

## Notes

# **A DIVINE COMITY: CERTIFICATION (AT LAST) IN NORTH CAROLINA**

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### ABSTRACT

*North Carolina is the only state never to have enacted a certification procedure, which would allow federal courts, in appropriate cases, to send questions of North Carolina law to the North Carolina Supreme Court. Previous calls for certification's adoption in this state have been unsuccessful, perhaps because the North Carolina Supreme Court's jurisdictional precedent seems to undercut certification's constitutionality. Reexamined in light of the North Carolina Constitution's design and the structure of the General Court of Justice, however, this precedent does not render certification unconstitutional. Even if the North Carolina Supreme Court holds to the contrary, certification could be adopted by constitutional amendment or under a theory that answering certified questions does not require an exercise of jurisdiction. North Carolina therefore can and should adopt certification. Such a procedure will avoid federal court guesswork on difficult state law issues, ensuring fairness for the litigants while saving time and money for future parties and the North Carolina courts. Certification's potential pitfalls can be circumvented through careful drafting and the North Carolina Supreme Court's conscientious use of discretion. Bearing principles of judicial economy, comity, and federalism in mind, North Carolina should at last join the rest of the union in adopting certification.*

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## INTRODUCTION

In 1966, the Fifth Circuit confronted a knotty question of state law.<sup>1</sup> A Florida citizen, returning on a round-trip ticket purchased in Florida, died when the plane crashed in Illinois.<sup>2</sup> The court wrestled with whether the Illinois wrongful death statute, which capped damages, violated Florida public policy.<sup>3</sup> What meager precedent there was consisted of only automobile cases and conflicting authority from other jurisdictions, and the academy was clamoring for departure from traditional choice-of-law considerations.<sup>4</sup> Ultimately, the decision rested not on “ascertain[ing] what had been held,” but on “divining the policy considerations which the Supreme Court of Florida would now embrace.”<sup>5</sup>

Stymied by such a “delicate choice,” the Fifth Circuit took advantage of a Florida procedure allowing it to certify the question before it to the Florida Supreme Court, which overruled itself to hold the cap applicable.<sup>6</sup> Receiving the state court’s reply, the Fifth Circuit reflected on the certification procedure’s value:

For a Federal Court to have attempted to resolve the question on its own would have been fraught with great hazard both to litigants and the law. That is especially so since the Supreme Court out of a single mass of materials reached at different times divergent results.

. . . [W]here *Erie* often compels the most speculative anticipation on matters not yet decided, Florida’s procedure gives a clear, positive, final decisive answer. It is not just a bright clear light showing the *Erie*-way . . . it is what the law actually is on the precise point presented to us and certified for answer. It is Florida law binding on us as we perform our *Erie* role.<sup>7</sup>

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1. See *Hopkins v. Lockheed Aircraft Corp.* (*Hopkins I*), 358 F.2d 347 (5th Cir. 1966).

2. *Id.* at 348.

3. *Id.* at 348–49.

4. *Id.* at 349.

5. *Hopkins v. Lockheed Aircraft Corp.* (*Hopkins II*), 394 F.2d 656, 656–57 (5th Cir. 1968).

6. *Id.* The Florida Supreme Court first held, over dissent, that the Illinois damages cap did not apply, *Hopkins v. Lockheed Aircraft Corp.* (*Hopkins III*), 201 So. 2d 743, 748 (Fla. 1967), then reversed itself 4–3 on rehearing, holding the cap applicable, *id.* at 752.

7. *Hopkins II*, 394 F.2d at 657 (footnotes omitted).

A certification<sup>8</sup> procedure like the one just described authorizes a federal court,<sup>9</sup> under certain circumstances, to certify (that is, send) questions of state law with which it is faced to the state's highest court.<sup>10</sup> The state high court, if it so chooses,<sup>11</sup> resolves the certified question with the expectation that the parties will return to federal court for further proceedings.<sup>12</sup>

North Carolina remains the only state never to have enacted such a procedure,<sup>13</sup> putting it behind the District of Columbia,<sup>14</sup> Puerto Rico,<sup>15</sup> the Northern Mariana Islands,<sup>16</sup> and Guam.<sup>17</sup> Previous calls for certification's adoption in North Carolina have been unsuccessful.<sup>18</sup> In a 1999 article, then-practitioner<sup>19</sup> Jessica Smith

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8. Like much of the literature, this Note employs "certification" as shorthand for "interjurisdictional certification." See generally 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4248 (3d ed. 2007) (using the same convention). Intra-jurisdictional certification procedures, e.g., 28 U.S.C. § 1254(2) (2000), are beyond this Note's scope.

9. Some certification procedures allow other states' appellate courts to certify, as well. See, e.g., W. VA. CODE ANN. § 51-1A-3 (LexisNexis 2000) (allowing interstate certification). The arguments for interstate certification parallel those for federal-state certification. For convenience, this Note refers only to "federal courts."

10. See, e.g., ALA. R. APP. P. 18(a) (allowing federal courts to certify questions "which are determinative of [the] cause" before that court when "there are no clear controlling precedents").

11. See, e.g., ARK. SUP. CT. R. 6-8(a) ("The Supreme Court may, in its discretion, answer questions of law certified to it . . .").

12. See, e.g., *id.* 6-8(g) ("The written opinion of the Supreme Court stating the law governing the questions certified shall be sent . . . to the certifying court . . .").

13. See Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 159 n.13 (2002) (listing the then-existing state certification procedures and concluding that only Arkansas, New Jersey, and North Carolina had none). Arkansas and New Jersey have since adopted certification. See ARK. CONST. amend. LXXX, § 2(D)(3); ARK. SUP. CT. R. 6-8; N.J. R. APP. P. 2:12A-1 to A-8. Note, however, that Missouri's certification procedure, MO. ANN. STAT. § 477.004 (West 2004), is nonfunctional: the Missouri Supreme Court held that answering a certified question would be unconstitutional, *Grantham v. Mo. Dep't of Corr.*, No. 72576, 1990 WL 602159, at \*1 (Mo. July 13, 1990) (en banc).

14. See D.C. CODE § 11-723 (2001); D.C. CT. APP. R. 22 (authorizing certification).

15. See P.R. LAWS ANN. tit. 4, § 24s(f) (2003); P.R. SUP. CT. R. 23 (authorizing certification).

16. See N. MAR. I. R. APP. P. 5, available at [http://www.cnmilaw.org/pdf/court\\_rules/R02.pdf](http://www.cnmilaw.org/pdf/court_rules/R02.pdf) (authorizing certification, adopted prior to 2004).

17. See GUAM R. APP. P. 20(b), available at <http://www.guamsupremecourt.com/Rules/images/GRAP%2002212007.pdf> (authorizing certification, adopted in 2007).

18. See Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. REV. 2123, 2125 (1999) (recommending that North Carolina adopt a certification procedure); see also JONA

urged state lawmakers to create a certification procedure, concluding that the North Carolina Constitution poses no bar.<sup>20</sup> Unfortunately, her analysis fails to account for the North Carolina Supreme Court's jurisdictional precedent, which prohibits the General Assembly from enlarging the supreme court's jurisdiction even though no such prohibition appears in the North Carolina Constitution's text.<sup>21</sup> This precedent poses an obstacle to certification's adoption in North Carolina.

That obstacle can be overcome. This Note takes the position that North Carolina can and should adopt a certification procedure. Part I lays out the case for certification, discussing how careful drafting and the North Carolina Supreme Court's conscientious use of discretion can maximize certification's benefits while avoiding pitfalls. Part II analyzes the difficulties certification may face in North Carolina, specifically the possibility that it violates the state constitution. Part III offers strategies for implementing certification that circumvent these constitutional problems and proposes features the certification procedure should incorporate.

## I. THE CASE FOR CERTIFICATION

Although North Carolina is the country's last certification holdout, bandwagon arguments alone should not dictate state policy. This Part lays out a three-part case for why North Carolina should adopt a certification procedure. Section A describes certification's

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GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 98 (1995) (same); J. Donald Hobart, Jr., Note, *Currie v. United States and the Elusive "Duty to Commit" Dangerous Mental Patients: Conflicting Views of North Carolina Law from the Federal Courts*, 66 N.C. L. REV. 1311, 1334 & n.162 (1988) (suggesting that certification, though difficult to implement, would be superior to conflicting federal court interpretations of an unclear state law). Although the North Carolina General Statutes Commission has had an open docket on the Uniform Certification of Questions of Law Act for a number of years, it has never recommended a certification statute to the General Assembly. Telephone Interview with P. Bly Hall, Assistant Reviser of Statutes, N.C. Gen. Statutes Comm'n, in Durham, N.C. (Mar. 17, 2008).

19. Professor Smith joined the faculty of the North Carolina School of Government shortly after publishing. See UNC School of Government – Faculty: Jessica Smith, <http://www.sog.unc.edu/about/directory/jsmith.html> (last visited Sept. 14, 2008) (listing the faculty member's starting date).

20. See Smith, *supra* note 18, at 2141–43 (analyzing the North Carolina Constitution but not the North Carolina Supreme Court's jurisdictional precedent).

21. See *infra* Part II.B.

development as a solution to *Erie*'s problems and abstention's shortcomings. Section B details certification's benefits to litigants, the federal courts, and the North Carolina Courts. Section C explains how North Carolina can avoid potential pitfalls through drafting and the North Carolina Supreme Court's conscientious use of discretion.

#### A. *Erie's Problems, Abstention, and Certification*

Certification developed in this country in response to difficulties arising out of the 1938 case *Erie Railroad Co. v. Tompkins*.<sup>22</sup> *Erie* demands that a federal court decide substantive state law questions exactly as a state court would.<sup>23</sup> Obeying *Erie* is straightforward if state law is clear,<sup>24</sup> but predicting how the state supreme court would decide an unclear issue is neither easy<sup>25</sup> nor value-free.<sup>26</sup> For unsettled issues implicating state policy, a federal court's *Erie*-based prediction creates "needless friction with [the] state."<sup>27</sup>

In response to this friction, the federal courts developed doctrines of abstention.<sup>28</sup> When it abstains, a federal court avoids adjudicating a state law issue by sending the parties to state court to obtain a declaratory judgment.<sup>29</sup> This process has significant flaws.

