Against Certification

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Abstract

Certification is the process whereby federal courts, confronted by an open question of state law in federal litigation, ask the relevant state high court to decide the state law question. If the state high court chooses to answer, its statement of state law stands as the definitive declaration of the law on the disputed point. The case then returns to the certifying federal court, which resolves any remaining issues, including federal questions, and then issues a mandate. Although a wide range of academic commentators and jurists support certification as an example of respect for state autonomy, this Article shows that in both practice and theory certification does not reflect real comity. Rather, certification is an example of "dual federalism," the view that state and federal law ought to be isolated into separate spheres of jurisprudence. For federal courts to show genuine respect for state law, they should stop treating it as foreign and decide open state law questions without certification.

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Introduction

Once upon a time, two young brothers found themselves under strict instruction to clean up the toys, clothes, books, and general mess scattered all over their shared room. The older brother offered to split the work fifty-fifty, if he could pick which half to do. Because the older brother was bigger (and quicker with his fists), the younger one figured that doing only fifty percent of the work was a better deal than he would get without agreement, so he cheerfully accepted. The older brother picked the top half.

When federal courts ask state courts to decide certified questions, they are modeling the same fraternal chicanery. "Let's split the work fifty-fifty," they propose; "we'll decide the federal questions and you take the state law." And the state courts cheerfully accept, figuring it's a better deal than they could get if push came to shove. In this Article, I argue that certification reflects a theory of federal-state relations—dual federalism—that undermines the role of states in the American constitutional order. Specifically, I argue that federal courts' practice of certification disrespects state courts and diminishes the scope of state autonomy. Certification's many admirers and practitioners suggest that comity toward states justifies the practice, but the conventional wisdom appears misguided upon closer review. On the contrary, interactive federalism, a recently developed alternative theory, better describes how federal courts can relate to state courts in a way that maximizes the benefit states can bring to our democracy.

Since *Erie*[1] required federal courts to apply state common law, federal courts have struggled with how to do so when state law appears indeterminate.[2] Certification is a highly favored method of easing this difficulty.[3] All but two state high courts have been granted, by

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1 Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

2 *See* Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 246 (2006) (noting that interpreting state law can be difficult for a variety of reasons).

3 *See* Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1878–79 (2008) (noting that commentators have shown increased support for "transjurisdictional procedural devices" like certification).

statute or rule, the authority to accept and answer questions of state law when courts of other jurisdictions, most commonly federal courts of appeal, seek an answer.[4] Typically, though not always, the state high court's acceptance of a certified question is conditioned on the answer being dispositive in the federal case.[5] Furthermore, state courts that practice certification maintain the option to decline a certified question.[6] Although various state courts are authorized to accept certified questions from other states' courts, from federal trial courts, or from the U.S. Supreme Court, the most significant interaction is between the U.S. Courts of Appeals and the state courts of last resort.[7] I limit my discussion in this Article to these cases: that is, where the federal circuit courts certify questions and receive answers from the state high courts.[8] The significance of certification in state-federal judicial relations has received renewed scholarly attention recently, but scholars have yet to apply contemporary theories of federalism to the practice in a comprehensive way.

Previous scholarship on certified questions has generally focused on weighing its advantages and drawbacks, overwhelmingly from a federal perspective and mostly favorable to the practice.[9] For exam-

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4 *See* Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 DUKE L.J. 69, 71 n.13 (2008) (noting that only North Carolina and Missouri now lack a certification procedure).

5 *See, e.g.*, 22 N.Y. COMP. CODES R. & REGS. TIT. 22, § 500.27 (2009) (authorizing the New York Court of Appeals to accept "dispositive" certified questions); *see also* FLA. CONST. art. V, § 3(b)(6) (allowing acceptance of "determinative" questions of law); OR. REV. STAT. § 28.200 (2007) (same); WIS. STAT. § 821.01 (2007–08) (same).

6 *See, e.g.*, Yesil v. Reno, 705 N.E.2d 655, 656 (N.Y. 1998) (rejecting certified questions from the U.S. Court of Appeals for the Second Circuit where the answers would not necessarily have been determinative of the federal litigation).

7 If, as I argue in this Article, certification from federal circuit courts expresses insufficient respect for state high courts, then *a fortiori* certification from even lower federal courts would similarly express insufficient respect.

8 No federal statute authorizes federal courts to certify questions to state courts. Instead, their power to do so comes from judicial policy. *See* Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960) (praising certification's use by federal courts and recognizing a Florida statute as sufficient authority to undertake the practice).

9 *See, e.g.*, Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 RUTGERS L.J. 847, 848–49 (2007) (arguing for more frequent certification as a stronger protection of federal jurisdiction than abstention); Eisenberg, *supra* note 4, at 72 (arguing that North Carolina should adopt a certification procedure); Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 384–85 (2000) (noting the support for certification by the National Conference of Commissioners on Uniform State Laws, the American Law Institute, the American Bar Association, the National Conference on State-Federal Judicial Relationships, and the United States Judicial Conference); *see also* Jerome I. Braun, *A Certification Rule for California*, 36 SANTA CLARA L. REV. 935, 935–36 (1996) (argu-

ple, one commonly cited advantage of certification is that it offers less delay and expense than federal court abstention,[10] for both the parties and the courts.[11] Because certification permits the litigants to short-circuit the ordinary state-court hierarchy by going directly to the state high court, it can save years of time and thousands of dollars in attorneys' fees.[12] Certification, contrasted with abstention, also reduces the financial burden for the state courts, because only one court, the state's highest, would have to consider the issue. Despite the lower cost,[13] certification promotes the same policies underlying abstention while still protecting federal-court jurisdiction over state law claims. As one scholar has noted, certification "was developed for and fits the needs of the federal court system."[14] If a federal forum for diversity actions is a sound policy choice because of the potential for bias against out-of-state litigants in state courts, then certification is superior to abstention for protecting the federal interest at stake.[15]

Another common argument for certification avoids the risk that the federal court might get the law "wrong," by deciding the law in a way differently from how its authoritative interpreter would.[16] Re-

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ing for certification and proposing a rule for California courts, such a rule being enacted in 2003); Guido Calabresi, Lecture, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301 (2003) (advocating routine certification); Karen LeCraft Henderson, *Certification: (Over)due Deference?*, 63 GEO. WASH. L. REV. 637, 637 (1995) (arguing for greatly increased use of certification).

10 *See infra* note 62.

11 *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) (stating that certification offers worthy benefits of reduced cost and delay compared to abstention); Lehman Bros. v. Schein, 416 U.S. 386, 390–91 (1974) (declaring that certification saves time and money). Oddly, the U.S. Supreme Court meant this comment as a criticism of the Ninth Circuit for failure to certify a question, but that court had simply decided the state-law question; abstention was not on the table. *See Arizonans for Official English*, 520 U.S. at 77. *But see* Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 725–27 (1969) (arguing that the delay caused by certification—contrasted with direct federal-court decisionmaking—is the most persuasive argument *against* certification).

12 *See* Eisenberg, *supra* note 4, at 73–74 (noting that certification avoids the delay and expense of abstention); Challener, *supra* note 9, at 865 ("[Certification] is typically both faster and less expensive than granting an abstention-based stay."). *But see Clay*, 363 U.S. at 228 (Douglas, J., dissenting) (arguing that, because many litigants "can hardly afford one lawsuit, let alone two," certification "is a sure way of defeating the ends of justice").

13 Certification to state high courts typically includes full briefing and oral argument, raising its expense.

14 John A. Scanelli, Note, *The Case for Certification*, 12 WM. & MARY L. REV. 627, 645 (1971).

15 *See* Nash, *supra* note 3, at 1901 (arguing that certification permits federal courts greater control over the litigation than abstention does, thereby allowing less room for state-court bias).

16 *See* Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1240–41 (2004) (arguing that the risk of a

gardless of any other effects, at least the party that was denied its state law victory is harmed by a judgment that later proves contrary to the state high court's final holding.[17] Furthermore, federal judges have expressed "embarrassment" when their predictions of unsettled state law later turn out to be mistaken.[18] Without certification or abstention, there is no avenue for state high court review of a potentially erroneous federal decision based on state law.[19] Also, commentators have noted that certification avoids the risk of a federal court's possibly mistaken view of state law influencing the development of that law by opining before the state high court has had a chance to address the question.[20] This influence might be seen as overbearing, given that state courts have a clear entitlement to shape the contours of their own law in their own fashion.[21]

Furthermore, variation between state and federal interpretations of state law open opportunities for forum shopping,[22] the original flaw in state and federal concurrent jurisdiction that *Erie* meant to discourage.[23] Plaintiffs can choose where to file, and defendants can choose

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federal court deciding state law differently from the state high court "is sufficiently high that, absent a strong countervailing interest, there is no reason for federal courts to decide novel state law questions").

17 *See* Kaye & Weissman, *supra* note 9, at 378 (arguing that federal litigants can be "frustrated" when they get a federal decision on state law that the state high court later repudiates).

18 *See, e.g.*, John R. Brown, *Certification—Federalism in Action*, 7 CUMB. L. REV. 455, 455 (1977) (noting, as the then-Chief Judge of the U.S. Court of Appeals for the Fifth Circuit, that "[i]t has been awkward—and, to some, not a little embarrassing—when our first guess turns out to be wrong and the state court makes the second and last guess by reversing our holding").

19 *See* Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-*Erie *World*, 46 WM. & MARY L. REV. 1399, 1427–28 (2005) (noting that a lack of hierarchical accountability is one of the objections to federal-court interpretation of state law).

20 *See* Glassman, *supra* note 2, at 271–73 (reviewing literature showing that federal courts are heavily cited by state courts, even on the meaning of state law).

21 *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1681 (1992) (arguing that federal interpretations of state law "may even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent"); *see also* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1494 (1997) (arguing that federal-court disposition of state-law claims subjects federal litigants to an unfounded exercise of state lawmaking power).

22 *See* Calabresi, *supra* note 9, at 1300 (arguing that "federal courts often get state law wrong" and that this leads to forum shopping as litigants strategically attempt to benefit from federal courts' misapprehension of state law).

23 *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (listing the reduction of forum shopping as a primary motivation for the Court's holding in *Erie*); *cf.* Philip B. Kurland, *Mr. Justice Frankfurter, the Supreme Court, and the* Erie *Doctrine in Diversity Cases*, 67 YALE L.J. 187, 212 (1957) (noting that if *Erie* requires federal courts to decide state-law questions strictly on the basis of existing law without predicting how the state high court would rule, inconsistency and forum shopping would ensue).

whether to remove, based on strategic considerations of how the lower state and federal courts have treated the open question of state law in the case.[24] Certification's advocates contend that the procedure short-circuits this invidious forum shopping by allowing the state high court to declare the content of state law no matter in which forum the lawsuit started.[25]

These common arguments for certification form the conventional wisdom on the topic. One commentator has gone as far as to suggest that questioning the benefits of certification is "politically incorrect."[26] This Article seeks to unsettle this seeming consensus. Simultaneously, legal scholarship in general is devoting renewed attention to questions of institutional competence to decide law, rather than simply the content of law.[27] A renewed certification debate contributes to this important trend.[28]

This Article questions the commonly accepted, and most powerful, rationale for certification: that it represents respect for state sovereignty. Instead, certification typically aggrandizes the power of federal courts at the expense of the states. Toward that end, in Part I of this Article, I identify some responses to the standard arguments for and against certification. In Part II, I conduct a close reading of the "comity" argument for certification. I conclude that the rhetoric of certification's advocates does not indicate real respect for state autonomy. Next, in Part III, I discuss the "passive virtues" theory of judicial minimalism and apply it to certification. This analysis shows that federal courts favor judicial minimalism for themselves, but use certification to encourage judicial activism among the state courts. On balance, federal-court interpretation of unsettled state law is more

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24 *See* Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999, 1019 (1985) (observing that federal-court resolution of state-law issues could promote parties' strategic filing to take advantage of the federal view of state law).

25 *See, e.g.*, Geri J. Yonover, *A Kinder, Gentler* Erie*: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 350 (1994) (observing that many supporters of certification argue that lack of uniformity between state and federal interpretations of state law can lead to interference with state sovereignty).

26 Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .* , 29 SUFFOLK U. L. REV. 677, 678 (1995).

27 *See* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 727 (2008) ("Public law scholarship is increasingly turning from questions about the content of law to questions about which institution should determine the content of law—that is, to 'deciding who decides.'").

28 *See, e.g.*, Daniel Ross Kahan, *The Administrative State(s): Delaware's New Administrative Certification Procedure*, J. BUS. & SEC. L. (forthcoming), *available at* http://ssrn.com/abstract=1431611 (discussing the significance of a new procedure for federal-agency certification to state high courts).

consistent with the virtues of judicial minimalism than certification is. In Part IV, I apply leading theories of federalism to certification, contrasting the "dual federalism" model with the "interactive" or "polyphonic" model. Nearly all certification commentary and jurisprudence, even that ultimately inclined against the practice, exhibits a dual-federalism approach to certification. This approach treats allocation of each sovereign's law interpretation to its own forum as best expressing the federalist norms of comity and deference to state autonomy. I argue that interactive federalism is the better approach to protect state autonomy, and that certification undermines this process. I conclude with a description of some normative doctrinal implications of the prior theoretical analysis. Prescriptively, I suggest reducing certification practice nearly to the point of elimination.

I. Conventional Arguments in Favor of Certification and Some Responses

In this Part, before reaching the broader questions of how certification relates to comity, judicial minimalism, and theories of federalism, I review a few of the standard reasons commentators give in support of certification and some responses in relation to how those arguments bear on the question of federal-state relations.

The initial argument that certification reduces courts' and litigants' expense seems not to affect the balance of respect between state and federal courts. This is because certification is more costly (to litigants and the courts) than a direct federal resolution of the state law matter,[29] but is less costly than abstention. If certification's advocates are correct in arguing that federal courts show respect to states by asking state high courts to resolve state law issues, certification is a cheaper method of expressing this respect than abstention. On the other hand, if the central argument of this Article is correct and federal courts best express respect for states by resolving state law issues themselves, then both certification and abstention generally undermine those goals. The matter of expense does little to answer the ultimate question of state-federal comity.

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[29] *Cf.* Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC, 519 F.3d 466, 472 (8th Cir. 2008) (declining to certify a question of state law because the procedural posture—after the district court decision and briefing and oral argument in the appellate court—suggested that further delay in reaching a decision would be "undue"). Apparently, the Eighth Circuit practice is to insist on certification from the federal district courts, leaving appellate disposition of the case entirely in its own hands. *See id.*

In contrast, the argument that certification saves federal courts from reaching conclusions of state law that later fail upon state high-court consideration does affect the federal courts' purported expressions of comity. Federal courts' "wrong" interpretation of state law undeniably works to the detriment of one of the parties.[30] An answer to a certified question would clearly solve that problem.[31] But federal litigants are no more harmed by a view of state law that later turns out to be different than are litigants in the lower state courts confronted with the same circumstance.[32] And state high courts are not generally in the business of error correction, any more than is the U.S. Supreme Court.[33] The notion that a state high court should be more solicitous of the state-law rights of federal litigants than it would be of state litigants need only to be stated to reveal its federal-favoring slant. In fact, there is less reason for a state high court to accept a certified question in these circumstances than there is reason for the high court to accept review of state lower-court decisions to correct error. If the federal appellate court is mistaken about state law, its decision is precedential only over federal courts, and only to the extent federal law requires.[34] In contrast, a state intermediate appellate court's[35] application of the law to particular facts, even if rejected in subsequent litigation, can still be a precedential statement of state law (as to lower

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30 The idea that any court considering an unsettled or novel question can get the answer "wrong" suggests a profoundly antipositivist jurisprudence. If the law is not settled, then there is no "right" answer blowing in the wind for the federal court to apply, and *Erie* does not hold otherwise. *See* Glassman, *supra* note 2, at 244 (arguing that *Erie* instructs federal courts to "discover[ ]" state law that does not really exist, and so is in some ways a return to the idea of *Swift v. Tyson*, 42 U.S. 1 (1842), that the common law exists independently of the courts); LeBel, *supra* note 24, at 1029–30 (explaining that calling federal court analysis of an open state law question "error" is inaccurate because the decision does not conflict with any authoritative holding at the time it issues). *But see* Schapiro, *supra* note 19, at 1427–28 (arguing a distinction between the "authoritative" interpretation of state law by that state's high court and an objectively "correct" interpretation).

31 *See* Scanelli, *supra* note 14, at 638 (noting that certification would impose uniformity on state and federal dispositions of otherwise indeterminate state law).

