

Notes

GIVE AND TAKE: STATE COURTS SHOULD BE ABLE TO CERTIFY QUESTIONS OF FEDERAL LAW TO FEDERAL COURTS

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ABSTRACT

For some time, federal courts faced with unresolved questions of state law have been able to certify those questions to state courts for resolution. In the past half-century, certification practice has exploded. Nearly every state allows at least one federal court to certify questions to its state courts, and some federal courts exercise the option frequently. However, there is no analogous tool for state courts to certify questions of federal law to federal courts. This Note argues that the creation of such a tool would benefit both courts and litigants. Of course, the considerations motivating certification to state courts, such as Erie and abstention doctrines, are not equally present in the other direction. But many of the benefits of certification would be reciprocal, including enhanced uniformity, an increased sense of fairness to litigants, and institutional comity between courts. Given these benefits, this Note argues that there should be some give and take in certification practice.

INTRODUCTION

State courts are often called upon to answer questions of federal law. Since the federal courts are courts of limited jurisdiction, many federal issues must be resolved in a state forum. It could be because the federal issue arises only as a defense to a state law claim,¹ or because the parties lack Article III standing to bring their claims in

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1. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (“It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States.”).

federal court,² or because the federal issue in a state law claim is not sufficiently substantial.³ The possibilities are numerous. In other circumstances, the federal courts may be accessible, but the litigants may prefer to resolve their claims in state court. Whatever the case may be, the United States' federal system recognizes that the state courts are "coequal parts of our national judicial system" that "give serious attention to their responsibilities for enforcing the commands of the Constitution."⁴ However, while we can be confident in the competence of the state courts to resolve issues of federal law,⁵ the Supreme Court has noted that there are benefits to the resolution of federal issues in federal court, as federal courts provide "experience, solicitude, and hope of uniformity."⁶ Indeed, one does not need to view the state courts as inferior to recognize that there are benefits to the federal forum.

Take federal patent law. 28 U.S.C. § 1338 grants the federal courts exclusive jurisdiction over federal issues "arising under any Act of Congress relating to patents."⁷ The highly specialized nature of patent law, along with a need for uniformity in its administration, has motivated Congress to centralize patent appeals in the Federal Circuit.⁸

2. State justiciability doctrines may allow for the resolution of cases in state courts that would not make it into federal court due to standing defects. *See generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) (discussing state justiciability doctrines); William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263 (1990) (arguing that state courts should adhere to Article III requirements when adjudicating questions of federal law).

3. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (holding that a federal issue raised within a state law claim must be "actually disputed and substantial" in order for the federal courts to exercise jurisdiction over the issue under 28 U.S.C. § 1331).

4. *Sawyer v. Smith*, 497 U.S. 227, 241 (1990).

5. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[W]e have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States."); *see also* Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214 (1983) ("Our study indicates that state courts are no more 'hostile' to the vindication of federal rights than are their federal counterparts . . .").

6. *Grable*, 545 U.S. at 312.

7. 28 U.S.C. § 1338.

8. *See* Pauline Newman, *The Federal Circuit in Perspective*, 54 AM. U. L. REV. 821, 823 (2005) (describing the motivating factors leading to the creation of the Federal Circuit, including "[t]he need for national consistency" and the desire for "a national appellate court with experience in the complexities of technology").

However, whether it be by unusual circumstances⁹ or by artful pleading,¹⁰ patent issues will sometimes be barred from resolution in a federal forum. In addition to frustrating Congress's desire for uniformity in the administration of the patent laws, this also presents challenges for state courts. Since patent issues arise more frequently in federal courts, state judges are less likely to be experienced in patent law,¹¹ and state courts have a comparatively smaller interest in their resolution.¹² In some cases, the question might be easily resolved by looking to relevant law and federal court precedent. In other cases, a state court might be faced with a genuinely novel issue of federal law.

One can imagine other scenarios where the state courts are likely to have little interest or experience. A case might present a complex issue involving the Internal Revenue Code¹³ or a similarly lengthy federal statute. If the U.S. Supreme Court has resolved the issue, the state courts are bound to follow.¹⁴ When lower federal court precedent exists on the matter, the state court might be happy to simply follow that.¹⁵ But when no federal precedent exists, the state court may have

9. *See, e.g.*, *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (holding that “legal malpractice claims based on underlying patent matters will rarely, if ever, arise under federal patent law” even though “such cases may necessarily raise disputed questions of patent law”).

10. *See generally* Ted D. Lee & Ann Livingston, *The Road Less Traveled: State Court Resolution of Patent, Trademark, or Copyright Disputes*, 19 ST. MARY'S L.J. 703 (1988) (arguing that litigating patent issues in state court may be preferable for clients and describing various ways to avoid federal jurisdiction).

11. There are some issues in which patent law is incidentally involved that the state courts might answer somewhat frequently; the state law of trade secrets is one example. *Id.* at 713.

12. A court might be less interested in building precedent in an area of law that does not typically arise within its jurisdiction.

13. *See, e.g.*, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 310–12 (2005) (describing a state law claim that raised an issue of federal tax law; although the Court held that the issue in this case could be heard by a federal court, the issue could have easily been heard by the state court as well if, for example, the defendant decided not to remove to federal court).

14. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (holding that interpretations of federal law enunciated by the U.S. Supreme Court have binding effect on the states, including state judicial officers).

15. *See, e.g.*, *Devi v. Senior & Disabled Servs. Div.*, 905 P.2d 846, 848 (Or. Ct. App. 1995) (“We are not bound by decisions of the federal courts of appeals on issues of federal law unresolved by the United States Supreme Court. . . . Nevertheless, we give those courts’ decisions due regard. On our independent review of the issues presented, we find the [Ninth Circuit’s] reasoning . . . persuasive”); *State Bank of Cherry v. CGB Enters., Inc.*, 984 N.E.2d 449, 462 (Ill. App. Ct. 2012) (“Therefore, to maintain a uniform body of law in interpreting the Act, we will follow [a decision of the federal courts of appeals] and apply its holding to our own analysis of the Act”); *see also* Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 62–64 (2015) (describing the differing approaches of state courts toward using lower federal court precedent).

to undertake the labor of resolving the federal issue, while perhaps contributing to later nonuniformity if the federal courts come to a different conclusion.¹⁶ But what if, when presented with complicated issues with which they have little interest, the state courts could ask the federal courts how they would resolve the issue and then defer to the federal court decision? Federal courts are capable of doing something similar when they are faced with unresolved questions of state law through the practice of certification.¹⁷

For some time, the federal courts have had the power to certify questions of state law to state courts.¹⁸ In general, the procedure works in the following way: when a federal court is asked to resolve a question of state law that has not been definitively resolved by the relevant state's courts, most states allow the federal court to send the question of state law to the state's highest court.¹⁹ Instead of guessing how the state's highest court would resolve the issue²⁰ or dismissing the case to await a state court determination,²¹ the federal court isolates the question of state law and asks the state's highest court for an answer.²² Usually, the certified question is phrased as a discrete question of law²³ and is accompanied by a statement of facts relevant to resolving the issue.²⁴ The state court then has discretion to decide whether to answer

16. See Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235, 254–62 (2014) (describing the consequences of conflicting interpretations of federal constitutional law between the federal courts of appeals and the state courts). Although Professor Logan's analysis focuses on constitutional interpretations, some of the consequences would apply in the case of conflicting statutory interpretations as well.

17. Federal courts are enabled to do so by state legislation. See *infra* notes 88–92 and accompanying text.

18. See *infra* Part I.B.

19. Jonathan Remy Nash, *Examining the Power of Federal Courts To Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1674 (2003). North Carolina is the only state that does not allow federal courts to certify questions to its courts. JASON A. CANTONE & CARLY E. GRIFFIN, *CERTIFIED QUESTIONS OF STATE LAW: AN EXAMINATION OF STATE AND TERRITORIAL AUTHORIZING STATUTES 1* (2020).

20. As would be required by the *Erie* doctrine. See *infra* notes 74–80 and accompanying text.

21. As would usually be required by *Pullman* abstention prior to the availability of certification. See *infra* notes 71–72 and accompanying text.

22. See, e.g., *Amaker v. King County*, 540 F.3d 1012, 1019 (9th Cir. 2008) (“[W]e respectfully certify to the Washington Supreme Court the following questions: (1) Whether only those individuals identified as ‘next of kin’ as defined by RCW § 68.50.160 at the time of the decedent’s death have standing to bring a claim for tortious interference with a corpse?”).

23. E.g., *id.*

24. See, e.g., *id.* at 1013–14 (“Before addressing the questions certified to the Washington Supreme Court, we first summarize the material facts and procedural history.”).

the question.²⁵ If the state court accepts the question, it will return an opinion of law to the federal court,²⁶ sometimes following briefing and argument by the parties.²⁷ The federal court can then defer to the state court's answer to resolve the original litigation.

While this procedure has existed for some time,²⁸ there is no analogous tool for state courts to certify questions to their federal counterparts.²⁹ At first glance, it is not hard to see why this imbalance exists. Federal court certification of state law questions is motivated in part by doctrines that require the federal courts to defer to state courts,³⁰ whereas, in contrast, state courts are largely expected to resolve federal questions on their own.³¹ Even so, there are many contexts in which a state court may wish to defer to federal courts. Indeed, many of the benefits that federal courts receive from certification could apply equally to the state courts. Certification gives courts a discretionary tool for conserving judicial resources, furthers institutional comity, and enhances fairness to litigants.³²

Furthermore, if there is value to the resolution of federal issues in federal court, as some courts and scholars have argued,³³ then there is reason to support certification as an additional avenue for federal issues arising in state court to reach a federal forum. As some

25. See, e.g., *Abrams v. W. Va. Racing Comm'n*, 263 S.E.2d 103, 106–07 (W. Va. 1980) (recognizing the benefits of certification but refusing to answer a certified question because resolution of state law issues would not be dispositive).