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22. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Certification already existed in Britain at the time. See J. Michael Medina, *The Interjurisdictional Certification of Questions of Law Experience: Federal, State, and Oklahoma—Should Arkansas Follow?*, 45 ARK. L. REV. 99, 99–100 (1992) (citing The British Law Ascertainment Act of 1859, 22 & 23 Vict. ch. 63).

23. See, e.g., *Waste Control Specialists, LLC v. Envirocare of Tex., Inc.*, 199 F.3d 781, 785 n.2 (5th Cir. 2000) ("[A] federal court applies state law exactly as would a state court." (citing *Erie R.R. Co.*, 304 U.S. at 64)), modified on other grounds, 207 F.3d 225 (5th Cir. 2000).

24. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1467 (1997).

25. See Smith, *supra* note 18, at 2133 ("[T]he federal judge [must] consider, among other things, the entire body of relevant state law, any pertinent trends bearing on the particular issue before him, treatises, restatements, law review articles or other materials that he thinks the state court might find persuasive, as well as decisions from other jurisdictions . . .").

26. See Clark, *supra* note 24, at 1469–71 (equating the policymaking judgments necessary for deciding unclear legal questions with legislation); see also *infra* notes 50–51 and accompanying text.

27. *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500–01 (1941) (instructing the district court to refer the parties to state court for a declaratory judgment on state law in "avoidance of needless friction with state policies").

28. See *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28–29 (1959) (requiring abstention on a state law issue that was "intimately involved with sovereign prerogative"); *Pullman*, 312 U.S. at 500–01 (requiring abstention as a matter of constitutional avoidance).

29. See 17A WRIGHT ET AL., *supra* note 8, § 4241 (describing the abstention doctrines).

Foremost among these is “legendary” cost and delay: the parties must leave federal court to initiate a full round of state litigation plus any attendant appeals, and then return to federal court for another full round of litigation and appeals.<sup>30</sup> Moreover, the state supreme court may not definitively resolve the relevant issue, as that court can decline review—undercutting the reason to abstain in the first place.<sup>31</sup> Accordingly, many commentators have rejected abstention as unacceptable.<sup>32</sup>

Meanwhile, an alternative to abstention has evolved: certification. Facing uncertain state law questions in *Clay v. Sun Insurance Office Ltd.*,<sup>33</sup> the U.S. Supreme Court seized upon Florida’s little-known certification statute, suggesting that the court below certify rather than abstain.<sup>34</sup> The decision touched off a steady movement toward consensus: the Uniform Certification of Questions of Law Act appeared in 1967, to be adopted by eighteen states, the District of Columbia, and Puerto Rico over the following twenty years.<sup>35</sup> Where state constitutions barred certification, states amended their constitutions.<sup>36</sup> Eventually, only Arkansas, New Jersey, and

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30. See Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 591 (1977) (describing certification’s attendant cost and delay as “legendary”).

31. *Id.* at 604–05.

32. E.g., David P. Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. CHI. L. REV. 268, 317 (1969) (“[T]he delays and added cost of abstention . . . [are] too high a price to pay . . .”); Field, *supra* note 30, at 592 (“[T]he abstention procedure is not worth its costs . . .”).

33. *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960).

34. See *id.* at 212 & n.3 (praising the Florida legislature’s “rare foresight” in creating the procedure); see also Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 381–82 (2000) (describing the Florida certification statute and its nonuse at the time).

The U.S. Supreme Court has continued to promote certification as a procedure that “in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism.” *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79–80 (1997) (recommending certification in a challenge to a new state constitutional amendment); *Bellotti v. Baird*, 428 U.S. 132, 150–51 (1976) (recommending certification in a challenge to an abortion statute).

35. See Unif. Certification of Questions of Law Act note (1967) (Refs. and Annotations) (listing jurisdictions that have adopted the act). As of 2007, this act had been adopted by twenty-four states. See *id.*; see also Unif. Certification of Questions of Law Act, 12 U.L.A. 67, 67 (1995) (revising the 1967 act; adopted in seven states).

36. Utah’s procedure, for example, was initially deemed unconstitutional. See *Holden v. N L Indus.*, 629 P.2d 428, 432 (Utah 1981) (“[T]his Court has no jurisdiction to provide federal courts the requested ruling on state law.”). In response, the state amended its constitution and

North Carolina had never adopted a procedure.<sup>37</sup> Arkansas amended its constitution in 2000 and issued a certification rule;<sup>38</sup> New Jersey followed suit in 2003.<sup>39</sup> North Carolina thus remains the only state never to have implemented certification.

### B. Certification's Benefits

Scholars have documented certification's benefits both theoretically<sup>40</sup> and empirically.<sup>41</sup> As its most noticeable benefit, a North Carolina certification procedure would relieve federal courts of the necessity of predicting unsettled North Carolina law. This avoidance is valuable for two reasons. First, it allocates legal decisionmaking efficiently. On a novel issue, it is much more difficult for a federal court to *predict* what the North Carolina Supreme Court will find persuasive than for the supreme court simply to *be persuaded*.<sup>42</sup> Second, the federal court may incorrectly predict how the

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reenacted the procedure. UTAH CONST. art. VIII, § 3; UTAH CODE ANN. § 78-2-2 (West 2007); UTAH R. APP. P. 41. New York avoided a similar problem by amending its constitution before enacting a certification statute. See Kaye & Weissman, *supra* note 34, at 386–93 (describing the history of the amendment). *But cf.* MO. ANN. STAT. § 477.004 (West 2007) (authorizing certification); *Grantham v. Mo. Dep't. of Corr.*, No. 72576, 1990 WL 602159, at \*1 (Mo. July 13, 1990) (en banc) (holding that the Missouri Supreme Court has no jurisdiction to hear certified questions under the statute). No constitutional amendment appears to be pending in Missouri.

37. Cochran, *supra* note 13, at 159 n.13. Some U.S. territories, too, had not yet adopted certification at that time, but have since done so. See *supra* notes 14–17 and accompanying text.

38. ARK. CONST. amend. LXXX, § 2(D)(3) (2000); ARK. SUP. CT. R. 6-8 (adopted in 2002).

39. N.J. R. APP. P. 2:12A refs. & annotations.

40. See Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999, 1036, 1038 (1985) (discussing certification's positivist underpinnings and the notion of the state supreme court as the better decisionmaker); Gerald M. Levin, Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 348, 350 (1963) (describing certification's benefits over abstention in terms of judicial economy and increased federal involvement in the state question's resolution).

41. See GOLDSCHMIDT, *supra* note 18, at 53 (listing a score of benefits identified by federal judges and state justices); John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 445–57 (1988) (reporting survey results from state and federal judges indicating “overwhelming judicial support” for certification).

42. See Kaye & Weissman, *supra* note 34, at 377 (“Whereas the highest court of the state can ‘quite acceptably ride along a crest of common sense, avoiding the extensive citation of authority,’ a federal court often must exhaustively dissect each piece of evidence thought to cast light on what the highest state court would ultimately decide.” (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 142 (1973))).

North Carolina Supreme Court would answer the question.<sup>43</sup> An incorrect guess deprives the present litigants of justice insofar as that concept refers to accuracy of outcome, not merely procedural fairness.<sup>44</sup> It also hurts future litigants who adjust their out-of-court behavior to conform to law that will not hold water when tested in the North Carolina courts.<sup>45</sup> Parties favored by a questionable federal decision will engage in forum shopping (loathed by *Erie*<sup>46</sup>), while the resulting uncertainty breeds, rather than eliminates, litigation.

In contrast, if the North Carolina Supreme Court hears the question, its response will be definitive.<sup>47</sup> Because the supreme court is the final arbiter of state law, its decision will always be “correct”; the parties are thus guaranteed as accurate an outcome as is possible. The resulting state law uniformity will create certainty, which benefits future parties (who know their rights) and the court system as a whole (by reducing suits).<sup>48</sup> This uniformity also fosters comity by affording North Carolina judges control over the content of North Carolina law.<sup>49</sup> Resolving unsettled issues of state law requires value-laden

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43. See Smith, *supra* note 18, at 2124–25 (describing federal courts’ incorrect predictions of North Carolina law); see also John R. Brown, *Certification—Federalism in Action*, 7 CUMB. L. REV. 455, 455 n.2 (1977) (listing some of the Fifth Circuit’s incorrect state law predictions); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1679–80 (1992) (same in the Third Circuit).

44. *But cf.* Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 690 (1995) (dismissing this concern because “appellate review . . . does not guarantee the ‘right’ answer—merely the last answer”). Respectfully, Judge Selya’s point is irrelevant. Legal procedures should be tailored toward the best outcome regardless of whether litigants have a right to it: that is why appellate judges hear arguments to make their determinations, rather than flipping coins. The latter would be just as final, but not as just.

45. See William G. Bassler & Michael Potenza, *Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure*, 29 SETON HALL L. REV. 491, 512 (1998) (“[T]ransaction costs . . . inevitably result when citizens of the state attempt to conform their conduct . . . to the non-precedential opinion of a federal court.”).

46. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (listing the “discouragement of forum-shopping” as one of *Erie*’s “twin aims”).

47. See Jonathan Remy Nash, *Examining the Power of the Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1698 (2003) (“[T]he state’s highest court [is] the only court capable of rendering a ‘definitive’ statement of state law under *Erie* and its progeny . . .”).

48. See Bassler & Potenza, *supra* note 45, at 512 (discussing certification’s “broad benefits to future litigants” and “elimination of transaction costs”).

49. See Clark, *supra* note 24, at 1465 (“[C]ertification ensures that agents of the state . . . resolve unsettled questions of state law.”).

policymaking;<sup>50</sup> state judges, immersed in this state's social and legal milieu and accountable to its citizens, should decide such issues.<sup>51</sup> Certification obtains this result without forcing the litigants to suffer abstention's cost and delay.<sup>52</sup>

Perhaps the most important (though least recognized) benefit of certification is that it is discretionary at both ends.<sup>53</sup> A federal court will certify only those questions of law that it feels are important enough to merit the North Carolina Supreme Court's attention and uncertain enough to raise the specter of erroneous decision—a judge confident of mastering the relevant law will not certify.<sup>54</sup> Likewise, the North Carolina Supreme Court may decline the question unless it agrees that answering will serve judicial economy, comity, and federalism.<sup>55</sup>

### C. How North Carolina Can Avoid Potential Pitfalls

Nonconstitutional<sup>56</sup> criticisms of certification fall into three basic categories: (1) delay for the parties, (2) state court congestion, and (3) piecemeal or abstract opinions.<sup>57</sup> North Carolina can sidestep each of

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50. *Id.* at 1469–71.