32 *See* Selya, *supra* note 26, at 690 (noting that there is no functional difference between a federal court and a lower state court reaching a holding that is later rejected by the state high court in separate litigation); *see also* Glassman, *supra* note 2, at 286–87 (same); LeBel, *supra*, note 24, at 1035–36 (same).

33 *See, e.g.*, N.Y. COMP. CODES R. & REGS. TIT. 22, § 500.22 (b)(4) (2009) (requiring that movants for leave to appeal to the state high court show that the appeal concerns a matter of statewide importance). Of course, in states without intermediate appellate courts, the state high courts do typically engage in error correction because they offer the only available appeal.

34 *See* Clark, *supra*, note 21, at 1494 (conceding that there is no serious claim that federal court interpretation of state law is really "*state* law" because the federal decision does not bind any state courts or institutions in future cases).

35 In states without intermediate appellate courts, my argument here does not apply.

state courts and, to some extent, to federal courts) until the high court speaks.

Furthermore, the argument that certification is laudable for saving federal appellate courts from the "embarrassment" of getting state law "wrong" also fails. As one scholar has remarked with a clever bit of paralipsis, "[a]n unsympathetic observer [of embarrassed federal judges] might simply disparage the ego demands of such sensitive federal judges, or even suggest that the experience might occasionally be healthy for some occupants of the federal bench."[36] If federal circuit courts and state high courts are "two households, both alike in dignity"[37]—i.e., if the two institutions are equal in status as to state law interpretation—then the state court's later rejection of a doctrine announced in the federal forum is, indeed, a bit of an affront. Polite peers do not publicly display the unbalanced power one has over the other. If, in contrast, the federal courts sitting in diversity really did think of themselves as "inferior" courts for the sake of state law development,[38] with the state high court as their supervising authority, there would be no more "embarrassment" about having a federal opinion overruled when the same issue percolated up to the state court in later litigation than there is now when the U.S. Supreme Court rejects a lower court interpretation of unsettled federal law.[39]

Nor does a decision not to certify logically subvert the state courts' ability to craft their own law through overbearing federal influence. Although state courts often do rely on persuasive federal precedent in construing and constructing their own law, they have also proven an intermittent willingness to break from federal decisions they disfavor.[40] To the extent state courts are cowed by federal decisions into reaching a state law result they otherwise would not, certification does offer a chance to write on a clean slate before the federal courts can influence the outcome. The argument's presumption of state court pliability, however, hardly expresses the sort of respect for

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36 LeBel, *supra* note 24, at 1031 (footnote omitted).

37 WILLIAM SHAKESPEARE, ROMEO AND JULIET act 1, prologue.

38 *See* Calabresi, *supra* note 9, at 1301 (arguing that federal appellate courts should act as equivalents to intermediate state courts when they interpret state law).

39 *Cf.* Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313, 351–53 (1999) (criticizing, as a federal judge, the U.S. Supreme Court over its explicit difference of opinion with the Ninth Circuit and expressing no embarrassment about the breach whatsoever).

40 *See, e.g.*, Sloviter, *supra* note 21, at 1679–80 & nn.48–51 (collecting cases where state high courts rejected the U.S. Court of Appeals for the Third Circuit's interpretations of state law).

state courts' control over state law that certification purportedly conveys. Indeed, some state high courts might prefer to have a federal court's ruminations on a matter before deciding it, much as high courts often prefer to let an issue percolate before reviewing it.[41]

A final common argument for certification—avoidance of forum-shopping opportunities—also falters upon closer examination. First, and most plainly, the mere existence of diversity jurisdiction in the federal courts necessarily means at least some opportunity for forum shopping (to take advantage of federal jury-selection rules, or federal judges' perceived quality or independence, or federal docket speeds, etc.). In fact, Congress *intended* a difference between state and federal court resolution of claims in diversity, so as to protect out-of-state litigants from state-court bias.[42] In addition, the opportunity for inconsistency exists only until the state high court decides the relevant question, because federal courts decline to decide their jurisdiction over state-law questions only where the state law is unclear.[43] Furthermore, state high courts seem to accept certified questions more easily than they accept petitions for appeal from the lower state courts,[44] which (paradoxically) suggests that litigants presenting open and important questions of state law who want the state high court to resolve their claim might be better off filing first in federal court, at least if federal courts are strongly inclined to certify questions of that sort. In any event, litigants who want a federal jury over a state law jury, or vice versa, will be unaffected by whether the ultimate legal questions are certified or not. Finally, even if certification does lead to an incremental decrease in undesirable forum shopping, state high courts do not (and should not) always value the uniformity of state

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41 *See* Michael C. Dorf, Foreword, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 65 (1998) (noting the U.S. Supreme Court's practice of allowing issues to be decided in several different lower-court cases before accepting a case for final decision).

42 *See* Craig Green, *Repressing* Erie*'s Myth*, 96 CAL. L. REV. 595, 604 (2008) (explaining how diverse litigants can choose between state and federal courts and how this creates forum-shopping opportunities).

43 *See* Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971) (holding that federal courts should exercise jurisdiction to interpret state law where that law lacks any ambiguity); Abrams v. W. Va. Racing Comm'n, 263 S.E.2d 103, 107–08 (W. Va. 1980) (declining to answer a certified question where state law was clear).

44 *See, e.g.*, Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 737 (Fla. 1961) (accepting certification of an insurance-law question from the Court of Appeals for the Fifth Circuit even in the absence of regulations required by statute to authorize the state court to accept certified questions).

law across state and federal courts over other concerns, such as concentrating on the best resolution to their own cases.[45]

In sum, these leading arguments in favor of certification fail to establish that certification is, indeed, more respectful to state courts than a direct federal resolution of the question. In the next Part, I discuss a fourth argument: that certification is justified as an expression of comity between state and federal courts.

II. Comity

In this Part I discuss one of the most commonly cited arguments for certification: that it reflects respect or comity toward state courts.[46] This argument flows from the (assumed) premise that directing state law questions to state forums enhances the power and prestige of the state courts. In a sense, this argument that certifying expresses comity toward state courts begs the question; whether certification does express respect or not is highly contestable and cannot be determined by axiom or raw intuition.[47]

The most obvious problem with arguing that certification might *not* show respect for states is that state courts routinely accept certified questions. If the state judges thought they were being disrespected, we would not expect to see such a welcoming attitude toward the federal questions. One response—that certification might interfere with the internal structure of state governments by favoring the state high courts at the expense of other state institutions—might explain why state judges are willing to accept certified questions. One of the state institutions that certification shortchanges is the state trial judiciary, because certification jumps directly over those judges.[48] There is even some evidence in cases like Oregon's *Western Helicopter Services, Inc.*[49] for the principle that state high courts accept certified questions more readily than they would petitions for direct review from lower state courts. There, the state court acknowledged that out

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45 *See* Yonover, *supra* note 25, at 351–52 (noting that state high courts sometimes reject certified questions, which suggests that they might have priorities other than achieving uniformity with the federal courts).

46 *See, e.g.*, Henderson, *supra* note 9, at 637 (arguing that federal courts should show respect to state courts by certifying questions of state law as much as possible).

47 *Contra* Kaye & Weissman, *supra* note 9, at 418–19 (arguing that certification's success is indisputable).

48 Notably, if one believes that the federal district courts provide better justice than state trial courts, this bypass might be preferable. My question here is not whether state courts are good or bad, but rather whether certification promotes respect or disdain for them.

49 W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627 (Or. 1991).

of "comity" it would sometimes accept certified questions from federal court even if the court would not have considered the case leave-worthy on appeal from a lower state court.[50] Similarly, the Louisiana Supreme Court in *Leiter Minerals*[51] gave the U.S. Supreme Court an answer to define ambiguous state law, even though the Louisiana court acknowledged that the answer would be advisory; the state court apparently felt that "out of respect for, and as a courtesy to," the federal court, too fine an examination of its own jurisdiction to issue the advice would be inappropriate.[52] The judicial temperament that causes state courts to exhibit this deference to federal courts is another possible explanation for why certification succeeds among state judges.

For their part, federal courts seem to expect to be treated more favorably than the lower state courts when the state high courts decide which cases to accept. Judge Calabresi confesses that "when the New York Court of Appeals declines certification, some federal judges walk around saying, 'what did they *do* to us? After all, *we* are the Second Circuit, they should listen to us!"[53] Judge Kozinski has written that a state's refusal to answer a certified question is equivalent to telling the federal judges "[they]'re out to lunch," and assumed that the state courts "would surely grant review if at all possible."[54] It seems a commonplace that federal egos will be bruised if states don't offer federal courts a jump to the front of the line. After one state court refused to accept a certified question from the Second Circuit where its answer would not dispose of all the issues in the federal case, the circuit court published a response explicitly rejecting the state court's interpretation of its own rule requiring that certified answers be determinative; apparently the federal judges know best, after all.[55] Together, these comments reveal that federal judges view certification as about more than just whatever legal question is at stake; the judges

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50 *Id.* at 633 ("Because of considerations of comity . . . [w]e may, on occasion, accept certification of questions that, were they tendered to us in a traditional petition for review, we would decline . . . .").

51 Leiter Minerals, Inc. v. Cal. Co., 132 So. 2d 845 (La. 1961).

52 *Id.* at 849–50.

53 Calabresi, *supra* note 9, at 1302.

54 Kremen v. Cohen, 325 F.3d 1035, 1052 (9th Cir. 2003) (Kozinski, J., dissenting) (arguing that the circuit court should not put the state court in the position of having to decline a certified question).

55 *See* Travelers Ins. Co. v. Carpenter, 411 F.3d 323, 327 n.3 (2d Cir. 2005) (construing Vermont Rule of Appellate Procedure 14(a) in response to the denial of a certified question by the state high court).

take certification personally as an expression of the relationship between state and federal courts.

In addition to the assumption that state courts will accept certified questions as a mark of respect for federal courts, the federal-court rhetoric surrounding certification further suggests that the procedure does not reflect respect for state courts or federal humility. Instead, pro-certification language typically asserts a sort of parallel equality between federal intermediate appellate courts and state high courts.[56] A fine example, from the Fifth Circuit, is favorably quoted in a commentator's article advocating for certification.[57] There, the federal court received a state high court's answer to certified questions and responded:

> First, to the Justices of the Supreme Court of Florida we wish to express publicly and with deep sincerity our appreciation for their answer to the question which we certified to that Court. That answer has saved this Court, through the writer as its organ, from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice. The Supreme Court of Florida has been a very real help in the administration of justice.[58]

No matter how deep the federal court's "sincerity" in its gratitude, the quoted passage is hardly the tone an intermediate court would normally adopt toward a high court. To realize how patronizing this passage is, one need only imagine the same outpouring of affection in response to a decision of the U.S. Supreme Court "sav[ing]" the Fifth Circuit, and the writer as its organ, from committing a serious error as to the law of the United States. Was the federal court *surprised* that the state high court was a "very real help" to it? Was the state court's purpose in declaring the state law through its certification answer to serve as "help" to the federal court? Indeed, then-Justice Rehnquist has described the state courts' role in certification as being an aid to

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56 *See, e.g.*, Calabresi, *supra* note 9, at 1299 (suggesting a procedure where a state court, if confronted by a difficult question of federal law, could certify the federal question to "the federal court of appeals"). Note that this would not provide one of the strongest purported benefits of certification of state-law questions, which is to obtain an authoritative declaration of the relevant law. Indeed, there already exists a process where state courts can obtain a definitive answer about the content of federal law from an authoritative federal court: the certiorari jurisdiction of the U.S. Supreme Court.

57 *See* Braun, *supra* note 9, at 937–38.

58 Green v. Am. Tobacco Co., 325 F.2d 673, 674 (5th Cir. 1963) (internal citations omitted).

the federal courts; in his view, certification is less about federalism and more like "researching a point of state law."[59]

The stark condescension inherent in the assumption that federal intermediate courts and state high courts are equal counterparts as to the interpretation of *state* law undermines the view that certification shows respect to state courts. If the federal and state judiciaries are to be treated as parallel, the U.S. Supreme Court (which has final authority over federal law) is logically the only analog to state high courts (which have final authority over state law).[60] While commentators generally have not made the parallel between circuit courts and state high courts as explicitly as the most famous judicial proponent of certification has,[61] the concept endures in the foundation of pro-certification rationales.

The types of cases commonly certified illustrate what kind of "equality" federal courts have in mind when allocating cases to their state colleagues. Given certification's close connection with *Pullman* abstention,[62] one might expect the bulk of certified questions to involve the construction of ambiguous state statutes facing federal constitutional challenges. Perhaps litigation over the conduct of state agencies or officials, where federal court intervention would be most likely to infringe the dignity of the state, would also be a predictable share of the certification docket.[63] Instead, federal courts typically

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59 Lehman Bros. v. Schein, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring); *see also* Challener, *supra* note 9, at 849 ("Certification allows a federal court, in effect, to research a question of state law . . . .").

60 Federal courts of appeals do have statutory authorization to certify questions of (federal) law to the federal high court. *See* 28 U.S.C. § 1254(2) (2006) (authorizing federal courts of appeals to certify questions of law to the U.S. Supreme Court). If this statute were used with anything approaching the frequency of certification to state high courts, that would be a strong indication that the circuit judges think of certification as a deferential procedure. Instead, the § 1254(2) procedure is almost never used, possibly suggesting that judges are not comfortable with it. *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1710–12 (2000) (calling certification from federal appellate courts to the U.S. Supreme Court a "dead letter"). Furthermore, after § 1254 certification, the federal Supreme Court can choose to resolve the entire case, unlike state high courts. *See* 28 U.S.C. § 1254(2); SUP. CT. R. 19(2) (authorizing the Supreme Court to decide the "entire matter in controversy" upon accepting certification).

61 *See* Calabresi, *supra* note 9, at 1299.

62 In *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), the Supreme Court formulated the abstention doctrine, under which federal courts should refrain from hearing a case that "touches a sensitive area of [state] social policy," to first allow state courts the chance to address those issues. *Id.* at 498. The federal court can retain jurisdiction to hear the case, however, if the state court does not properly resolve the matter. *Id.* at 501–02.

63 *See* Glassman, *supra* note 2, at 254–55 (arguing that "political hot-button issue[s]" are more appropriate for certification that garden-variety technical questions).

certify questions in diversity cases, where only private law is at stake.[64] Concededly, private law has an important effect on a state's economy and consequently can engage state political forces, and I do not intend anything I say here to suggest the contrary. Nevertheless, if federal courts were to "guess wrong" about the allocation of rights and obligations of private parties, the state itself—its officials, institutions, and dignity—would not seem to be affronted. In contrast, a federal court misinterpretation of state public law can directly interfere with the operations of state government, and thus with state autonomy. More telling than whether private law decisions actually are important to state policy or not, however, is the federal judges' view that these cases are not important.[65]

For example, insurance questions seem to especially befuddle the federal courts,[66] despite those courts' confidence at handling even the most nuanced questions of important federal policy. In contrast, the unsettled questions of state law that state high courts answer in advisory opinions often include weighty topics of state constitutional law like the separation of powers, state-municipal conflicts (home rule), and even the legality of state legislative procedures.[67] To check the types of cases that get certified, I surveyed certification opinions from federal circuit courts for the year ending on September 24, 2008; I found twenty cases within the sample.[68] Of these twenty, just three

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64 *See, e.g.*, Brown, *supra* note 18, at 459–60 (citing a case concerning the application of a state statute of limitations and workers' compensation law to a tort action for wrongful death as an example of how successful certification can be); Sloviter, *supra* note 21, at 1677–79 (noting that typical questions of unsettled state law in federal court arise in areas including "products liability, common law duties of care, defamation, the availability of insurance coverage," and other private law matters) (footnotes omitted).

65 *See infra* note 79 and accompanying text.

66 *See, e.g.*, Boston Gas Co. v. Century Indem. Co., 529 F.3d 8, 15 (1st Cir. 2008) (certifying unsettled questions of insurance law); *see also* Henderson, *supra* note 9, at 638 (noting that the D.C. Court of Appeals has accepted certified questions on topics "including tort, insurance, and criminal law").

67 *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1848–50 (2001) (describing the topics commonly covered by state advisory opinions issued to inquiring state officials).

