Id.* at 1433.

¹⁴⁷ See *id.*; see also Schapiro, *supra* note 2, at 301-02 (“Intersystem adjudication . . . represents the flowering of [interactive] federalism in the judicial realm. 301-02

¹⁴⁸ See Cal. L. Rev. at 1428.

¹⁴⁹ See *id.* at 1422; see also Iowa at 301-02 (“The redundancy of state and federal court systems provides a significant advantage of judicial federalism in the United States. If one system fails in its promise to protect rights, the other remains ready to intervene.”). Professor Schapiro’s work focuses on the availability of federal courts to protect state constitutional rights through intersystemic adjudication when state courts fail to do so. See generally Cal. L. Rev.; Iowa at _____. He has stated, however, that intersystemic adjudication provides redundant remedies “in several settings.” Cal. L. Rev. at 1432.

understanding of federalism and an acceptance of intersystemic adjudication facilitate[] [a] fail-safe option.”¹⁵⁰

3. Costs of Intersystemic Adjudication: Uniformity, Finality and Hierarchical Accountability

Intersystemic adjudication is not without costs. Plurality, dialogue and redundancy come at the expense of uniformity and finality in the law and hierarchical accountability.¹⁵¹ When a federal court interprets state law, it creates the possibility of divergent meanings of the same law in state and federal court and therefore the possibility of conflict. This plurality of legal meaning can be “unsettling and confusing. Parties may win or lose depending on the forum hearing the case.”¹⁵² Although each individual case that comes before a federal court will be resolved, the law may suffer from a lack of clarity and certainty until the state high court definitively resolves the issue.¹⁵³ Thus, intersystemic adjudication undermines the “settlement function” of the law.¹⁵⁴

Intersystemic adjudication also results in a lack of hierarchical accountability.¹⁵⁵ When a federal court interprets state law, no appeal can be taken to the state supreme court in that particular case. Consequently, there is essentially no accountability for federal courts when they engage in intersystemic adjudication.¹⁵⁶

¹⁵⁰ Cal. L. Rev. at 1431-32.

¹⁵¹ Cal. L. Rev. 1418-20.

¹⁵² *Id.* at 1418.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1420. “Yet if one views adjudication more as an evolving dialogue about appropriate norms than as an attempt to end disputation, the reality of intersystemic adjudication may be liberating. Different voices may contribute to the search for norms, whether that search takes the form of an inquiry into the common-law understanding of liability or into the meaning of particular statutory or constitutional provisions. Especially when the matter involves general principles applicable to a broad range of human conduct in diverse geographical settings, territorial or system boundaries need not disqualify a court from making a valuable contribution to the ongoing interpretive exercise.” Cal. L. Rev. at 1467.

¹⁵⁵ *Id.* at 1420-21; Iowa at 310-11.

¹⁵⁶ Iowa at 310-11 (“No state-court review is possible. Review by the United States Supreme Court would in theory be possible, but in practice would be unlikely.”).

From a dualist perspective of federalism, “this arrangement frustrates authoritative interpretation” and may result in error.¹⁵⁷ The state supreme court may ultimately disagree with a federal court’s construction of state law. If a federal district court errs in its interpretation of state law, however, only a federal appellate court can correct the error in that particular case. If a federal appellate court errs, the error will stand in that particular case and in the law generally until the state high court provides an authoritative resolution of the interpretive issue in a different case¹⁵⁸ The error cannot authoritatively be corrected in the case at bar. Moreover, from a dualist perspective, federal courts are more likely to err in their interpretation of state law because states represent distinctive communities, and a federal judge cannot “understand the spirit of the state community” and interpret state law accordingly.¹⁵⁹ Additionally, citizens may become confused when a federal court decides a question of state law.¹⁶⁰ If they object to the decision, they may not know which sovereign to blame.¹⁶¹

From an interactive perspective, however, federalism is about “achieving widely shared values,” not “protect[ing] distinctive state enclaves.”¹⁶² The overlap of state and federal power created by intersystemic adjudication fosters the attainment of these values.¹⁶³ In this view, a federal court’s “misinterpretation” of state law does not necessarily constitute error. Instead, when a federal court interprets state law, it contributes to a dialogue with state courts about the

¹⁵⁷ See Cal. L. Rev. at 1420-21.

¹⁵⁸ Iowa at 310-11 (“A federal appellate court, in particular, will have little accountability.”).

¹⁵⁹ Cal. L. Rev. at 1421-22; see also Cal. L. Rev. at 1445-46 (“To the extent that one believes that state constitutional law reflects the unique values and experiences of the state community, federal judges might appear ill-equipped for the interpretive task. . . . I believe the text and structure of the state constitution, rather than the distinctive history of the state, should provide the focus of interpretation. Federal judges are certainly quite adept at such textual and structural approaches. Nor are federal judges generally unfamiliar with state law. Normally, federal district judges have direct experience practicing law in the state in which they sit. Because they usually will have practiced in at least a nearby state, judges sitting on the court of appeals may have experience in the laws of a particular state as well.”); see Fordham at 2154.

¹⁶⁰ Fordham at 2154.

¹⁶¹ *Id.*

¹⁶² See Cal. L. Rev. at 1421-22.

¹⁶³ See *id.*

proper meaning of state law. When the state supreme court does decide the issue, it benefits from the plurality of meanings that have developed in the federal courts and in the lower state courts. Because federal courts participate in the discussion about how best to interpret state law and thereby achieve the policies behind the law, the state supreme court is more likely to reach the correct interpretation. Even if the state high court eventually disagrees with the federal court's construction, however, this does not mean that the state supreme court has reached "the" correct interpretation and that the federal court erred.¹⁶⁴ It simply means that a state's highest court has the last word on the issue, and that state and federal courts must follow its authoritative pronouncement.