51. LeBel, *supra* note 40, at 1038.

52. *See* Medina, *supra* note 22, at 103 (describing certification as a means to achieve abstention's purpose without its problems). Another benefit of certification over abstention is that certification preserves federal fact finding and issue framing—assuaging some concerns about forum fairness—rather than relegating out-of-state litigants entirely to state court. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 12-606 (West 2008) (requiring the certifying court to find the underlying facts and frame the questions for review).

53. *See, e.g.*, ARK. SUP. CT. R. 6-8(a)(1) (“The Supreme Court may, in its discretion, answer questions of law certified to it . . .”). Certification appears to remain discretionary even if couched in “mandatory” terms. *Compare, e.g.*, WASH. REV. CODE ANN. § 2.60.020 (West 2008) (“[T]he supreme court shall render its opinion in answer [to a properly certified question].” (emphasis added)), *with* Broad v. Mannesmann Anlagenbau, A.G., 10 P.3d 371, 374 (Wash. 2000) (“[W]hether to answer a certified question . . . is within the discretion of the court.”).

54. *See, e.g.*, State Auto Mut. Ins. Co. v. McIntyre, 652 F. Supp. 1177, 1195 (N.D. Ala. 1987) (“[T]he judge who is here sitting is thoroughly persuaded by his 31 years of trial and appellate practice in the Alabama courts . . . that he can reasonably predict the opinion and holding of Alabama's highest court . . .”).

55. *Cf.* CONN. R. APP. P. § 82-3 (requiring the certified question's determination to be “in the interest of simplicity, directness and economy of judicial action”).

56. Unlike these superficial criticisms, certification's constitutional difficulties in North Carolina are genuine. This Note addresses them *infra* in Part II.

57. *See* Bassler & Potenza, *supra* note 45, at 509–10 (identifying the same categories).

these concerns through careful drafting and the North Carolina Supreme Court's conscientious use of discretion.

First, a North Carolina certification procedure will not force federal litigants to endure undue delay. One study indicated that federal courts of appeals waited a mean of 6.6 months for the answer to a certified question, and district courts waited 8.2 months.<sup>58</sup> Not all of that time is delay, as regardless of whether certification is employed the parties must brief and argue the issue and some court must decide it and draft an opinion.<sup>59</sup> The relatively small delay from certification reflects a tradeoff between fairness and efficiency: time in exchange for an authoritative ruling on a difficult issue. Any residual disadvantage to the parties will be offset by the benefit that settled law brings to future parties and future courts.<sup>60</sup>

In addition, North Carolina can avoid *unproductive* delay through careful drafting. A few litigants have had to wait for some time merely to find out that a certified question was declined.<sup>61</sup> This problem can be avoided by drafting a time limit into the certification procedure. For example, the Arkansas certification rule specifies that a certified question be rejected by default if the Arkansas Supreme Court does not accept the question within thirty days.<sup>62</sup> Other states have chosen different time limits.<sup>63</sup> Learning from these states' experience, North Carolina should protect parties from unnecessary delay by including a timing provision in its procedure.

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58. GOLDSCHMIDT, *supra* note 18, at 42. By contrast, the median disposition time for federal cases in 2006, from filing in the lower court to appellate decision, was 27.5 months. ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 125 tbl.B-4A (2006).

59. Bassler & Potenza, *supra* note 45, at 512. Sometimes certification may *reduce* the decision time on a state law issue. For example, if a federal district court were to certify the question of whether the plaintiff stated a claim under state law, the North Carolina Supreme Court's answer would render an appeal on that issue unnecessary.

60. See GOLDSCHMIDT, *supra* note 18, at 109 (“[T]he savings in costs and time to future litigants . . . greatly outweigh [the] additional costs . . . incurred by litigants in a single certification case.”).

61. See Selya, *supra* note 44, at 681 (lamenting the Supreme Court of Puerto Rico's decision not to answer a series of certified questions after a delay of “some two to three years”).

62. ARK. SUP. CT. R. 6-8(a)(2)–(3). The acceptance period can be extended by order. *Id.*

63. See NEB. REV. STAT. § 24-222 (2007) (sixty days); S.C. R. APP. P. 228(c) (forty-five days).

Second, certified questions will not overrun North Carolina's "under-funded and overstretched court system."<sup>64</sup> Federal judges take their jurisdiction seriously, regarding certification as a "valuable resource" to be preserved, not a "panacea . . . to be used as a convenient way to duck [the court's] responsibility."<sup>65</sup> The U.S. Supreme Court has implied that the difficulty of predicting state law is insufficient, by itself, to allow certification.<sup>66</sup> A federal court should therefore certify only if the question (1) is dispositive,<sup>67</sup> (2) cannot be determined from precedent,<sup>68</sup> and (3) implicates some matter of North Carolina policy.<sup>69</sup> If other Fourth Circuit states' experiences are an indication, the North Carolina Supreme Court will receive one to four questions per year.<sup>70</sup> Should answering these questions prove too burdensome, the supreme court can decline to do so for lack of time.<sup>71</sup>

The North Carolina Supreme Court should also use its discretion to winnow out certified questions that do not merit its time and attention. If a federal court certifies banal questions of law or questions that are too factually specific to be of broad significance,

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64. N.C. ADMIN. OFFICE OF THE COURTS, FISCAL YEAR 2005-06 ANNUAL REPORT: THE NORTH CAROLINA JUDICIAL BRANCH 19, available at [http://www.nccourts.org/Citizens/Publications/Documents/annualreport\\_2005-06.pdf](http://www.nccourts.org/Citizens/Publications/Documents/annualreport_2005-06.pdf).

65. *Transcon. Gas Pipeline Corp. v. Transp. Ins. Co.*, 958 F.2d 622, 623 (5th Cir. 1992) (per curiam). Another judge contemplated his discretion to certify as follows:

Prudent exercise of this discretion is important. All certifying courts should be keenly aware of their obligation not to abdicate their responsibility to decide issues properly before them. They should also be keenly aware that certification involves an imposition on the time and resources of the Supreme Court of [the State] and an increase in the expenditure of time and resources by the parties . . . In appropriate cases it is the "best solution," but [not] every case . . . [is] an *appropriate* case.

*W. Am. Ins. Co. v. Bank of Isle of Wight*, 673 F. Supp. 760, 764 (E.D. Va. 1987) (footnote omitted).

66. See *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (discussing certification and noting that "mere difficulty in ascertaining local law is no excuse" for abdicating jurisdiction).

67. See John D. Butzner, Jr., & Mary Nash Kelly, *Certification: Assuring the Primacy of State Law in the Fourth Circuit*, 42 WASH. & LEE L. REV. 449, 453 (1985) (describing the Fourth Circuit's prudential limits on certifying).

68. *Id.*

69. See *Lehman Bros.*, 416 U.S. at 390-91 (suggesting, because state law difficulty alone is insufficient, that some comity interest must be present to justify certification).

70. From 1990 to 1994 inclusive, the high courts of South Carolina, Virginia, and West Virginia received seven, four, and eighteen certification requests, respectively. (West Virginia was the second highest in the nation.) GOLDSCHMIDT, *supra* note 18, at 34-35 tbl.6. Nationally, high courts answered a mean of 6.6 questions each over those five years. *Id.*

71. See Smith, *supra* note 18, at 2146 ("[I]f the certification procedure . . . is discretionary, [the] court will always have a means to control its caseload . . .").

the benefit to North Carolina will be insubstantial. Even some significant questions, such as intricate applications of state constitutional law, might be decided better on full factual records developed by North Carolina's state courts.<sup>72</sup> Accordingly, the North Carolina Supreme Court should decline any certified question that, in its determination, does not appreciably further state interests.<sup>73</sup> It should also set forth its reasons for so concluding in a short, per curiam opinion to serve as a guide for future certifying courts.<sup>74</sup> This conscientious use of discretion will encourage certification only when it is worthwhile.

Third, a properly drafted certification procedure would not force the North Carolina Supreme Court to decide cases piecemeal, or worse, to decide abstract questions of law without underlying facts. By definition, a certified question emerges from a controversy already justiciable before an Article III court. The question therefore arises out of sufficient operative facts; North Carolina's procedure can require the certifying court to supply them. For comparison, Virginia's procedure requires the certifying order to state the certified question and the nature of the controversy in which it arises, a statement of all relevant facts, and an explanation of how the certified question is determinative of the pending case.<sup>75</sup> If the parties dispute the facts, the certifying court can be compelled to determine the facts before certifying.<sup>76</sup> Furthermore, the North Carolina Supreme Court can require the certifying court to provide the entire record from

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72. See Randall T. Shepard, *Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?*, 38 VAL. U. L. REV. 327, 351 (2004) (worrying that certification will "dilute the quality" of constitutional adjudication because "[c]onstitutional issues are especially fact sensitive").

73. See, e.g., *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 170 n.1 (Iowa 2002) (declining to answer certified questions of fact or that require factual determinations); *Yesil v. Reno*, 705 N.E.2d 655, 656 (N.Y. 1998) (declining to answer certified questions pertaining to immigration because that issue was better left to federal courts); *Grabois v. Jones*, 667 N.E.2d 307, 307 (N.Y. 1996) (declining to answer a certified question because the issue was unlikely to recur); *Rufino v. United States*, 506 N.E.2d 910, 911 (N.Y. 1987) (declining to answer a certified question on the same subject as an appeal pending in the state system).