68 I searched LexisNexis's "U.S. Courts of Appeals Cases, Combined" database for "certif! /s question andnot (certificate or class certification) and date geq (09/24/2007) and leq (09/24/2008)." This search is overinclusive and underinclusive. It yielded a total of 193 results, but only 20 involve certification to state high courts, with the other 173 consisting primarily of intra-federal cases like interlocutory or pro se prisoner-instigated appeals from federal district courts, or else citations to questions certified outside of the specified time frame. I reviewed and excised these irrelevant cases. The search is (potentially) underinclusive because it excluded any certified questions that happened to arise in the context of class-action appeals, but I expect that the overwhelming majority of all cases certified in this time period have appeared in my results.

presented any question of state constitutional law.[69] Only two cases were certified to provide state high courts with a chance to find a narrowing construction of state laws otherwise subject to federal constitutional challenge in the federal courts.[70] Three more cases arguably affected state government, in that the defendants were municipal agencies (though one[71] of those three centered on questions of private law, where a holding would apply equally to any private party).[72] In one case, the court carrying out federal collateral review of a state-court criminal conviction saw fit to ask the same state judiciary that had previously approved the conviction a question of state procedure that would be dispositive in the federal review.[73]

The remaining eleven cases did not implicate state governmental structures, controversial questions of state policy, or delicate balancing of individual rights against the state. Instead, the state courts were called upon merely to adjust the rights between private parties. Five of these eleven certified cases can be roughly categorized as tort or comparable private law.[74] The final six cases, comprising the largest

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69 *See* Moore v. King County Fire Prot. Dist. No. 26, 545 F.3d 761, 764 (9th Cir. 2008) (whether a Washington state statute retroactively expanding liability for disability discrimination violated state constitutional separation of powers, while a similar challenge was already pending at the state supreme court); Fla. Ass'n of Prof. Lobbyists, Inc. v. Div. of Leg. Info. Servs., 525 F.3d 1073, 1077 (11th Cir. 2008) (whether restrictions on lobbying violated the Florida Constitution); Jackson-Shaw Co. v. Jacksonville Aviation Auth., 508 F.3d 653, 658 (11th Cir. 2007) (Florida state constitutional challenge to joint venture between public authority and a private company).

70 *See* Planned Parenthood Cincinnati Region v. Strickland, 531 F.3d 406, 412 (6th Cir. 2008) (whether an Ohio statutory restriction on the timing of abortions applied to the drug RU-486); Kan. Judicial Review v. Stout, 519 F.3d 1107, 1111 (10th Cir. 2008) (instead of *Pullman* abstention, certifying interpretation of judicial canons promulgated by the Kansas Supreme Court limiting judicial campaign activities).

71 *See* Amaker v. King County, 540 F.3d 1012, 1013, 1019 (9th Cir. 2008) (certifying whether decedent's sister, not next-of-kin, had standing to bring a tortious-interference-with-a-corpse claim where decedent's organs were donated without family consent).

72 The other two cases are *Fuentes v. Board of Education*, 540 F.3d 145 (2d Cir. 2008) (considering whether non-custodial divorced parent can make educational decisions under New York state law, thereby possessing standing under federal education statute), and *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 508 F.3d 897, 897 (9th Cir. 2007) (asking whether California law allows municipalities to enact zoning restrictions on telephone-utility placement on aesthetic grounds).

73 *See* Chaffer v. Prosper, 542 F.3d 662, 663 (9th Cir. 2008) (considering the timeliness of a California state habeas petition).

74 *See* Tammi v. Porsche Cars N. Am., Inc., 536 F.3d 702, 713–14 (7th Cir. 2008) (scope of damages under Wisconsin lemon law, where consumer opted to purchase the lemon at conclusion of lease period); MAC East, LLC v. Shoney's, 535 F.3d 1293, 1294, 1297 (11th Cir. 2008) (whether, in a commercial lease authorizing a sublease in the "sole discretion" of the lessor, a reasonableness standard applied to limit discretion under Alabama law); Official Comm. of Unsecured Creditors of Allegheny Health, Ed. and Research Found. v. PriceWaterhouseCoopers,

category under the total twenty, raise questions of insurance law.[75] Amazingly, one of the insurance cases that the Fifth Circuit felt was important enough to be conclusively and authoritatively determined by the state high court was not important enough to garner a published, precedential decision from the federal court itself.[76]

Beyond my own research, an empirical study of certification practices revealed that "federal courts may use certification as a means to impress state courts into service on the more tedious legal issues that come before them."[77] An application of Brainerd Currie's interest analysis from conflict-of-law theory suggests that there is no true conflict between any federal resolution of an unsettled state-law issue and state interests.[78] Finally, lest there be any doubt about the significance and desirability of the law issues commonly certified, a federal judge once openly referred to the state common law questions arising in diversity cases as some of the "dullest" that federal judges must con-

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LLP, No. 07-1397, 2008 U.S. App. LEXIS 18823, at *19 (3d Cir. July 1, 2008) (whether under Pennsylvania law a corporation in bankruptcy is barred from recovering on tort claims against its accountant where corporate officers conspired to defraud the accountants); FTC v. Olmstead, 528 F.3d 1310, 1314 (11th Cir. 2008) (duty of judgment-debtor in Florida to surrender interest in single-member limited-liability corporation); Pino v. United States, 507 F.3d 1233, 1238 (10th Cir. 2007) (whether Oklahoma recognizes a cause of action for the wrongful death of a nonviable fetus).

75 *See* Boston Gas Co. v. Century Indem. Co., 529 F.3d 8, 23–24 (1st Cir. 2008) (insurance allocation dispute under Massachusetts law between joint and several coverage or pro rata allocation); Cascade Health Solutions v. Peacehealth, 515 F.3d 883, 889 (9th Cir. 2008) (whether price discrimination in pursuit of insurance reimbursements by hospitals violated Oregon antitrust law); Cornhusker Cas. Ins. Co. v. Kachman, 514 F.3d 977, 979 (9th Cir. 2008) (whether there exists an actual notice requirement under Washington law for insurance carrier denying coverage); Plastics Eng'g Co. v. Liberty Mut. Ins. Co., 514 F.3d 651, 653 (7th Cir. 2008) (liability of insurance carriers in Wisconsin for mass tort claims against the insured company); XL Specialty Ins. Co. v. Fin. Indus. Corp., 259 F. App'x 675, 675 (5th Cir. 2007) (unpublished decision) (whether an insurance carrier must show prejudice before denying a claim based on a breach of a prompt-notice provision under Texas law); Nat'l Union Fire Ins. Co. v. Miss. Ins. Guar. Ass'n, 507 F.3d 309, 312 (5th Cir. 2007) (whether an insurance policy providing that its coverage will be reached only after any applicable "other insurance" must be exhausted before Mississippi statutory insurance-guaranty coverage is reached, where a similar question was already pending at the state supreme court).

76 *See XL Specialty Ins. Co.*, 259 F. App'x at 675 n.* (noting that "the court has determined that this order should not be published").

77 Wendy L. Watson, McKinzie Craig & Daniel Orion Davis, *Federal Court Certification of State-Law Questions: Active Judicial Federalism*, 28 JUST. SYS. J. 98, 103 (2007).

78 *See* Yonover, *supra* note 25, at 352–54 (conducting an interest analysis of federal court application of *Erie* principles). *See generally* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 172–73 (1959) (describing cases where a conflict of policy between the jurisdictions forces courts to weigh the interests of the relevant sovereigns in the subject of the litigation).

front.[79] It seems that boredom, not comity, drives federal judges to push state-law questions off of their dockets.

III. Certification and the Passive Virtues

A. Theories of Judicial Restraint

Federal courts unabashedly employ a variety of devices to avoid deciding cases, to avoid deciding issues, and particularly to avoid interpreting the U.S. Constitution. For example, the U.S. Court of Appeals for the Second Circuit (coincidentally, perhaps, a court fond of certification)[80] regularly engages in the unorthodox "*Jacobson* remand"[81] whereby the appellate panel retains a case[82] but temporarily remands to the district court for further development of the record or, frequently, merely another clarifying opinion on the law.[83] This practice allows the circuit court to avoid either affirming or rejecting the result below, at least until the district court has had a second opportunity to sidestep whatever legal problem inspired the appeal. Certification of state law questions can be viewed as another tool for the federal courts to avoid deciding controversies within their jurisdiction.[84] For that reason, in this Part, I review the leading theories of

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79 David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 322 (1977) (noting the sentiments of Judge Friendly of the Court of Appeals for the Second Circuit).

80 *See* Kaye & Weissman, *supra* note 9, at 422 (describing throughout the article the Second Circuit's frequent and—in then-Chief Judge Kaye's view—successful practice of certifying questions to the New York Court of Appeals).

81 *See* United States v. Jacobson, 15 F.3d 19, 22 (2d Cir. 1994) (describing and approving the court's practice of retaining an appellate panel's oversight of a case while remanding it to the district court to supplement the record). *See generally* Catherine T. Struve, *Power, Protocol, and Practicality: Communications from the District Court During an Appeal*, 84 NOTRE DAME L. REV. 2053 (2009) (arguing that the boundaries between the authority of federal district and appellate courts during an appeal shift according to practical concerns). The new material the district court is compelled to add is not limited to supplemental factual findings; the Second Circuit often requires reconsidered or further-explained conclusions of law. *See, e.g.*, Vives v. City of N.Y., 524 F.3d 346, 355–56 (2d Cir. 2008) (remanding questions of state law to the district court that it had already answered, rather than deciding them at the circuit, and ordering the district court to request and consider amicus briefing from the New York Solicitor General and to reconsider its legal conclusions in light of the briefing).

82 The Second Circuit panel issues a mandate (and so formally surrenders jurisdiction), but guarantees that a future appeal will return to the same panel. *See generally* United States v. Salameh, 84 F.3d 47 (2d Cir. 1996) (examining the procedure).

83 A cynic might see a telling parallel between the *Jacobson* procedure, which the appellate court directs at a court acknowledged to be its inferior, and the certification procedure, which is purportedly directed to a superior (or at least parallel) court but which performs a nearly identical decision-avoiding function for the circuit court.

84 *See, e.g.*, Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1675 (2003) (arguing that if certification is not

judicial restraint and then apply them to certification procedures. I conclude that certification is ultimately a form of judicial activism rather than restraint. Proponents of a consciously self-limiting judiciary should oppose certification on that ground.

Alexander Bickel, the most influential academic proponent of judicial restraint, argued that this approach brought a cornucopia of benefits to courts, benefits he called the "passive virtues."[85] Bickel's theory centers on aspects of justiciability—some inferred from the jurisdictional requisites of Article III and some merely prudential—that the U.S. Supreme Court has developed, including the doctrines of standing, case and controversy, ripeness, and political questions.[86] In Bickel's view, the practice of unelected judges weighing the legality of legislative acts poses a profound challenge to the majoritarian characteristics of the American democracy.[87] The passive virtues, he argued, work as a powerful counterpoint to this challenge.

Naturally, the passive virtues have their skeptics.[88] The more absolutist opponents of Bickelian judicial restraint argue that federal courts should never decline to exercise their legitimate jurisdiction, at

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outright unconstitutional, "at the very least certification is in tension with the fundamental purpose of federal diversity jurisdiction" because it permits federal courts to exercise less than the jurisdiction that Congress has authorized).

85 *See* Alexander M. Bickel, Foreword, *The Passive Virtues*, 75 HARV. L. REV. 40, 42–47 (1961) [hereinafter Bickel, *The Passive Virtues*] (arguing that the U.S. Supreme Court consistently declines to hear cases over which it has jurisdiction). *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111–98 (1962) [hereinafter BICKEL, THE LEAST DANGEROUS BRANCH] (same). Bickel's theory was a conscious effort to revive the nineteenth century laissez-faire jurisprudence of James B. Thayer. *See* Bickel, *The Passive Virtues*, *supra*, at 62 (quoting JAMES BRADLEY THAYER, JOHN MARSHALL 106–07 (1901)); *id.* at 79 (quoting JAMES BRADLEY THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law*, *in* LEGAL ESSAYS 1, 32–33 (1908)). *See generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 136–45 (1893) (explaining the counter-majoritarian difficulty with judicial review and arguing for sharp constraints on its exercise).

86 Bickel, *The Passive Virtues*, *supra* note 85, at 42 (cataloging the jurisdiction-avoidance doctrines).

87 *See* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 85, at 16 ("The root difficulty is that judicial review is a counter-majoritarian force in our system."); *cf.* Jeremy Waldron, Book Review, *Dirty Little Secret*, 98 COLUM. L. REV. 510, 517–18 (1998) (reviewing ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996)) (noting that "[t]hough the courts are held in high esteem in the United States, their legitimacy as agents of political change is really rather limited, and it is necessary to conserve that legitimacy, and avoid straining it by saddling the courts with massive or radical reforms").

88 *Cf.* District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008) (Scalia, J.) ("The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.").

least for federal questions.[89] More moderately, Neal Katyal has argued that even when the U.S. Supreme Court declines to resolve a legal issue (by using the jurisdictional and prudential techniques associated with the passive virtues), the Justices can and often should advise the political branches about their legal concerns.[90] For example, Katyal approves of an opinion that declines to declare whether the particular disputed statute is constitutional or not, but alerts the political branches through dicta that the opinion should not be construed as approving of the dubious statute.[91] Although some commentators have described Katyal's position as contrary to the passive virtues,[92] advice giving for Katyal works largely *because* it permits judges to issue narrow, self-restrained holdings while still participating in the political debate.[93]

A deeper critique of the passive-virtues theory would argue that the legitimacy problems associated with an unelected judiciary, federalism concerns, and the jurisdictional limits of Article III are insufficient to justify a timid, incomplete exercise of judicial review. Helen Hershkoff has comprehensively articulated just this critique, which flows from her attention to state constitutional scholars' oft-ignored observation that state judiciaries are typically unbounded by many of the constitutional constraints that inspired Bickel.[94] Hershkoff argues

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89 *See, e.g.*, Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory That Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1328–29 (2005) (arguing that federal fora should decide federal questions to the greatest possible extent, leaving state questions to state fora if necessary for judicial economy); *cf.* Brian C. Kalt, *Tabloid Constitutionalism: How a Bill Doesn't Become a Law*, 96 GEO. L.J. 1971, 1982–83 (2008) (describing how, after an important constitutional flaw was identified in the federal statutes governing prosecution in a remote section of Yellowstone National Park, the U.S. district court neither accepted nor refuted the objection, but sustained the prosecution on "practical" grounds: passive virtue that *avoided* giving Congress an incentive to act rather than encouraged democratic deliberation).

90 *See* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1710 (1998) (arguing that Supreme Court justices can and should promote democratic deliberation by using dicta in judicial opinions to give policy or legal advice); *cf.* Hershkoff, *supra* note 67, at 1851 (arguing that state courts' advisory opinions allow the judiciary to participate in the constitutional debate without removing the dispute from the reach of the political branches).

91 *See* Katyal *supra* note 90, at 1712 (providing examples).

92 *See, e.g.*, Abner J. Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825, 1825–26 (1998) (describing Katyal as disagreeing with Bickel's idea that "judicial minimalism is a good thing"). *But cf.* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1471–73 (2000) (describing Katyal's advice-giving theory as closely linked to contemporary theories of judicial minimalism).

93 *See* Katyal, *supra* note 90, at 1711 ("The combination of 'narrow holding + advicegiving dicta' enjoys a natural advantage over a broad holding in terms of democratic self-rule, flexibility, popular accountability, and adaptability.").

94 *See* Hershkoff, *supra* note 67, at 1834–37 (noting that state courts are not limited by the

vehemently that whatever the merits of the passive virtues might be for the federal courts, a different analysis is required for state courts.[95]

Hershkoff's contention that differing state justiciability doctrines might undermine the virtue of passivity in the state courts is hardly a consensus position.[96] Her distinction between the passive virtues' applicability to the state and federal courts,[97] however, means that Hershkoff does not directly contest the significance of the passive virtues to courts that *are* bound by Article III. Like Katyal, Hershkoff suggests that whether the passive virtues are advantageous or not should be evaluated by whether their use fosters the best forms of democratic decision-making.[98] For example, Hershkoff suggests that the state-court practice of issuing advisory opinions promotes well-informed debate among political actors because the court describes its vision of the relevant legal framework without issuing a holding that would bind parties and tend to end the policy debate, confining the scope of political activity.[99]

Beyond the skeptics, even Bickel's self-acknowledged intellectual heirs are careful to distinguish what they like about judicial restraint from what Bickel endorsed. The most prominent contemporary defender and refiner of the passive virtues is Cass Sunstein,[100] but he

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features of justiciability doctrine that led Bickel to support the passive virtues); Hans A. Linde, *Structures and Terms of Consent: Delegation, Discretion, Separation of Powers, Representation, Participation, Accountability?*, 20 CARDOZO L. REV. 823, 834–35 (1999) (same); *see also* Christine M. Durham, Speech, *The Judicial Branch in State Government: Parables of Law, Politics, and Power*, 76 N.Y.U. L. REV. 1601, 1603–06 (2001) (explaining that the separation of powers, among other doctrines, differs between the states and federal government, and that consequently the state judiciaries carry out a more legitimately policy-conscious role).

