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EXAMINING THE POWER OF FEDERAL COURTS TO CERTIFY QUESTIONS OF STATE LAW

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Attracted by the perception that certification accords with norms of federalism and comity, federal courts have applied certification without serious examination of its jurisdictional validity. Close examination of certification's jurisdictional underpinnings reveals that they are contradictory and flawed. When a federal court certifies questions of law to a state court, the procedural posture is either that of the federal court temporarily relinquishing jurisdiction over the case to the state high court—the "unitary conception" of certification; or that of the federal court abstaining pending resolution of an independent, streamlined case by the state high court—the "binary conception" of certification. The unitary conception is problematic because it may require state courts to exercise the federal judicial power improperly. The binary conception is problematic because it is inconsistent with current Supreme Court precedent. Moreover, although this precedential inconsistency can be mitigated, the binary conception of certification remains inconsistent with the fundamental purpose of federal diversity jurisdiction.

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INTRODUCTION

A federal court is frequently called upon to determine matters of state law. In such situations, the federal court must divine how the state's high court would decide the state law question at issue.[1] On their own, federal courts can at best make only educated guesses as to how a state high court would decide an issue of state law.[2] Thus, fed-

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1 *See infra* text accompanying notes 15–17.

2 For a discussion of the difficulties federal judges face in undertaking such inquiries, see Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1675–77 (1992).

eral courts have often ruled on issues of state law only to be "corrected" subsequently by state high courts.[3]

Most state high courts now offer federal courts faced with questions of state law, as well as similarly situated state courts, the opportunity to "certify" those questions to the state high court. The state high court returns to the certifying court answers to the certified questions. With the issues of state law resolved, the certifying federal court presumably is then able to render judgment in the case in accordance with properly interpreted state law.

Certification advances the interests of the states and their courts, as well as the interests of the federal courts.[4] States are assured that state law will be applied uniformly and in accordance with the interpretations given by each state's high court. State courts enjoy the benefit of having the final say on matters of state law.[5] Federal courts are able to avoid the awkward, tenuous, and difficult chore of attempting to determine how a state high court would rule on a matter of state law.[6] Indeed, from the viewpoint of federalism, certification's salutary effects are clear.[7] For this reason, certification has become increasingly popular since its inception half a century ago.[8]

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3 *Compare, e.g.*, Md. Cas. Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987) (predicting that, under Maryland law, costs incurred by cleaning up a site contaminated with hazardous wastes to comply with governing environmental law were not "damages" under the language of a standard comprehensive general liability insurance policy), *and* Cont'l Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 985–87 (8th Cir. 1988) (en banc) [hereinafter NEPACCO], *with* Bausch & Lomb Inc. v. Utica Mut. Ins. Co., 625 A.2d 1021 (Md. 1993) (holding that environmental cleanup costs did not constitute "damages," and finding that the Fourth Circuit misperceived Maryland law in stating that "'the term "damages" imports a distinctively legal meaning in insurance matters'" (quoting *Armco*, 822 F.2d at 1352)), *and* Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505, 510 (Mo. 1997) (finding that the Eighth Circuit had misperceived Missouri law in *NEPACCO*, and holding instead that environmental cleanup costs were "damages").

Such correction will likely do little for the parties to the earlier federal proceeding once it becomes final. *See, e.g.*, DeWeerth v. Baldinger, 38 F.3d 1266, 1272–75 (2d Cir. 1994) (holding that relief under Rule 60(b) of the Federal Rules of Civil Procedure from a previously entered judgment, which was based upon a federal court's prediction of state law, was not available even though an intervening decision by the state high court explicitly rejected the federal court's prediction of state law).

4 *See infra* notes 89–95 and accompanying text.

5 *See infra* notes 89–90 and accompanying text.

6 *See infra* note 91 and accompanying text.

7 *See infra* notes 89–95 and accompanying text.

8 Florida enacted the first statute that contemplated certification of questions to its supreme court in 1945. 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4248, at 160 (2d ed. 1988). The device was not used, however, until 1960. *See id.* Today, most states, as well as the District of Columbia and Puerto Rico, provide (whether through statute or court rule) authority for certification to their highest courts of questions of state law by federal courts. *See id.* § 4248, at 167 n.3; *infra* note 71 and accompanying text.

A more complete discussion of the historic development of certification is presented at *infra* notes 50–73 and accompanying text.

Notwithstanding certification's longstanding popularity and recognized benefits, the certification procedure raises serious questions involving the scope of federal jurisdiction and judicial power. Rarely have courts or legal commentators undertaken a serious examination of these questions. In fact, it is somewhat difficult to make the case that certification does not exceed the constitutional and statutory limits on federal jurisdiction. Even if it does not, at the very least certification is in tension with the fundamental purpose of federal diversity jurisdiction.

Certification is subject to, and defenses to constitutional challenges to certification naturally rely upon, two competing and internally incompatible conceptions. The questionable jurisdictional viability of certification has its origins in the incompatibility of these two conceptions. First, the unitary conception applies when a federal court that certifies a question to a state high court is understood to transfer the very case that is before it (or some portion thereof) to the state court. The state court considers and responds to the questions of state law, whereupon the federal court regains control of the case. Under this conception, there is one, unitary case, with jurisdiction shifting from the federal court to the state court and then back to the federal court.