74. The New York cases cited in *supra* note 73 are excellent examples of this practice.

75. See VA. SUP. CT. R. 5:42(c) (setting forth the requirements for a certification order).

76. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 12-606(b) (West 2008) ("If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.").

below or any portion thereof.<sup>77</sup> The supreme court may also retain the right to reformulate the question if it determines that the certifying court confused or misstated the legal issues.<sup>78</sup> Finally, if the question remains too abstract despite these tools, the North Carolina Supreme Court may decline the question.<sup>79</sup>

In sum, a well-drafted and -executed certification procedure would serve North Carolina well, if the state can implement it. The following Part of this Note examines the constitutional difficulties such a procedure faces in North Carolina. The final Part proposes ways to sidestep those difficulties so that North Carolina may finally get on the certification bandwagon.

## II. CERTIFICATION'S CONSTITUTIONAL DIFFICULTIES IN NORTH CAROLINA

Implementing certification in North Carolina raises two constitutional questions. First, would certification require the North Carolina Supreme Court to render impermissible advisory opinions? Second, does that court have jurisdiction over the subject matter of certified questions? After a brief description of North Carolina's drafting options, Sections A and B address these questions in turn.

Certification procedures can be created via court rule,<sup>80</sup> statute,<sup>81</sup> or both.<sup>82</sup> The North Carolina Constitution requires that the North Carolina Supreme Court supply a rule for some of certification's procedural aspects, but the General Assembly may statutorily

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77. See, e.g., *id.* § 12-605(b) (“[The High Court] of this State may require the certifying court to deliver all or part of its record . . .”).

78. See, e.g., *id.* § 12-604 (“The [High Court] of this State may reformulate a question of law certified to it.”). To avoid issuing an advisory opinion, however, the North Carolina Supreme Court should solicit the certifying court's input when reformulating a question. See *infra* Part II.A.

79. Cf., e.g., *Smith v. Duff & Phelps, Inc.*, 548 So. 2d 146, 146 (Ala. 1989) (declining to answer an abstract certified question without underlying facts); *Willis v. Ga. Power Co.*, 174 S.E. 625, 626 (Ga. 1934) (declining to answer a certified question due to overbreadth); *Eley v. Pizza Hut of Am.*, 500 N.W.2d 61, 64 (Iowa 1993) (declining to answer a certified question based on conflicting facts).

80. Cf., e.g., S.C. R. APP. PRAC. 228 (implementing certification via court rule).

81. Cf., e.g., W. VA. CODE ANN. §§ 51-1A-1 to -13 (West 2007) (implementing certification via statute).

82. Cf., e.g., MD. CODE ANN., CTS. & JUD. PROC. §§ 12-601 to -613 (West 2007); MD. R. 8-305 (implementing certification via court rule and statute).

implement the aspects of certification not governed by the state constitution. The North Carolina Constitution creates a unified General Court of Justice within the state, consisting of Appellate, Superior Court, and District Court Divisions.<sup>83</sup> Only the North Carolina Supreme Court may prescribe procedural rules for the Appellate Division,<sup>84</sup> of which it is a part.<sup>85</sup> The North Carolina Supreme Court must therefore supply a rule for the procedure that it would follow when answering certified questions. On the other hand, the General Assembly can regulate when federal courts may *send* questions, as this would prescribe procedure for federal courts, not for the North Carolina Supreme Court.<sup>86</sup> The General Assembly might also be able to prescribe the criteria by which the North Carolina Supreme Court would decide whether to answer, by analogy to the General Assembly's power to prescribe the criteria by which the North Carolina Supreme Court decides whether to grant discretionary review.<sup>87</sup> These drafting options are important to keep in mind when considering the constitutional questions below, for the

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83. N.C. CONST. art. IV, § 2.

84. *See id.* art. IV, § 13(2) (“The Supreme Court shall have exclusive authority to make rules of procedure . . . for the Appellate Division.”).

85. *See id.* art. IV, § 5 (“The Appellate Division . . . shall consist of the Supreme Court and the Court of Appeals.”).

86. Think of certification as a process consisting of two parts: (1) a federal court sends a question and (2) the North Carolina Supreme Court accepts it for review. Logically, a rule governing when federal courts may send questions, but not when the supreme court may accept, prescribes procedure only for the federal courts. Under a constitutional theory explored *infra* Part II.B, the General Assembly can create a certification procedure for federal courts even if it could not prescribe when the North Carolina Supreme could answer. In brief, the reasoning proceeds as follows:

The power to create a certification procedure for federal courts is not mentioned in the North Carolina Constitution. *See* N.C. Const. art. IV, § 13(2) (describing the judicial and legislative rulemaking powers). Under prevailing doctrine, the General Assembly may pass any statute not prohibited by the constitution, but may not enlarge the North Carolina Supreme Court's jurisdiction. *See infra* Part II.B. The General Assembly can therefore create a certification procedure unless it would enlarge the North Carolina Supreme Court's jurisdiction. So long as the statute does not govern when the supreme court shall answer certified questions, it does not affect that court's jurisdiction and is thus constitutional. For a full explanation of the constitutional theory and precedent behind this reasoning, see *infra* Part II.B.

87. *See* N.C. GEN. STAT. ANN. § 7A-31 (West 2007) (permitting the supreme court to review decisions of significant public interest or legal significance or that conflict with its precedent). The General Assembly's power to pass such a statute depends upon whether the North Carolina Supreme Court has jurisdiction over certified questions. *See infra* Parts II.B, III.A.

certification procedure's constitutionality may turn on which branch of government adopts it.<sup>88</sup>

#### A. *Advisory Opinions*

The North Carolina Supreme Court has held that its opinions cannot merely be advisory.<sup>89</sup> Certification raises concerns about advisory opinions for two reasons: (1) a certified question arises in a case pending in a court of another jurisdiction, and (2) the answering court decides the question with the expectation that the parties will return to the certifying court.

These concerns are unjustified. Certified questions are unlike advisory opinions in all other relevant respects.<sup>90</sup> A certified question arises out of a bona fide case or controversy justiciable before an Article III court; the parties fully brief and argue the question to nest it within a concrete factual setting.<sup>91</sup> Certification therefore “bears the hallmarks of the adversarial system and the purported benefits that follow.”<sup>92</sup> Unlike an advisory opinion, the North Carolina Supreme Court's decision would have *res judicata* and *stare decisis* effect and constitute binding law on the present and all future parties.<sup>93</sup>

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88. For a discussion of whether the General Assembly may constitutionally enlarge the North Carolina Supreme Court's jurisdiction, see *infra* Part II.B. For an examination of whether the North Carolina Supreme Court can exercise the people's reserved powers, see *infra* Part III.B.

89. *In re Advisory Opinion*, 335 S.E.2d 890, 891 (N.C. 1985) (“The North Carolina Constitution does not authorize the Supreme Court as a Court to issue advisory opinions.”). To be non-advisory, an opinion must potentially affect an actual dispute between adverse litigants. See, e.g., *United States v. Johnson*, 319 U.S. 302, 304 (1943) (per curiam) (insisting that a case is not justiciable in the “absence of a genuine adversary issue between the parties”). As discussed in this Section, answers to certified questions are not advisory opinions because they may determine a federal litigant's claim. See *infra* notes 96–99 and accompanying text.

90. See Bassler & Potenza, *supra* note 45, at 521–22 (“The features of advisory opinions that make them objectionable . . . are not present in the certification procedure proposed . . .”).

91. See Smith, *supra* note 18, at 2139 (describing how these concerns persuaded the Maine Supreme Court to hold that certified questions are nonadvisory).

92. Bassler & Potenza, *supra* note 45, at 522.

93. See, e.g., ALASKA R. APP. P. 407(f) (“The answer to the certified questions shall be *res judicata* as to the parties and have the same precedential force as any other appellate decision of the supreme court.”); S.C. R. APP. PRAC. 228(f) (“The decision shall be accorded the same force and effect as any other decision of the Supreme Court . . .”). Such language renders the answer to a certified question binding in all U.S. jurisdictions. See U.S. CONST. art. IV, § 1, cl. 1 (“Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State.”); 28 U.S.C. § 1738 (2000) (“[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of

Moreover, certified questions do not implicate the separation-of-powers concerns plaguing advisory opinions. Certification would not encourage the North Carolina Supreme Court to encroach upon the realm of the General Assembly. In adjudicating adverse parties' rights on the facts of a single case, the answering court performs a quintessentially judicial function<sup>94</sup>—consider, for example, how out of place it would be for a federal court to certify a question to the state legislature. To the extent that the North Carolina Supreme Court “interferes” with anyone by answering the question, it interferes with the certifying court; yet this interference is a fulfillment, not an infringement, of federalist principles. When interpreting North Carolina law, a federal court is supposed to be subordinate, not coordinate, to the North Carolina Supreme Court.<sup>95</sup>

Finally, certified questions are more than advisory because they are dispositive. Under the Uniform Law, a properly certified question is one that may be determinative of the claim.<sup>96</sup> The North Carolina Supreme Court's answer, like its ruling on any dispositive motion, has the potential to foreclose at least one claim or defense within the case.<sup>97</sup> If the supreme court discovers that a certified question cannot

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such State . . . from which they are taken.”). The answer to a certified question is nonadvisory because of this binding effect, much as a monetary judgment against a party with no in-state assets is nonadvisory because of its binding effect in other states. *Cf., e.g.,* N.C. GEN. STAT. § 1-75.4(5)(a) (West 2007) (granting North Carolina courts long-arm jurisdiction over claims arising from promises “to pay for services to be performed in th[e] State”); *Blue Ridge Health Investors, LLC v. Mars Syst, Inc.*, No. COA04-1248, 2005 WL 1578391, at \*2–3 (N.C. Ct. App. July 5, 2005) (exercising jurisdiction under § 1-75.4(5)(a) despite the defendant's apparent lack of in-state assets).

94. As one Michigan Supreme Court Justice convincingly argued:

When an actual controversy exists between parties, it is submitted in formal proceedings to a court, the decision of the court is binding upon the parties and their privies and is *res adjudicata* [*sic*] of the issue in any other proceedings . . . what else can the decision be but the exercise of judicial power?

*Melson v. Prime Ins. Syndicate*, 696 N.W.2d 687, 696 (Mich. 2005) (Markman, J., dissenting from a decision to answer a certified question) (quoting *Wash.-Detroit Theater Co. v. Moore*, 229 N.W. 618, 680–81 (1930)).

95. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (making state courts' decisions binding on federal courts when state law supplies the rule of decision).