95 *See* Hershkoff, *supra* note 67, at 1838–40, 1842–53 (cataloging the diverse approaches to justiciability employed by state courts).

96 *See, e.g.*, Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 105–06 (2000) (arguing that his study of school finance litigation in state courts shows that judicial activism by state high courts increases legislative complacency, undermines judicial authority, and even results in less generous remedies than plaintiffs might have won if the legislature were uncertain of its obligations).

97 *See* Hershkoff, *supra*, note 67, at 1906 (arguing that perhaps state courts will choose to apply Article III-type restraints on their judicial power, but if they do, it should be because they have conducted an independent, state-centered analysis and concluded that the federal-style passive virtues are appropriate in their own particular state context).

98 *See id.* at 1907 ("I argue that whether a state court should help to resolve a particular dispute—or instead remit the matter to politics, to the market, or to other institutions—ought to turn on an independent assessment of whether state judicial review can contribute to democratic life, weighing the interests at stake and the comparative abilities of alternative decisionmakers." (footnote omitted)).

99 *See id.* at 1846–52.

100 *See* Heise, *supra* note 96, at 73–74 (tracing the development of judicial minimalism the-

distinguishes his own views from Bickel's by emphasizing that judicial minimalism is meant to maximize and guard the deliberative space of the political branches rather than the legitimacy or power of the judiciary.[101] Toward this end, Sunstein adopts a cautious but favorable approach to what he calls "judicial minimalism."[102] Sunstein argues that minimalism is best when profound and highly contested policy questions are at stake,[103] and when judges lack adequate information about the state of the world to craft a widely-applicable rule (for example, when legally relevant technology is changing rapidly).[104] By staying out of the way of the political branches, minimalist courts can promote healthy public debate and appropriate majoritarian decisionmaking.[105]

B. How Passive Virtues Apply to Certification

Regardless of whether one accepts or rejects the arguments in favor of judicial minimalism, it is clear that the federal courts (and many of their academic observers) tend to view the practice as a defining feature of any self-respecting judiciary.[106] Hershkoff notes this phenomenon and condemns the prevailing tendency to describe Article III justiciability constraints as if they were requirements of natural law, inherent features of any court worthy of respect.[107] Another commentator has suggested that certain values and practices common to all courts collectively amount to "institutional rules which make them appear responsible, rational, and competent."[108] To the extent that

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ory from Bickel to Sunstein and suggesting that both favor judicial restraint as a way to increase public discourse and majoritarian decisionmaking).

101 *See* Cass R. Sunstein, Foreword, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 9 n.8 (1996).

102 *Id.* at 6 (defining minimalism as "leaving as much as possible undecided").

103 *See id.* at 8 (arguing for minimalism when "the nation is in flux").

104 *See id*. at 18.

105 *See id*. at 37 (suggesting that the role of courts should be to provide "spurs and prods" when democratic deliberation is structurally broken, but otherwise to allow the political process to reach its own conclusions). For an even more skeptical view of judicial authority in the face of democratic deliberation, see Amanda Frost, *Certifying Questions to Congress*, 101 Nw. U. L. REV. 1, 3 (2007) (asserting that federal courts lack the institutional competence to construe truly ambiguous statutes).

106 *See* James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805, 809–11, 826 (1993) (describing how the U.S. Supreme Court views judicial minimalism as a core responsibility of any court).

107 *See* Hershkoff, *supra* note 67, at 1836 (noting that "commentators . . . tend to discuss [the jurisdictional limits on federal courts] in universal or essential terms, as if Article III courts represent the institutional possibilities of courts more generally").

108 Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49

state judges perceive the U.S. Supreme Court to be the acme of judicial practice and that Court's enthusiasm for the passive virtues to be among these universal institutional rules, their concept of themselves as responsible and rational courts will compel them to adopt judicial minimalism as their own practice.

Beyond the pressure on state courts to practice the passive virtues, *pace* Hershkoff, the centrality of judicial minimalism to the federal courts suggests that an invitation from them to practice judicial activism is not a sign of real respect. From the perspective of the federal courts, politicians and bureaucrats, not courts, may appropriately engage in activism. For federal courts to treat state judiciaries as nonminimalist is to suggest that state judiciaries lack a defining feature common to respectable courts.[109] When federal courts ask state courts to act contrary to judicial minimalism, they thereby identify the state courts as something apart from "real" American courts, an institutional Other.[110]

And indeed, federal courts appear to be issuing just such an invitation with certification. Consistent with the idea that certification allows federal courts to avoid reaching issues unnecessarily,[111] the U.S. Supreme Court has repeatedly and expressly described certification as an exercise of the federal courts' judicial minimalism.[112] A fairly typical example from the circuit courts is *Hertz Corp. v. City of New*

SYRACUSE L. REV. 1039, 1047–50 (1999) (describing the pressures toward conformity that help create institutions culturally recognizable as courts).

109 *See, e.g.*, Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 360 (2000) (arguing that state-court separation-of-powers doctrines, because they are broader than conventional federal standards, "articulate conceptions of judicial authority that sweep beyond any defensible conception of judicial power").

110 *Cf.* ALAN DUNDES, THE SHABBAT ELEVATOR AND OTHER SUBTERFUGES: AN UNORTHODOX ESSAY ON CIRCUMVENTING CUSTOM AND JEWISH CHARACTER 62–74 (2002) (describing the "Shabbes goy" (lit. "Sabbath gentile"), a person whose freedom from the religious restraints imposed on traditional Jews allows him to carry out otherwise-prohibited tasks on Jews' behalf, thereby defining him as outside the Jewish community); *see also* Note, *State Law as "Other Law": Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1671 (2007) (describing state law as the product of "unique historical, social, and institutional forces" that are distinct from the national community's underlying forces). For a further discussion of how federal courts view state courts as foreign, see *infra* Part IV.B.

111 *See* LeBel, *supra* note 24, at 1003 ("One can thus describe certification as an issue-avoidance, decision-ducking technique . . . .").

112 *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 79 (1997) (directing federal courts to avoid deciding federal constitutional questions if certification would allow a state-court answer that might obviate the need for the constitutional decision); Clay v. Sun Ins. Co., 363 U.S. 207, 212 (1960) (Frankfurter, J.) (using certification, for the first time, so that the federal courts could avoid reaching a federal constitutional question that state-court interpretation might leave unnecessary).

York.[113] There, the Second Circuit was confronted with a series of state and federal claims against a local ordinance prohibiting car-rental companies from discriminating on the basis of the renter's residence.[114] The court realized that if the city ordinance was preempted as a matter of state constitutional law by state statutes, as Hertz argued, then the court would never need to reach the federal constitutional question.[115] The court even gave its own desire to exercise judicial minimalism as a good reason for the state court to take the question.[116] To avoid the federal constitutional question, the circuit court asked the state high court to reach the *state* constitutional question. So if the federal courts use certification to *avoid* deciding an issue (either a difficult question of state law, or a federal question that might not be reached depending on the state-law answer), what are the state courts doing when they answer?

Just as federal courts prefer a case to be resolved on state-law grounds rather than on the basis of a federal constitutional interpretation, many state courts prefer to address the federal constitutional question rather than decide a case on the basis of their own state law.[117] Certification thus invites the state courts to resolve a question it otherwise would not have. This is anti-minimalist in at least four ways. First, the state court reaches the issue *unnecessarily*. Second, the state court resolves the question *finally*. Third, the state court answers the question *prematurely*. Finally, the state court decides the question *advisorily*. At first glance, some of these categories might seem redundant (unnecessarily/prematurely), and others might seem contradictory (finally/advisorily). But certification, procedural para-

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113 Hertz Corp. v. City of N.Y., 967 F.2d 54 (2d Cir. 1992).

114 *Id*. at 56.

115 *Id*. at 57.

116 *Id*. (asserting that the state court should accept certification because, among other reasons, "this court's determination of the federal claims advanced by Hertz will be necessary only if state preemption law upholds the authority of the city"). The state court did accept the question, *see* Hertz Corp. v. City of N.Y., 607 N.E.2d 784, 785 (N.Y. 1992), and its answer ultimately required the Second Circuit to reach the federal questions anyway, just over a full year after its certifying opinion. *See* Hertz Corp. v. City of N.Y., 1 F.3d 121, 125, 129 (2d Cir. 1993) (establishing that the challenged ordinance violates certain antitrust principles and that the city could be liable for its restraint of trade, but remanding to the district court for further consideration of these questions of law).

117 *See, e.g.*, State v. Hunt, 450 A.2d 952, 955 (N.J. 1982) (construing the state constitution only after determining that the federal Constitution did not resolve the dispute); *see also* Robert F. Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 CLEV. ST. L. REV. 415, 423 (2004) (describing a conventional approach where the state high court will interpret the state constitution only if the federal Constitution does not resolve the rights claim).

dox that it is,[118] leads directly to each of these oddities. The total effect is that the incentives toward democratic deliberation that animate both Sunstein's vision of judicial minimalism and Hershkoff's concept of state-court activism are lost in certification.

The state court's answer to the federal court is *unnecessary* because the federal court can answer the question itself sufficiently to end the controversy between the parties, as *Erie* makes clear, and doing so would save a final, authoritative statement of the state law for another day.[119] No matter how ambiguous or vague the state law might be, the federal court has the full formal capacity to reach a decision about its content.[120] In this light, anything the state court contributes toward the ultimate resolution of the case merely improves the (purported) quality of the federal disposition, like an excellent law clerk's memo might do.[121] Furthermore, all state courts that permit certification do so at their own discretion;[122] if the state court's resolution were really essential to the federal case, allowing the state court to refuse to answer would interfere intolerably with federal jurisdic-

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118 *See* Nash, *supra* note 84, at 1675–76 (noting that certification can be interpreted from the federal perspective either as a single case that moves back and forth between fora, or as two cases that exist simultaneously in both fora, and arguing that under the first interpretation, certification is unconstitutional, while under the second interpretation, it defeats the federal diversity-jurisdiction statute).

119 *See, e.g.*, Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 443–46 (1959) (conducting a sufficiency-of-evidence review to resolve an insurance dispute under North Dakota law); *cf.* N.Y. Life Ins. Co. v. Gamer, 303 U.S. 161, 165–66 (1938) (before *Erie*, applying federal common law to facts strikingly similar to those in *Dick*). *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (requiring federal courts to construe and apply state law rather than their own notions of general federal common law).

120 *See* Clark, *supra* note 21, at 1460–62 (describing the duty of federal courts to identify the substance of state law, even where positive indicia are lacking); Green, *supra* note 42, at 598–99 (arguing that federal courts retain broad authority to rule, even under *Erie*, where state or Congressional direction is not to the contrary); Kurland, *supra* note 23, at 189 (describing the origins and application of the *Erie* doctrine).

121 With certification, the federal court's interpretation of state law moves from *possibly* or *probably* what the state high court would have held, to *certainly* what the state high court would have held. Consider, for comparison, a state common-law policy that exists, but is so complex that discovering the right set of holdings is time-consuming and intellectually difficult. A federal court faced with a question on the policy might lack the resources to be certain of its answer; then, its shortcut decision would *possibly* or *probably* match the actual state law. With a little more research from a sufficiently clever clerk, the federal court could find the relevant state precedents and improve its answer to *certainly* what the state high court had decided. Certification simply permits the same incremental improvement in the federal holding where the state law had actually been undetermined.

122 *See* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. Legis. 157, 160 (2003).

tion.[123] From the passive-virtues perspective, judges should never be "roving commissions," hunting out problems where no real party has brought a dispute to the court.[124] And with certification, it is unambiguously the federal courts, not the contesting parties, which send the question for consideration, as shown by the federal courts' occasional practice of certifying questions even over the express objection of both parties.[125] Concededly, proponents of judicial activism will see no practical harm from state courts' reaching out to decide legal questions as a favor to federal courts where there is no need for them to do so, and indeed, there are at least genuinely adverse parties set to (unwillingly) dispute the merits. However, even for those unpersuaded about the virtue of judicial minimalism, this role seems unlike the federal courts' standard minimalist image of appropriate judicial behavior. The ease, therefore, with which federal courts invite state courts to adopt this role hints that the certifying courts view their correspondents as different from "real" courts in a fairly fundamental way.[126]

For the federal court, a major advantage of a state high court's answers to certified questions is that they *finally* resolve the question of law.[127] Indeed, a craving for the comfort of certainty is a but-for

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123 *See* Peter Jeremy Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 673 (1999) (arguing that Congress could constitutionally compel state courts to answer certified questions if it felt the answers were important to the speedy and effective resolution of federal cases).

124 *See* Broadrick v. Oklahoma, 413 U.S. 601, 610–11 (1973) ("[U]nder our constitutional system courts are not roving commissions . . . . Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court . . . .") (citation omitted).

125 *See, e.g.*, Planned Parenthood Cincinnati Region v. Strickland, 531 F.3d 406, 408 (6th Cir. 2008) (certifying a question of state law even though both litigants, one of which was the state's own attorney general, argued that the circuit court should decide the question for itself without certifying to the state high court). This aspect of certification differs from the U.S. Supreme Court's grant of certiorari review, which is initiated by the parties. *See generally* SUP. CT. R. 12–14 (explaining the procedures for a party to request review by the Court). The federal high court's overwhelming preference for party-initiated review (in contrast to certification from the circuit courts) is itself a method of practicing the passive virtues.

126 Note that federal courts have no difficulty requiring *administrative* tribunals to engage in inquisitorial-type judicial activism that would be intolerable in the courts themselves. *See, e.g.*, Scott v. Astrue, 529 F.3d 818, 824 (8th Cir. 2008) (remanding a Social Security appeal for the administrative law judge to correct his "failure to carry out his statutory duty to develop the record independent of the claimant's burden"). Suffice it to say that United States Circuit Judges do not think of agency hearing officers as their equal partners in the administration of justice.

127 *See* 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4248 (3d ed. 2007) ("Certification would be a pointless exercise unless the state court's answers are regarded as an authoritative and binding statement of state law.").

cause of the federal courts' need to certify questions in the first place.[128] And the state courts satisfy that craving: answers to certified questions are uniformly regarded by the state judiciaries as fully authoritative precedents, with the same binding and stare decisis effects as inhere in a high-court opinion in a case begun in the state courts.[129] This leads to a genuinely strange situation. Although federal courts promise, consistently with *Erie*, that the state high-court answers will be given conclusive weight as to the meaning of state law within the federal litigation, in both formal and practical senses, the answers are not strictly binding on the parties "before" the state court, because the federal court retains ultimate control over the disposition and the mandate (as I discuss further in paragraphs below about the advisory nature of certification answers).[130] On the other hand, unlike official advisory opinions, the answers in the abstract *are* maximally binding on government institutions confronted with the same legal question in the future, including federal courts, lower state courts, future state high courts, and state agencies.[131] From a passive-virtues perspective, this looks like the worst of both worlds. "Minimalists," Sunstein explains, "try to decide cases rather than to set down broad rules."[132] Certification encourages state courts to set down broad rules rather than to decide cases. To the extent federal courts view minimalism as a prerequisite of good judging, they will consider this activism by state courts as a mark of inferiority.

Because final state-court answers to certified questions diminish the political space for further democratic deliberation about the contested legal issue, they also pose some of the same problems minimal-

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128 *Cf.* Gerald M. Levin, Note, *Inter-jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 345 (1963) (asserting that the absence of an authoritative decision on point from the state high court may render the federal court "unable to determine with certainty" the ambiguous state law).

129 *See* WRIGHT ET AL., *supra* note 127 (noting that answers to certified questions must be authoritative for the procedure to make sense); *see also* Kincaid v. Mangum, 432 S.E.2d 74, 83 (W. Va. 1993) (agreeing with the statement that "[t]he answering court may be best situated to frame the question for precedential value and to control the development of its laws").

130 Note that even if *Erie* requires the federal courts to treat the state answer as binding as to the content of state law, that requirement is itself a matter of federal law, beyond the control of the state court.

131 *See* WRIGHT ET AL., *supra* note 127, nn.68–69 and accompanying text ("[I]t is now accepted that the state answers are binding [on the state and those subject to its jurisdiction]."); *see also* Allan D. Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 636 & n.44 (1951) (asserting that the answers to *intrastate* certified questions are binding on both the asking and answering courts).