C. INTERACTIVE FEDERALISM IN ACTION: STATE CONSTITUTIONAL CLAIMS IN FEDERAL COURT

The above discussion of intersystemic adjudication is based on principles developed by Professor Schapiro in the context of federal court adjudication of dual state and federal constitutional claims.¹⁶⁵ In assessing intersystemic adjudication of state constitutional claims, he acknowledges that "[f]ederal courts understand state constitutions to enjoy an especially intimate connection to the state. Federal interpretation of the state charters thus may appear as the height of federal intrusion."¹⁶⁶ Nevertheless, Professor Schapiro's work provides an example of how, from an interactive perspective, intersystemic adjudication can be beneficial even though it results in "non-authoritative" interpretations of state law in an area believed to "truly local." Professor Schapiro does not argue that federal courts should always adjudicate a state constitutional claim when it is brought along with a federal constitutional claim.¹⁶⁷ He argues

¹⁶⁴ *See id.* at 1421 ("[I]t is important to distinguish between deviation from what the state high court might eventually hold and incorrect interpretation.").

¹⁶⁵

¹⁶⁶ *Wm & Mary* at 1413-14.

¹⁶⁷

that federal courts should do so in the appropriate circumstances rather than using abstention, declining supplemental jurisdiction, or certification to avoid the state law issue.¹⁶⁸ Furthermore, he argues that federal judges should determine whether such appropriate circumstances exist by weighing the values of plurality, dialogue and redundancy against the costs of uniformity, finality and hierarchical accountability.¹⁶⁹

For example, Professor Schapiro has examined whether federal courts should adjudicate state constitutional claims when the state constitutional provision at issue parallels a provision of

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¹⁶⁹ Professor Schapiro also demonstrates how “federal court interpretation of state constitutions [can] advance[] the values of federalism.” Iowa at 314. He explains: “The federal court interpretation would have little impact on interstate competition. With or without an active interpretive role for the federal courts, different states could offer different packages of state constitutional rights. Federal court interpretation would, though, enhance intrastate competition between the state and federal courts. The highest court of the state will eventually provide the definitive judicial interpretation of the state constitution. Until that ruling, however, the state and the federal courts can attempt their own constructions of the constitutional provision. The dual court systems can serve as laboratories in which different interpretations of the same provision are tested.” *Id.* at 314-15.

“An appreciation of the republican perspective requires careful attention to the working of the state government. In the republican model, the state constitution represents the product of participatory self-governance. Citizens deliberate over their communal interests and then enshrine important principles in the state constitution. Respect for republican self-governance requires respect for the state constitution. From this perspective, federal courts might seem like interpretive interlopers, giving an unwanted national spin to the outcome of local deliberation.” *Id.* at 315

“Such a view of federal courts, however, mistakes the state courts for the state constitution. Honoring the state constitution is essential to realizing republican values. State courts, though, do not enjoy a monopoly over correct constitutional interpretation. Any court, state or federal, might misinterpret the state constitution. In this regard, even the highest state court has no special privilege. The interpretation of the highest state court is authoritative, and it must be followed by state and federal courts. That finality does not mean that the interpretation of the state high court is necessarily the best, just the last. What is most important from the republican perspective is that the state constitution be interpreted correctly. The state and federal courts can participate in the process together. Producing the best interpretation is the best realization of republican values.” *Id.* at 315.

“Federal court interpretation of the state constitution can play a valuable role in safeguarding against governmental tyranny. The state constitution is a prime way in which the people of the state protect themselves from the power of the state government. State individual rights guarantees have become an increasingly significant force in protecting human rights in the states. State court enforcement of state constitutional rights, however, has at times proved disappointing. State courts generally are accountable to the voters in the state. To the extent that the constitutional provision protects an individual against a majoritarian decision, that electoral vulnerability may distort the interpretive process. In these circumstances, the more insulated federal judiciary may provide a valuable alternative perspective on a state constitutional issue. In participating in the process of state constitutional interpretation, federal courts can help to prevent state tyranny.” *Id.*

Professor Schapiro also examines and refutes arguments about whether “federal adjudication of state constitutional claims would interfere with some of the key features of state constitutionalism.” *See* Cal. L. Rev. at 1452-59.

the U.S. Constitution but has been interpreted differently.¹⁷⁰ He rejects abstention in these circumstances because “[a]bstention imposes substantial burdens on the plaintiff, and a general policy of abstaining for dual constitutional challenges would route many federal constitutional claims through state court.”¹⁷¹ He also rejects certification on the ground that dual constitutional challenges may involve complex factual settings, and he appears to limit his discussion to the application of state constitutional law that is not unclear but is simply different from federal constitutional law.¹⁷²

After rejecting abstention and certification, Professor Schapiro addresses whether the federal court should start with the state or federal constitutional claim.¹⁷³ He concludes that benefits of intersystemic adjudication outweigh the costs in this situation, and that the federal court therefore should begin with the state-law issue.¹⁷⁴

According to Professor Schapiro, plurality, dialogue and redundancy are of great value in these circumstances. By deciding the state-law claim first, the federal court “can contribute to an understanding of the meaning of the state constitution.”¹⁷⁵ Because federal judges have a “different institutional perspective” and experience “explor[ing] concepts such as liberty, equality, and due process in other settings,” they may have valuable insights into the interpretation of the particular concept of liberty, equality, or due process embodied in a specific state constitution.¹⁷⁶ In this way, federal judges can “contribute[e] to the discussion of the best

¹⁷⁰ See Cal. L. Rev. at 1464-66.

¹⁷¹ *Id.* at 1464.

¹⁷² See *id.*

¹⁷³ *Id.* at 1465.

¹⁷⁴ See *id.*

¹⁷⁵ *Id.* at 1429; see also *id.* at 1465 (stating that “a federal court’s decision on the state constitutional claim promotes dialogue [because] [t]he federal voice is added to the state constitutional debate”).