96. See *Unif. Certification of Questions of Law Act*, 12 U.L.A. 67, 73 (1995) (“The [Supreme Court] may answer questions of law certified to it . . . which may be determinative of the cause . . .”).

97. See *W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp.*, 811 P.2d 627, 630 (Or. 1991) (interpreting “may be determinative” to “mean[] that our decision must, in one or more of the forms it could take, have the potential to determine at least one claim in the case”). For

be determinative, it should decline to answer.<sup>98</sup> For this reason, most states consider certification a proper exercise of the judicial power, not an advisory opinion.<sup>99</sup>

*B. Subject Matter Jurisdiction*

The North Carolina Constitution does not explicitly grant the North Carolina Supreme Court jurisdiction over certified questions. Nevertheless, in her 1999 article, Jessica Smith examined North Carolina law and concluded that the state could constitutionally enact a certification procedure.<sup>100</sup> She looked first to the North Carolina Supreme Court's jurisdictional clause, which states:

The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts. The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission.<sup>101</sup>

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example, consider the question, "Has the plaintiff stated a claim for negligent infliction of emotional distress (NIED)?" If the state court refuses to recognize NIED, the plaintiff's claim will fail. Thus the question is dispositive notwithstanding the fact that, if the court recognizes NIED and defines its elements, the plaintiff may or may not be able to make out those elements at trial.

98. See, e.g., *Union Planters Bank v. People of the State of New York*, No. 1050562, 2008 WL 274756, at \*2-4 (Ala. Feb. 1, 2008) (declining to answer certified questions for lack of determinativity); *Raborn v. Menotte*, 974 So. 2d 328, 332 (Fla. 2008) (declining to answer a certified question for mootness); *Ball v. Wilshire Ins. Co.*, 184 P.3d 463, 467 (Okla. 2007) (declining to answer certified questions because the certifying court possibly lacked jurisdiction).

99. *Corr & Robbins*, *supra* note 41, at 422. But compare *Melson*, 696 N.W.2d at 687 (Young, J., concurring) (arguing that answers to certified questions are advisory opinions), *with id.* at 692-702 (Markman, J., dissenting) (rebutting Justice Young's argument in detail).

100. See Smith, *supra* note 18, at 2141-43 (discussing the North Carolina Constitution, but not the North Carolina Supreme Court's jurisdictional precedent); see also GOLDSCHMIDT, *supra* note 18, at 98 (acknowledging that precedent but suggesting that certification would be constitutional).

101. N.C. CONST. art. IV, § 12(1).

This provision says nothing about interjurisdictional certification.<sup>102</sup> Under prevailing constitutional theory, a state constitution is not a power-granting, but a power-limiting document: any power not prohibited by the North Carolina Constitution's provisions is reserved to the people, and the people may exercise their power through their elected representatives.<sup>103</sup> Because the constitution is ambiguous as to answering certified questions,<sup>104</sup> the argument runs, that power was reserved to the people and a certification procedure may validly be enacted.<sup>105</sup> Other states adopting this theory, including Florida, Washington, and Idaho, have found certification constitutional.<sup>106</sup> Using similar reasoning, Smith concluded that North Carolina could constitutionally enact a certification procedure.<sup>107</sup>

Although correct in many respects, Smith's analysis suffers from two defects: (1) it misses a possible peculiarity of North Carolina's constitutional theory, and (2) it fails to consider the North Carolina Supreme Court's jurisdictional precedent. First, although the constitution-as-limit theory is entrenched in North Carolina law,<sup>108</sup> it is

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102. *See id.* (delimiting the North Carolina Supreme Court's jurisdiction without regard to certification).

103. Smith, *supra* note 18, at 2141 (quoting *Baker v. Martin*, 410 S.E.2d 887, 891 (N.C. 1991)). After citing North Carolina law for this principle, however, Smith next cites the Florida Supreme Court's formulation, which explicitly refers to judicial power. *See id.* at 2142 ("[A]ll sovereign power, including the judicial power, not limited by a state constitution inheres to the people . . ." (emphasis added) (quoting *Sun Ins. Office Ltd. v. Clay*, 133 So. 2d 735, 741 (Fla. 1961))). Significantly, the North Carolina formulation does not mention the judicial power. *See Baker*, 410 S.E.2d at 891 ("All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." (emphasis added)).

104. One other provision may also bear on this question: the separation-of-powers section of the article on the judicial power. *See* N.C. CONST. art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article."). Certification does not establish any new court and grants, rather than removes, Supreme Court jurisdiction. Thus, this provision does not facially apply, and Smith's analysis proceeds. The North Carolina Supreme Court, affords the policies behind this provision great weight, however. *See infra* note 127 and accompanying text.

105. Smith, *supra* note 18, at 2141.

106. *See id.* at 2141-42 & nn.139-40 (citing examples from these states).

107. *Id.* at 2143.

108. *See In re Spivey*, 480 S.E.2d 693, 698 (N.C. 1997) (citing the theory to *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 478 (N.C. 1989)). But the theory is much older:

always formulated to grant the legislature, not the courts, the power to exercise the people's reserved rights.<sup>109</sup> Second, as discussed in the remainder of this Section, the North Carolina Supreme Court's precedent prohibits the General Assembly from enlarging the supreme court's jurisdiction even though no such limitation appears in the North Carolina Constitution's text. If only the General Assembly may exercise the people's reserved power, but it may not do so to enlarge the supreme court's jurisdiction, Smith's argument fails.<sup>110</sup>

The North Carolina Supreme Court's jurisdictional precedent, beginning with *North Carolina Utilities Commission v. Old Fort Finishing Plant*,<sup>111</sup> undercuts Smith's attempt to apply the constitution-as-limit theory to the adoption of certification. In 1963, the General Assembly enacted a law creating a direct appeal to the North Carolina Supreme Court from decisions of the North Carolina Utilities Commission.<sup>112</sup> Entertaining the first such appeal in *Old Fort*, the supreme court struck down the law as unconstitutional.<sup>113</sup> Article IV of the North Carolina Constitution had been rewritten in 1962 to vest the judicial power of the state in three loci: the General Court of Justice, a court for the Trial of Impeachments, and administrative agencies.<sup>114</sup> A concurrent amendment gave the North Carolina

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[S]tate Constitutions are not to be construed as grants of power . . . but rather as limitations upon the power of the state Legislature.

. . . Consequently, the Legislature of a state may lawfully enact any law, of any character, on any subject, unless it is prohibited, in the particular instance, either expressly or by necessary implication, by the Constitution of the United States or by that of the state, or unless it improperly invades the separate province of one of the other departments of the government . . . .

*State v. Lewis*, 55 S.E. 600, 602 (N.C. 1906) (quoting BLACK, CONSTITUTIONAL LAWS §§ 100–01); *see also* *State v. Matthews*, 48 N.C. 451, 452–53 (1856) (“With the exception of the powers surrendered to the United States, each State is absolutely sovereign. With the exception of the restraints imposed by the Constitution of the State and the Bill of Rights, all legislative power is vested in the General Assembly.”).

109. *See* sources cited *supra* notes 103 and 108.

110. Compare this argument with *infra* Part III.B, which analyzes whether the supreme court can exercise reserved powers.

111. *State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant*, 142 S.E.2d 8 (N.C. 1965).

112. *See id.* at 9 (citing N.C. GEN. STAT. § 62-99).

113. *Id.* at 13.

114. The rewritten provisions read:

Section 1. . . . The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a court for the Trial of Impeachments and in a General Court of Justice. . . .

Supreme Court “jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference.”<sup>115</sup> The supreme court reasoned that the North Carolina Constitution distinguished administrative agencies from the courts of the General Court of Justice and therefore administrative agencies were not courts.<sup>116</sup> Because the North Carolina Supreme Court had appellate jurisdiction only over decisions of the “courts below,” it could not review the North Carolina Utilities Commission’s decisions on direct appeal.<sup>117</sup> Nor did the General Assembly have the power to *create* such an appeal.<sup>118</sup> In short, to provide for the direct appeal to the supreme court, the Assembly had to amend the North Carolina Constitution.<sup>119</sup>

Ten years later, the North Carolina Supreme Court reconsidered its constitutional jurisdiction in *Smith v. State*.<sup>120</sup> In *Smith*, a public employee sued the state in a superior court for wrongful discharge, claiming breach of an employment contract.<sup>121</sup> On appeal, although no party had raised the issue of original jurisdiction, the *Smith* court examined the validity of General Statute Section 7A-25—granting the supreme court original jurisdiction over claims against the state—in light of a then-recent constitutional amendment.<sup>122</sup> Historically, the North Carolina Constitution contained a clause granting the North

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Sec[ti]on 3. . . . The General Assembly may vest in administrative agencies . . . such judicial powers as may be reasonably necessary . . . .

*See id.* at 11–12 (quoting N.C. CONST. art. IV, §§ 1, 3).

115. *Id.* at 12 (quoting N.C. CONST. of 1868, art. IV, § 10(1) (1962), amended and renumbered § 12(1) by N.C. Sess. Laws, ch. 1258 (1969)).

116. *See id.* (“Administrative agencies referred to in Section 3 of Article IV *ex vi termini* are distinguished from courts.”).

117. *Id.*

118. *Id.* at 12–13. The other provisions in the newly amended Article IV were of no help. Sections 10(4) and 10(5), both quoted in *Old Fort*, permitted the Assembly to waive jurisdictional limits in civil cases and to provide a proper system of appeals. *Id.* at 12 (quoting N.C. CONST. of 1868, art. IV, §§ 10(4)–(5) (1962), renumbered §§ 12(4)–(5) by N.C. Sess. Laws, ch. 1258 (1969)). The supreme court did not address the former and dismissed the latter: “Obviously, [Section 10(5)] refers to a system of appeals from a lower court to a higher court within the General Court of Justice.” *Id.*

119. *See* N.C. CONST. art. IV, § 12(1) (“The Supreme Court also has jurisdiction to review . . . direct appeals from a . . . decision of the North Carolina Utilities Commission.”).

120. *Smith v. State*, 222 S.E.2d 412 (N.C. 1976).

121. *Id.* at 414, 416.

122. *Id.* at 426–27.