132 Sunstein, *supra* note 101, at 15. Sunstein calls this the goal of making decisions "*narrow rather than wide*." *Id.*

ism identifies in *premature* judicial decisions. Respect for state courts is not the same as respect for states.[133] And despite federal inattention to the matter, states' internal institutions do sometimes engage in inter-branch political struggles of elemental significance.[134] At the very least, federalism demands protection for the internal structural arrangements of state governments, free from interference by the national institutions.[135] Certification delivers an open (and, theoretically, an important) question of state law directly to the state high court for resolution, bypassing the lower state courts[136] and privileging that court over all other institutions of state government. The state high court, with the close complicity of the certifying federal court, thus maximizes its influence over the development of state law at the expense of further deliberation by the state's ordinary political forces.[137]

In contrast to certification, if the federal court simply resolved the state law question for itself, what Bickel called "giv[ing] the electoral

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133 *See* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1509 (1987) (arguing that federal courts should avoid treating state courts as equivalent to a monolithic state entity, but instead should consciously consider how the state courts interact with other institutions of state government); Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1170 (2007) (arguing that federal courts' deference to one branch of state government in preference to another, in the absence of a federal constitutional reason to do so, is an interference in state autonomy and a derogation of state sovereignty).

134 *See, e.g.*, Silver v. Pataki, 755 N.E.2d 842, 849–50 (N.Y. 2001) (balancing the executive's power over the state budget against the legislature's and holding the dispute justiciable).

135 *See* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2246–55 (1998) (arguing that federalism demands, at a minimum, autonomy for the state governmental structures described in the federal Constitution: the state legislative, executive, and judicial branches); McCormick, *supra* note 133, at 1167–71 (arguing that the U.S. Supreme Court has lately exhibited a tendency to force federal separation-of-powers notions on the states, thereby improperly interfering with the internal structure of state governments); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 314 (2005) (arguing that federal doctrines like sovereign immunity can improperly interfere with the checks and balances among branches of state government); *cf.* Edward L. Rubin & Malcom Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 930–31 (1994) (arguing that internal government structures of states are immune from federal interference in practical terms because of the states' political protections in the national government).

136 This feature of certification—passing over the lower state courts—might even privilege litigants who bring novel state claims in *federal* courts by allowing them to avoid the unpredictability of lower state courts and by potentially increasing their chances of getting review in the state high court. It also eliminates the sort of "percolation" that both the federal and state high courts routinely favor.

137 I distinguish here between "democratic" institutions, which in most states include the state courts, and "political" forces. Judges can participate in competitive elections while still understanding the role of judge as distinguishable from ordinary politics.

institutions their head" comes into play.[138] For example, in a case about the scope of Elvis Presley's posthumous right of publicity, the U.S. Court of Appeals for the Sixth Circuit held that Tennessee common law would not support the Presley estate's claim.[139] In response to the Sixth Circuit's holding and the holdings of lower state courts (which split on the issue), the Tennessee legislature adopted a statute prospectively confirming that a celebrity's right of publicity is inheritable, the position directly contrary to the federal court's.[140] Later, when a state intermediate appellate court was confronted by the question as to facts arising prior to the statute's passage (and thus governed by common law), the court reached the same result as the elected officials had, rather than following the federal court.[141]

If the Sixth Circuit had certified this question when it first arose there, the Tennessee Supreme Court might have answered the question as the intermediate state court did. If so, the Tennessee legislature would never have needed to craft the new legislation. Whatever political compromises were made to ensure the passage of the statute, they would never have occurred because the supreme court would have announced the law definitively. Instead, because the Sixth Circuit answered the state-law question for itself, the Tennessee legislature had the benefit of the circuit court's opinion, the contrary lower court opinions, plus whatever public discussion or lobbying the state's political institutions could muster. While the ultimate rule might have been the same whether the circuit court used certification or not, if the goal of judicial minimalism is to maximize democratic deliberation, then certification would have caused the Tennessee law to be resolved prematurely.

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138 *See* Bickel, *The Passive Virtues*, *supra* note 85, at 51. Of course, most state courts *are* "electoral institutions" in that the institutions' officials (judges) are elected, *see* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 777 & n.85 (1995) (noting that judges in twenty-nine states face some sort of election in their judicial careers), but not "political" institutions, which is presumably what Bickel meant.

139 *See* Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 960 (6th Cir. 1980) (holding that the right of publicity did not survive the celebrity's death).

140 *See* Personal Rights Protection Act of 1984, Tenn. Code Ann. § 47-25-1103(b) (2001) (providing that the right of publicity extends beyond the famous person's death); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 Vand. L. Rev. 1199, 1225–26 (1986) (noting that the statute was a response to the Sixth Circuit's decision in *Factors Etc.* and decisions of lower Tennessee state courts).

141 *See* State *ex rel.* Elvis Presley Int'l Mem'l Found. v. Crowell, 735 S.W.2d 89, 99 (Tenn. Ct. App. 1987) (reaching a holding contrary to the Sixth Circuit's decision in *Factors Etc.*).

Finally, certification invites state courts to issue *advisory* answers.[142] To begin analyzing this claim, I must clarify the term "advisory." Certified answers are decidedly not advisory in the sense favored by Hershkoff or Katyal—non-binding judicial opining about the law while leaving the political branches at least formal flexibility to act otherwise[143]—because the answers are definitive statements of state law fully binding on everyone subject to state law. However, in the traditional federal courts' conception of advisory opinions, derived from the purported requirements of Article III, a judicial opinion is advisory if it does not issue from a court with the power to finally resolve the case at bar.[144] Regardless of how much weight the federal courts give to certification answers as definitions of state law, there is no dispute that the certifying court retains full authority to issue the formal mandate.[145] Beyond form, the state-court answer will be substantively more or less advisory depending on how much work the federal court has left to do after getting the state-court answer, and how logically essential that answer is to the ultimate federal holding.

Predictably, state and federal judges, and commentators, are widely divided on just how advisory certification answers are and, if they are advisory, whether that is acceptable or not.[146] Some state judges do not think certification answers are advisory at all, because

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142 *See* John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 419 (1988) (acknowledging that the criticism of certification that answers might be advisory is "[p]robably the most damaging" point against certification).

143 *See generally* Jonathan D. Persky, Note, *"Ghosts That Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155, 1159 (2005) (describing advisory opinions and noting the federal "presumption that they are disruptive").

144 *See* Hayburn's Case, 2 U.S. (1 Dall.) 409, 410, 413 (1792) (holding that the judicial power did not extend to an administrative determination over which executive branch officials had discretion to later reverse); United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 860, 864 (Tex. 1965) (holding, in a *Pullman* abstention case, that the court lacked jurisdiction to issue a declaratory judgment while the federal court retained jurisdiction to enter the final judgment, because the state court answer would then be advisory); *see also* Bickel, *The Passive Virtues*, *supra* note 85, at 42 (defining advisory opinions as those that "are not finally decisive, the power of ultimate disposition of the case having been reserved elsewhere" and arguing that this definition flows from the core logic of the federal courts' power of judicial review).

145 The argument that certification is not an abdication of federal jurisdiction rests on this power of the federal court to control the litigation's ultimate outcome. *See* Challener, *supra* note 9, at 848 (justifying certification, from a federal duty-to-adjudicate perspective, on the federal court's final control over the mandate).

146 *See* Mattis, *supra* note 11, at 721 & n.33 (discussing state courts' varied levels of strictness about how dispositive their answers must be before they will accept certified questions from federal courts); Levin, *supra* note 128, at 357 (arguing that if the certification answers were advisory, there would be a federal constitutional problem with incorporating the answer into the binding decision of an Article III court).

(for example) there is an actual case or controversy in the federal court with genuine adverseness, the question is presented on a full factual record, and the answer will at least somehow affect the federal decision.[147] On the other hand, the Michigan Supreme Court has been the site of a vehement dispute about whether certification answers are advisory and therefore beyond the court's jurisdiction,[148] while the Missouri Supreme Court has flatly refused to answer certified questions, on the ground that the state statute authorizing such answers violates the (judicially inferred) state constitutional limitations on the court's jurisdiction.[149] Some state high courts have held expressly that their certification answers *are* advisory, but the courts will provide them anyway.[150] Other state courts have not gone so far, but give answers even where they know there is a significant chance that the answers will not resolve the federal case.[151] State high courts have sometimes rejected particular questions where they anticipated that the answers might not be dispositive in the federal litigation, but accepted certified questions in other cases where the state courts were

147 *See, e.g.*, *In re* Richards, 223 A.2d 827, 829–32 (Me. 1966) (holding that the court had state constitutional authority to answer a certified question because the answer would not be advisory where there was a live controversy in the federal court that could be determined by the state answer, and surveying approaches taken by other state high courts); *see also* Levin, *supra* note 128, at 357 (arguing that certification answers are not advisory because the dispute was justiciable in federal court, the answer would settle the (state law) rights between the parties, and the answer would have res judicata and precedential effect).

148 *See* County of Wayne v. Philip Morris, Inc., 622 N.W.2d 518, 519–20 (Mich. 2001) (Weaver, J., dissenting) (arguing that certification answers are advisory and that the Michigan constitution's express authorization of advisory opinions to certain state officials implicitly prohibits the giving of advisory opinions to anyone else); *see also* Watson et al., *supra* note 77, at 100 (describing the intense debate on the Michigan Supreme Court about whether the absence of a guarantee that the federal court will treat the certification answer as dispositive means that the answer is necessarily advisory).

149 *See* Grantham v. Mo. Dep't of Corr., No. 72576, 1990 WL 602159, at *1 (Mo. July 13, 1990).

150 *See, e.g.*, Leiter Minerals, Inc. v. Cal. Co., 132 So. 2d 845, 849–50 (La. 1961) (answering a declaratory judgment request from the U.S. Supreme Court, functionally similar to a certification request, with an otherwise-illegal advisory opinion "out of respect for, and as a courtesy to," the requesting court); Spackman *ex rel.* Spackman v. Bd. of Educ., 2000 UT 87, ¶ 1, 16 P.3d 533, 534 n.2 (2000) ("On certification from the Federal District Court our duty is to answer the legal questions presented. We will not seek to resolve the underlying dispute." (citation omitted)).

151 *See, e.g.*, Scheehle v. Justices of the Supreme Court, 57 P.3d 379, 381 (Ariz. 2002) (agreeing to provide a certification answer where the state court's decision merely "may" be determinative in the federal dispute); W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 629–30, 635 (Or. 1991) (allowing certification where the answer might potentially determine the outcome in the federal case, but declining to do so in this case for "discretionary" reasons).

more confident the answers would matter.[152] The Wyoming court has adopted a strict rule that it will answer certified questions only if the answer will leave the federal court with nothing remaining to decide in the litigation, a position at odds with most state high courts.[153]

Just how advisory the answers are may vary from case to case, but there are enough examples of federal courts treating certification answers as little more than a suggestion to establish that the worry about advisory opinions is not baseless. For a forceful example, consider a recent civil rights case decided in the U.S. Court of Appeals for the Second Circuit under diversity jurisdiction.[154] There, the federal court asked the New York Court of Appeals for its view of whether municipal law would apply federal standards to permit an award of attorneys' fees.[155] Upon receipt of the state court's answer, which held that the federal standard did apply and that the federal district court's fee award was not an abuse of discretion because a reasonable person could have found the award warranted,[156] the Second Circuit remarked that the state court's answer failed to "resolve the ultimate question raised by this appeal: whether the . . . award . . . was reasonable."[157] Apparently, the Second Circuit disliked the certification answer enough that it felt free to remand the case to the district court for reexamination of the very question the state court had answered: whether the fee award was reasonable in the circumstances.[158]

Even when a federal court asks the certified question(s) in the belief that the answers would satisfy state dispositiveness requirements, sometimes the case's disposition bypasses the need for the

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152 *See, e.g.*, Retail Software Servs., Inc. v. Lashlee, 525 N.E.2d 737, 738 (N.Y. 1988) (revoking the New York Court of Appeals' prior decision accepting a certified question, upon concluding that its answer would not "necessarily" determine the outcome of the certified case because both other statutory claims and federal constitutional claims remained undecided, potentially obviating the need to reach the certified issue).

153 *See In re* Certified Question from U.S. Dist. Court, 549 P.2d 1310, 1311 (Wyo. 1976) (stating the must-be-dispositive requirement).

154 *See* McGrath v. Toys "R" Us, Inc., 356 F.3d 246, 247–48 (2d Cir. 2004) (certifying a fee-award question).

155 *Id*. at 254.

156 *See* McGrath v. Toys "R" Us, Inc., 821 N.E.2d 519, 526 (N.Y. 2004) ("[W]e cannot say, as a matter of law, that a court that reached that conclusion [that a fee award was warranted, as the federal trial court did,] would have abused its discretion.").

157 McGrath v. Toys "R" Us, Inc., 409 F.3d 513, 517 (2d Cir. 2005).

158 Notably, the original district court decision awarding fees applied the same legal standard that the state court approved in its certified answer. *See* McGrath, 821 N.E.2d at 520, 526. In essence, the trial court applied a standard, the Second Circuit asked the state court whether the standard was correct and could support the result, the state court answered yes to both questions, and the Second Circuit responded with, "Well, we'll have to see about that."

state law determination. For example, in *Policano v. Herbert*, the U.S. Court of Appeals for the Second Circuit asked the New York Court of Appeals to rule on several thorny questions of state criminal law that had deeply divided the state jurists.[159] The state high court accepted the questions[160] and declared New York law on the disputed points (with two Judges dissenting).[161] After the answer reached the Second Circuit, however, that court read the trial transcripts more closely and discovered that its certified questions had been entirely unnecessary; the matter was resolved on other grounds.[162] The state high court's answer became irrelevant to the federal proceeding, but remained good law as a broad, precedential statement of principle by the state high court.[163] Of course, sometimes the U.S. Supreme Court reaches holdings on points of law that ultimately do not resolve the litigation on remand.[164] Unlike the state high courts answering certified questions, however, the U.S. Supreme Court retains the authority to resolve the litigation when it wishes to do so.[165]

Certainly, state courts are not bound by Article III, as Hershkoff explains. They might, upon due consideration, decide to advise federal courts about the content of state law even without expectation that the answer will be determinative in the federal litigation. After all, some state high courts advise their governors or legislatures about

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159 Policano v. Herbert, 453 F.3d 75, 75–76 (2d Cir. 2006) (certifying questions concerning the retroactive applicability of judicial interpretations of the state's depraved-indifference murder statute). *See generally* Abraham Abramovsky & Jonathan I. Edelstein, *In Search of the Point of No Return:* Policano v. Herbert *and the Retroactivity of New York's Recent Depraved Indifference Murder Jurisprudence*, 57 SYRACUSE L. REV. 973, 980–84 (2007) (describing the controversy about the statute's meaning in both the Second Circuit and the New York Court of Appeals).

160 Policano v. Herbert, 853 N.E.2d 1107, 1107 (N.Y. 2006).

161 *See* Policano v. Herbert, 859 N.E.2d 484, 494–95 (N.Y. 2006) (holding that a more lenient interpretation of the elements of a statutory crime would not be applied retroactively).

162 *See* Policano v. Herbert, 507 F.3d 111, 116–17 & n.5 (2d Cir. 2007) (discovering previously overlooked evidence in the record and rendering the issue addressed by the certification answer "moot").

163 *See, e.g.*, People v. Jean-Baptiste, 901 N.E.2d 192, 195 (N.Y. 2008) (discussing (though distinguishing) the holding of the court's certification answer in *Policano*, 859 N.E.2d at 495).

164 *See, e.g.*, Belmontes v. Ayres, 551 F.3d 864, 865 (9th Cir. 2008) (Reinhardt, J., concurring in denial of rehearing en banc) (explaining that the federal Supreme Court had twice decided distinct points of law that proved non-dispositive on remand).

165 *See, e.g.*, Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam) (reversing the Florida Supreme Court's interpretation of Florida law to conclusively end litigation concerning a ballot-counting dispute). Federal Supreme Court review of state-law questions is ordinarily considered outside the Court's jurisdiction, *see id.* at 139 (Ginsburg, J., dissenting), but "rarely" is not "never."

state law without requiring the advice to be treated as binding.[166] The difference, however, between these examples of advisory opinions and advisory certification answers is that the certification answers bear the same precedential authority as an opinion of the state high court reached on direct appeal from the lower state courts. Inter-branch advisory opinions within the states are non-binding on both the advisor and the recipient.[167] In contrast, with certification, the *only* institution for which the answers are advisory rather than binding is the certifying federal court. Even a strong nationalist, comfortable with subordinating state autonomy to federal power, can concede that answering certified questions under these conditions is an example and an enactment of a judicial hierarchy that places state high courts as subordinate to federal intermediate appellate courts.