¹⁷⁶ *Id.* at 1451-52.

way to realize the underlying constitutional value. [They] can contribute to a plurality of legal meaning, which provides a rich background for the investigation of fundamental rights.”¹⁷⁷

Furthermore, by deciding the state constitutional claim first, the federal court provides a fail-safe option for litigants if the lower state courts are not properly interpreting state constitutional rights.¹⁷⁸ Thus, intersystemic adjudication in these circumstances “allows the federal government to play a role in safeguarding state constitutional rights against state intrusion. Such federal adjudication of state constitutional issues might well advance the . . . principle of safeguarding individual rights against governmental impairment.”¹⁷⁹

At the same time, Professor Schapiro argues that a dialogue between state and federal courts on the best interpretation of state constitutional provisions does little to impair uniformity and finality.¹⁸⁰ He reasons that state constitutional questions arise frequently because state constitutions are “long [and] complex” and state governments are involved in a multitude of activities.¹⁸¹ As a result, state attorneys general and other state officials often interpret state constitutions and “will, in many areas, determine the meaning of the state constitution with

¹⁷⁷ *Id.* at 1416-18. “In recognizing the benefit of interpretive plurality, I assume that state and federal constitutional rights share important features. When a state constitution and the federal Constitution both talk about due process or equality, those meanings might be distinct; that is a premise of allowing the state provision to be interpreted independently of the federal. The meanings, however, are not incommensurable. The state and federal charters invoke shared values. The contours of the specific rights may vary, but the ideals the provisions embody are sufficiently similar for federal and state courts to engage in a profitable dialogue.” *Id.* at 1419-20; *see also* Cal. L. Rev. at 1467-68 (“In the protection of individual rights against potential majoritarian threats, the political insulation of federal courts has generally served them well. Federal court interpretation of state constitutions presents the potential to continue those contributions. Federal courts will never play the dominant role in construing state charters, but their contributions may be important nevertheless.”). Additionally, by starting with the state-law question, the federal court may be able to avoid deciding the federal constitutional claim altogether. This would satisfy the federal policy of avoiding decision of federal constitutional issues when possible and allow dialogue on the federal issue to continue as well. *Id.* at 1465.

¹⁷⁸ *Id.* at 1422

¹⁷⁹ *Id.* at 1456; *see also id.* at 1422 (“This kind of redundancy is one of the chief results of the system of judicial federalism that exists in the United States.”).

¹⁸⁰ *Id.* at 1428-29.

¹⁸¹ *Id.*

practical finality.”¹⁸² Thus, because state constitutional interpretation is “necessarily plural,” federal contributions do not undermine uniformity and finality.¹⁸³

Professor Schapiro does caution, however, that federal courts should “consider whether the judgment in a particular case presents special dangers of intrusiveness.”¹⁸⁴ While making contributions to a dialogue about the proper interpretation of state constitutional law may be very valuable, a federal court need not assert its authority by “adjudicat[ing] a state claim that would require ongoing supervision of state governmental agencies.”¹⁸⁵ Thus, “[i]n the realm of state constitutional law . . . federalism suggests a more advisory, rather than supervisory, role” for federal courts.^{186 187}

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1465

¹⁸⁵ *Id.* (“Federal courts may contribute to the dialogue about the meaning of state constitutional law, but complex, intrusive remedies would likely best be left to state courts.”). This caution about controlling state agencies should serve to vindicate the interests underlying the *Pennhurst* decision. The central concern of *Pennhurst* was not federal interpretation of state law, but federally mandated restructuring of a state agency based on state law. To prevent such intrusion, the Supreme Court adopted an inflexible jurisdictional bar when the defendant is the state itself. The Court left open the way for a more flexible balancing of interests in other situations. In deciding how to address dual constitutional challenges, a court can take account of the problem of federal intrusion. The goal of federal adjudication of state constitutions is not to assert federal authority, but to offer interpretive guidance. 1465-66

¹⁸⁶ *Id.*

¹⁸⁷ Fourth category: Broad state constitutional provisions without federal analogues present similar issues. Here, too, federal courts may offer a valuable perspective. Even if the Federal Constitution does not have an equal rights amendment or a specific guarantee of privacy, federal experience will likely prove relevant. In construing these general protections of individual rights, the federal court’s different, more insulated, perspective may well prove useful. The disadvantages of abstention certainly remain in this setting. Abstention delays federal adjudication of the federal claim. Further, even if the state provision has no exact federal analogue, its application may prove sufficiently widespread to present the danger of turning abstention into a rule. For example, routing all gender discrimination cases through state court for an interpretation of a state equal rights amendment would impose an unwanted detour on a substantial number of federal constitutional claims. 87 Cal. L. Rev. 1466]

Second category: By contrast, where the challenged state law forms part of an integrated regulatory scheme, clarification of the underlying state legal regime may serve important goals. In this situation, the constitutional character of the regulations is not especially significant. Before it holds that a state law violates the Federal Constitution, a federal court should be sure that it knows what the state law means. A federal court may itself construe the state provisions or, if the state law is genuinely uncertain, a federal court could invoke certification procedures. In the case of specialized state provisions, federal interpretation of state law would have less to contribute to a federal-state dialogue. When construing specialized provisions, federal courts would not be building on their federal constitutional experience. Prior federal decisions are likely to be of little guidance in helping a federal court to interpret a clause prohibiting a “special privilege of fishery.” Even in this situation, though, a federal court should be reluctant to subject the federal claim to the delay inherent in abstention. 146

Professor Schapiro also analyzes a second category of dual state and federal constitutional challenges where “the challenged state [constitutional] law forms part of an integrated regulatory scheme.”¹⁸⁸ He concludes that a federal court has little to contribute to a dialogue about construing “specialized state provisions” because the court “would not be building on [its] federal constitutional experience. Prior federal decisions are likely to be of little guidance in helping a federal court to interpret a clause prohibiting a ‘special privilege of fishery.’”¹⁸⁹ Professor Schapiro does note that before the federal court holds that the state law violates the federal constitution, it should be sure that it understands the meaning of the state law.¹⁹⁰ He concludes that the federal court can construe the state provision itself “or, if the state law is genuinely uncertain, a federal court could invoke certification procedures.”¹⁹¹

Thus, Professor Schapiro seems to suggest in passing that certification is appropriate where state constitutional law is uncertain and the federal court has little to contribute to a federal-state dialogue about the proper interpretation of state law. The remainder of this Article examines in depth when certification is appropriate from an interactive perspective of federalism.