Carolina Supreme Court such jurisdiction.<sup>123</sup> But a 1971 amendment to that provision removed the clause, leaving the surrounding material unchanged.<sup>124</sup> Interpreting this amendment as divesting it of original jurisdiction over claims against the state, the *Smith* court concluded that Section 7A-25 had been implicitly repealed by the amendment.<sup>125</sup>

The *Smith* court also opined<sup>126</sup> that Section 7A-25, if not repealed, would be unconstitutional: “[W]hen the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution. This principle is grounded on the separation of powers provisions found in many American constitutions . . . .”<sup>127</sup> On these separation-of-powers grounds, the *Smith* court interpreted *Old Fort* to hold that the General Assembly may not extend the supreme court’s appellate jurisdiction beyond its constitutional limits.<sup>128</sup> Section 7A-25 was unconstitutional because, in light of the 1971 amendment, the General Assembly no longer had authority to confer original jurisdiction on the North Carolina Supreme Court.<sup>129</sup> The supreme court’s jurisdiction was therefore “limited ‘to review upon appeal any decision of the courts below upon any matter of law or legal inference.’”<sup>130</sup>

Finally, in *In re Martin*,<sup>131</sup> the North Carolina Supreme Court reaffirmed *Smith*’s interpretation of its jurisdictional clause, but allowed the Assembly to create a new type of appeal to the supreme

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123. *Id.* at 425–26.

124. *Id.* at 426.

125. *Id.* at 428.

126. Because neither party had cited Section 7A-25 and the supreme court had already held the statute to be repealed, its alternative constitutional holding must be dictum.

127. *Id.* at 428–29. The *Smith* court’s interpretation is reasonable: the North Carolina Constitution contains an explicit Separation of Powers clause. See N.C. CONST. art. I, § 6 (“The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”). In addition, the opening section of the North Carolina Constitution’s judiciary article reiterates the same concerns. See N.C. CONST. art. IV, § 1 (“The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.”).

128. *Smith*, 222 S.E.2d at 429.

129. *Id.*

130. *Id.* (quoting N.C. CONST. art. IV, § 12(1)).

131. *In re Martin*, 245 S.E.2d 766 (N.C. 1978).

court when constitutionally authorized.<sup>132</sup> In 1972, the electorate ratified an amendment to the North Carolina Constitution requiring the General Assembly to create a nonimpeachment method for the removal of incapacitated judges.<sup>133</sup> The Assembly responded by creating a commission to field removal actions, the decisions of which would be reviewed directly by the North Carolina Supreme Court.<sup>134</sup> Judge Martin challenged the act as unconstitutional, arguing that the supreme court's jurisdictional clause contained no provision for such an appeal and, under *Smith* and *Old Fort*, the Assembly had no authority to extend the court's jurisdiction.<sup>135</sup> The *Martin* court confirmed that the Assembly may not expand the supreme court's jurisdiction without constitutional authorization, but held that the new amendment provided such authorization.<sup>136</sup> The Assembly could appropriately select the North Carolina Supreme Court as the venue for review because of the supreme court's general supervisory authority over the state courts.<sup>137</sup> The statute was therefore constitutional.<sup>138</sup>

These three cases create a regime under which the North Carolina Supreme Court may hear all, but only, those types of cases provided for in the text of the North Carolina Constitution. Despite the general conception of the North Carolina Constitution as a power-limiting document, the General Assembly is bound by the constitutional text when providing access to the North Carolina Supreme Court. Therefore, if the supreme court determines that it does not have jurisdiction to answer certified questions from federal courts, precedent prohibits the General Assembly from granting such jurisdiction to the supreme court by statute.<sup>139</sup> Unfortunately, this precedent undermines Smith's argument that, absent a limitation in

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132. *Id.* at 770–71. Thus *Martin* converted *Smith*'s dicta into controlling law. *See id.* at 770 (“[D]iscussing the jurisdiction of this Court, we held, in *Smith v. State*, . . . that the Supreme Court no longer had original jurisdiction over claims against the State . . .” (emphasis added)).

133. *Id.*

134. *Id.* at 769–70.

135. *Id.* at 770.

136. *Id.* at 770–71.

137. *Id.* at 771.

138. *Id.* at 772.

139. *See Smith v. State*, 222 S.E.2d 412, 429 (N.C. 1976) (“[T]he General Assembly [is] without authority to expand the appellate jurisdiction of [the North Carolina Supreme Court] beyond the limits set in the Constitution.”).

the North Carolina Constitution, the General Assembly may validly enact a certification law.

### III. STRATEGIES FOR IMPLEMENTING CERTIFICATION IN NORTH CAROLINA

As the previous Part explains, for a certification statute to be constitutional, the North Carolina Supreme Court must interpret its jurisdictional clause to include answering certified questions. At first glance, the precedent described in Part II.B cuts against this interpretation. Section A of this Part reexamines that precedent in light of the North Carolina Constitution's design, the structure of the General Court of Justice, and separation-of-powers concerns to suggest that the North Carolina Supreme Court *does*, in fact, have jurisdiction to answer certified questions. In the event that the supreme court holds to the contrary, the remaining three Sections offer alternative strategies for implementing certification. Section B considers whether the North Carolina Supreme Court, as opposed to the General Assembly, can exercise the people's reserved powers to extend its own jurisdiction. Section C explores a theory, adopted by some states, that the supreme court need not exercise jurisdiction over a certified question to answer it. Section D, as a final measure, proposes a constitutional amendment.

#### A. *The N.C. Supreme Court Has Jurisdiction to Answer Certified Questions*

The North Carolina Constitution grants the North Carolina Supreme Court jurisdiction “to review upon appeal any decision of the courts below, upon any matter of law or legal inference.”<sup>140</sup> In light of the supreme court's precedent, this provision poses three obstacles to certification. First, federal courts (though clearly “courts”) may not be “courts *below*”—that is, not lower courts in the General Court of Justice.<sup>141</sup> Second, certification may not be an “appeal,” placing it outside the North Carolina Supreme Court's

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140. N.C. CONST. art. IV, § 12(1).

141. *Cf. State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant*, 142 S.E.2d 8, 12 (N.C. 1965) (“[T]he appellate jurisdiction of the Supreme Court relates solely to appeals from decisions of ‘the courts below’ . . .”).

“appellate jurisdiction.”<sup>142</sup> Third, because a court certifies a question in lieu of determining it, certification may not be a “decision” of a court below suitable for review.<sup>143</sup>

A certification procedure can overcome all of these obstacles. First, the North Carolina Supreme Court’s precedent limiting its jurisdiction to “the courts below” is inapposite. Second, certification meets the other jurisdiction requirements because it strongly resembles discretionary appellate review and the decision to certify rests on a “matter of law or legal inference.” Third, the design of the North Carolina Constitution and structure of the General Court of Justice suggest that the North Carolina Supreme Court can answer certified questions. Finally, the separation-of-powers policies motivating the North Carolina Supreme Court’s previous, narrow interpretation of its jurisdictional clause are inapplicable to certification. For these reasons, the North Carolina Supreme Court should hold that it has jurisdiction to answer certified questions and either allow the General Assembly to enact a certification statute or adopt a certification rule on its own motion.

1. *Distinguishing Precedent.* The North Carolina Supreme Court’s precedent limiting its jurisdiction to appeals from “the courts below” is inapplicable to certification. As discussed in Part II.B, the *Smith* court held that a constitutional amendment had excised the constitutional language granting the court original jurisdiction over claims against the state, but otherwise had left the relevant provision unchanged.<sup>144</sup> The drafters’ conscious removal of that language stripped the supreme court of its original jurisdiction.<sup>145</sup> In contrast, certification has never been mentioned in the North Carolina

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142. *Cf. id.* (limiting the supreme court’s jurisdiction to “*appeals* from . . . ‘the courts below’” (emphasis added)). The Court might consider certification to be original jurisdiction, *cf.* ARK. CONST. amend. LXXX, § 2(D)(3) (“The Supreme Court shall have . . . [o]riginal jurisdiction to answer questions of state law certified by a court of the United States . . .”), or it might consider certification to be *sui generis*, distinct from both original and appellate jurisdiction, *cf.* *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1079 (Ohio 1991) (holding that the Ohio Supreme Court “need[s] no grant of jurisdiction in order to answer certified questions” because that power “exists by virtue of Ohio’s very existence as a state in our federal system”).

143. *Cf. Old Fort*, 142 S.E.2d at 12 (limiting jurisdiction to appeals from “decisions” of the courts below).

144. *Smith v. State*, 222 S.E.2d 412, 425–26 (N.C. 1976).

145. *Id.* at 428.

Constitution. There is no evidence that the drafters intentionally denied the North Carolina Supreme Court the power to hear certified questions; they probably never contemplated it. If the supreme court has jurisdiction to hear certified questions, that jurisdiction remains; no constitutional amendment removed it.

*Old Fort* is more on point. In *Old Fort*, the General Assembly attempted to create a direct appeal from administrative agencies to the North Carolina Supreme Court.<sup>146</sup> But because administrative agencies were distinguished from courts in the North Carolina Constitution's text, those agencies could not be "courts" below the supreme court under the language of that court's jurisdictional clause.<sup>147</sup> The North Carolina Constitution's explicit distinction of administrative agencies from courts proved that it did not authorize the North Carolina Supreme Court to hear appeals from administrative agencies.

Conversely, the North Carolina Constitution does not explicitly distinguish federal courts from state courts; it does not mention federal courts at all. Unlike administrative agencies, federal courts are (as their name and operation show) "courts." The sole question is whether they are "below" the N.C. Supreme Court. *Erie* commands that federal courts, when deciding North Carolina law, attempt to predict what the North Carolina Supreme Court would hold.<sup>148</sup> They are subordinate to the North Carolina Supreme Court, bound by its decisions just like any state court.<sup>149</sup> Certification's sole purpose is to alleviate problems arising from federal courts' subservience to the North Carolina Supreme Court. Federal courts should therefore be considered "courts below."

2. *Other Jurisdictional Limits.* Certification also satisfies the "appeal" and "decision" requirements. First, like an appeal, a certified question arises out of a case or controversy in an inferior

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146. *Old Fort*, 142 S.E.2d at 9.

147. *Id.* at 12.