In the model I have described so far, the "passive virtues" might look like a zero-sum game. When a federal appellate court avoids resolving an open question of state law by certifying the question to the state high court, it avoids endorsing any view of the dispositive legal issue before it. And the federal court benefits, or at least may perceive itself to benefit, from the husbanding of its scarce political capital, with a bonus for appearing to exercise humility in regard to the state courts. The same action, however, places the state court in the opposite position. It acts in the certification litigation even before the lower state courts have had an opportunity to feed it a developed dispute. The state court often sacrifices its normal preference to interpret the state constitution only if the federal Constitution does not resolve the dispute, in favor of exactly the reverse order of constitutional avoidance. While the state political branches are left in the cold, the court sets the agenda. If the state court declines the certified question, the pattern reverses: the federal court is left to spend its own political capital, while the state court sits back to see whether the state's political branches tolerate the rule adopted by the federal court.

Rather than a two-player zero-sum game, however, a better model of certification is a system with two components. Whether the system, as a whole, exhibits the passive virtues and protects democratic deliberation is the better question to evaluate the wisdom of certification. The discussion in this Part has shown that certification, considered as a single system, unnecessarily yields definitive declara-

166 *See* Hershkoff, *supra* note 67, at 1845–46 (noting that at least eleven state high courts offer advisory opinions to other institutions of state government).

167 *See id.* at 1846–47.

tions of state law. If federal courts answered state-law questions themselves, the two judiciaries together could avoid a final, definitive answer (because the federal answer lacks authoritative weight). In contrast, certification solidifies the authority of courts as against the political institutions of state government, including state attorneys general, but simultaneously undermines the juridical legitimacy of the state courts by engaging them in activities widely seen as inappropriate for proper courts. In sum, application of judicial-minimalism theory to certification suggests that the procedure does not bolster democratic deliberation and especially does not reflect federal-court respect for states or state courts.

IV. Certification Through the Lens of Federalism Theory

After considering what passive-virtues theory reveals about the relationship between federal and state courts engaged in certification, I turn now toward a discussion of federalism. In this Part, I apply three basic theories of federalism (dual federalism, cooperative federalism, and interactive/polyphonic federalism) to certification, showing that certification is an example of dual federalism. With certification, federal courts treat state courts as if the latter were foreign, like a separate sovereign. Although many of the advocates of certification support it largely because they believe it works to show respect to states and to increase state autonomy, understanding the dual-federalism aspects of certification reveals that the practice ultimately shrinks the authority of state courts. I then consider how the relationship between state and federal courts need not be dualist. Instead, interactive federalism maximizes state autonomy as well as the capacity of both state and federal courts to develop sound law, to promote democratic deliberation, and to protect against overreaching by either the state or federal governments.

Dual federalism is the theory that the state and federal governments are separate sovereigns and that their operations should be confined to separate spheres of endeavor.[168] Dual federalism may be obsolete,[169] but its Victorian fascination with fixed categories and clear boundaries—"a place for every [government], and every [govern-

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168 *See* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (defining four features of dual federalism); *see also* Schapiro, *supra* note 135, at 246.

169 *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 815 (1998) (acknowledging that "[i]t is commonplace to observe that 'dual federalism' is dead," and replaced by "cooperative" federalism).

ment] in its place"[170]—still finds expression in the work of contemporary scholars.[171]

In contrast to dual federalism, cooperative federalism emphasizes that state and federal powers overlap, and that states often work cooperatively with the federal government to carry out shared goals.[172] While this theory successfully describes much state-federal interaction, particularly among administrative agencies,[173] it offers little guidance for what to do when state and federal authorities conflict.[174]

Finally, interactive judicial federalism acknowledges both that state and federal authority overlaps and that sometimes the interaction is contentious.[175] In this way, states are partners with the federal government in the development of shared American legal values.[176] Recently, other scholars have applied the theory of interactive federalism outside of the judicial context to state-federal administrative relations.[177]

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170 ISABELLA BEETON, THE BOOK OF HOUSEHOLD MANAGEMENT 21 (London, 1861).

171 *See, e.g.*, Calabresi, *supra* note 9, at 1307–08 (arguing for dividing jurisdiction between state and federal courts according to the substantive areas of law each system had traditionally overseen); Friedman, *supra* note 16, at 1235 (assuming that, all other things being equal, "it is better for a sovereign's own courts to resolve novel or unsettled questions regarding that sovereign's laws"); Sloviter, *supra* note 21, at 1683 (positing that state and federal governments have "separate and sovereign functions").

172 *See* Corwin, *supra*, note 168, at 19–20; *see also* Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766–68 (2006) (discussing the virtues of state and federal governments working in the same subject areas to accomplish common goals).

173 *See* Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 205, 212–17 (1997) (noting the prevalence of states executing federal policy).

174 *See* Schapiro, *supra* note 135, at 284.

175 *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 180–82 (2005) (arguing that the purpose of states is to compete with the federal government to provide liberty to the nation); ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 97–104 (2009) (arguing for interactive federalism).

176 *See* James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1005–06 (2003) (describing state contestation of federal jurisprudence as part of a holistic inter-institutional conversation about broad national values); Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 864 (1985) (arguing in favor of "interactive federalism," which entails overlapping federal-state jurisdictions and a dynamic combination of competitive and cooperative approaches between the state and federal governments in order to maximize "social welfare"); Schapiro, *supra* note 135, at 288 (arguing that "the concurrence of federal and state authority provides a valuable opportunity for dialogue"); *see also* Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2370 (2008) (arguing for a return to jurisdictional "pluralism" through concurrent jurisdiction).

177 *See* Hills, *supra* note 169, at 815–16 (arguing that states can cooperate with the federal

Applying these theories of federalism to certification, we see its dual-federalism nature. Certification, at its core, directs state-law questions to state courts expressly so that each forum can mind its own law, creating separate spheres of jurisdiction. The rhetoric of federal courts considering certification confirms that dualism operates as the underlying theory. As I discuss in more detail below, these courts treat state law as if it were foreign; they ignore the national significance of judicial interpretation of state law; and they overstate the legal weight of federal-court interpretation of state law. Together, these approaches amount to a passive-aggressive effort to shrink state autonomy and the authority of state courts.[178]

A. Costs of Declining to Certify and Some Responses

Admittedly, the variations between state and federal court interpretations of the same questions of law can result in costs, including lack of uniformity, reduced judicial accountability, and slower development of finality in the law.[179] While these costs are real, they do not outweigh the advantages of interactive federalism. I address these costs now before moving to my own contribution to the debate.

First, in the absence of certification, different courts can reach different conclusions about the meaning of a particular law. If competing interpretations of the same issue prevail in the different fora, then litigants obtain a forum-shopping opportunity.[180] However, the increase in potential forum shopping appears merely marginal. Even within a single system, like a single state's judiciary, lower courts might reach competing interpretations of a state-law question that had not yet been definitively resolved by the state high court.[181] Of course, if the relevant question *has* been definitively resolved, then

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government, but that they also contest federal policies by using their autonomy and overlapping subject-matter authority); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. (forthcoming 2009) (manuscript at 131–32 & nn.108–10), *available at* http://ssrn.com/abstract=1266319 (same).

178 *See* Redish, *supra* note 176, at 877 (criticizing dual federalism as offering states less autonomy and influence than would overlapping authority); Schapiro, *supra* note 135, at 260–64 (arguing that dual-federalist opinions of the U.S. Supreme Court in preemption and dormant commerce clause cases reduce state autonomy).

179 *See* Schapiro, *supra* note 135, at 288–92 (listing the goals of "uniformity, finality, and hierarchical accountability" as values that interactive federalism weakens).

180 *See* Schapiro, *supra* note 19, at 1418 (explaining that reduced uniformity is a cost of interactive federalism).

181 *See, e.g.*, State v. Payne, 873 N.E.2d 306, 308 (Ohio 2007) (stating that the high court would exercise its discretion to resolve a conflict between lower appellate courts over state criminal sentencing guidelines).

there would be no opportunity for forum shopping in either the lower state or federal courts; they simply apply the announced law. Courts also exhibit tolerance for forum shopping in other contexts. Plaintiffs often retain some discretion to frame a claim as either federal or state, thereby permitting them to pick their forum. Furthermore, defendants satisfying federal jurisdictional limits can choose to remove a case to federal court or not, according to their tactical judgment.[182] The prevalence and acceptance of forum shopping by these means suggests that even relatively weak norms (like the norm that a plaintiff is "master" of the complaint) can overcome the intuition against permitting strategic choice of courts.

In addition, as Professor Robert Schapiro points out, a lack of "hierarchical accountability" results from federal-court interpretation of state law.[183] After the federal court reaches a holding on state law, the losing party has no opportunity to appeal to a court with final authority over that state-law issue. This means that the fear of reversal that normally provides an incentive for lower court judges to attend carefully to state high court holdings does not apply. Like the forum-shopping objection, this objection seems to be founded on a very weak norm: the principle that litigants should have access to a final determination of the law in their cases from the highest court with relevant authority. Litigants in federal court, presenting federal questions, are denied the opportunity for a final and definitive declaration of the law from its final arbiter every time the U.S. Supreme Court denies certiorari. Similarly, in states with discretionary high-court review, litigants in the lower state courts are often denied the opportunity to get a definitive declaration of the law. If a federal court consistently applies a state-law interpretation inconsistent with prior holdings of the state high court, then other litigants will ordinarily bring actions in state court and the state high court will eventually have an opportunity to clarify its precedents.

Schapiro acknowledges that allowing different judiciaries to reach competing interpretations of law might also slow the pursuit of finality in the development of the law.[184] While the differing interpretations are in force, the law will be uncertain and the public will need to adjust its conduct differently for different courts. This problem is greatest where the conduct of state institutions or public policy is at stake. Consider, for example, the problem of a lower state court upholding a

182 *See* 28 U.S.C. § 1441 (2006) (outlining the removal procedure).

183 *See* Schapiro, *supra* note 135, at 288–292.

184 *See id.* at 291.

particular state agency's regulation under state law, but a federal court subsequently interpreting state law to conclude that the regulation is improper. The agency will comply with the federal order and decline to enforce the regulation (or else risk a contempt finding), but then the agency might well lack any opportunity to bring the regulation's validity to the attention of the state's high court. Thus the starting situation—a federal court interpreting state law—appears consistent with interactive federalism, but the consequence effectively silences the state court.[185] Dialogue becomes monologue.

This challenge admits of at least four potential responses. First, federal courts might adopt a canon of construction concerning state law similar to what they apply in interpreting federal statutes in the face of challenges to the actions of federal agencies.[186] Unless there is no reasonable interpretation of the state law that would save the validity of the state agency's action, the federal court could construe the state law to permit the agency action.[187] This approach offers the additional advantage of deferring to the legal interpretation of the state agency acting through its attorney general, thereby protecting and promoting democratic deliberation about the content of state law within state political structures.[188]

Second, state courts might adopt declaratory judgment procedures that would allow state agencies confronted by this situation to bring an action in state court. This declaration could potentially then be appealed to the state high court for a final determination. This approach would be time-consuming and might require a more lax set of justiciability principles than the state would otherwise apply, but it would restore the role of the state high court in finally determining state law.

Third, the federal courts could defer to the permissive interpretation adopted by lower state courts, where one exists. This approach

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185 Note that this difficulty only applies to public-law issues where the state is a party. In the context of private law, if a federal court blocks a particular tort recovery or a contract remedy that the state high court might permit, there is normally no procedural obstacle to *other* private parties bringing the same question to the state courts.

186 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (requiring judicial deference to agency interpretations of the statutes the agencies are charged to enforce).

187 If there is no reasonable interpretation of the state law that would permit the agency action, then the problem of whether to certify evaporates, because the law is not unsettled; the action is clearly prohibited.

188 *Cf.* Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 207, 212 (1960) (remanding for certification of a question of Florida law to the state supreme court rather than deferring to the view of Florida law offered by the state attorney general as amicus curiae).

might be adopted as an extension of *Erie* to require deference to lower state courts' holdings, or it might be adopted as a prudential matter beyond any *Erie* requirements.

Fourth, the federal courts might certify the state-law question. As long as the federal court first gave its view of state law and explained what the disposition would be if that interpretation were to stand, then both courts would have at least some voice in the development of state law (with the state high court having the last word).

B. How Certification Reflects Dual Federalism

The problems with federal court resolution of state law questions (i.e., noncertification) described above and the responses I have outlined seem balanced in persuasive force. These reasons alone do not offer, in my view, a strong reason to view certification as disrespectful toward states or state courts. However, the points I raise below offer a stronger critique of certification by tying certification to the discredited theory of dual federalism.

1. Federal Courts Often Treat State Law as Foreign

State law, along with federal law, is an integral component of American jurisprudence. The number of cases determined in state courts vastly exceeds the number on federal court dockets,[189] meaning that if an American goes to court, the odds are that it is a state court. And state courts can use their decisions to confirm or challenge federal legal norms,[190] thereby altering the course of the national politico-legal culture.[191] Of course, state courts have interpreted and enforced federal law ever since the federal government was created.[192] As Rob-

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189 Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 769 (1989) (reporting that in 1988, the federal courts accepted 240 thousand civil filings while state courts received seven million civil filings); *see also* SHAUNA M. STRICKLAND ET AL., NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2007, *at* 105–06 (2008), *available at* http://www.ncsconline.org/D_Research/csp/2007_files/State%20Court%20Caseload%20Statistics%202007.pdf (reporting that in 2006 state courts received over seventeen million civil filings).

190 *See, e.g.*, Roper v. Simmons, 543 U.S 551, 564–67 (2005) (surveying state law to find the meaning of the U.S. Constitution's Eighth Amendment). *Compare* Perez v. Sharp, 198 P.2d 17, 29 (Cal. 1948) (applying the federal Constitution's Equal Protection Clause to invalidate a state anti-miscegenation statute), *with* Loving v. Virginia, 388 U.S. 1, 12 (1967) (invalidating a state anti-miscegenation statute on federal constitutional grounds nearly twenty years after California's *Perez* holding). *See also* Schapiro, *supra* note 135, at 289 (noting that "state law can provide . . . a powerful criticism of the federal approach").

191 *See* GARDNER, *supra* note 175, at 94–100 (explaining how states can affect national power).

192 *See* Redish, *supra* note 176, at 890–98 (describing the historical development of state-

ert Schapiro emphasizes, state citizens increase their influence over the law that most affects them when state courts participate fully in the development of national law.[193]

When federal courts treat state law as unrelated to federal concerns, they thereby isolate states from the common project of developing national law. As Justice Stevens recently wrote for the U.S. Supreme Court,

> This Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures. Federal and state law together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.[194]

In this sense, dual federalism fails as an adequate description of American federalism in both directions: not only does federal law interact with state law at multiple points of intersection, but state law is extensively embedded in federal law, even where we least expect it. For example, creative new scholarship in international law, a field ostensibly monopolized by the federal government in the United States, acknowledges the capacity of states to confirm, contest, and change federal policy.[195]

Nevertheless, the federal reporters are rife with federal courts' sense of mystery bordering on the occult as they try vainly to "predict" unsettled state law in attempted compliance with their *Erie* duty.[196] This mystery persists even though *Erie* likely requires no

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court jurisdiction over federal questions); *see also* Brown v. Gerdes, 321 U.S. 178, 188–89 (1944) (Frankfurter, J., concurring) (explaining that only a state can define the jurisdiction of state courts, but once jurisdiction is granted, the state courts are empowered "to enforce rights no matter what the legislative source of the right may be").

193 *See* SCHAPIRO, *supra* note 175, at 114–18 (arguing that polyphonic federalism expands the political influence of a state's citizens).

194 Haywood v. Drown, 129 S. Ct. 2108, 2114 (2009) (internal quotation marks and citation omitted).

195 *See, e.g.*, Perry S. Bechky, *Darfur, Divestment, and Dialogue*, 30 U. PA. J. INT'L L. 823, 848–52 (2009) (explaining how states affect federal foreign-affairs policy). *See generally* Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007) (same).

196 *See, e.g.*, Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656, 656–57 (5th Cir. 1968) ("divining" state law); Clark, *supra* note 21, at 1495 (noting that most federal courts identify uncertain state law by prediction). Admittedly, some states' lower courts produce many unpublished, oral, or conclusory judicial opinions that might obscure their true holdings. If federal courts feel obliged to weigh the hidden contents of these lower-court decisions, they set them-

more than that federal courts sitting in diversity apply state common law where it exists.[197] Indeed, "the very essence of the *Erie* doctrine is that a federal judge can find, if not make, the law almost as well as a state judge."[198] Still, federal judges turn toward certification as a productive diversion from the "fruitless task"[199] of state-law prediction, without needing to sacrifice any of their control over the federal issues in the case (unlike abstention).[200]

Federal court confusion about even ordinary procedures for identifying state law reveals the extent to which the courts perceive state law as alien. For instance, the basic question of whether federal trial courts should get deference from appellate courts based on their findings of state law was an open question until the U.S. Supreme Court resolved it half a century after *Erie*,[201] as if state law were the type of law that is "proved" by witnesses and found as "fact" in the federal courts. Even district court determinations of the law of foreign nations are, by contrast, no longer treated as fact-finding subject to deferential appellate review.[202] Other fundamental questions concerning how federal courts interpret state law and how to weigh those deter-

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selves up for failure. To the extent the state law is inscrutable to federal judges, however, it is equally inscrutable to the public and to state institutions outside of the courts, suggesting that the role of these decisions as state "law" (as opposed to unreasoned discretion) might be diminished, at best.