IV. CERTIFICATION

A. DEFINITION

Certification is a "procedure" that allows a federal court faced with an unsettled issue of state law to stay its proceedings and "put the question directly to the State's highest court."¹⁹² Today, almost all states as well as the District of Columbia and Puerto Rico permit

¹⁸⁸ Cal. L. Rev. at 1464.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Arizonans for Official English*, 520 U.S. at 76. For a discussion of the history of certification and an overview of the certification procedure, see Peter Jeremy Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 Conn. L. Rev. 649, 650-59 (1999).

certification.¹⁹³ In contrast to abstention, certification "does not require litigating a new lawsuit through state appellate review."¹⁹⁴ As a result, it is typically both faster and less expensive than abstention.¹⁹⁵ The Supreme Court has stated that because certified questions are sent directly to a state's highest court, certification "increase[es] the assurance of gaining an authoritative response" from the only court that can provide one.¹⁹⁶ Thus, the Court has endorsed the use of certification on the grounds that it "may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'"¹⁹⁷

B. CERTIFICATION AND THE SUPREME COURT

In the diversity context, the Court has provided little guidance to the lower courts regarding the circumstances under which certification is appropriate. It has addressed certification in only one diversity case: *Lehman Brothers v. Schein*.¹⁹⁸ *Lehman* involved three shareholders' derivative suits that were filed in federal district court on the basis of diversity jurisdiction and consolidated on appeal.¹⁹⁹ The district court concluded that Florida law applied to the disputes and that, under Florida law, the cases must be dismissed.²⁰⁰ Although the court of

¹⁹³ Only two states, Arkansas and North Carolina, do not have a certification procedure. While Missouri has a certification statute, Mo. Stat. Ann. § 477.004 (Vernon Supp. 2006), the Missouri Supreme Court has declined to answer certified questions on the ground that the Missouri Constitution does not permit it to do so. See *Zeman v. V.F. Factory Outlet, Inc.*, 911 F.2d 107, 109 (8th Cir. 1990) ("On July 13, 1990, the Missouri Supreme Court held that, notwithstanding the certification statute, the Missouri constitution did not grant the Missouri Supreme Court original jurisdiction to render opinions on questions of law certified by federal courts and declined to answer the certified question.")

¹⁹⁴ Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 *Fordham L. Rev.* 373, 381 (2000).

¹⁹⁵ *Arizonans for Official English*, 520 U.S. at 76.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 77 (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

¹⁹⁸ 416 U.S. 386, 390-91 (1974).

¹⁹⁹ *Id.* at 387.

²⁰⁰ *Id.* at 388-89.

appeals found that Florida law was unclear, it nonetheless reversed the district court and held that under Florida law the plaintiffs could recover.²⁰¹

The Supreme Court vacated the judgment of the court of appeals and remanded the cases so that the court could "reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court."²⁰² The Court said that certification seemed "particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law."²⁰³ The Court made clear, however, that even where state law is unclear and certification is available, certification is not mandatory.²⁰⁴ Rather, the Court said that the decision whether to use certification "in a given case rests in the sound discretion of the federal court."²⁰⁵ Thus, in *Lehman*, the Court appeared to approve the use of certification where state law is unclear.

C. THE FEDERAL APPELLATE COURTS AND CERTIFICATION

Given the Court's apparent endorsement in *Lehman* of certification in diversity cases where state law is unclear,²⁰⁶ it would not be unreasonable to expect that federal appellate courts²⁰⁷ would have adopted the "*Lehman* approach" to certification in diversity cases. The circuits, however, generally have not done so. While four circuits appear to lean exclusively toward the *Lehman* approach,²⁰⁸ at least six circuits tend to rely on abstention principles to determine when they should certify.²⁰⁹ In particular, these courts require "exceptional circumstances" before they will certify. The First Circuit, on the other hand, takes a dual

²⁰¹ *Id.* at 389.

²⁰² *Id.* at 391-92.

²⁰³ *Id.* at 391.

²⁰⁴ *Id.* at 390-91.

²⁰⁵ *Id.*

²⁰⁶ *See supra*

²⁰⁷ For purposes of this Article, the phrases "federal circuit courts" and "federal appellate courts" refer to the First through Eleventh Circuits and the District of Columbia Circuit.

²⁰⁸ These circuits are the Fourth, Sixth, Eighth and Eleventh Circuits.

²⁰⁹ *See supra* Part II.A-C. The circuits that rely on abstention principles to determine when certification is appropriate are the District of Columbia Circuit, the Second Circuit, the Third Circuit, the Fifth Circuit, the Seventh Circuit and the Ninth Circuit.

approach to certification, employing both the abstention-based approach and the *Lehman* approach to certification. The Tenth Circuit takes an ad hoc approach that is impossible to classify.²¹⁰

In addition, all of the circuits, at times, also consider "secondary" factors in deciding whether to certify. These factors include (1) whether the issue is or may be dispositive, (2) the likely recurrence of the issue, (3) the timing of the request for certification, (4) whether the party requesting certification chose the federal forum, and (5) whether the denial of certification will lead to forum shopping or inequitable administration of the laws.²¹¹ These factors are "secondary" because the circuits sometimes apply them and sometimes ignore them. In addition, a factor that receives weight in one case may not be mentioned in another case.

1. The *Lehman* Approach to Certification

The Fourth, Sixth, Eighth, and Eleventh Circuits appear to employ primarily the *Lehman* approach to certification. Multiple Eleventh Circuit cases demonstrate that the Eleventh Circuit,

²¹⁰ The Tenth Circuit has said, in more than one diversity case, that "certification is appropriate 'where the legal question at issue is novel and the applicable state law is unsettled.'" *Enfield v. A.B. Chance Co.*, 228 F.3d 1245, 1255 (10th Cir. 2000) (quoting *Allstate Ins. Co. v. Brown*, 920 F.2d 664, 667 (10th Cir. 1990)); see also *Pehle v. Farm Bureau Life Ins. Co.*, 397 F.3d 897, 900 n.1 (10th Cir. 2005) (same). In the cases where the court has made this statement, however, it has declined to certify. *E.g.*, *id.* at 900 n.1 (declining to certify because state law was settled); *Enfield*, 228 F.3d at 1255 (declining to certify because the party "did not seek certification until after it received an adverse decision from the district court"); *Brown*, 920 F.2d at 667 (declining to certify because state law was settled). Thus, these cases do not necessarily indicate that the Tenth Circuit *will* certify when state law is uncertain.