26. See, e.g., *Sullivan v. Oracle Corp.*, 254 P.3d 237, 240–49 (Cal. 2011) (answering a certified question from the Ninth Circuit and providing a discussion of the legal issues).

27. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, § 500.27(e) (2021) (“If the certification is accepted The Clerk of the Court shall notify the parties of the time periods for filing of printed briefs and briefs in digital format, if any, and calendaring of argument, if any, directed by the Court.”).

28. See *infra* notes 66–69 and accompanying text.

29. Andrew D. Bradt, Grable *on the Ground: Mitigating Unchecked Jurisdictional Discretion*, 44 U.C. DAVIS L. REV. 1153, 1209–10 (2011) (“[S]o far, there is no reciprocal ability for state courts to certify questions of *federal* law to a federal court.”).

30. See *infra* notes 74–79 and accompanying text.

31. See, e.g., *Haywood v. Drown*, 556 U.S. 729, 736 (2009) (holding that states may not use jurisdictional rules to discriminate against federal rights or causes of action).

32. These benefits are addressed at greater length later in this Note. See *infra* Part II.B.1.

33. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005); see also Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 124–32 (2009) (recognizing the expertise of federal judges in resolving issues of federal law, but also pointing out the limits of that expertise); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 85 (“[F]ederal courts are comparatively more skilled than state courts at interpreting and applying federal law”).

commentators note, it is increasingly rare for the Supreme Court to review state court decisions involving federal issues.³⁴ Certiorari to state courts makes up a small portion of an already miniscule Supreme Court docket.³⁵ Practically speaking, state courts are the final word on federal law for many litigants. Certification, however, could provide the federal courts with additional opportunities to consider and resolve issues of federal law, to the benefit of both the litigants and the judicial system.

However, the prospect of enabling state courts to certify questions of federal law to the federal courts, or “reverse certification” as some scholars call it,³⁶ has received little academic attention.³⁷ From my review, only two scholars have given the proposal serious attention, and even then, only as short proposals designed to remedy a narrow problem.³⁸ This Note endeavors to give reverse certification focused consideration. Furthermore, this Note will focus especially on the benefits of reverse certification to judicial administration, and not just the benefits to litigants who aspire to access a federal forum. Ultimately, this Note will conclude that enabling the state courts to

34. Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 HARV. L. REV. 167, 169–72 (2018) (collecting data demonstrating the rarity of Supreme Court review of state court decisions and noting that “[t]he data in more recent Terms suggests a greater disparity”).

35. *See id.* at 167 (noting the small percentage of petitions for certiorari that reach the Court’s merits docket).

36. It appears that the term “reverse certification” may have first been used by Judge Bruce M. Selya. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK L. REV. 677, 685 (1996). The term has caught on in subsequent scholarship. *See* Bradt, *supra* note 29, at 1160 (“[F]ederal courts should adopt a procedure allowing state courts to certify federal questions in their cases to the federal circuit courts—a form of ‘reverse certification.’”).

37. Most scholarship considering reverse certification has given the idea only very brief attention. *See* Paul R. Gugliuzza, *Patent Law Federalism*, 2014 WIS. L. REV. 11, 73 n.367 (considering, in a footnote, whether allowing state courts to certify questions to the Federal Circuit could help break the “cycle of removal” in patent litigation); Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How To “Fix” Florida Prepaid (And How Not To)*, 79 TEX. L. REV. 1037, 1114 n.378 (2001) (considering, in a footnote, the proposal that state courts could certify questions of intellectual property law); Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1298–99 (2003) (proposing that Congress should shift more criminal cases to state courts, and that state courts should be able to certify complicated questions of federal law that arise); Selya, *supra* note 36 (entertaining and criticizing “reverse certification” as a proposal).

38. *See* Bradt, *supra* note 29, at 1207–19 (considering reverse certification as a potential solution to the tendency of federal district courts to reject jurisdiction over federal issues arising in state law claims under the *Grable* test); Logan, *supra* note 16, at 271–78 (arguing that Congress should enable state courts to certify questions to the U.S. Supreme Court when a split of authority occurs between state courts and lower federal courts).

certify questions of federal law would be both practically and symbolically desirable. Doing so would provide benefits to both state and federal forums, and it would strengthen institutional comity and reciprocity between both courts. This latter benefit will result even if certification is used sparingly by the state courts. Given these benefits, this Note advocates for some give and take in modern certification practice.

The Note proceeds as follows. Part I provides an overview of the history of certification in the federal courts and explains how certification of questions of state law has become a mainstream practice. Part II then focuses on reverse certification from a policy perspective and considers practical elements: what the benefits of reverse certification might be, how it might work, and when it might be utilized. Part III then considers the constitutionality of reverse certification and concludes that a reverse certification procedure could be consistent with Article III restrictions on federal judicial power.

I. CERTIFICATION IN THE FEDERAL COURTS

Although infrequently discussed, certification comes in many forms. Federal courts can certify to state courts; state courts can certify to other state courts;³⁹ and intermediate appellate courts can certify to courts of last resort.⁴⁰ Generally, any discussion of federal certification procedure likely refers to the certification of questions of state law to state courts. However, this is not the exclusive avenue for federal certification. Indeed, the federal courts of appeals have been capable of certifying questions directly to the U.S. Supreme Court for centuries.⁴¹ This Part will discuss the two federal certification procedures that currently exist. Section A will begin by discussing certification from the federal courts of appeals to the Supreme Court, which is the older of the two. Section B will then discuss certification from federal courts to the state courts, which has become far more common.

39. See generally Ira P. Robbins, *Interstate Certification of Questions of Law: A Valuable Process in Need of Reform*, 76 JUDICATURE 125 (1992) (describing interstate certification and advocating for expanding its use).

40. For example, the federal circuit courts of appeals can certify questions to the U.S. Supreme Court. 28 U.S.C. § 1254(2). Some states also have procedures that allow state intermediate appellate courts to certify questions to the state's highest court. See, e.g., FLA. R. APP. P. 9.030(a)(2)(A)(v) (allowing Florida's intermediate appellate courts to certify questions "of great public importance" to the Florida Supreme Court).

41. See *infra* Part I.A.

A. *Certification to the U.S. Supreme Court*

Although certification to the Supreme Court has fallen out of practice, there are good reasons to discuss this old variety of certification before considering a system of reverse certification. The practice demonstrates that certification exists as a tried-and-true method for resolving federal issues in federal courts, albeit one that has been neglected for some time.

Certification to the Supreme Court predates the federal courts as we know them today. In 1802, when the first statute enabling certification to the Supreme Court was passed,⁴² each of the six circuit courts consisted of only two judges: a Justice of the Supreme Court riding circuit, and “the district judge of the district, where such court shall be holden.”⁴³ The first certification statute allowed parties to request certification when “the opinions of the judges shall be opposed.”⁴⁴ Thus, it appears that certification was originally a response to intracircuit splits between two-judge panels. In those days, certification was sometimes the only method for a case to reach the Supreme Court for review.⁴⁵

In 1891, the passing of the Evarts Act⁴⁶ introduced the modern courts of appeals.⁴⁷ Even though the Act provided for the writ of certiorari as a new way to bring cases before the Supreme Court,⁴⁸ the

42. See Kevin G. Crennan, *The Viability of Certification in Federal Appellate Procedure*, 52 WM. & MARY L. REV. 2025, 2028 (2011) (“Certification has deep historical roots that extend as far back as 1802.”).

43. Act of Apr. 29, 1802, § 4, 2 Stat. 156, 157–58.

44. *Id.* at 159.

45. See Aaron Nielson, *The Death of the Supreme Court’s Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 486 (2010) (“For a long time, certification was the exclusive statutory method by which many cases could reach the Supreme Court.”).

46. Judiciary Act of 1891, ch. 517, 26 Stat. 826, 826. The Act is commonly known as the “Evarts Act” in reference to its primary sponsor: Senator William M. Evarts. See Paul D. Carrington, *The Function of the Civil Appeal: A Late Century View*, 1987 S.C. L. REV. 411, 414–16 (describing Evarts’s sponsorship of the bill and the compromises made to secure its passing).

47. See generally ch. 517, 26 Stat. at 826 (establishing the “circuit courts of appeals” as intermediate appellate courts).

48. *Id.* at 828 (“[I]n any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review”); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1650–51 (2000) (noting the introduction of the writ of certiorari in the 1891 Act).

Act also explicitly retained the practice of certification.⁴⁹ The Judiciary Act of 1925 (“1925 Act”) again retained certification,⁵⁰ and the statutory basis for certification has remained substantially the same ever since.⁵¹ The current statutory language providing for certification, in 28 U.S.C. § 1254(2), provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: . . . (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.⁵²

In the decade following the 1925 Act, certification was used with some regularity. Between 1927 and 1936, “courts of appeals issued seventy-two certificates.”⁵³ However, certification declined after 1930, with only sixteen certificates having been issued since then.⁵⁴ The Supreme Court has accepted only four certificates since 1946, with the most recent being in 1985.⁵⁵

What happened? If there is a suspect in certification’s death, it would be the Supreme Court itself.⁵⁶ The Court made clear in several cases that certification could be used only in very limited circumstances.⁵⁷ This led to a general reluctance to certify among

49. § 6, 26 Stat. at 828 (“[T]he circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.”).

50. As the Judiciary Act of 1925 provides,

In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause.

Judiciary Act of 1925 (Judges’ Bill), ch. 229, § 239, 43 Stat. 936, 938.

51. See Nielson, *supra* note 45, at 485–86 (noting that the current version of the certification statute “has been part of the United States Code since 1948, and a ‘substantially’ identical version has existed since 1925”).

52. 28 U.S.C. § 1254(2).

53. Nielson, *supra* note 45 (quoting Hartnett, *supra* note 48, at 1710).

54. *Id.*

55. Hartnett, *supra* note 48, at 1712 & n.404.

56. See Nielson, *supra* note 45, at 488 (“The question, then, is not *whether* certification is dead, but *why* it is dead. Or, rather, who killed it? The Supreme Court did . . .”).

57. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (holding that an intracircuit split was not an “occasion for invoking so exceptional a jurisdiction of this Court as that on certification”); Crennan, *supra* note 42, at 2040–41 (collecting cases in which the Supreme Court has restricted the use of certification).

federal appellate judges.⁵⁸ One motivating factor in the Court's decision to restrict certification was likely the fact that certification historically entailed *mandatory* review.⁵⁹ Although incapable of dismissing certified questions for discretionary reasons, the Court could nonetheless control its docket by arguing that certification in a given case was legally improper.⁶⁰ Certification's death was all but confirmed when the Supreme Court refused to answer a question certified by the Fifth Circuit in 2009, with only Justices John Paul Stevens and Antonin Scalia dissenting from the refusal to answer.⁶¹

Some scholars, notably Professors Amanda Tyler and Aaron Nielson, lament the Supreme Court's reluctance to answer certified questions and argue for a resurgence of the practice.⁶² However, regardless of whether certification to the Supreme Court returns, the history of the practice provides a background for certified questions in the federal courts. The procedure indicates that it would not shake the foundations of the federal judiciary to suggest that a federal court could answer a federal question certified to it in the context of an ongoing litigation. If anything, the decline of certification to the Supreme Court can be attributed not to any constitutional defect of certification, but rather to the Supreme Court's desire to control its docket.⁶³ Of course,

58. See Nielson, *supra* note 45, at 489–91 (describing the reluctance of circuit courts of appeals to certify questions to the Supreme Court); *Taylor v. Atl. Mar. Co.*, 181 F.2d 84, 85 n.2 (2d Cir. 1950) (“We will not certify the question to the Supreme Court. . . . It is not for us to decide what matters are of enough importance to require decision by that court; the control of its docket should rest exclusively in its own hands.”).

59. See Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 35 (1930) (“Petitions for *certiorari* the Court can deny, but questions certified must be answered.”).

60. As the *Wisniewski* court noted,

It is also the task of a Court of Appeals to decide all properly presented cases coming before it, except in the rare instances, as for example the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and expedition of judicial business.

353 U.S. at 902.

61. *United States v. Seale*, 558 U.S. 985, 985 (2009) (Stevens, J., dissenting).

62. See generally Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310 (2010) (arguing for a limited revival of certification); see Nielson, *supra* note 45, at 490–92 (“[m]ourning” the death of certification); Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE. L.J. 1439, 1450–51 (2009) (arguing that “certification today could be even more valuable than it was a hundred years ago”).

63. Members of the Court have at times been forthright about their desire to reduce caseloads on the Court. Cf. Warren Burger, *Annual Report on the State of the Judiciary*, 69 ABA J. 442, 442 (1983) (“Today I will focus on only one subject, which is perhaps the most important

there are constitutional considerations involved when a federal court answers a certified question, and some of those concerns have been present when the Supreme Court has considered its own power to answer certified questions.⁶⁴ But such concerns do not preclude certification altogether.⁶⁵

While certification to the Supreme Court may be dead, one form of certification is very much alive in the federal courts—certification of questions of state law to state courts. The next Section will focus on this form of certification.

B. Certification of State Law Questions to the State Courts

In 1945, the Florida legislature passed a statute allowing the Florida Supreme Court to receive and answer certified questions from certain federal courts.⁶⁶ This act of “rare foresight”⁶⁷ went completely unnoticed until 1960, when the U.S. Supreme Court decided to certify a question of Florida law to the Florida Supreme Court.⁶⁸ This was a watershed moment for federal/state certification; in the decade following, several states adopted certification statutes of their own, and the Uniform Law Commission recommended a uniform certification statute.⁶⁹

By many accounts, the adoption of certification statutes was driven by two problems: the onerous litigation costs imposed on litigants by federal abstention doctrines and the challenges of ascertaining state law following the *Erie* doctrine.⁷⁰ Federal abstention

single, immediate problem facing the judiciary, and that is the caseload of the Supreme Court . . .”).

64. The Court’s primary concern has been that a certified answer could be a prohibited exercise of the Court’s original jurisdiction. *See White v. Turk*, 37 U.S. 238, 239 (1838) (“This certificate, therefore, brings the whole cause before this Court; and, if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate jurisdiction.”); Crennan, *supra* note 42, at 2033–39 (discussing constitutional issues involved in certification to the Supreme Court). This issue will not be discussed further in this Note.

65. *See infra* Part III.

66. Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIA. L. REV. 717, 717 (1969).

67. *Clay v. Sun Ins. Off. Ltd.*, 363 U.S. 207, 212 (1960).

68. *See id.* (deciding to utilize Florida’s certification statute).

69. Mattis, *supra* note 66, at 721.

70. *See id.* at 718 (discussing certification in relationship to abstention doctrine); Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit’s Experience*, 115 PENN ST. L. REV. 377, 381 (2010) (describing certification of state law questions as “precipitated by the *Erie* doctrine”); M. Bryan Schneider, “*But Answer Came There None*”: *The Michigan Supreme Court and the Certified Question of State Law*, 41 WAYNE L. REV.

doctrines, such as *Pullman* abstention,⁷¹ require federal courts, when certain circumstances are present, to halt or dismiss federal litigation so that a controversy may be resolved in a state court.⁷² Certification provides an alternative that is more efficient on its face: instead of forcing a litigant to start over in state court, the federal court can certify the question of state law directly to the state's highest court. Once the state court returns a definitive answer, the federal court can resolve the remaining federal issues if necessary.

While abstention imposes burdens on aspiring federal litigants, the Court's decision in *Erie Railroad Company v. Tompkins*⁷³ imposes burdens on the federal courts. *Erie*, of course, requires federal courts to follow the decisions of state courts when resolving questions of state law.⁷⁴ In some cases, applicable state decisional law is unclear or conflicting, and the federal court is called upon to resolve an open question of state law.⁷⁵ In such a scenario, federal courts generally approach the problem by predicting how the state's highest court would resolve the issue, a so-called "*Erie* guess."⁷⁶ As one federal judge put it, this process is "laborious, often onerously so."⁷⁷ In unclear cases, the *Erie* inquiry can require a judge to "exhaustively analyze[] all the

273, 277 (1995) (describing "the difficulties faced by federal courts in ascertaining state law and the *Erie* and abstention doctrines" as "the background which gave rise to the use of the certified question").

71. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

72. *See id.* at 501 (holding that a federal district court ought to "sta[y] its hands" if the resolution of a state law issue by a state court "cannot be pursued with full protection of the constitutional claim").

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

74. *Id.* at 79 ("[T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." (second alteration in original) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928))).

75. *See* Geri J. Yonover, *Ascertaining State Law: The Continuing Erie Dilemma*, 38 DEPAUL L. REV. 1, 6-7 (1988) (describing the circumstances in which a federal court must resolve a question of state law on its own).

76. Haley N. Schaffer & David F. Herr, *Why Guess? Erie Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1626 (2010) (describing the Eighth Circuit's approach to the "*Erie* guess"); *Nolan v. Transocean Air Lines*, 365 U.S. 293, 295-96 (1961) (instructing the lower federal court to determine the relative weights that the New York Court of Appeals would accord to authoritative sources when answering a California state law question); *Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 199 (2d Cir. 2003) ("Where the substantive law of the forum state is uncertain or ambiguous, the job of the federal courts is carefully to predict how the highest court of the forum state would resolve the uncertainty or ambiguity." (quoting *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d Cir. 1994))).

77. J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 321 (1967).

state court cases even remotely in point,”⁷⁸ and perhaps even seek out law review articles, treatises, and decisions from other states “which might impress and influence the state high court in deciding the issue today.”⁷⁹

While the “predictive” approach to the *Erie* inquiry has received some pushback,⁸⁰ *Erie* can put federal judges to a time-consuming task. Certification provides an alternative. Instead of predicting what a state court will do, the federal court can simply ask the state court. But certification does more than save federal courts’ time;⁸¹ it gives state courts an opportunity to resolve unclear state law issues that arise in federal court. Without certification, federal courts may sometimes serve as the final word on open questions of state law, at least so far as the litigants are concerned.⁸² Since there is no avenue to appeal state law issues from federal court to a state high court, certification provides a state with additional autonomy over how its law is applied.

There are other benefits to certification that merit mentioning. Certification provides state courts with more opportunities to develop state law, as it could present factual scenarios that the state courts would have otherwise not seen.⁸³ It allows for unresolved legal issues to be answered by the same body whether they arise in federal or state court, which enhances uniformity and could reduce forum shopping.⁸⁴ According to several federal and state judges, certification also

78. *Id.*

79. *Id.*

80. See Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 710–15 (1995) (discussing some of the jurisprudential issues involved in the predictive model and suggesting an alternative); Yonover, *supra* note 75, at 8 (describing one federal judge’s relatively idiosyncratic approach to the *Erie* inquiry).

81. The time saved here refers to the time the federal courts would have otherwise spent conducting the laborious *Erie* inquiry. Certification is time-consuming in another sense since it prolongs litigation while the federal courts wait for a state court’s answer. See *Lehman Bros. v. Schein*, 416 U.S. 386, 394 (1974) (Rehnquist, J., concurring) (“[Certification] entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court.”); *Lindenberg v. Jackson Nat’l Life Ins. Co.*, 919 F.3d 992, 994 (6th Cir. 2019) (Clay, J., concurring) (stating that resort to certification in diversity cases “serve[s] little purpose other than to needlessly delay resolution of the ultimate issues in the case”).

82. While federal court decisions on open questions of state law are not binding authority in future cases, the judgments will nonetheless bind the parties involved.

83. See Nash, *supra* note 19, at 1697 (asserting that certification “gives the state judiciary the opportunity to rule on important issues of state law in cases in which it might not otherwise have had the chance”).

84. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1544 (1997).

promotes institutional comity between the courts.⁸⁵ Lastly, there may be an enhanced sense of fairness among litigants when a state law question is resolved by the court positioned to deliver a definitive answer with binding effect on future litigation.⁸⁶

Driven by *Pullman*, *Erie*, and federalism concerns, certification of state law questions has become a relatively common practice in the federal courts. As of this writing, forty-nine states, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and the Mariana Islands all have certified question statutes.⁸⁷ North Carolina is the only state without such a statute.⁸⁸ Although there is some variation, each statute authorizes certification from at least one federal court of appeals,⁸⁹ and all but one authorize certified questions from the U.S. Supreme Court.⁹⁰ Some states accept certified questions from the federal district courts or the U.S. bankruptcy courts as well.⁹¹

With certification now widely available, data shows that the federal courts use the tool quite frequently. A recent study examined certification practices in the Third, Sixth, and Ninth Circuits from 2010 to 2018.⁹² In that span, the Ninth Circuit certified the most questions, eighty-nine total, of which 80 percent were accepted by the state high

85. See John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 457 (1988) (recounting the position of several federal and state judges that “the federal courts’ use of certification improves federal-state comity”). The comity that might result from certification is discussed later in this Note. See *infra* Part II.B.1 (discussing, in the fourth paragraph, how certification might advance institutional comity between courts).

86. See Nash, *supra* note 19, at 1698 (“[C]ertification offers a federalism benefit to litigants in the form of ‘fairness.’ Specifically, it provides federal court litigants the benefit of a resolution of their case based upon definitive state law.”); see Selya, *supra* note 36, at 690 (claiming that fairness concerns are the “best argument in favor of certification,” but noting that “litigants do not have an entitlement to something identifiable in the abstract as a ‘right’ answer”).

87. CANTONE & GRIFFIN, *supra* note 19.

88. *Id.* The North Carolina legislature has considered allowing certification, but legislation has yet to be passed despite support from judges on the Fourth Circuit and a few justices on the North Carolina Supreme Court. See Matthew Nis Leerberg, *Bill Would Allow Federal Courts To Certify Questions to the North Carolina Supreme Court*, FOX ROTHSCHILD (Feb. 23, 2017), <https://ncapb.foxrothschild.com/2017/02/23/bill-would-allow-federal-courts-to-certify-questions-to-the-north-carolina-supreme-court> [<https://perma.cc/WE6J-9JBV>] (discussing a proposed bill that would enable the North Carolina Supreme Court to answer certified questions).

89. CANTONE & GRIFFIN, *supra* note 19, at 3.

90. *Id.* at 2. The exception is the New Jersey statute, which allows certified questions only from the Third Circuit. N.J. CT. R. 2:12A-1.

91. CANTONE & GRIFFIN, *supra* note 19, at 3–4.

92. JASON A. CANTONE & CARLY GRIFFIN, CERTIFICATION OF QUESTIONS OF STATE LAW IN THE U.S. COURTS OF APPEALS FOR THE THIRD, SIXTH, AND NINTH CIRCUITS (2010–2018) 1 (2020) [hereinafter CERTIFICATION IN THE THIRD, SIXTH, AND NINTH CIRCUITS].

court (in most instances, the Supreme Court of California).⁹³ The Sixth Circuit saw much less certification activity; between 2010 and 2018, the Sixth Circuit certified only ten questions to state courts, of which only six were accepted.⁹⁴ The Third Circuit certified thirty-one questions in the years surveyed, and experienced a higher rate of response from the state courts, with 87 percent acceptance.⁹⁵ These numbers indicate a wide variation in certification practices among the courts of appeals. They also indicate that certification has become relatively commonplace in some circuits.

The Second Circuit also has a reputation for frequent certification. Between 2012 and 2017, the Second Circuit certified thirty-nine questions to state courts, thirty-one of which were directed at the New York Court of Appeals.⁹⁶ This is perhaps in part due to the support of Second Circuit Judge Guido Calabresi, who once implored the federal courts to “certify, certify, certify”⁹⁷ whenever a question of state law is “even possibly in doubt.”⁹⁸ The Second Circuit certified at least seven questions to the New York Court of Appeals alone in 2020, indicating that certification trends in the Circuit continue at a steady pace.⁹⁹

The courts of appeals also vary in the criteria they use to determine whether to certify a question of state law. Although the Supreme Court has endorsed certification,¹⁰⁰ it has given little guidance on what factors lower courts should consider when deciding whether to certify. In *Arizonans for Official English v. Arizona*,¹⁰¹ for example, the Court held that a “[n]ovel, unsettled question[] of state law” was “necessary before federal courts may avail themselves of state certification procedures.”¹⁰² But the Court has also made clear that

93. *Id.* at 5–9.

94. *Id.* at 9.

95. *Id.* at 7.

96. Scott A. Chesin & Karen W. Lin, *Certification from the Second Circuit to the N.Y. Court of Appeals: A Guide*, N.Y. L.J. (Apr. 10, 2017, 12:00 AM), <https://www.law.com/newyorklawjournal/almID/1202783229410/Certification-From-the-Second-Circuit-to-the-NY-Court-of-Appeals-A-Guide> [<https://perma.cc/EVS9-SECD>].

97. Calabresi, *supra* note 37, at 1301.

98. *Id.*

99. *Certified Questions (500.27)*, NYCOURTS.GOV, <https://web.archive.org/web/20210320231127/https://www.nycourts.gov/ctapps/certquest.htm> [<https://perma.cc/GAR8-FPFY>].

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

101. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43 (1997).

102. *Id.* at 79.

resort to certification is not obligatory in such circumstances.¹⁰³ The Court has said little else about what factors inform a discretionary decision to certify. In *Arizonans*, the Court found that the requests for certification in that case “merited more respectful consideration than they received” by the courts below “[g]iven the novelty of the question and its potential importance to the conduct of Arizona’s business.”¹⁰⁴

Endowed with wide discretion by the Supreme Court, the circuits developed their own criteria for deciding whether to certify. The Ninth Circuit, for example, held that “[t]he certification procedure is reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts.”¹⁰⁵ The Ninth Circuit also noted that certification should not be used because a legal issue is “difficult,” but rather because of “deference” to the state court.¹⁰⁶ Other circuits have had more difficulty developing a test. In the Sixth Circuit, for example, a recent decision not to certify triggered three different opinions discussing when the Circuit should take advantage of certification.¹⁰⁷ The competing opinions highlighted the tension between two values at stake in the decision whether to certify: the desire for uniform application of state law on one hand, and the obligation of federal courts to resolve state law issues in diversity jurisdiction on the other.¹⁰⁸ Without consensus, there is some uncertainty regarding what factors inform a decision to certify in that circuit.

As these cases demonstrate, certification depends on judicial self-regulation. State certification statutes may include some constraints,

103. *Schein*, 416 U.S. at 390–91 (“We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory.”).

104. *Arizonans*, 520 U.S. at 78.

105. *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003); see *Childress v. Costco Wholesale Corp.*, 978 F.3d 664, 666 (9th Cir. 2020) (applying the *Kremen v. Cohen* factors to determine whether to certify).

106. *Kremen*, 325 F.3d at 1037.

107. See generally *Lindenberg v. Jackson Nat’l Life Ins. Co.*, 919 F.3d 992 (6th Cir. 2019) (denying rehearing en banc of a decision not to certify).

108. See *id.* at 993–94 (Clay, J., concurring) (“[W]hen diversity jurisdiction is properly invoked, federal courts have a ‘duty . . . to decide questions of state law whenever necessary to the rendition of a judgment.’” (omission in original) (quoting *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943))); *id.* at 996 (Bush, J., dissenting) (“[A] federal judge’s assessment of state law ‘cannot escape being a forecast rather than a determination’ if the state courts have not yet definitively resolved an issue.” (quoting *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 499 (1941))).

such as restricting which courts can certify¹⁰⁹ or mandating that the state law questions be potentially determinative in the federal case,¹¹⁰ but certifying courts have wide latitude within those boundaries.

And it is not just federal courts that are controlling the flow of certified questions. State courts can also guide the process when deciding whether to accept a certified question.¹¹¹ In fact, both courts have strong incentives to ensure that the process runs smoothly. Federal courts want to avoid wasting time by certifying questions that will not be answered, and state courts want to avoid wasting time poring over certified questions that they will ultimately reject. There is reason to expect, then, that certification would become a more efficient process over time, as federal and state courts communicate the desired balance. Indeed, some of the data above suggests that the process has already become quite efficient in some circuits.¹¹²

The above discussion makes clear that certification has become a normal practice in at least some federal courts. This leads to the primary question this Note considers: Why don't the federal courts accept certified questions themselves? As noted previously, there is no shortage of federal questions that struggle to find their way into federal court.¹¹³ To be sure, certification in general is subject to a fair amount of criticism,¹¹⁴ but if certification is here to stay, there are reasons to consider making certification a two-way street. The next Part will consider what so-called reverse certification might look like and what its possible benefits might be.

109. See, e.g., N.J. CT. R. 2:12A-1 (“The Supreme Court may answer a question of law certified to it by the United States Court of Appeals for the Third Circuit . . .”).

110. See, e.g., ALASKA R. APP. P. 407 (allowing certification of state law questions “which may be determinative of the cause then pending in the certifying court”).

111. State courts sometimes make their reasons known when rejecting a federal court's certified question, but not always. See, e.g., *Abrams v. W. Va. Racing Comm'n*, 263 S.E.2d 103, 106–07 (W. Va. 1980) (recognizing the benefits of certification but refusing to answer a certified question because resolution of state law issues would not be dispositive); see also *Schneider*, *supra* note 70, at 315 (“The Michigan Supreme Court, to say the least, is not very receptive to the certified question. Not only does the court refuse to answer most questions, but it generally fails to state the reasons for its refusal.”).

112. Between 2010 and 2018, 87 percent of the Third Circuit's questions were accepted by the relevant state court. See *supra* note 95 and accompanying text (referencing this statistic).

113. See *supra* notes 1–3 and accompanying text (introducing this struggle).

114. See generally Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114 (2009) (arguing that certification furthers an erroneous view that “state and federal law ought to be isolated into separate spheres of jurisprudence”); Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1885–90 (2008) (arguing that there are downsides to allowing cases to be “decompose[d]” for the purpose of certification).