197 *See* Clark, *supra* note 21, at 1461 (challenging the use of "predict[ion]" by federal courts to determine state law); Glassman, *supra* note 2, at 244 (arguing that *Erie* only requires applying existing state law, not predicting future state law); Green, *supra* note 42, at 596 (describing *Erie*'s holding as the requirement that federal courts sitting in diversity "*apply* state substantive law") (emphasis added).

198 Kurland, *supra* note 23, at 217 (rejecting the view that a state's law is a "brooding omnipresence in the sky" over that state).

199 Knox v. Eli Lilly & Co., 592 F.2d 317, 319 (6th Cir. 1979) (describing federal-court prediction of state law as essentially futile and complaining that the Michigan Supreme Court declined to answer questions certified to it).

200 *See* Scanelli, *supra* note 14, at 634 (noting that a federal court cannot prevent the state court from reaching federal questions after abstention, and the state court's resolution would then be res judicata on the federal court).

201 *See* Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991) (holding that de novo review of federal district court determinations of state law is appropriate in the federal appellate courts). Previously, federal appellate courts adopted varying degrees of deference to the district courts' determination of state law. *See, e.g.*, Gillette Dairy, Inc. v. Mallard Mfg. Corp., 707 F.2d 351, 353 (8th Cir. 1983) (holding that the district court's interpretation of ambiguous state law was "entitled to great weight"). *But see generally* Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975 (2004) (arguing that in practice, federal appellate courts continue to defer to district court interpretations of state law).

202 *See* FED. R. CIV. P. 44.1 (declaring a determination of foreign law to be "a ruling on a question of law").

minations within the federal system are still, surprisingly, unsettled.[203] For example, federal law remains unclear as to how federal courts should treat circuit-court precedent on state-law questions when there has been intervening jurisprudence from state courts.[204]

The supposed foreignness of state law makes certification more attractive for federal courts, because it passes the difficulty to another institution: an approach one might call the "it['s-all]-Greek-to-me"[205] school of certification. One naturally empathizes with the impulse toward certification among judges who feel so at sea when contemplating state law. But simply because federal judges do not consider open questions of state law very often does not justify their treating that law as foreign. After all, federal judges do not see open questions of treaty interpretation very often, either, but they would hardly be quick to suggest their own lack of capacity to address those issues.[206]

Another way that federal courts treat state law as foreign is by assuming that it is legitimated by cultural distinctiveness, a thin reed to rest upon.[207] The most profound concerns of Americans are shared nationwide,[208] a reality that federal judges implicitly ignore when they treat states as repositories of fundamental values at variance with the national standards. For example, one federal judge posited that a state court might interpret its constitution differently from how the appellate panel had interpreted the federal Constitution, but he suggested that the reason for the different interpretation would be the "rugged individualism" that marked the state character.[209] This rheto-

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203 *See* Glassman, *supra* note 2, at 263 (noting that federal appellate courts have still "not developed a consensus approach to the sources of state law, nor have they truly demonstrated consistent command of the principles involved").

204 *See* Colin E. Wrabley, *Applying Federal Court of Appeals' Precedent: Contrasting Approaches to Applying Court of Appeals' Federal Law Holdings and* Erie *State Law Predictions*, 3 SETON HALL CIR. REV. 1, 4 (2006).

205 WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2.

206 *Cf.* Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (interpreting the Geneva Convention).

207 *See* Sloviter, *supra* note 21, at 1682 (arguing that a federal judge "is certainly not likely to be as attuned as a state judge is to the nuances of that state's history, policies, and local issues"); *see also supra* notes 168–71 and accompanying text.

208 *See* James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219 (1998) (demonstrating the insufficiency of state "character" as an explanatory force in Confederate state constitutional interpretation); Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. SCH. L. REV. 635, 681–82 (2006) (arguing that national concerns predominate over local concerns for most Americans).

209 Acton v. Vernonia Sch. Dist. 47J, 66 F.3d 217, 220 (9th Cir. 1995) (Reinhardt, J., dissenting) (arguing that Oregon might not share the "national frenzy" for drug prosecution and therefore certification to the state supreme court was appropriate).

ric marks the state judges as holding profound values not shared by the federal judges or the national polity, a view unsupported by ethnographic evidence. But separating a state's "character" from the nation's can be used to rationalize excluding states from their full role as *part* of the community that defines the nation's values. If a state's judges genuinely were more ruggedly individualistic than federal judges, and a question of real national significance were to arise, the state judges would lack the normative qualifications (and associated political legitimacy) to rule. This view has even found explicit expression in a remarkably frank passage by a Second Circuit judge. In an essay, he dreaded the decline of the federal bench's quality, fearing that

> [i]n selection and performance [the federal judiciary] will be indistinguishable from the judiciary of most states—manned by many capable and conscientious judges, but including within its ranks an unacceptable number of men and women *not sufficiently qualified to be the primary adjudicators of federal law*.[210]

Of course, state judiciaries do bear primary responsibility for adjudicating federal law when federal questions arise in their courts, as made explicit by the oath state and federal judges alike owe to the nation, under Article VI of the U.S. Constitution, "to support this Constitution" by adjudicating federal questions.[211] A decline in the quality of federal judges to the (presumably low) level currently exhibited by state judges, even if accepted as a realistic view of state courts, does not imply that the interpretation of federal law requires any greater judicial skill than the interpretation of state law. The contrary attitude quoted above seems to echo the cultural imperialism exhibited in one of the very first certification cases, *Login v. Princess of Coorg*, decided in 1862.[212] Rather than seek to learn and apply the Indian estate law that controlled the case, the Master of Rolls certified questions to the Bengal high court. The reported opinion does not

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210 Newman, *supra* note 189, at 767 (emphasis added).

211 U.S. CONST. art. VI, cl. 3; *see also id.* cl. 2 (stating that "Judges in every State shall be bound [by federal law]"). Judge Selya has made the connection, with characteristic vigor, between certification, the separate-spheres philosophy, and an impulse to reduce state courts' authority over federal questions. *See* Selya, *supra* note 26, at 685 (arguing that the logic of certification suggests that reverse-certification of federal questions away from state courts would promote the same underlying values).

212 Login v. Princess of Coorg, (1862) 54 Eng. Rep. 1035 (Ch.) (certifying to the Supreme Court of Bengal questions of Hindu estate law for disposition of an estate among the decedent's three wives and multiple legitimate and illegitimate children).

suggest that the Victorian English jurist undertook the certification as a self-deprecating gesture of comity to the colonial judiciary.

2. *Federal Courts Often Underestimate the National Importance of State Law*

State law has a national importance that merits the time and attention of federal judges. Certification allows federal judges to avoid this effort. At the simplest level, state law is important to federal law because it directly affects the definition of federal law in certain areas, such as the "evolving standards of decency"[213] test under the Eighth Amendment,[214] the privacy interest protected by the Fourth Amendment,[215] or the property interest protected by the Fifth Amendment.[216] When federal courts interpret state law in these areas, they are simultaneously helping to develop the content of the federal Constitution, whether congenially or contentiously.[217] In this narrow sense, the meaning of state law is essential to defining the federal law, leading one commentator to conclude that the U.S. Supreme Court should not defer to state high-court interpretations of state law in contexts where the definition of state law essentially affects the federal constitutional question at stake.[218] Regardless of whether one agrees with such a potent response, if federal courts adequately respected the significance of state law to their own project of crafting federal law, they would not surrender its interpretation exclusively to the state courts. Concededly, this removes state-court control over state law in a limited number of cases. But federal court interpretation of state law

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213 Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

214 *See, e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641, 2650–51 (2008) (noting that available punishment under state law is a factor in whether the federal Constitution permits severe punishments).

215 *See, e.g.*, Virginia v. Moore, 128 S. Ct. 1598, 1608 (2008) (holding that the U.S. Constitution does not prohibit a warrantless arrest for a state misdemeanor committed in view of the arresting police). While the *Moore* Court heartily denied that state law could affect the content of the Fourth Amendment, *see id*. at 1607, the Court confirmed that federal search and seizure doctrine governs wherever local police officers conduct an arrest for "crimes," *see id*. The *Moore* opinion leaves no doubt that the threshold question of whether the conduct at issue was a crime or not depended entirely on state law.

216 *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998) (noting that state law creates the property interests that are then protected by the federal Constitution).

217 *See* Mattis, *supra* note 11, at 724 (describing the tension between state and federal courts that can arise from federal collateral review of state convictions).

218 *See* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1957–67 (2003) (arguing the federal Supreme Court should independently evaluate federal constitutional claims, including the meaning of any state law necessary to reach the federal question).

brings another voice to the dialogue, a practice my review of interactive federalism shows to promote state autonomy.

One area of federal law, habeas corpus jurisprudence, vividly illustrates this principle. Somewhat surprisingly, federal courts have occasionally certified questions of state law in federal collateral-review cases,[219] a practice that might seem inconsistent with the defining feature of habeas review: providing a check on the state courts' interpretation of federal law. In its normal path, federal collateral review of state-court convictions uses jurisdictional redundancy to provide an additional opportunity for courts to protect federal rights.[220] When habeas courts certify state-law questions[221] to the very high court that previously approved the conviction under review (explicitly through affirmance or passively by declining review), they reduce rather than maximize the number of institutional voices participating in the discussion. Federal courts cut themselves out of the development of state law, even in a context where that state law is of clear vital importance to the protection of federal constitutional rights.

In a broader sense, the fundamental values that Americans generally share derive in part from state law and the conversation state courts engage in with federal courts about the meaning of national

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219 *See, e.g.*, Adams v. Murphy, 394 So. 2d 411, 414–15 (Fla. 1981) (answering certified question from federal habeas court and concluding that the petitioner's conviction of attempted perjury was invalid because the crime did not exist in state law); Policano v. Herbert, 859 N.E.2d 484, 494 (N.Y. 2006) (answering certified question from federal habeas court by providing the answer that would preserve the original state-court conviction); Warnick v. Booher, 144 P.3d 897, 898, 901–02 (Ok. Ct. Crim. App. 2006) (same); Fiore v. White, 757 A.2d 842, 848–49 (Pa. 2000) (answering certified question from the U.S. Supreme Court in habeas case and concluding that the petitioner was improperly convicted).

220 *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1052 (1977) (promoting the rights-protective nature of habeas review). While collateral review in federal courts has undergone radical restriction since Cover and Aleinikoff's 1977 article, *see* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. § 2254 (2006)) (enacting more restrictive habeas standards), the basic framework remains for the sake of providing federal courts an extra look at violations of federal rights.

221 Incidentally, this example illustrates the difficulty in untangling state issues from the underlying federal question. If a state court certification procedure prohibits the court from accepting non-dispositive questions, and the federal habeas court can grant the habeas petition only if the state conviction violated federal law as clearly established by the U.S. Supreme Court or if the state court "unreasonably" applied Supreme Court precedent, *see* 28 U.S.C. § 2254(d) (2006), then the real question being certified (in order to be dispositive) must be whether the state court acted unconstitutionally or unreasonably. Of course, presumably the state court already thought about Supreme Court precedent when it originally acted to approve the judgment of conviction.

norms.[222] Changes in national values may occur smoothly or spastically, subtly or severely, slowly or suddenly, but in any event, states are one locus where the people express these changes.[223] For example, the contemporary debate about same-sex marriage depends heavily on how each state chooses to express what it concludes is the best American approach to this question. The values being debated—the meaning of family, equality, love, and sexual morality—are national values, but they did not spring fully formed like Minerva from the head of the federal government. States, along with the other institutions of national political life, are contesting what it means to be American.[224]

3. Federal Courts Often Overestimate How Much Weight Their Own Interpretation of State Law Should Receive

Some federal judges have argued that federal courts should avoid interpreting state law because they thereby "make" state law, a task for which they have no warrant.[225] This view has won support from numerous advocates of certification, who argue that federal court exercise of policy-making authority over state common law appears inconsistent with *Erie* principles.[226] But federal courts interpreting state law, no matter how hard they try or how persuasive their reasoning, simply lack any positive authority to declare "law" of the state.[227] Federal state-law decisions bind no state institution or even any private person, except the parties to federal litigation.[228]

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222 *See* Nash, *supra* note 3, at 1916–17 (arguing that federal-state dialogue in deciding each other's law promotes better answers through effects similar to the marketplace of ideas).

223 *See* GARDNER, *supra* note 175, at 125 (arguing that states can check national power).

224 *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 421–23 (Conn. 2008) (applying federal precedents and conventional federal standards to construe the right to marriage under the state constitution).

225 *See* Sloviter, *supra*, note 21, at 1682 (describing federal courts' state-law holdings as an infringement of the state "lawmaking function").

226 *See* Clark, *supra* note 21, at 1471–72 (arguing that the federal Constitution prohibits federal courts from substantively declaring the laws of the states); Sloviter, *supra*, note 21, at 1687 ("When federal judges make state law—and we do, by whatever euphemism one chooses to call it—judges who are not selected under the state's system and who are not answerable to its constituency are undertaking an inherent state court function."); Smith, *supra* note 123, at 682 (arguing that certification "implicitly recognizes that state courts, and not federal courts, are the final arbiters of the content of state law").

227 *See* Clark, *supra* note 21, at 1494 (conceding that there is no serious claim that federal court interpretation of state law is really "*state* law" because the federal decision does not bind any state courts or institutions in future cases).

228 *See* Erie R.R. v. Tompkins, 304 U.S. 64, 65 (1938) (holding that federal courts are bound by state courts' interpretation of state law, rather than vice-versa). Federal courts can even avoid binding future *federal* courts by writing "unpublished" (i.e., non-precedential) opinions

In truth, a federal court's construction of unsettled state law is no more "law" as to the state courts than is an arbitrator's resolution of the same state-law dispute.[229] It binds the parties, in reliance on the state's law-making power, but even state trial courts remain free to construe the law according to their own lights as if the federal courts had never spoken.[230] Only where the public law of the state is at stake—because state agencies or state officials are parties to the federal litigation—would the state court's refusal to cooperate with the federal court result in the exercise of federal power in a way that would constrain the state court's future options. But as I noted earlier in Part II, the bulk of certified questions are issues of private law, not disputes over the power or structure of state government.[231]

The thesis that federal courts improperly "make" state common law when they reach state questions suggests that federal courts should certify rather than engage in policymaking.[232] But this is merely another way that federal courts treat state courts as outside the national normative consensus. Note that rejecting the idea of state norms as alien to national norms does not require denying that common-law adjudication sometimes necessitates normative policy choices.[233] Instead, federal courts could simply make those common-law judgments, according to their own common sense, trusting that their values and reasoning are not essentially different from those of state judges because both types of judges share common American

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when they interpret state law. *See, e.g.*, Wang v. Holder, 569 F.3d 531, 538 n.5 (5th Cir. 2009) (noting that "while unpublished opinions are not binding precedent," they may be persuasive on legal issues).

229 *See* LeBel, *supra* note 24, at 1014–15.

230 Not only are the lower federal courts' view of state law not binding on state courts, their view of *federal* law is equally unauthoritative, even on states within the same geographic jurisdiction. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (noting that state courts hold an independent right to interpret federal law, regardless of even the existence of lower federal courts); Donald H. Zeigler, *Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law*, 40 Wm. & Mary L. Rev. 1143, 1178 (1999) (arguing that state courts are not bound to follow lower federal courts' interpretation of federal law). The U.S. Court of Appeals for the Ninth Circuit once asserted the contrary proposition, *see* Yniguez v. Arizona, 939 F.2d 727, 736–37 (9th Cir. 1991), and was predictably chastened by the U.S. Supreme Court, *see* Arizonans for Official English v. Arizona, 520 U.S. 43, 58 n.11 (1997) (rejecting the Ninth Circuit's "remarkable" explanation for why its view of federal law should be binding on state courts).

231 *See supra* notes 63–76 and accompanying text.

232 *See* Clark, *supra* note 21, at 1484–87 (arguing that federal courts lack "lawmaking" power under Article III, as to both federal and state law).