Furthermore, in discussing certification, the Tenth Circuit has quoted *Meredith v. Winter Haven*, 320 U.S. 228 (1943) for the proposition that federal courts have a duty to decide state law issues absent exceptional circumstances. *Copier v. Smith & Wesson Corp.*, 138 F.3d 833, 838 (10th Cir. 1998) (quoting *Meredith*, 320 U.S. at 235) (reviewing the district court's refusal to certify); see also *Enfield*, 228 F.3d at 1255 (quoting *Copier*, 138 F.3d at 838) ("[U]nder the diversity statutes the federal courts have the duty to decide questions of state law even if difficult or uncertain."). Confusingly, however, the Tenth Circuit has also recognized that in *Arizonans for Official English v. Arizona*, 520 U.S. 43, the Supreme Court said that "[n]ovel, unsettled questions of state law, . . . not unique circumstances, are necessary before federal courts" can certify." *Copier*, 138 F.3d at 839 (quoting *Arizonans*, 520 U.S. at 79). To complicate matters further, in most, if not all, of its published certification cases, the Tenth Circuit has declined to certify for myriad reasons, none of which are related to whether the issue involved is sufficiently important to the State. Given the Tenth Circuit's contradictory statements regarding whether it follows the *Lehman* approach or an abstention-based approach to certification and the lack of case law establishing that it follows either method, it is impossible to classify the court's approach. Due to the lack of diversity cases in which the Tenth Circuit has certified, perhaps the most that can be said is that the court is very reluctant to certify and views certification with great circumspection.

²¹¹ These factors are discussed *infra*.

more than any other, certifies solely because state law is unclear.²¹² In contrast to the numerous diversity cases in the Eleventh Circuit where the court has taken the *Lehman* approach to certification, there are very few published diversity-based certification cases in the Fourth and Sixth Circuits. While making conclusions about the circumstances under which these circuits certify is therefore speculative at best, the available case law suggests that they also take the *Lehman* approach to certification.²¹³ Similarly, while the Eighth Circuit also seems to take the *Lehman* approach to certification,²¹⁴ there are too few published cases in the Eighth Circuit from which a definitive conclusion can be drawn.

2. The Abstention-Based Approach to Certification

The District of Columbia, Second, Third, Fifth, Seventh and Ninth Circuits use an abstention-based approach to certification. In deciding whether to certify in diversity cases, these circuits commonly ask (1) whether state law is unsettled and (2) whether an interest of sufficient importance to the State is involved. In analyzing the second factor, the circuits are concerned about whether considerations of federal-state comity indicate that the issue before

²¹² In its certification cases, the Eleventh Circuit often says: "Where there is doubt in the interpretation of state law, a federal court may certify the question to the state supreme court to avoid making unnecessary *Erie* guesses and to offer the state court the opportunity to interpret or change existing law." *Tobin v. Michigan Mut. Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005) (citing multiple cases for the same proposition). For examples of Eleventh Circuit cases in which the court takes the *Lehman* approach to certification and considers primarily whether state law is unclear in deciding whether to certify, *see, e.g., id.* at 1274 (certifying where the appeal "depend[ed] on resolution of questions of unsettled Florida law and [would] affect many other cases"); *Miller v. Scottsdale Ins. Co.*, 410 F.3d 678, 678 (11th Cir. 2005) (per curiam) ("Because there is no controlling Florida authority on this question, we certify this issue to the Florida Supreme Court."); *Freeman v. First Union Nat'l*, 329 F.3d 1231, 1234 (11th Cir. 2003) (certifying where there was "no clear, controlling precedent in the decisions of the state's highest court" and the "unanswered questions of state law" were "determinative of [the] appeal").

²¹³ *See, e.g., C.F. Trust, Inc. v. First Flight Ltd.*, 306 F.3d 126 (4th Cir. 2002) (certifying where state law uncertain); *Langley v. Pierce*, 993 F.2d 36, 37-38 (4th Cir. 1993) (certifying where there was "no controlling precedent in [state] law that address[ed] the exact controversy between the parties"); *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (stating that "[r]esort to the certification procedure is most appropriate when the question is new and state law is unsettled" and declining to certify because the pertinent case law was "relatively settled").

²¹⁴ *See, e.g., Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 373 (8th Cir. 1997) (certifying where there was no "controlling precedent in the decisions of the Minnesota Supreme Court which would enable [the] court to reach a sound decision without indulging in speculation or conjecture").

them is one that warrants certification. Accordingly, the circuits examine whether the issue is "intimately" related to the state's "sovereign prerogative," whether the issue is one of "vital public concern," whether the state has an interest in "maintaining uniformity in the treatment of an essentially local problem," or whether the state has an interest in "retaining local control over difficult questions of state law bearing on policy problems of substantial public import."²¹⁵

While the circuits do not often use this precise language from the abstention cases to describe the second factor, they do employ very similar language and appear to be equating certification with abstention by, in effect, requiring exceptional circumstances before they will certify. For the most part, however, the circuits do not acknowledge that they are relying on abstention principles or explain their reasoning for taking this approach to certification.

The Second Circuit's approach to certification demonstrates the use of certification as a proxy for abstention in diversity cases. Interestingly, the Second Circuit has stated specifically that certification is proper "only where there is a split of authority on the issue, where [a] statute's plain language does not indicate the answer, or when presented with a complex question of [state] common law for which no [state] authority can be found."²¹⁶ This suggests that the Second Circuit has adopted the *Lehman* approach to certification in diversity cases and asks only whether state law is sufficiently unclear in deciding whether to certify. Nevertheless, the Second Circuit usually considers not only whether state law is unclear, but also whether the issue involves important state public policy considerations.²¹⁷

²¹⁵ *Supra* Part II.C.

²¹⁶ *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 52 (2d Cir. 1992). In a case decided five years after *Riordan* the Second Circuit said, "*Riordan* establishes the standard applicable in this Circuit for determining whether it is appropriate to certify a question to a state court." *McCarthy v. Olin Corp.*, 119 F.3d 148, 154 n.3 (2d Cir. 1997).