II. CERTIFICATION OF QUESTIONS OF FEDERAL LAW

Given that federal and state judges have praised certification in the past,¹¹⁵ it seems odd that there has never been much interest in reversing the procedure. Perhaps it is because the primary motivators for certification to state courts, namely abstention doctrine and the *Erie* inquiry, do not move in the opposite direction. However, as will be shown more extensively below,¹¹⁶ many of the benefits of certification procedure could flow in both directions. For example, reverse certification would allow the state courts to conserve judicial resources by allocating unanswered federal questions to federal courts, just as the federal courts conserve resources by certifying to their state counterparts. And reverse certification would provide many of the same benefits to litigants and the legal system—it would increase uniformity in results and reduce the likelihood of splits between state high courts and federal courts of appeals.

In addition to its practical benefits, reverse certification would increase institutional comity between the courts. Certification in its current form is motivated in part by a desire to conserve resources in the federal courts. But many state courts are likewise burdened by heavy dockets.¹¹⁷ A reverse certification procedure would represent a reciprocal desire by both state and federal courts to share caseloads and allocate lawmaking duties efficiently. Furthermore, reverse certification has few apparent downsides. As a completely discretionary procedure, it does not threaten to add a higher workload than the federal courts can bear.¹¹⁸ In short, many of certification's

115. See Clark, *supra* note 84, at 1545–46 (“[T]he Supreme Court of the United States . . . prais[ed] the Florida legislature’s ‘rare foresight’ in authorizing certification, and suggest[ed] that the court of appeals on remand attempt to obtain an authoritative determination of ‘two unresolved state law questions’ by certifying them to the Florida Supreme Court.”); Chesin & Lin, *supra* note 96 (“Frequent use of the certification process has been the norm in the Second Circuit since the mid-1990s, when Judge Calabresi joined the court and became a vocal and persuasive advocate for use of the procedure.”).

116. The practical and symbolic benefits of certification are discussed at greater length later in this Note. See *infra* Part II.B.1.

117. See NAT’L CTR. FOR STATE CTS., PROBLEMS AND RECOMMENDATIONS FOR HIGH-VOLUME DOCKETS 2 (2016) (noting that high volume dockets in state courts present “enormous challenges to litigants, judges and court administrators” that “threaten the integrity of judicial processes and can thwart meaningful examination of basic facts and claims”).

118. A later section of this Note discusses when state courts might certify questions and argues that the discretionary use of certification is unlikely to overburden the federal courts. See *infra* Part II.B.3.

benefits could work both ways, and without significantly disrupting the status quo.

It may seem surprising, then, that few scholars have considered the proposal. Out of the few scholarly discussions on the topic, most address the idea only in a footnote or during a brief aside.¹¹⁹ However, at least two scholars have given more serious thought to the idea.¹²⁰ And others have proposed reforms with similar goals. Judge Jon Newman, for example, proposed that federal issues arising in state court could be appealed from a state's highest court to the federal courts of appeals.¹²¹

When considering certification of federal questions by state courts, several questions immediately arise: *Would the benefits outweigh the costs? How would it work? When, and how often, would it be used?* This Part aims to answer these questions and more.¹²² Two approaches to reverse certification are considered: certification by state courts directly to the U.S. Supreme Court, and certification to the courts of appeals in which the state court sits. Between these two approaches, the second is arguably more viable, and will receive more attention.

A. *Certification by State Courts to the U.S. Supreme Court*

In some respects, the U.S. Supreme Court is a logical candidate for receiving certified questions from the state courts. The Supreme Court is the only court that can provide a definitive ruling on federal law, just as the state supreme courts provide definitive rulings on state law.¹²³ Furthermore, the state courts, with few exceptions, view the Supreme Court as the only federal court that can bind them on federal issues.¹²⁴ However, the proposal would need to proceed with cautious

119. See *supra* note 37 (describing the scholarship).

120. See *supra* note 38 (referencing the two scholars who have explored the proposal in greater depth).

121. See Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals To Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 774–76 (1989) (describing a system of “reciprocal routing of appeals” between federal and state courts).

122. The question whether such proposals would be constitutional, however, is dealt with in Part III.

123. See *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass’n*, 426 U.S. 482, 488 (1976) (“We are, of course, bound to accept the interpretation of [state] law by the highest court of the State.”).

124. See *Frost*, *supra* note 15, at 63 (“[A]t least a few state supreme courts appear to consider themselves bound by lower federal court decisions on questions of federal law, although that number has shrunk in recent years.”).

awareness of the Supreme Court's limited docket. Ideally, any plausible proposal for allowing certification from state courts to the Supreme Court would need to be either extremely limited,¹²⁵ discretionary, or both. But allowing for discretionary certification alongside certiorari might seem pointless. Indeed, certified questions might be treated in the same manner as petitions for certiorari, with similarly low prospects for review. However, there are some reasons to believe that adding certification as an additional avenue for Supreme Court review of state court decisions would be valuable.

First, a certified question may be more obviously capable of review. The Supreme Court cannot review state court decisions that rest on an adequate and independent state law ground.¹²⁶ In other words, a federal issue must be at least partially determinative of the state court case for the Supreme Court to assume jurisdiction on review. Under *Michigan v. Long*,¹²⁷ a state court decision discussing federal law is generally considered to be motivated by federal law in the absence of a clear expression by the state court to the contrary.¹²⁸ While *Michigan v. Long* simplifies the inquiry, certification may simplify it even further. A certified question would amount to a clear message from the state supreme court that it believes that state law is not adequate to resolve the dispute.¹²⁹ If it were, certification would not be necessary. Of course, a state court could be wrong about the necessity of federal law, but certification could streamline the inquiry by isolating the federal question to be considered.

Second, a certified question reflects deference to Supreme Court authority. Some scholars suggest that the Supreme Court may see review of state court decisions as a more solemn affair than when the Court reviews decisions from the courts of appeals.¹³⁰ Unlike the

125. For an example of such an extremely limited proposal, see Logan, *supra* note 16, at 273 (proposing that state courts should be able to certify questions to the U.S. Supreme Court but only in the limited circumstance of “intrastate, state-federal circuit court conflicts”).

126. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (“[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”).

127. *Michigan v. Long*, 463 U.S. 1032 (1983).

128. *Id.* at 1040–41.

129. This assumes that a federal certification statute would only allow federal questions to be certified if they were necessary and dispositive of the case. Many state statutes include such a requirement. See *infra* note 155 (citing to state statutes referencing certification requirements).

130. See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 199–200 (2018) (noting that one possible explanation for the infrequency of Supreme Court review of state court decisions could

federal appellate courts, state courts are not participants in the same judicial system as the Supreme Court, and certiorari review of the state courts can seem more intrusive. The Supreme Court may be more hesitant to review the decisions of a state's highest court in an attempt to "dignify the independent sovereign status of the state courts."¹³¹ Certification, in contrast to certiorari, would reflect explicit consent by the state court for Supreme Court review. Thus, the Supreme Court may be more comfortable answering certified questions.

While these benefits may be small, the downsides to allowing state courts to certify questions to the Supreme Court would likewise be small. Certified questions would be unlikely to significantly affect the number of cases brought before the Court, as state judges would likely be aware of the gravitas involved in certifying a question to the Supreme Court. But that awareness might also dissuade state judges from certifying altogether, especially if there were an alternative option to certify to the courts of appeals, which will be discussed below. It is worth noting, though, that the process would be somewhat reciprocal. The Supreme Court has itself certified questions to the state supreme courts on several occasions.¹³² But, for better or worse, the Supreme Court's nature makes it perhaps less likely to answer certified questions in return. The next Section considers a much more likely candidate for certification.

B. Certification by State Courts to the Federal Courts of Appeals

Allowing state courts to certify federal questions to the courts of appeals is a far more intuitive proposal. The federal appellate courts oversee extensive dockets and are designed to resolve legal issues that have a prior procedural history.¹³³ Furthermore, as discussed previously, the courts of appeals frequently take advantage of state certification statutes, and thus, there would be a degree of reciprocity in asking them to answer certified questions in return. It is not surprising, then, that the sparse academic commentary considering

be that "the National Court has come to see infrequent review of state court decisions as a way to convey respect for the state courts," but ultimately arguing that infrequent review does not necessarily convey respect).

131. *Id.* at 199.

132. *See* Tyler, *supra* note 62, at 1325 n.88 (collecting six cases in which the United States Supreme Court certified a question of state law to the highest court of a state).

133. The nature of the circuit courts of appeals as intermediate appellate courts makes them a far more sensible target for certification than the federal district courts since the federal district courts cannot provide precedential proclamations on federal law.

reverse certification has focused on this proposal.¹³⁴ In the most extensive discussion to date, Professor Andrew Bradt considers certification to the federal courts of appeals as a potential response to the increasing number of federal issues being resolved by state courts after the decision in *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*.¹³⁵ Some of the benefits and roadblocks considered by Bradt will be discussed below, alongside other benefits and challenges. This Section aims to discuss, in detail, reverse certification as a policy proposal. The advantages of reverse certification will be elucidated through the answers to three questions: (1) What would the benefits of reverse certification be?; (2) How would reverse certification work?; and (3) When would reverse certification be utilized?

1. *What Would the Benefits of Reverse Certification Be?* Although the motivations for allowing state courts to certify questions of federal law are slightly different than those animating certification of questions of state law, there is much overlap. The following discussion reveals that many of the institutional benefits of certification can be felt by state courts and federal courts alike, and litigants may reap some of the benefits as well. In general, the benefits of reverse certification can be separated into three different categories: judicial efficiency, uniformity, and comity. The first two benefits could be classified as practical and the third as symbolic.