233 *See* Glassman, *supra* note 2, at 281 (noting that the development of state common law includes "[s]omething other than pure legal reasoning").

norms.[234] Federal judges' interpretation of state law can add a different perspective that ultimately may help the states improve their law by responding (positively or negatively) to the points raised in federal court,[235] but not because federal judges speak from a different set of normative commitments. Such interpretation offers the additional benefit of satisfying the federal courts' obligation to exercise their jurisdiction where properly established.[236]

C. Lessons from Applying Federalism Theory to Certification

Certification implies that state law is foreign to federal courts. But interactive federalism teaches otherwise. State courts and state law are not on the sidelines of the overriding national project of carrying out the people's will, but are full players competing with the federal courts for citizens' trust and loyalty. The dual federalist argument for certification—and its procedural cousins, abstention and the abolition of diversity jurisdiction—is effectively an argument undermining the capacity of state courts to engage significantly with federal questions. Polyphonic federalism is thus brayed over by the monotony of federal aggrandizement.

To see how certification works to disrespect state autonomy, consider how the procedure's logic of "separate spheres" would restrict the capacity of state courts to reach the federal questions they now handle comfortably. Whether "parity" of state and federal courts in the handling of federal questions is a "myth" or not,[237] state courts have the power and duty to address federal questions over which they have jurisdiction—even unsettled, difficult, and politically contentious federal questions. Even in cases of abstention, the state court remains formally authorized to consider the federal questions along with the state questions that the federal court has refrained from taking up.[238] When a state court answers a certified question, however, it has been deprived of this power.

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234 *See, e.g.*, Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 442–43 (1959) (interpreting North Dakota law).

235 *See* Yonover, *supra* note 25, at 334–42 (arguing that federal court resolution of state law issues promotes "cross-pollination" through persuasive opinions issued by federal judges with the advantages of a high degree of independence).

236 *See* Meredith v. Winter Haven, 320 U.S. 228, 234 (1943) (holding that it is the "duty" of the federal courts to interpret state law where doing so is necessary to decide cases within the courts' jurisdiction).

237 *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal courts are a superior and sympathetic forum for federal rights claims compared to state courts).

238 *See* Friedman, *supra* note 16, at 1265.

Similarly, the U.S. Supreme Court has held that it has jurisdiction on certiorari from state high courts to review only federal questions, typically leaving state-law questions for the state high courts.[239] This point admittedly undermines my argument that restricting state high courts on certification to state law questions is disparaging, because there is no serious argument that the federal high court is disparaged by its limited review of state law. Nevertheless, the contextual balance of power between the U.S. Supreme Court and state courts seems starkly different from the balance between federal circuit courts and the state high courts. This background difference colors the interaction such that a limitation on one court might lack any pejorative valence while the same limitation on the lower court might (and in my view, does) express underlying disrespect.

A recent case illustrates the idea that certification deprives state courts of a fair opportunity to decide state and federal law interactively: an unsettled question of federal free speech law arose in the context of "libel tourism"—the use of plaintiff-friendly English courts to obtain a libel judgment against an author, followed by a potential threat to bring enforcement proceedings in courts in the United States.[240] The author brought a declaratory judgment action to confirm that she could not be bound by the English judgment in this country, while the libel plaintiff (having never entered the United States) defended on the merits and by asserting a lack of statutory personal jurisdiction. If the author initiates her action in state court, then she would permit the state courts to decide the state statutory issues holistically in the context of the federal constitutional question. The state court might then construe the statute more narrowly than its plain terms suggest to avoid a potentially unconstitutional application, or it might conclude that personal jurisdiction exists under the statute, but that due process (under either the state or federal constitution) prohibits the statute from reaching so far. In contrast, the author could bring the same action in federal court. On appeal, the federal courts might certify the unsettled and "important" state law question of whether the state's long-arm statute reaches the defendant,[241] but any federal questions in the case would either be resolved in the fed-

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239 *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (holding that the U.S. Supreme Court will not review a state court decision where it rests on an "adequate and independent" state-law ground).

240 *See* Ehrenfeld v. Mahfouz, 518 F.3d 102, 103–04 (2d Cir. 2008) (discussing libel-tourism case raising state-law problems of personal jurisdiction).

241 *See* Ehrenfeld v. Bin Mahfouz, 881 N.E.2d 830, 831 (N.Y. 2007) (answering that the statute did not confer jurisdiction).

eral court before certification or applied to the certified answer before issuance of the federal mandate.[242]

This example shows that certification's dual-federalism style "respect" for state courts does indeed come at a cost to states: the direct restriction of state courts' capacity to discuss and decide federal questions. Given that under current doctrine, virtually any question that might traditionally have fallen subject to state sovereignty—from where one can haul garbage[243] to how often to test fifth-graders[244] to which marriages earn recognition[245]—now constitutes routine federal law, a judicial procedure that systematically limits state courts to issues of pure state law is not a good deal for the states. This brand of comity cuts state courts out of the project of building national law.

In doing so, certification undermines the strongest argument for federalism in the first place: the advantage of multiple voices contending and cooperating over the fundamental jurisprudential dilemmas of our time. We ought to abhor the "unanimity of the graveyard"[246] in juridical as much as political discourse. Not because states are "laboratories,"[247] trying and erring their way through their own socio-political idiosyncrasies; to the contrary, this view of the states' role in our federal system is largely unsound both logically and normatively.[248] Rather, as the scholars of interactive federalism have argued, states serve their highest and best role by engaging federal institutions on the great national challenges faced in common by both levels of government.[249]

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242 *See* Ehrenfeld v. Mahfouz, 489 F.3d 542, 547 (2d Cir. 2007) ("We note that even if the New York Court of Appeals concludes that personal jurisdiction is proper under § 302(a)(1) of the New York long-arm statute, this Court must make the ultimate determination whether this jurisdiction satisfies constitutional due process.").

243 *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) (invalidating a municipal waste-disposal regulation on Dormant Commerce Clause grounds).

244 *See* No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7941 (2006) (establishing national goals and requirements for local public schools).

245 *See* Defense of Marriage Act, 1 U.S.C. § 7 (2006) (defining marriage for federal purposes).

246 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves on the unanimity of the graveyard.").

247 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

248 *See* James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 491 (1996) (critiquing the metaphor as empirically unfounded and prescriptively undesirable).

249 *See* Gardner, *supra* note 176, at 1005 (describing the states' function as "cogs in a national apparatus" to include occasional resistance to federal authority on issues governed both by the federal Constitution and state constitutions).

To establish an effective counterbalance to federal courts' handling of federal questions, state courts must be able to address the very same questions. Professor Gardner's explanation that the more state constitutions vary, the less useful a self-consciously comparative approach becomes,[250] also applies to the gap between state and federal law. Returning to our example of personal jurisdiction over the libel tourist, perhaps the state court might conclude that its own law protects the foreign defendant and so does not reach any federal question. But if the state court is barred from reaching the federal due process problem, regardless of what it concludes about the content of state law, then the federal courts face no competition in their refinement of the constitutional limits on personal jurisdiction. Certainly, at any given time in history, expansive federal power over states might result in a momentarily more effective protection of the people's liberties,[251] but other historical periods might prove federal courts to be less attuned to democratic requirements than their state counterparts.[252] Certification, like other techniques of dual federalism, is a judicial collusion that ultimately weakens the power of courts to protect liberty.

Conclusion

I began this inquiry into whether certification shows respect for state autonomy by examining the rhetoric associated with the procedure. In Part II, I showed that certification comes with a surprising amount of condescending rhetoric by federal judges toward their state counterparts. Part III amplified the impression that federal courts do not treat state courts as partners in a common project. The federal courts' retention of the passive virtues for themselves, at the expense of the state courts' virtue, suggests that federal courts do not view state courts as animated by the same fundamental values the federal courts view as inherent to a successful judiciary. This tendency toward viewing state courts as foreign was confirmed in Part IV, where I studied the application of theories of federalism to certification. I con-

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250 *See* Gardner, *supra* note 248, at 481–82.

251 *See* Cooper v. Aaron, 358 U.S. 1, 16–17 (1958) (opinion by Warren, C.J., Black, J., Frankfurter, J., Douglas, J., Burton, J., Clark, J., Harlan, J., Brennan, J., and Whittaker, J.) (holding that states are bound to follow the U.S. Supreme Court's order to desegregate public schools).

252 *Compare* Lochner v. New York, 198 U.S. 45, 64 (1905) (invalidating state regulation of employment as an interference with commerce), *with* N.Y. CONST. art. I, § 17 ("Labor of human beings is not a commodity nor [sic] an article of commerce and shall never be so considered or construed.").

cluded that certification reflects dual federalism, a theory that inevitably undermines state autonomy.

Interactive federalism, on the other hand, offers states the best chance to participate fully in the development of the major issues and values common across American law. Interactive federalism, like some strains of judicial minimalism, calls for maximizing the number of institutional voices heard on any given dispute. The result—what Robert Schapiro calls "polyphony"—promotes pluralism and the development of national norms in an inclusive, thoughtful way. Unorthodox views may hold sway for a limited time, or over a limited space (like a state). But when a national consensus develops, these minority views form part of the American experience.

By deciding state law questions directly, federal courts show the importance of state law to the development of law (including federal law) nationwide, without risking any intrusion into the lawmaking powers of the state courts. Federal judges should treat state law as part of their own legal enterprise, not a separate sphere, and the excuse that federal judges just "aren't good" at state law should be no more socially acceptable than if they were to announce they "aren't good" at due process. Federal judges confronted with an open and challenging question of state law should see the case as a reason for harder work and deeper thought, not quitting the field. The alternative is not comity, but disrespect for states; abandoning state law to the state courts treats it as insignificant and foreign to the fundamental values common to the entire nation.[253]

The primary insight of interactive federalism is that state *and* federal participation in the development of American norms is better than state *or* federal participation in the development of distinct state *or* national norms. If courts were to accept that normative conclusion, then the principle implies some specific doctrinal consequences. Here, I offer a sketch of what some of these consequences might be.

First, federal courts should almost always decline to certify questions of state law, because certification leaves federal courts out of the debate about the meaning of state law, which in turn constitutes an important part of American law. Certification reduces the number of institutions available to opine about the issues certified, thereby decreasing the quality and legitimacy of legal decision-making.

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253 *Cf.* Braun, *supra* note 9, at 939–40 (arguing that certification allows federal judges to "avoid[ ] both the necessity of time-consuming speculation on the unfamiliar law of a *foreign* jurisdiction and the possibility of embarrassing error" (emphasis added)).

This rule suggests an exception: where quirks of jurisdiction make impossible (or very unlikely) state-forum litigation over certain state law areas, certification is appropriate to increase the number of voices. For example, if certain state law questions concerning corporate governance arise as a practical matter exclusively in federal bankruptcy proceedings, then the state courts will have no real opportunity to opine on those questions unless the federal courts occasionally certify them.

On the other hand, certification should never be used to undermine existing opportunities for inter-forum review, like federal collateral review of state criminal convictions. If both the state and federal judiciaries already have a voice in the resolution of state criminal law, then certifying state law questions away from the federal courts deprives them of their role and leaves only one system, the state, to develop the law.

If federal courts proceed to decide state-law questions themselves, ample interpretive tools exist to help decide ambiguous or open issues. For example, imagine a federal prosecution where an ambiguous state law constitutes an element of the offense (perhaps a federal financial services crime that depends on whether a fiduciary relationship existed under state law). Should the federal court certify the state law question before proceeding with the criminal litigation? This presents no true dilemma. The ordinary rule of lenity calls for a court to resolve statutory ambiguity in favor of a criminal defendant.[254] In this example, certification would not only reduce the number of institutions interpreting the ambiguous law, it would also give the prosecution an extra chance to convict someone for violating an ambiguous statute, a chance that would not be available if state law were not at stake. If the state high court later interprets the state law in a manner favorable to the prosecution, then perhaps state prosecutors could initiate a parallel state prosecution against the federally-acquitted defendant (which would be entirely consistent with polyphonic federalism). Even if that particular defendant could no longer be prosecuted under state law, at least future defendants will have adequate notice of which conduct is prohibited by the federal offense, in contrast to the initial defendant.

Similarly, where a state statute has two plausible interpretations, one of which would avoid the necessity of considering a federal constitutional or preemption question, the federal court should construe the

254 *See* Hughey v. United States, 495 U.S. 411, 422 (1990).

statute in the way that preserves its validity. If a later state court wishes to construe the statute differently, that court would then need to go on to decide the federal question the new interpretation requires; the federal courts would be free to reach a different conclusion on the federal question in future litigation. All told, if the question is certified, only the state court considers the state law question, and only the federal court considers the federal law question. In contrast, if the federal court applies the ordinary canon of constitutional avoidance and decides the state law question itself, then both the state and federal courts benefit from opportunities to interpret both the state and federal questions.

Where a state law is ambiguous but there is no latent constitutional or preemption question, federal courts could defer to the interpretation offered by the state agency charged with its enforcement, as they normally do with federal agencies. This device could work like *Chevron* deference for the states. If the agency is a party, federal court deference to its interpretation promotes interactive federalism because it permits the state courts to hear later challenges to agency action by other parties. If, instead, the federal court construes an ambiguous statute against the agency, then the agency will be bound by the court's ruling and would lack an opportunity to present its argument to the state courts.

For other indeterminate questions of state law, an inquisitive federal court could solicit the views of the state attorney general through amicus briefing.[255] This process would offer the advantage of exhibiting genuine deference toward a state institution—which is purportedly the primary motivation for certification—without soliciting an advisory opinion from a state court. Where state attorneys general are

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255 The U.S. Supreme Court has directed certification in three cases where state attorneys general were active in the case, and state high courts ultimately accepted those officials' views in two of the three. *Compare* Bellotti v. Baird, 428 U.S. 132, 144–45 (1976) (describing the arguments of the Massachusetts attorney general for as narrow a construction of the challenged statute as would be necessary to sustain its constitutionality), *with* Baird v. Attorney General, 360 N.E.2d 288, 292 (Mass. 1977) (adopting as narrow a construction of the challenged statute as would be necessary to sustain its constitutionality), *and* Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 207–08 (1960) (noting that the State of Florida appeared, through its attorney general, as amicus curiae for the view that the state could apply its statute to a contract made in Illinois), *with* Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 738 (Fla. 1961) (holding that the state could apply its statute to a contract made in Illinois). *But compare* Arizonans for Official English v. Arizona, 520 U.S 43, 52 (1997) (noting that the state attorney general had issued an official opinion construing the purportedly ambiguous state law), *with* Ruiz v. Hull, 957 P.2d 984, 992 (Ariz. 1998) (rejecting the state attorney general's narrowing construction of the challenged law as inconsistent with the text).

elected, such deference would offer the additional advantage of increasing democratic accountability in federal interpretation of state law.[256] If the attorney general's view later proves unpersuasive with the state high court, the dispute will lie between two institutions within the state, rather than a conflict between state and federal courts.

One might challenge these otherwise innocuous proposals by noting that *Erie* requires federal courts to interpret state law as the state high court would, but application of the interpretive techniques I have described assumes, without evidence, that the state high courts would adopt these techniques. What if the state courts would decide otherwise, the challenger may ask? This question reaches to the core of the argument in this Article.

If there is evidence in positive state law (i.e., statutes, appellate precedents, etc.) that a state high court would prefer the pro-prosecution interpretation of an ambiguous criminal law, or the potentially unconstitutional interpretation of a state statute, or a statutory interpretation contrary to that proposed by the state attorney general, then federal courts should, by all means, give effect to that evidence by deciding the state law question in accordance with it. Whether or not to certify, however, is a challenge that confronts the federal courts only when state law is genuinely indeterminate. In these cases, there is not enough evidence of the type necessary to indicate how the federal court should decide: no evidence of the substantive law; no evidence of overarching policy goals; no evidence of decisive tools of interpretation. If there were such evidence, there should be no dispute that certification would be inappropriate, because the federal courts should follow the discernible state law, as *Erie* demands.

Where the necessary evidence of positive law is lacking—that is, where certification is a legitimate option—federal courts should assume that the state high courts would apply the same ordinary tools of interpretation that the federal courts themselves routinely apply. To assume instead that state high-court judges' motives are inscrutable, their policies opaque, and their methods unknowable is to treat state law as *foreign*. This inevitably places state law in a separate sphere, as if it were a thing apart from normal American legal discourse.

I would be the last to pretend that state law lacks occasional eccentricities, even injustices. But state law and state courts constitute

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256 *See generally* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2468 (2006) (describing the autonomy in legal judgment common to many state attorneys general).

an integrated, essential element of the American legal system. State judges, and the people they serve, belong first and foremost to the national political community. To assert otherwise is to disparage the patriotism of state officials. Federal courts' treatment of state law as belonging to "them" rather than to "us" does not reflect comity toward a parallel judiciary. For that reason, advocates of federalism should oppose procedural devices that isolate and limit state law to state fora. States and their defenders should align against certification.