²¹⁷ See, e.g., *Colavito v. N.Y. Organ Donor Network*, 438 F.3d 214, 229 (2d Cir. 2006) ("Where unsettled and significant questions of state law will control the outcome of a case, we may certify those questions.") (internal quotation marks and citation omitted); *Regatos v. N. Fork Bank*, 396 F.3d 493, 498 (2d Cir. 2005) (certifying where the case involved "unsettled and significant" issues of state law); *Carvel Corp. v. Noonan*, 350 F.3d 6, 25-26 (2d Cir.

Recently, for example, in *Colavito v. New York Organ Donor Network*,²¹⁸ the Second Circuit certified several "novel questions of [state] statutory interpretation" that involved an "important and sensitive area of state law and policy" to the New York Court of Appeals.²¹⁹ The plaintiff in *Colavito* had end-stage renal disease.²²⁰ When he did not receive a kidney that allegedly had been directly donated to him, he brought suit in federal court under diversity jurisdiction against the New York Organ Donor Network ("NYODN") and two NYODN officials.²²¹ The plaintiff claimed that the defendants had engaged in fraud and had committed the common law tort of conversion by violating New York Public Health Law.²²² The plaintiff also asserted a private right of action under New York Public Health Law.²²³ The Second Circuit affirmed the district court's grant of summary judgment to the defendants on the fraud claim, but "reserve[d] decision on the remaining issues" and certified several questions.²²⁴

Specifically, the Second Circuit said that before it reached the merits of the plaintiff's other claims, it had to determine whether those claims even existed under state public health law.²²⁵ After examining the statutory sections at issue, the court concluded that it could not determine whether the claims "[gave] rise to enforceable rights for individuals."²²⁶ The court ultimately held that certification was appropriate because the statutory language was ambiguous,

2003) ("[I]n deciding whether to certify . . . this Court looks to both the extent of existing state precedent and the nature of the questions to be asked. In particular, whether to certify a question depends to some extent upon whether the question implicates issues of state public policy.") (internal quotation marks and citation omitted)); *City of Burlington v. Indem. Ins. Co.*, 332 F.3d 38, 40 (2d Cir. 2003) (certifying questions because the state courts had not yet ruled on the issues and because the issues involved "important public policy considerations" for the state); *N.Y. Univ. v. First Fin. Ins. Co.*, 322 F.3d 750, 756 (2d Cir. 2003) (certifying a "significant and novel public policy question").

²¹⁸ 438 F.3d 214 (2d Cir. 2006).

²¹⁹ *Id.* at 216, 229.

²²⁰ *Id.* at 217.

²²¹ *See id.* at 217, 219, 220.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 232-33.

²²⁵ *See id.* at 223.

²²⁶ *Id.* at 228.

and there was very little pertinent case law interpreting the statutory provisions.²²⁷ In addition, the court reasoned that certification was justified because it did not have the "experience, expertise, or authority" to ascertain the public policy underlying the statutes at issue.²²⁸ According to the court, the goal behind the statutes—increasing organ donation—could be achieved either by protecting "organ procurement organizations from liability or by giving donors and donees enforceable rights to remedy and deter misconduct."²²⁹ The court concluded that "it would be imprudent to embark on an excursion . . . into the state statutory incentive structure in this important and sensitive area of state law and policy."²³⁰ Therefore, after applying abstention principles, the Second Circuit determined that certification was warranted.²³¹

V. CERTIFICATION AND FEDERALISM

A. THE *LEHMAN* APPROACH AND COOPERATIVE FEDERALISM

Given that at least some federal courts employ the *Lehman* approach to certification, the question that arises from an interactive federalism perspective is whether this method represents the best means of exploiting the overlap in power between the state and federal court systems. In *Lehman*, the Court referred to the ability of certification to "help build a cooperative judicial federalism." By viewing certification as an example of cooperative federalism, the Court acknowledged the overlapping jurisdiction of state and federal courts and the actual interaction of the two court systems that occurs when certification is used. This view of certification is flawed, however, for the same reasons that Professor Schapiro argues that the concept of

²²⁷ *Id.* at 229.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

cooperative federalism is generally flawed.²³² While the Court has “blesse[ed] the voluntary interaction of state and national governments” through the use of certification, it has not provided “rules of engagement.”²³³

The *Lehman* Court did not provide the lower federal courts with any guidance regarding how or when they should use certification to foster intersystemic collaboration. The Court merely referred to the use of certification to resolve “unsettled questions of state law.” It is possible that the *Lehman* Court intended federal courts to certify in diversity cases whenever state law is “unsettled.” Even if this is the case, however, state law can be unsettled in varying ways and to varying degrees. As one commentator has pointed out, “[e]ven when there is a state supreme court decision on point, the direction is not always crystal clear. For example, the allegedly controlling decision of the state supreme court may be old and intervening doctrinal trends may call into question whether the state supreme court would follow it today. Further, the relevant language may be merely dictum, or the pertinent holding may have been joined by less than a majority of the court.”²³⁴ The Supreme Court simply has not given any real substantive content to the phrase “unsettled questions of state law.”

It is true, as the Court has indicated, that certification increases the possibility of obtaining an authoritative interpretation of state law. From the interactive perspective, however, an “authoritative” interpretation of state law from the state’s highest court is not necessarily the best or even the correct interpretation of state law.²³⁵ The uniformity, finality and accountability that come with certification and the “authoritative” construction of state law cut

²³² See *supra* Part II.B.

²³³ See *id.*

²³⁴ Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1676 (1992).

²³⁵ See *supra* Part III.B.

off the dialogue, plurality of legal interpretation and redundancy that come from intersystemic adjudication. Thus, if federal courts were to certify in all cases where state law was in any sense unclear, the potential for federalism to mitigate errors by creating a role for federal interpreters of state law would be lost altogether.