First, reverse certification would provide state courts with a tool for conserving judicial resources and allocating them more efficiently. Since certification is a discretionary tool that relies on courts being motivated to use it, this benefit cannot be understated. While state courts are often called upon to answer questions of federal law, some

134. From my review, only one scholar has suggested that the state courts should be able to certify questions to the Supreme Court, and, even then, only in a very limited capacity. See *supra* note 125. On the other hand, certification to the federal courts of appeals has been entertained on more occasions. See Bradt, *supra* note 29, at 1211 (“Although one could envision an argument that any federal certification process should be to only the U.S. Supreme Court, the courts of appeals would be superior tribunals for certification.”); Gugliuzza, *supra* note 37 (considering, in a footnote, whether allowing state courts to certify questions to the Federal Circuit could help break the “cycle of removal” in patent litigation).

135. *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005); see Bradt, *supra* note 29, at 1208 (“If part of the problem created by . . . wide-ranging discretion . . . to decline jurisdiction under *Grable* is that important federal questions are left to state tribunals, that problem could be mitigated by . . . allowing federal courts to answer those embedded questions, while keeping the entire case in state courts.”).

federal issues may be highly specialized and niche and may come to state courts only infrequently. Issues involving intellectual property law or complex federal statutes are possible examples. But certification would not merely be an opportunity for state courts to offload complicated questions onto the federal courts, it would allow for a more efficient allocation of judicial resources. Federal judges are more likely to be experienced in answering complex issues involving, for example, the interpretation of federal statutes. Thus, it is plausible to argue that such questions could be answered more efficiently by the federal courts,¹³⁶ just as the state courts could be more efficient at answering questions of state law. Furthermore, as Bradt notes, making certification reciprocal might make certification more efficient overall.¹³⁷ Both federal and state courts would have an incentive to swiftly answer questions certified to them, as they would want their own certified questions to be answered quickly in return.

Second, reverse certification would advance the interests of litigants in the uniform resolution of federal issues. In the abstract, litigants may feel as if the resolution of a federal issue is more correct when adjudicated by a federal court.¹³⁸ Litigants may also feel dissatisfied when a state court resolves a federal issue and a federal court later disagrees in a different case. Since reverse certification would allow more issues to be resolved in federal courts, it would help ameliorate both of these concerns. More concretely, reverse certification could reduce forum shopping by disincentivizing the use of artful pleading to avoid federal court resolution of federal issues, since the federal issues would have an additional pathway to reaching federal court. It may also lead to a more uniform administration of federal law overall by reducing the likelihood that there will be a split between a state court and a federal appellate court on any given federal issue. Furthermore, when the appellate court answers a certified question, its resolution of the issue would have precedential effect in

136. The efficiency gained here refers to the advantages federal courts have in resolving federal questions due to their experience and expertise. *See* sources cited *supra* note 33. Certification would not necessarily make the process more efficient for litigants since the process will inevitably be slowed by the procedural demands of certification.

137. *See* Bradt, *supra* note 29, at 1215 (“There may even be an incentive on the part of the courts of appeals to respond to certified questions expeditiously in hopes that they will benefit from similar treatment when certifying their own questions to the states.”).

138. *But see* Selya, *supra* note 36, at 690 (“[L]itigants do not have an entitlement to something identifiable in the abstract as a ‘right’ answer.”).

federal courts throughout the circuit;¹³⁹ thus, reverse certification would provide the federal courts of appeals with additional opportunities to develop precedent that could be applied consistently to future litigants.

Third, reverse certification would advance institutional comity between federal and state courts. As discussed above, certification of state law questions is in part motivated by the laborious task imposed on federal courts charged with resolving state law issues. However, the unilateral nature of certification may overvalue the resources of the federal courts and undervalue the resources of the state courts. The overwhelming size of the federal docket has been firmly established,¹⁴⁰ but state courts are faced with significant dockets as well.¹⁴¹ Proposals for reducing the federal docket often involve shifting more burdens onto the state courts.¹⁴² Similarly, unilateral certification allows federal courts to capitalize on state court labor without any analogous tool for states to request the help of the federal courts. There is a risk, then, that certification as currently practiced sends a message to the state courts that their time is less important. On the other hand, state courts retain discretion to reject certified questions, and the success of certification in some circuits implies that state courts are receptive to answering at least some state law questions that arise in federal cases.¹⁴³ And some circuits have made clear that the decision to certify should be motivated by deference and not the difficulty of answering state law questions.¹⁴⁴ It might be more fair, though, for there to be some give and take in the certification process.¹⁴⁵ A bilateral system of

139. See Bradt, *supra* note 29, at 1213 (“When the circuit court opines on a particular question, its opinion would become binding law throughout the circuit . . .”).

140. See generally Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”*: Charting a Path for Federal Judiciary Reform, 108 CALIF. L. REV. 789, 843–69 (2020) (collecting data concerning the growing dockets of the federal courts).

141. See NAT’L CTR. FOR STATE CTS., *supra* note 117 (reporting on case volumes in state courts).

142. See Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 194 (1992) (arguing in favor of allocating more cases to the state courts as an alternative to increasing the size of the federal judiciary); Calabresi, *supra* note 37, at 1297–98 (proposing that a significant number of criminal cases be shifted to state courts to alleviate the federal docket).

143. See *supra* notes 92–95 and accompanying text (noting that several circuits have made use of certification and that states have been largely receptive).

144. *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003).

145. Of course, nearly every state has passed a certification statute despite the fact that federal courts do not accept certified questions. See *supra* notes 87–90 and accompanying text. The unilateral nature of the procedure has not dissuaded states from embracing it.

certification would emphasize that certification is motivated by deference and the efficient allocation of judicial resources, not merely the assistance of one court at the expense of the other.

Relative to these benefits, the costs of a certification procedure can be minimized. There are several costs to consider: certification will add to the workload of the federal courts, create delays for litigants whose issues are certified, and raise possible federal constitutional concerns. The next Subsection will discuss how reverse certification might be structured as to reduce these costs.¹⁴⁶ Following that, Section II.B.3, which discusses *when* reverse certification might be used, will argue that its discretionary use is unlikely to overburden the federal courts or substantially burden litigants.¹⁴⁷ Finally, Part III of this Note will discuss constitutional concerns in greater detail.¹⁴⁸

2. How Would Reverse Certification Work? Establishing a process for reverse certification would likely require legislative action by both the states and Congress. The states would probably need to enact legislation empowering their courts to certify questions, and Congress would likely need to enact a statute allowing the federal courts to receive and answer said questions.¹⁴⁹ The multiplicity of state certification statutes shows that a statute can take many forms. In general, the state statutes specify three elements: (1) which courts can certify questions,¹⁵⁰ (2) which courts can accept certified questions,¹⁵¹ and (3) any other restrictions intended to calibrate the use of certification.¹⁵² A federal statute would need to contemplate these elements as well.

As for which courts would be able to certify, a practical proposal would be to restrict certification to a state's highest court. In some

146. See *infra* Part II.B.2 (discussing how reverse certification might work).

147. See *infra* Part II.B.3 (discussing when reverse certification might be used).

148. See *infra* Part III (arguing that reverse certification would be constitutionally permissible).

149. See Bradt, *supra* note 29, at 1208 n.240 (opining that legislative action on behalf of both the States and Congress would be necessary to implement a reverse certification scheme).

150. See, e.g., N.J. CT. R. 2:12A-1 (specifying that questions may be certified to the Supreme Court of New Jersey only by the United States Court of Appeals for the Third Circuit).

151. See, e.g., WYO. R. APP. P. 11.01 (“The supreme court may answer questions of law certified to it . . .”).

152. See, e.g., W. VA. CODE § 51-1A-3 (2021) (“The Supreme Court of Appeals of West Virginia may answer a question of law certified to it . . . if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, Constitutional provision or statute of this state.”).

cases, this may dilute the benefits of certification, as there would at times be two layers of discretion insulating a federal issue from review in federal court. However, it would be preferable to limit certification to a small number of courts; there would, after all, be courts from fifty different states, and possibly several territories, that would be empowered to certify questions. Restricting the power to certify questions to a state's highest court would ensure that certification remains a relatively solemn affair. Furthermore, it would require a greater consensus of state judges to decide to certify, as courts of last resort typically have the largest panels of any court in a state.¹⁵³ As discussed in Part II.A, it makes the most sense for federal questions to be certified to the courts of appeals. Given that, it is intuitive that a state court would be able to certify questions to the circuit within which it is geographically situated. For instance, the Supreme Court of California could certify questions to the Ninth Circuit, and so on.¹⁵⁴

Certification could be calibrated in other ways as well. A federal statute would likely require that the issue be unresolved and determinative in the case, as many state certification statutes do.¹⁵⁵ It could also require that certified questions arise from a case that fulfills the requirements of Article III standing.¹⁵⁶ The statute could also provide for supplemental briefing and oral argument by the parties, either as an option or a requirement.¹⁵⁷ Congress could also use various tools to limit the use of certification. For example, Congress could set an amount-in-controversy requirement for certified questions.¹⁵⁸ But

153. Yosh Halberstam, *Trial and Error: Decision Reversal and Panel Size in State Courts*, 32 J.L. ECON. & ORG. 94, 98 (2015).

154. That said, there are limited circumstances where it would be beneficial to allow the state courts to certify questions to other circuits as well. It would make sense, for example, to allow high courts from any state to certify a question of patent law to the Federal Circuit.

155. *See supra* note 152; CAL. R. CT. 8.548(a) (“[T]he Supreme Court may decide a question of California law if: (1) The decision could determine the outcome of a matter pending in the requesting court; and (2) There is no controlling precedent.”); FLA. STAT. ANN. § 25.031 (West 2021) (allowing certification only when the state law questions “are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state”).

156. *See infra* Part III.B (discussing the relationship between reverse certification and Article III standing).

157. Supreme Court Rule 19, the rule that enables the circuit courts of appeals to certify questions to the Supreme Court, requires the parties to submit briefs when a question is certified. *See* SUP. CT. R. 19(3) (“When a question is certified . . . the Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed.”).