148. *See, e.g.,* Waste Control Specialists, LLC v. Envirocare of Tex., Inc., 199 F.3d 781, 785 n.2 (5th Cir. 2000) ("[A] federal court applies state law exactly as would a state court." (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 64 (1938))), *modified on other grounds*, 207 F.3d 225 (5th Cir. 2000).

149. Perhaps one could say the same thing about state administrative agencies. But *Old Fort* did not hold that these agencies were not "below" the Supreme Court, it held that they were not "courts below." *Old Fort*, 142 S.E.2d at 12 (emphasis added).

court,<sup>150</sup> and the inferior court finds all of the relevant facts.<sup>151</sup> The North Carolina Supreme Court would determine whether to answer the question in a manner similar to granting discretionary appellate review.<sup>152</sup> The subject matter of a certified question, a dispositive question of state law, falls within the supreme court's normal scope of appellate review—"any matter of law or legal inference."<sup>153</sup> These similarities have led other states to consider certification an exercise of appellate jurisdiction. For example, the New Jersey Supreme Court adopted a certification rule<sup>154</sup> even though its constitutional authority extends only to "appellate jurisdiction in the last resort."<sup>155</sup> The North Carolina Supreme Court should similarly interpret "appeals" to include certified questions.

Second, the "decision" requirement is very lax. The supreme court emphasized in 2005 that "decision" refers to "*any* decision of the courts below, upon *any* matter of law or legal inference"—in that case, a trial judge's order in a declaratory judgment action.<sup>156</sup> If the supreme court is true to its word, the decision to certify ought to be enough: it requires a legal judgment as to whether the question meets certification's requirements.<sup>157</sup> Because this is a decision on a "matter

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150. See Smith, *supra* note 18, at 2139 (noting that "the parties are before the court and are given the opportunity to present briefs and oral arguments," so "it is clear that there is a germane live controversy pending in the federal court which will be decided").

151. See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 12-606(b) (LexisNexis 2006) (requiring the certifying court to determine the relevant facts before certifying).

152. See *supra* note 53 and accompanying text.

153. See N.C. CONST. art. IV, § 12(1) ("The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference.").

154. N.J. R. APP. P. 2:12A (authorizing certification).

155. N.J. CONST. art. VI, § 2, cl. 2. New Jersey is not unusual in this respect. See, e.g., MISS. CONST. art. VI, § 146 (granting the Mississippi Supreme Court "such jurisdiction as properly belongs to a court of appeals"); MISS. R. APP. P. 20 (allowing certified questions); W. VA. CONST. art. VIII, § 3 (granting the West Virginia Supreme Court, *inter alia*, such "appellate jurisdiction . . . as may be prescribed by law"); W. VA. CODE ANN. § 51-1A (West 2007) (allowing certified questions). *But see*, e.g., VA. CONST. art. VI, § 1 ("The [Virginia] Supreme Court shall . . . have original jurisdiction . . . to answer questions of state law certified by a court of the United States . . .").

156. James v. Bartlett, 607 S.E.2d 638, 641 (N.C. 2005).

157. On the other hand, because a trial court's decision to certify precedes any decision on the merits, the North Carolina Supreme Court might hold that a trial court's decision to certify is insufficient to allow review. If the North Carolina Supreme Court so holds, certification should still be possible from appellate courts. *Cf.*, e.g., LA. REV. STAT. ANN. § 13:72.1 (2007) (allowing certification only from appellate courts); LA. SUP. CT. R. XII (same). An appellate court can only certify after the trial court's decision on the merits; the North

of law or legal inference” the North Carolina Supreme Court should hold that it may answer certified questions.

3. *Constitutional Design and the General Court’s Structure.* Furthermore, the North Carolina Constitution’s design and the structure of the General Court of Justice indicate that the North Carolina Supreme Court has jurisdiction to answer certified questions. First, the North Carolina Constitution grants the supreme court “general supervision and control” over the General Court of Justice.<sup>158</sup> The supreme court superintends the courts below with appellate jurisdiction over decisions on any legal matter and the power to issue writs affecting their proceedings.<sup>159</sup> It further controls these proceedings during the appellate process via its rulemaking authority.<sup>160</sup> These clauses envision a supreme court occupied by questions of law, aiming toward general judicial control of all law produced by courts within the state.

Certification respects this constitutional design. It asks the North Carolina Supreme Court to do only what it is in the very business of doing: resolving, in its discretion, questions of state law that arise out of cases or controversies in inferior courts. Like the power to issue writs, certification aims to reinforce the supreme court’s supervisory control over all law produced by the courts within the state. Moreover, it provides this service in situations—federal court cases—in which state law applies but appellate review is not available. In these situations, certification furthers the North Carolina Constitution’s goals by providing a second-best supervisory opportunity.

Second, the structure of the General Court of Justice indicates that the North Carolina Supreme Court is vested with the power to

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Carolina Supreme Court could review the trial court’s decision. To analogize to existing law, the supreme court has discretion to review a case before it has been determined by the North Carolina Court of Appeals. *See* N.C. GEN. STAT. ANN. § 7A-31 (West 2007) (allowing for supreme court review “either before or after [the claim] has been determined by the Court of Appeals”). A question certified from a federal appellate court before it determines the claim’s merits should likewise be reviewable. If necessary, the certification procedure can reflect the foregoing concerns by allowing only appellate courts to certify.

158. N.C. CONST. art. IV, § 12(1) (“[T]he Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.”).

159. *Id.*

160. *See id.* art. IV, § 13(2) (defining the supreme court’s rulemaking authority).

hear certified questions. The North Carolina Constitution vests all of the relevant judicial power in the General Court of Justice,<sup>161</sup> a “unified judicial system” within the state.<sup>162</sup> As the court of last resort in the General Court, only the North Carolina Supreme Court can render definitive interpretations of state law.<sup>163</sup> It is just such a definitive interpretation of state law that a court requests when certifying a question. A certifying court therefore asks for an exercise of judicial power that only the North Carolina Supreme Court can perform. Since *all* of the relevant judicial power is vested in the General Court, and since the North Carolina Supreme Court is the only court within the General Court that could exercise this aspect of that power, by process of elimination the North Carolina Supreme Court must be the court vested with the power to answer certified questions.<sup>164</sup>

*In re Martin* suggests that these institutional-competence considerations are appropriate when determining the proper venue for a new procedure. In *Martin*, because of the North Carolina Supreme Court’s general supervisory control over the state courts, the General Assembly could establish it as the reviewing court for a removal procedure for incapacitated judges.<sup>165</sup> Similarly, the North Carolina Supreme Court’s general supervisory authority over state courts and its sole ability to issue definitive state law rulings make it the appropriate court to answer certified questions.

4. *Separation of Powers Does Not Apply.* Finally, the policies behind the precedent limiting the General Assembly’s power to expand the North Carolina Supreme Court’s jurisdiction do not apply to certification. In both *Smith* and *Old Fort*, the North Carolina

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161. The North Carolina Constitution vests the state’s judicial power in three loci: the General Court of Justice, the Court for the Trial of Impeachments, and administrative agencies. *See id.* art. IV, §§ 1, 3. Certification, which involves neither impeachment nor administrative hearings, implicates only the General Court of Justice’s power.

162. *Id.* art. IV, § 2.

163. *See Nash, supra* note 47, at 1698 (“[T]he state’s highest court [is] the only court capable of rendering a ‘definitive’ statement of state law under *Erie* and its progeny . . .”).

164. A counterargument could be that the power to answer certified questions is not part of “the judicial power” vested in the General Court of Justice at all. This argument misses the point that answering certified questions—that is, deciding state law questions arising from justiciable cases—is *quintessentially* judicial. *See supra* note 94 and accompanying text.

165. *In re Martin*, 245 S.E.2d 766, 771 (N.C. 1978).

Supreme Court struck down statutes providing for proceedings in the supreme court as a matter of right.<sup>166</sup> Theoretically, if the General Assembly could propagate mandatory appeals by the thousands, the North Carolina Supreme Court's constitutional duty to supervise the lower courts (and its ability to judicially review statutes) would be diluted out of existence. In that sense, enlarging the supreme court's jurisdiction implicates separation-of-powers concerns. But certification is discretionary, and so poses no dilution problem.<sup>167</sup> Certification's goal—to preserve the integrity of state law in a federal system—has nothing to do with one part of the state government encroaching on the province of another. For this reason, if no other, the North Carolina Supreme Court should hold that it has jurisdiction to answer certified questions.

If the supreme court has such jurisdiction, the General Assembly can enact a certification statute—for it will not be enlarging the supreme court's jurisdiction—or the supreme court can adopt a rule on its own motion.<sup>168</sup> A version of the 1995 Uniform Law,<sup>169</sup> with which many courts across the nation are familiar, would work well. The procedure should also incorporate the three recommendations described in Part I.C: the law should be tailored to require (1) that the North Carolina Supreme Court accept a question within, say, thirty days or else the question shall be rejected by default; (2) that the North Carolina Supreme Court answer or decline to answer questions by written memorandum, setting forth the question certified and the reason(s) for (non)acceptance; and (3) that the answer to a certified question shall be *res judicata* to the parties, have the force and effect of other decisions of the North Carolina Supreme Court, and be

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166. The statute struck down in *Smith* granted the N.C. Supreme Court *original* jurisdiction over claims against the state. *Smith v. State*, 222 S.E.2d 412, 429 (N.C. 1976). The statute struck down in *Old Fort* created a direct appeal from the N.C. Utilities Commission to the N.C. Supreme Court. *State ex rel. N.C. Utils. Comm'n v. Old Fort Finishing Plant*, 142 S.E.2d 8, 9 (N.C. 1965). That appeal was by right. *See* 1963 N.C. Sess. Laws, c. 1165, § 1 (providing that the direct appeal to the North Carolina Supreme Court under Section 62-99 be taken in the same manner as other appeals to North Carolina Superior Court).

167. If the separation-of-powers objection to certification is fear of an *aggrandized* supreme court, it is even less troublesome. The procedure, if enacted by statute, can just as easily be repealed by statute. The General Assembly will not really have yielded any power at all.

168. *See* N.C. CONST. art. IV, § 13(2) (granting the supreme court appellate rulemaking power).

169. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 67 (1995).

published in the same manner. These improvements will help realize certification's goals and avoid potential pitfalls.

*B. If the North Carolina Supreme Court Lacks Jurisdiction:  
Exercising Reserved Powers*

Notwithstanding the previous Section's reasoning, the North Carolina Supreme Court may hold that it does not have jurisdiction to answer certified questions. If it does so, a question arises as to whether the supreme court can extend its own jurisdiction; this inquiry returns to Smith's constitution-as-limit argument.<sup>170</sup> The North Carolina Constitution does not mention answering certified questions; therefore the power to provide for such a procedure must have been reserved to the people.<sup>171</sup> Usually, the General Assembly exercises the people's reserved powers,<sup>172</sup> but separation-of-powers concerns prevent the General Assembly doing so to enlarge the North Carolina Supreme Court's jurisdiction.<sup>173</sup> The inquiry need not end there: because the power to answer certified questions is quintessentially judicial,<sup>174</sup> in other states adopting the constitution-as-limit theory, the *court* has exercised the people's reserved powers.<sup>175</sup> Like the highest courts in Florida, Idaho, and Minnesota, the North Carolina Supreme Court could extend its jurisdiction to answering certified questions from federal courts.<sup>176</sup>

If the North Carolina Supreme Court believes this theory is sound as to its jurisdiction, under the rulemaking power it can probably adopt any sort of certification procedure it wishes. The theory, though, can be sound only when answering certified questions

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170. See *supra* Part II.B.

171. See *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 478 (N.C. 1989) ("All power which is not expressly limited by the people in our State Constitution remains with the people . . .").

172. See *id.* ("[A]n act of the people *through their representatives in the legislature* is valid unless prohibited by that Constitution." (emphasis added)).

173. See *Smith v. State*, 222 S.E.2d 412, 429 (N.C. 1976) ("[T]he General Assembly [is] without authority to expand the . . . jurisdiction of this Court beyond the limits set in the Constitution."); see also *supra* Part II.B.

174. See *supra* note 94 and accompanying text.

175. See, e.g., *Sunshine Mining Co. v. Allendale Mut. Ins. Co.*, 666 P.2d 1144, 1147-48 (Idaho 1983) (interpreting the Idaho Supreme Court's jurisdictional clause as a limitation, not a grant, and holding that the court had inherent judicial power to create a certification procedure).

176. See *Smith*, *supra* note 18, at 2141-42 & nn.139-40 (citing examples from these states).

remains within the judicial power. The procedure described at the conclusion of Section A firmly roots certification within that power by avoiding advisory opinions and properly limiting certification's scope.<sup>177</sup> The North Carolina Supreme Court could adopt it.

Realistically, however, the supreme court is unlikely to hold that it may validly exercise the people's reserved powers. The enunciation of the constitution-as-limit theory in North Carolina has always granted that right to the General Assembly alone.<sup>178</sup> More broadly, the potential ramifications of the North Carolina Supreme Court's exercise of the people's reserved powers would be frightening. If that court may extend its jurisdiction under this theory provided that its activities remain "quintessentially judicial," could the governor exercise the people's reserved powers so long as the governor's activities remained "quintessentially executive"? This theory would countenance plenary power in ways that seem foreign to the American understanding of government. More likely, the right to exercise the people's reserved power is the exclusive prerogative of the General Assembly, where such acts are subject to the safeguards of bicameralism<sup>179</sup> and presentment.<sup>180</sup>

*C. If the North Carolina Supreme Court Lacks Jurisdiction:  
Answering Without Exercising Jurisdiction*

The North Carolina Supreme Court could also implement certification under the Oklahoma and Ohio Supreme Courts' view that no exercise of jurisdiction is required to answer a certified question.<sup>181</sup> The Ohio Supreme Court, like the North Carolina

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177. See *supra* Parts I.C, III.A; see also *supra* note 94 and accompanying text.

178. See, e.g., *State v. Lewis*, 55 S.E. 600, 602 (N.C. 1906) ("[S]tate Constitutions are not to be construed as grants of power . . . but rather as limitations upon the power of the state Legislature." (emphasis added) (quoting BLACK, CONSTITUTIONAL LAWS § 100)); accord *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 478 (N.C. 1989) ("All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." (emphasis added)).

179. See N.C. CONST. art. II, § 1 (dividing the General Assembly into two legislative bodies).

180. See *id.* art. II § 22(1) (permitting gubernatorial veto).

181. See *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1079 (Ohio 1991) (holding that the Ohio Supreme Court "need[s] no grant of jurisdiction in order to answer certified questions" because that power "exists by virtue of Ohio's very existence as a state in our federal system"); *Bonner v. Okla. Rock Corp.*, 863 P.2d 1176, 1178 n.3 (Okla. 1993) ("This court needs no explicit

Supreme Court, would strike down any statute purporting to extend its constitutional jurisdiction.<sup>182</sup> Nevertheless, the Ohio Supreme Court allows certification because it does not consider its answer to be an exercise of jurisdiction: although the Ohio Supreme Court's answer affects the case before the certifying court, the latter court alone ultimately decides the case.<sup>183</sup> The Ohio Supreme Court instead grounds its power to answer in the structure of the U.S. Constitution as reflected in *Erie*:

[T]he Ohio Constitution permits the state to exercise its own sovereignty as far as the United States Constitution and laws permit. Since federal law recognizes Ohio's sovereignty by making Ohio law applicable in federal courts, the state has the power to exercise and the responsibility to protect that sovereignty. Therefore, if answering certified questions serves to further the state's interests and preserve the state's sovereignty, the appropriate branch of state government—this court—may constitutionally answer them.<sup>184</sup>

A certification rule under Ohio's theory could be much broader in scope than the Uniform Rule. For example, an advisory opinion could conceivably "further the state's interests and preserve the state's sovereignty,"<sup>185</sup> so the requirement that the certified question be determinative would be unnecessary. The North Carolina Supreme Court should therefore be skeptical of the Ohio court's reasoning: the North Carolina Supreme Court cannot constitutionally issue advisory opinions.<sup>186</sup> But, advisory opinions are generally prohibited in Ohio as well.<sup>187</sup> Presumably, the North Carolina Supreme Court could adopt a certification rule under Ohio's theory if the rule did not permit advisory opinions. The procedure recommended at the conclusion of

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grant of jurisdiction to answer certified questions from a federal court; such power comes from the United States Constitution's grant of state sovereignty.").

182. See *Scott*, 577 N.E.2d at 1079 ("[N]either statute nor rule of court can expand our jurisdiction beyond the constitutional grant. If [the certification rule] expanded our jurisdiction, we would have to declare it unconstitutional." (citations omitted)).

183. *Id.*

184. *Id.* at 1079–80.

185. *Id.*

186. *In re Advisory Opinion*, 335 S.E.2d 890, 891 (N.C. 1985) ("The North Carolina Constitution does not authorize the Supreme Court as a Court to issue advisory opinions.").

187. See *State ex rel. Todd v. Felger*, 877 N.E.2d 673, 676 (Ohio 2007) ("[O]ur general rule [is] that we will not issue advisory opinions . . .").

Section A incorporates a determinativity requirement,<sup>188</sup> which avoids advisory opinions.<sup>189</sup>

*D. If the North Carolina Supreme Court Lacks Jurisdiction:  
Constitutional Amendment*

As a final measure, the General Assembly could amend the North Carolina Constitution to permit certification.<sup>190</sup> The last sentence of the supreme court's jurisdictional clause could be amended:

The Supreme Court also has jurisdiction to decide, when authorized by law, the following:

- (a) Direct appeals from a final order or decision of the North Carolina Utilities Commission, and
- (b) At the Supreme Court's discretion, questions of North Carolina law certified from courts of other jurisdictions.<sup>191</sup>

This amendment would allow the North Carolina Supreme Court the discretion to hear certified questions while affording the General Assembly some influence over the process. Just as it may establish the criteria for discretionary appeals,<sup>192</sup> the General Assembly could establish acceptance criteria for certified questions.<sup>193</sup> If the proposed amendment passes, the General Assembly should adopt the version of the Uniform Law<sup>194</sup> described at the conclusion of Section III.A. By

188. See UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 67, 73 (1995) ("The [Supreme Court] of this State may answer questions of law certified to it . . . which may be determinative of an issue in pending litigation in the certifying court . . .").

189. For a description of how determinativity avoids advisory opinions, see *supra* Part II.A.

190. See *In re Martin*, 245 S.E.2d 766, 770–71 (N.C. 1978) (allowing the General Assembly to create a new appeal to the supreme court because of an authorizing constitutional amendment).

191. Cf. N.C. CONST. art. IV, § 12 ("The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission.").

192. See N.C. GEN. STAT. ANN. § 7A-31(b) (West 2007) (permitting the supreme court to review decisions of significant public interest or legal significance or that conflict with its precedent).

193. The North Carolina Supreme Court would retain control over certification's procedural aspects. See N.C. CONST. art. IV, § 13(2) (granting the North Carolina Supreme Court appellate rulemaking power).

194. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 67 (1995).

maximizing certification's benefits and minimizing its costs, this procedure will serve judicial economy, preserve the integrity of state law in our federal system, and inspire us to a divine comity.

#### CONCLUSION

North Carolina is the only state never to have enacted a certification procedure. Previous calls for certification's adoption in this state, notably Professor Smith's in 1999, have been unsuccessful, perhaps because the North Carolina Supreme Court's jurisdictional precedent seems to undercut certification's constitutionality. Reexamined in light of the North Carolina Constitution's design and the structure of the General Court of Justice, however, this precedent does not render certification unconstitutional. Even if the North Carolina Supreme Court holds to the contrary, certification could be adopted under a theory that answering certified questions does not require an exercise of jurisdiction or by constitutional amendment.

North Carolina therefore can and should adopt certification. Such a procedure will avoid federal court guesswork on difficult state law issues, ensuring fairness for the litigants while saving time and money for future parties and the North Carolina courts. Certification's potential pitfalls can be circumvented through careful drafting and the North Carolina Supreme Court's conscientious use of discretion: that court should decline to answer cases that fail to meet certification's requirements or serve state interests. With these principles of judicial economy, comity, and federalism in mind, North Carolina should at last join the rest of the union in adopting certification.