B. THE ABSTENTION-BASED APPROACH AND DUALIST FEDERALISM

I have previously argued that federal courts need not employ abstention principles to limit the certification of state-law questions in diversity cases.²³⁶ First, I have argued that because the Supreme Court has never limited certification in federal question or diversity cases to exceptional circumstances, the lower courts are not compelled to do so. Second, I have asserted that the decision whether to certify should not turn on the presence of exceptional circumstances because certification does not result in abdication of the duty to exercise jurisdiction. Instead, when a federal court certifies a question of law to a state's highest court, it merely postpones the exercise of its jurisdiction. Thus, there is no reason for federal courts to use the exceptional circumstances requirement of the abstention doctrines to restrict the use of certification.²³⁷

Although federal courts need not limit certification to exceptional circumstances, from an interactive perspective they also *should* not determine whether to certify using an exceptional circumstances standard. While the *Lehman* approach to certification can be classified as an example of cooperative federalism, the abstention-based approach to certification can be classified as an example of dualist federalism.

²³⁶ See generally Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 Rutgers L.J. 847 (2007).

²³⁷ See generally *id.*

Like the Supreme Court’s approach to federalism in its Commerce Clause cases and scholars’ typical approach to federalism, an abstention-based approach to certification focuses on how best to divide power between the federal government and the states rather than on how to exploit the actual overlap of power that certification represents. The abstention-based approach to certification acknowledges that it can be useful for federal and state courts to interact in order to resolve questions of state law. This approach, however, attempts to identify the circumstances in which certification is appropriate by drawing a line between the “truly local” and the “truly national.” Indeed, the dualist certification language of the circuits that use an abstention-based approach is very telling. They will certify when state law is unclear and the issue is “intimately” related to the state’s “sovereign prerogative,” the issue is one of “vital public concern,” the state has an interest in “maintaining uniformity in the treatment of an essentially local problem,” or the state has an interest in “retaining local control over difficult questions of state law bearing on policy problems of substantial public import.”²³⁸ Thus, in *Colavito*, the Second Circuit certified a novel question of state law that involved “an important and sensitive area of state law and policy.”

The dualist approach to certification, like the Court’s and scholars approach to federalism, is flawed because the lines that the federal courts draw to identify “truly local” issues that are proper for certification are arbitrary. Like the Supreme Court, the circuit courts have not found a useful way to define the contours of the local/national boundary.

For example, as of the year 2000, the New York Court of Appeals had received forty-five requests for certification, forty-four from the Second Circuit and one from the Eleventh

²³⁸ *Supra* Part

Circuit.²³⁹ The certified questions involved “New York law in areas as diverse as the rule against perpetuities, the attorney-client privilege, loss of consortium, and malicious prosecution.”²⁴⁰ “Fertile areas” for certification included products liability and contract law.²⁴¹ Products liability issues were “well suited for certification [because the area] is dominated by state common law and arises frequently in federal diversity cases.”²⁴² In addition, several certified questions involved statutory interpretation of “statutes relating to personal jurisdiction, rent stabilization, limitations periods, elevation-related hazards to workers[,] and truck owner liability for injuries sustained during unloading.”²⁴³ Certification had also allowed the New York Court of Appeals “to define the scope of New York’s right to privacy statutes.”²⁴⁴ It is difficult to identify precisely what it is that makes any one of these areas particularly “local” and therefore an appropriate subject of certification, other than the fact that they all involve state law. Indeed, how can it be that any issue of state law is not intimately related to the state’s sovereign prerogative, or is not an issue of vital public concern, or does not involve a sensitive issue of state policy?

The dualist approach to certification is also flawed because it fails to take into consideration the potential benefits and costs of overlapping state and federal authority. Rather than considering the benefits and costs of intersystemic adjudication, this approach to certification focuses solely on line-drawing. It can move the line between state and federal power in one direction or another, but it has no resources to address the overlap of state and federal power or to identify when the benefits of federal-state interaction outweigh the costs.

²³⁹ Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 *Fordham L. Rev.* 373, 397 (2000).

²⁴⁰ *Id.* at 399.

²⁴¹ *Id.* at 399-402.

²⁴² *Id.* at 399.

²⁴³ *Id.* at 403.

²⁴⁴ *Id.* at 403-04.

C. CERTIFICATION AND INTERACTIVE FEDERALISM: A NEW APPROACH

1. General Approach

From an interactive approach to federalism, certification provides federal courts with an opportunity to harness the dynamic interaction of state and federal power in order to promote the goals of federalism. In order to do this, the federal courts must replace the *Lehman* approach to certification and the abstention-based approach to certification with a functional interactive approach. First, federal courts should abandon any attempt to identify the “truly local” when they decide whether to use certification. They should embrace the overlap of state and federal power exemplified by diversity jurisdiction. Second, in determining whether to certify a question of state law, federal courts should apply a background presumption that state and federal power can coexist. In other words, federal courts should apply a presumption against certification and in favor of intersystemic adjudication. Third, in deciding whether to certify, federal courts should seek a functional balance of state and federal authority by weighing the benefits of plurality, dialogue and redundancy against the need for uniformity, finality, and accountability.

In weighing the benefits and costs of intersystemic adjudication, a federal judge should consider the value of a dialogue between federal and state courts and the resulting plurality of legal meaning in the context of the case before it. In particular, a federal judge should ask whether a federal opinion will contribute meaningfully to the discussion about the best way to realize the policies behind the law at issue. In determining whether a federal viewpoint will be meaningful, the judge should consider the institutional context in which federal judges operate as compared to state judges. The judge should address whether, given the circumstances of the case, the insulation of the federal courts may be necessary to protect against geographical,

political or social bias on the part of electorally vulnerable state judges. The judge should also consider whether intersystemic adjudication is needed to provide a redundant fail-safe option because lower state courts have failed to recognize or enforce rights available under state law.

Against these potential benefits of intersystemic adjudication, a federal court must weigh the potential costs incurred when a federal court interprets state law. In particular, the court must consider whether the issues involved make the lack of uniformity and finality that result from dialogue and plurality of legal meaning unacceptable. The court should consider the extent of uncertainty and confusion that its interpretation of state law may engender. The court should also take into consideration whether federal interpretation of state law will make individuals uncertain about which system to hold accountable if they are unhappy with the federal interpretation.

In balancing the benefits of intersystemic adjudication against the costs, the federal court should bear in mind that “authoritative” opinions from a state supreme court, while binding, are not necessarily correct. *Erie R.R. v. Tompkins* does not stand for the proposition that only state courts can interpret state law. It leaves room for federal and state courts to work together to achieve the best interpretation of state law. In this way, intersystemic adjudication diminishes the potential for errors in the construction of state law.