158. Such a limit might be undesirable, though. The amount in controversy in a litigation is not always a good measure for the complexity or importance of federal questions that may exist.

there is reason to believe that extensive statutory restrictions would not be necessary. Current certification practice suggests that state courts would develop doctrines that guide the decision to certify, and the federal courts would give feedback when accepting or dismissing certified questions.¹⁵⁹ Thus, the courts would likely develop a mutual understanding regarding whether certification is appropriate in each case. Furthermore, the federal courts would be vigilant against any constitutional issues that may prevent the resolution of a particular certified question, such as a lack of Article III standing.

There is an additional question regarding *who* within a circuit would decide to accept or dismiss a certified question. One possibility is that the initial question of whether to accept could be heard by a motions panel in the relevant circuit. If accepted, the certified question would then be sent to a merits panel for resolution of the legal issues. Or the initial inquiry and the merits could be resolved simultaneously. Certified questions could be assigned similar to routine appeals—one three-judge panel could make the decision whether to accept the certified question, and then that same panel would either issue an opinion answering the question or respond with a dismissal.¹⁶⁰

There are other ways certified questions could be reviewed as well. For example, Bradt posits that the circuit's chief judge or an en banc panel could decide whether to accept a question.¹⁶¹ However, each of these alternatives has disadvantages. Leaving the decision to the chief judge of the circuit may give too much discretion to one judge, and it could risk overloading the chief judge's already heavy administrative workload.¹⁶² And leaving decisions to en banc panels might be

Many significant federal questions arise in circumstances where the monetary value of the litigation does not represent what is at stake.

159. See *supra* notes 105–108 and accompanying text (describing certification criteria developed by federal courts); *supra* note 111 (noting cases where state courts provided feedback to federal courts regarding certification).

160. It may be beneficial for a discretionary rejection to be accompanied by a brief opinion detailing the reasons for the rejection. The opinion could help guide state high courts in future decisions to certify. However, the state courts have not always been so helpful in explaining their reasons for rejecting a certified question. See Schneider, *supra* note 70, at 315–16 (“The Michigan Supreme Court, to say the least, is not very receptive to the certified question. Not only does the court refuse to answer most questions, but it generally fails to state the reasons for its refusal.”).

161. Bradt, *supra* note 29, at 1210 n.251. Bradt also proposes using a rotating three-judge panel, which is more akin to my proposal. *Id.*

162. Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 VAND. L. REV. 1, 22–23 (2008) (listing the administrative duties of a chief circuit judge and noting that the duties “often appear significant in their demand on a chief’s time”).

inefficient.¹⁶³ Ultimately, different circuits could establish different procedures for dealing with certified questions that reflect the policy preferences of the circuit, unless Congress specifies a uniform procedure.¹⁶⁴

3. *When Would Reverse Certification Be Utilized?* Even if reverse certification were available as a procedure, there might be a concern that it would not be used. Indeed, one might think that the lack of discussion on the topic evinces a lack of desire. One might also remember, though, that there was not a vocal desire among the federal courts for state certification. Florida's pathbreaking certification statute lay dormant for fifteen years until the U.S. Supreme Court decided to take advantage, and certification is now a common practice.¹⁶⁵ That said, there are plausible concerns regarding the attractiveness of reverse certification. State courts are commonly called upon to answer questions of federal law, and they generally do not have abstention doctrines that counsel deference to federal court decision-making. Moreover, the federal courts have crushing dockets and might not be thrilled to open themselves to more work. The following discussion describes *when* state courts might want to certify questions and argues that federal courts would have incentives to answer. The value of reverse certification, however, does not depend on these instances occurring frequently. Even if used sparingly, reverse certification can be a valuable tool for courts and litigants.

As previously discussed, state courts might want to certify when they are faced with complicated issues of federal law with which they have little interest. If the federal issue is one that infrequently arises in a state court, the court will likely have no precedent, and accordingly, there will be little benefit to building precedent. If the issue will be resolved by the federal courts nine times out of ten, or perhaps more,

163. The number of judges involved in an en banc proceeding can greatly increase the decision-making time and the expenditure of judicial resources. See Irving R. Kaufman, *Do the Costs of the En Banc Proceeding Outweigh Its Advantages?*, 69 JUDICATURE 7, 7 (1985) (describing the costs and delays caused by en banc proceedings).

164. The federal courts of appeals often diverge in administrative practices based on the policy goals of the circuit. See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 368–73 (2011) (finding that nonuniformity in case-management practices among the circuit courts is in part due to differences in priorities among those courts).

165. See *supra* notes 66–69 and accompanying text (describing the historical roots of federal-state certification); *supra* notes 92–99 and accompanying text (presenting data on the frequency of federal-state certification).

why not defer to the federal courts? Indeed, many state courts *do* defer to the federal courts of appeals by citing their decisions as persuasive authority and adopting their interpretations.¹⁶⁶ If the state courts are willing to cite to the federal courts as persuasive authority for resolved federal issues, it is not a stretch to suggest that the state courts would be willing to defer to those same courts for unresolved federal issues. Certification would provide state courts with an opportunity to defer in such circumstances.

Another factor that might motivate certification is the desire to avoid splits of authority. When called upon to resolve a question of federal law, state courts are especially reluctant to disrupt uniformity.¹⁶⁷ In some circumstances, the state court may be convinced that its legal interpretation is correct and will be willing to disagree with the federal court.¹⁶⁸ But when a state court has little interest in the resolution of a niche federal issue, it might prefer to use certification to allow the courts of appeals to battle over the correct interpretation.

Furthermore, as has been alluded to above, the state courts might be motivated to certify in order to save time. State courts have busy dockets,¹⁶⁹ and it might take greater than usual effort to resolve a complex federal issue for which little precedent exists. The state court might find certification to effectively conserve resources in such circumstances. Of course, the court's desire to save time must also be balanced against the value of speedy and efficient justice. Some judges have pointed out that certification can significantly delay litigation.¹⁷⁰ A state court could balance these concerns by looking to the

166. See *supra* note 15 and accompanying text (providing examples of instances in which state courts followed federal decisions).

167. See *State Bank of Cherry v. CGB Enter.*, 984 N.E.2d 449, 464 (Ill. 2013) (“Because we find the goal of developing a uniform body of law to be important, we must accord more deference to federal court interpretations when those interpretations are unanimous.”); *NASDAQ OMX PHLX, Inc. v. PennMont Sec.*, 52 A.3d 296, 303 (Pa. Super. Ct. 2012) (“Whenever possible, Pennsylvania state courts follow the Third Circuit so that litigants do not improperly ‘walk across the street’ to achieve a different result in federal court than would be obtained in state court.”).

168. See, e.g., *State Bank of Cherry*, 984 N.E.2d at 464 (“[W]e may choose not to follow Seventh Circuit or uniform lower federal court precedent if we find that precedent to be wrongly decided because we determine the decision to be without logic or reason.”).

169. *Supra* note 117 and accompanying text.

170. See *Lehman Bros. v. Schein*, 416 U.S. 386, 394 (1974) (Rehnquist, J., concurring) (“[Certification] entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court.”); *Lindenberg v. Jackson Nat’l Life Ins.*, 919 F.3d 992, 994 (6th Cir. 2019) (Clay, J., concurring) (stating that resort to certification in diversity cases “serve[s] little purpose other than to needlessly delay resolution of the ultimate issues in the case”).

complexity of the issues and the length of the litigation up to that point. In some cases, one or both of the parties may prefer that the issues be certified, even if the procedure results in delays. Indeed, sometimes federal courts are moved to certify questions to the state courts by the litigants themselves.¹⁷¹ These litigants likely understand that certification may come with additional delay, but they have determined that it is worthwhile to have their state law claim adjudicated by a state forum. It is plausible that some litigants would have similar motivations in state court and would be willing to accept delays in return for limited access to a federal forum.

There is a further question, though, of whether the federal courts would be willing to accept certified questions from the state courts. The near death of certification to the U.S. Supreme Court demonstrates that courts are reluctant to certify when the receiving court consistently refuses to answer.¹⁷² However, the federal courts of appeals may not be as hesitant to accept certified questions as some might expect. While it is true that the federal courts of appeals are not wanting for more work,¹⁷³ certified questions are likely to present legal issues that the federal courts have a distinct interest in taking on. As has been discussed, certification would only be necessary in the case of unresolved and difficult federal issues, and certified questions would present federal judges with an opportunity to create new precedents for their circuits. Certification, if used efficiently,¹⁷⁴ would provide federal judges with opportunities to answer questions that they are interested in answering: those that involve complex and novel issues of federal law.

171. One study examined the initiating activity leading to certified questions in three federal courts of appeals. Although certification by sua sponte order was more common, each circuit also certified questions on the motion of a party. CERTIFICATION IN THE THIRD, SIXTH, AND NINTH CIRCUITS, *supra* note 92, at 5, 7, 9.

172. See *supra* notes 56–61 and accompanying text (recounting how the Supreme Court’s persistent refusal to hear certified questions led to the death of certification).

173. The judicial commentary on crushing caseloads is extensive. See, e.g., Debra Cassens Weiss, *Judges Tell of Case Delays, High Caseloads as House Committee Considers Expanding Judgeships*, ABA J. (Feb. 25, 2021, 12:08 PM), <https://www.abajournal.com/news/article/judges-tell-of-case-delays-and-high-caseloads-as-house-committee-considers-expanding-judgeships> [<https://perma.cc/RYU7-8YQR>] (providing recent examples of increased caseload volume); Jon O. Newman, *The Current Challenge of Federal Court Reform*, 108 CALIF. L. REV. 905, 910–12 (2020) (discussing the adverse consequences of increased caseload volume).

174. As it probably would be. See *supra* notes 109–112 and accompanying text (explaining that both federal and state courts have used judicial self-regulation in order to use certification more effectively).