2. Application to *In re Katrina Canal Breaches Litigation*

In *In re Katrina Canal Breaches Litigation*, the Fifth Circuit refused to certify to the Louisiana Supreme Court the question of whether the flood exclusions in the plaintiffs’ policies were ambiguous.²⁴⁵ In doing so, the court acknowledged that it would have to “make an *Erie* guess and determine, in [its] best judgment,” how the Louisiana Supreme Court would decide the

²⁴⁵ 495 F.3d 191, 208 & n.11 (5th Cir. 1007).

issue.²⁴⁶ In a footnote the court stated: “Although we acknowledge that the Louisiana Supreme Court has not issued a definitive ruling on the interpretation of a flood exclusion in the context of the facts before us, this is not alone sufficient to warrant certification. Because the rules of contract interpretation set forth in the Louisiana Civil Code provide us with an adequate basis to decide this appeal, we decline the certification requests.”

The plaintiffs whose motions to certify had been denied then filed petitions for writs of certiorari in the Supreme Court.²⁴⁷ In their petition, the plaintiffs essentially argued that uniformity, finality and accountability mandated certification in their cases. More specifically, in their petition the plaintiffs asserted that the Fifth Circuit improperly “disregarded principles of federalism” by refusing to certify when cases involving the same issue were pending in the state courts, there was no state appellate opinion on point, and “the issue on appeal was of important concern to the State of Louisiana and its citizens.”²⁴⁸ The plaintiffs further argued that the refusal to certify “set the stage for inconsistent decisions and confusion among citizens of Louisiana, rather than allowing for a uniform interpretation of the insurance policies at issue.”²⁴⁹

While the petitions for certiorari weighed the costs of intersystemic adjudication heavily, they did not consider the countervailing benefits of denying the motions for certification and allowing the Fifth Circuit to decide the state law issue before it. Furthermore, while I believe that, on balance, the Fifth Circuit reached the correct result, it did not weigh the benefits of deciding the state law issue against the costs. From an interactive perspective, however, a federal court should use a functional approach of weighing the benefits of plurality, dialogue and

²⁴⁶ *See id.* at 208.

²⁴⁷ *E.g. In re Katrina Canal Breaches Litigation*, 2007 WL 4207148 (Nov. 26, 2007).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

redundancy against the costs of uniformity, finality and accountability to properly determine whether it should certify.

Thus, in deciding whether to certify, the Fifth Circuit should have presumed that it was appropriate for a federal court to decide the state-law issue. The court then should have considered the value of a dialogue between the Fifth Circuit and the Louisiana state courts regarding the proper interpretation of the flood exclusion and the potential plurality of legal meanings that would result from the dialogue. The court should have asked whether the institutional context of the Fifth Circuit, including the judges' life tenure and their interpretive experience, would allow them to contribute in a meaningful way to the discussion. In addition, the court should have addressed whether bias was potentially an issue in the case and whether a fail-safe option was needed.

If the Fifth Circuit had explicitly applied these principles, it would have found that a federal court does have a valuable contribution to make in these circumstances. First, given the magnitude of the damage caused by Hurricane Katrina and number of insurance claims that have been denied post-Katrina, the Katrina litigation appears to present the kind of situation where politically insulated federal judges would have much to contribute to a dialogue with state court judges who are subject to re-election. Although the Fifth Circuit cannot "authoritatively" decide the state law question, it can serve as a type of check on state courts that might be tempted to succumb to political pressure by deciding the issue in a manner contrary to well-established contract interpretation principles.

In addition, as the Fifth Circuit pointed out in denying the certification motions, the Louisiana rules of contract interpretation provided it with an adequate basis to resolve the unclear question of state law before it. Basic contract interpretation is surely something that

federal judges are qualified by their experience to do. Not only do many federal judges have experience interpreting contracts as judges, many of them also practiced law and have experience dealing with contracts generally. Furthermore, the Katrina cases also present the type of situation in which the possibility of geographical bias and the need for a federal forum to prevent bias should be considered. The Katrina cases at issue in *In re Katrina Canal Breaches Litigation* were in federal court based on diversity jurisdiction whether they were filed in federal court initially or removed to federal court by the defendants. It is not a leap to surmise that the insurance companies involved in these cases might well receive a fairer, more impartial hearing in federal court than they would in Louisiana state court. Finally, these Katrina cases demonstrate the potential for intersystemic adjudication to provide redundant remedies. State district courts had already reached conclusions contrary to the Fifth Circuit's by the time the Fifth Circuit decided that the flood exclusion in the plaintiffs' policies was not ambiguous. Regardless of whether the Louisiana Supreme Court ultimately agrees with the state district courts or the Fifth Circuit, the Fifth Circuit has provided a fail-safe option for the insurance companies in these cases.

After considering the benefits of deciding the state law issue, the Fifth Circuit should also have considered the costs. There is no question that the Fifth Circuit undermined uniformity and finality by deciding the issue before it in the *Katrina Canal Breaches Litigation* while similar cases were working their way through the state appellate system. It is also possible that the Fifth Circuit's decision confused citizens because it contradicted state court opinions. With regard to accountability, however, it seems highly unlikely that state court judges subject to re-election would allow citizens in this situation to be confused about which sovereign had ruled against them.

The question is whether the benefits of intersystemic adjudication outweigh the costs here. If one takes the position that the Fifth Circuit may have “erred” in interpreting state law, then the question becomes close. It is thus important to remember that the federal court’s “nonauthoritative” contribution to state law has the potential to alleviate state court errors in the interpretation of state law. It is also important to remember that even if the Louisiana Supreme Court ultimately disagrees with the Fifth Circuit, it does not mean that the state high court has interpreted state law correctly. It simply means that the Louisiana Supreme Court has the final word on Louisiana law. From this interactive perspective of federalism, the benefits of overlapping state and federal power in the circumstances of the *Katrina Canal Breaches Litigation* on balance outweigh the costs. Thus, the Fifth Circuit reached the correct result in those cases despite the dearth of proper analysis in its opinion.