Even so, it is difficult to predict how frequently reverse certification would be utilized. But, whatever the case may be, there are few downsides to simply making the tool available. If certification were used only sparingly by the state courts, then the tool might still be worthwhile in that small subset of cases that present complicated and unresolved federal issues. If certification were used too frequently, then the federal courts could react by tightening their criteria for accepting certified questions. The worst-case scenario would be if the federal courts tightened the criteria as to dissuade certification altogether, as the Supreme Court has done.¹⁷⁵ Ultimately, however, the courts of appeals would have at least some incentives to accept and answer certified questions, and it cannot be easily presumed that the federal courts would reject them altogether.

III. THE CONSTITUTIONALITY OF REVERSE CERTIFICATION

Now that the theoretical benefits of reverse certification have been discussed, there remains the critical issue of whether such a procedure could be implemented consistent with the Constitution. The scholars who have considered reverse certification question its consistency with Article III's grant of judicial power.¹⁷⁶ This Section considers the constitutional challenges to reverse certification and ultimately concludes that the procedure would be constitutional. Of course, federal courts would need to scrutinize certified questions to determine whether the federal issue is truly determinative and whether the underlying dispute qualifies as a case or controversy for Article III purposes.¹⁷⁷ But this is nothing new—every case must be scrutinized to

175. See *supra* notes 56–61 and accompanying text (recounting how the Supreme Court's persistent refusal to hear certified questions led to the death of certification); Nielson, *supra* note 45, at 489 (describing how the Supreme Court discouraged the practice of certification through “[c]urt *per curiam* dismissals” (alteration in original) (quoting James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 22 n.87 (1949))).

176. See Selya, *supra* note 36 (“[F]ederal courts would likely resist the fiction that certified questions are not advisory opinions.”); Berman et al., *supra* note 37 (positing that reverse certification would “rais[e] difficult issues under Article III’s prohibition on advisory opinions”).

177. As Article III provides,

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

answer preliminary issues of jurisdiction.¹⁷⁸ A federal certification statute could easily specify that certified questions must arise from underlying cases that satisfy the requirements of Article III, or federal judges could make the inquiry themselves. This Part will first discuss concerns that certification would entail the issuance of advisory opinions. Following that, it will discuss concerns related to Article III standing.

A. *Advisory Opinions*

By and large, the most significant alleged defect of certification procedure is that it would require the federal courts to issue unconstitutional advisory opinions. This concern rests on two elements of certification procedure. First, an answer to a certified question may seem too many steps removed from a “case or controversy,”¹⁷⁹ as it requires the federal courts to answer a discrete question extracted from a broader case. Second, there may be a concern that answers to certified questions are not sufficiently final, as they rely on state courts for implementation.

In response to the first concern, Bradt argues that an answer to a certified question would be akin to a declaratory judgment, not an advisory opinion.¹⁸⁰ Like a proper request for a declaratory judgment, a certified question asks a federal court to resolve “a discrete issue that is in actual, not theoretical, dispute.”¹⁸¹ In the declaratory judgment context, the Supreme Court has stated that a federal court opinion is not an advisory opinion “so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below.”¹⁸² Thus, if state and federal courts appropriately screen certified questions to ensure that adversity, finality, and Article III standing are present, there will

178. *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900) (“On every writ of error or appeal, the first and fundamental question is that of jurisdiction . . . [t]his question the court is bound to ask and answer for itself, even when not otherwise suggested . . .”); *see also* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (acknowledging that some cases “dilute[] the absolute purity of the rule that Article III jurisdiction is always an antecedent question,” but nonetheless reaffirming the rule).

179. *See* *O’Shea v. Littleton*, 414 U.S. 488, 493 (1974) (“The complaint failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy.”).

180. Bradt, *supra* note 29, at 1216.

181. *Id.*

182. *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933).

be “a real, not a hypothetical” controversy for the federal courts to resolve.

Furthermore, the Supreme Court has had the power to answer certified questions virtually from its inception.¹⁸³ This power indicates that the extraction of a discrete question of law from a broader case is not problematic for the federal courts. It seems clear, then, that a certified question can appropriately be answered so long as the underlying case satisfies Article III requirements.

That said, concerns related to finality could persist despite the character of the underlying dispute. The federal courts can screen certified questions to ensure that true adversity and standing are present, but they would rely on the state courts to render final decisions incorporating their answers. One might worry that state courts, who largely see themselves as not bound by lower federal court decisions,¹⁸⁴ could receive an answer to a certified question and simply disregard it. If state courts have discretion to disregard answers to certified questions, then those answers could be nonbinding advisory opinions.¹⁸⁵ This would be odd given that the state court decided to certify the question in the first place. It could be argued that certification constitutes an implicit concession by the state court that the federal court decision will be final and that the federal court can rely on the “good faith” of the state court to follow its answer.¹⁸⁶

Relying on the good faith of state courts is not new. There is at least one other context where this happens: when the Supreme Court remands a case to a state court after delivering an opinion on the merits.¹⁸⁷ Furthermore, Congress could possibly mandate in the

183. See *supra* Part I.A (describing the power of lower federal courts to certify questions to the Supreme Court and its historical background).

184. See, e.g., Frost, *supra* note 15 (describing the differing approaches of state courts toward using lower federal court precedent).

185. See *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) (“Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.”). *But see* *Glidden Co. v. Zdanok*, 370 U.S. 530, 570–71 (1962) (holding that the federal courts could rely on the “good faith” of the United States to honor money judgments rendered by the Court of Claims, even though Congress could hypothetically refuse to make an appropriation to fulfill judgments over a particular amount).

186. *Zdanok*, 370 U.S. at 571.

187. The Supreme Court continues to do this even though the state courts will at times evade the Court’s mandates. See generally Jerry K. Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U. L. REV. 260 (1972) (examining instances where state courts exercised discretion on remand in a manner inconsistent with Supreme Court mandates).

certification statute that answers to certified questions are binding on the state courts despite the fact that they come from a lower federal court.¹⁸⁸ But Congress would not necessarily need to mandate that answers to certified questions are binding as a matter of precedent. All that is needed to avoid a finality issue is that the federal court resolution of the federal issue be determinative between the parties in the case.¹⁸⁹ Indeed, every federal court of appeals recognizes its own power to issue nonprecedential opinions.¹⁹⁰ Although it might enhance reciprocity to give answers to certified questions precedential effect in the state courts, it would not be constitutionally necessary.

B. *Standing*

Standing is closely related to the prohibition of advisory opinions. If a federal court were to answer a certified question, the question would need to arise from an underlying case that qualifies as a “case or controversy” for the purposes of Article III. For an actual controversy to exist, the plaintiff in the underlying case would need to have had Article III standing to bring their original claim.¹⁹¹ This is important to note because many state courts have more relaxed standing requirements than the federal courts.¹⁹² Thus, a federal issue may make its way to a state’s highest court even though it would have never made it through a federal court’s front door. As a result, certification would be inappropriate in state cases presenting federal questions where the

188. It has been persuasively argued that Congress has the power to declare that the decisions of lower federal courts on issues of federal law are binding on the state courts. *See Frost, supra* note 15, at 81–83 (arguing that Congress could require state courts to follow precedent set by the lower federal courts pursuant to the Inferior Tribunals Clause, Art. I, § 8).

189. Finality is achieved when a judicial decision is the “last word” for a “particular case or controversy.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (“Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy.”).

190. *See* Merritt E. McAlister, “Downright Indifference”: *Examining Unpublished Decisions in the Federal Courts of Appeals*, 188 MICH. L. REV. 533, 549–51 (2020) (examining data regarding the use of nonprecedential unpublished opinions in all federal courts of appeals except for the Federal Circuit but noting that unpublished opinions are used in the Federal Circuit as well).

191. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III.”). There may be one small exception to this requirement, but it is doubtful. *See infra* note 193 (discussing the possible exception).

192. *See* Hershkoff, *supra* note 2, at 1836–37 (“State courts, however, are not bound by Article III, and . . . [s]ome state courts issue advisory opinions, grant standing to taxpayers challenging misuse of public funds, and decide important public questions even when federal courts would consider the disputes moot.”).

requisites of Article III standing doctrine are not met.¹⁹³ This is not fatal to reverse certification, but it does restrict its use.

The variations in standing requirements may also impose additional burdens on federal courts answering certified questions, as they would need to be wary of the differing doctrines to conduct their own inquiry. That said, the system would likely exert pressure on the state courts to vet cases to avoid being denied for jurisdictional reasons. Furthermore, a federal certification statute could require state courts to include a statement of standing along with the certified question. Of course, a federal court would always have discretion to deny the certified question after conducting an independent inquiry, but such a requirement could ensure that state courts do some due diligence before certifying a question.

CONCLUSION

This Note paints a modest picture of reverse certification as a policy proposal by establishing that reverse certification would be both practically feasible and normatively attractive. Reverse certification would generate benefits for both courts and litigants and would enhance the symbolic parity of the state and federal courts. In the absence of significant downsides or constitutional concerns, reverse certification is a plausible expansion of an interjurisdictional procedure that has grown significantly in popularity in the past few decades.

This Note does not, however, attempt to establish that Congress would be likely to create such a tool. It is notable, though, that certification of state law questions has gathered inertia, and certification in general will likely remain a common procedure in the federal judicial system. Lastly, while this Note has responded to criticisms against reverse certification, it does not tackle the criticisms of certification in general. This Note does not comprehensively defend certification, but rather argues that certification should be a two-way

193. There may be some limited circumstances, though, where federal courts could answer certified questions even if the plaintiff in the underlying case never had standing to bring the original claim. In *ASARCO Inc. v. Kadish*, the U.S. Supreme Court exercised jurisdiction over a case on appeal from the Supreme Court of Arizona even though the “plaintiffs in the original action had no standing to sue under the principles governing the federal courts.” 490 U.S. 605, 623 (1989). The Court reasoned that “we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review.” *Id.* at 623–24. However, *ASARCO* may not extend to the certification context, as the Court expressly limited its reasoning to “jurisdiction on certiorari,” and specified that the state court judgment must injure the parties who petition the Supreme Court for review. *Id.*

street. In other words, since certification is here to stay, there are good reasons to consider making it reciprocal.