Second, the binary conception, by analogy to typical federal court abstention doctrine, applies when a federal court invokes certification in order to abstain from exercising federal jurisdiction while the state court, in a separate case under entirely state court jurisdiction, considers the certified questions of state law. The state court closes its case when it renders answers to the certified questions, and it is not until this point that the federal court ends its abstention and resumes administering the case before it.

These two competing, and apparently inconsistent, conceptualizations of certification reveal a "duality" in the underlying assertions of jurisdiction.[9] Certification's compatibility with constitutional and

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[9] *Cf.* White v. Edgar, 320 A.2d 668, 683 (Me. 1974) (referring to certification as embodying a "duality" of court involvement, while at the same time noting that certification affords litigants "the benefit that both . . . federal and state claims will be settled in the substantial equivalent of a single lawsuit").

This duality is reminiscent of the duality physicists observe in the character of light. *Cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty."); Mark R. Killenbeck, *The Physics of Federalism*, 51 U. KAN. L. REV. 1, 5 (2002) (critiquing the applicability of Justice Kennedy's aphorism and stating that "[t]he founding was not . . . an instance of fission, . . . but rather fusion"). Physicists find it useful to conceive of light either as a collection of individual particles, or "photons," of light, or as a wave of energy, in order to explain different observable phenomena of light. *See* ELMER E. ANDERSON, MODERN PHYSICS AND QUANTUM MECHANICS 60 (1971); ALASTAIR I. M. RAE, QUANTUM MECHANICS 8 (2d ed. 1986). For example, scientists rely on the "wave theory" of light to explain diffraction. *See* ANDERSON, *supra*, at 60; RAE, *supra*, at 8. By contrast, the particle or

statutory limits on federal jurisdiction largely turns on the conception of certification upon which one relies to justify the procedure. Moreover, different conceptions are better suited to answer different objections to certification. With respect to the federal constitution, certification violates the Article III assignment of the federal judicial power to the federal judiciary to the extent that state courts assert jurisdiction as to cases properly before federal courts. Only resort to the binary conception of certification avoids this constitutional infringement.

Turning from the constitutional to the statutory basis for federal court jurisdiction, certification is inconsistent with the statutory diversity jurisdiction conferred upon the federal courts by Congress to the extent that it improperly allows state courts to hear cases that fall within the statutory grant. Unlike the constitutional issue, this problem is better addressed by the unitary conception of certification. The unitary conception protects, at least somewhat, the notion that the state law issues are resolved in the very case that is before the federal court. Further, even though a state court may resolve those issues, it does so pursuant to jurisdiction that is derivative of the federal court's diversity jurisdiction. The binary conception can also be called upon to resolve the problem. However, it provides only a superficial solution. It allows for compliance with governing Supreme Court prece-

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"quantum theory" of light explains the photoelectric effect. *See* ANDERSON, *supra*, at 54–57; DAVID PARK, INTRODUCTION TO THE QUANTUM THEORY 6–9 (3d ed. 1992); RAE, *supra*, at 2–3; FRANZ SCHWABL, QUANTUM MECHANICS 5–6 (Ronald Kates trans., 2d ed. 1995). The applicability of these two facially dichotomous theories is said to demonstrate the dual nature of light. *See* ANDERSON, *supra*, at 60; PARK, *supra*, at 9. In fact, "a *duality* similar to that which we found for light waves also exists for the conventional particles of classical physics." SCHWABL, *supra*, at 7. In this sense, matter can also be seen as exhibiting features of both particles and waves. *See* PARK, *supra*, at 10–21.

The idea of looking to concepts of modern physics to enlighten and broaden our understanding of the law is not novel. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 827 (1935) (suggesting a "parallel between the functional method of modern physics and the program of realistic jurisprudence"); Avner Levin, *Quantum Physics in Private Law*, 14 CANADIAN J.L. & JURISPRUDENCE 249 (2001); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 2 (1989) ("[M]y conjecture is that the metaphors and intuitions that guide physicists can enrich our comprehension of social and legal issues."). *See generally* Tribe, *supra*, at 3–4 (presenting historical examples of the influence of the sciences on legal development).

To the extent that the analogy to quantum physics is valid, this Article ultimately highlights the limits of applying descriptive devices, so useful in the field of physics, to the legal landscape. Physicists rely on descriptive devices to explain phenomena beyond their control, that they do not fully understand. Often these descriptive devices appear facially inconsistent (such as the conceptions of light as both a wave and as a collection of particles), again reflecting a lack of complete knowledge about the underlying phenomenon. Legal procedures such as certification, by contrast, are not naturally occurring phenomena that lie beyond the control of courts or beyond the recommendations of theoreticians. Thus, the fact that applicable descriptive devices for a legal procedure appear facially inconsistent reflects a need for refinement of the underlying procedure.

dent, but it leaves unresolved the underlying, important policy issue of whether allowing certification to proceed in pure diversity cases frustrates the purpose of the grant of diversity jurisdiction. Thus, only the binary conception of certification interprets the procedure as consistent with the Constitution, while only the unitary conception of certification renders the procedure consistent with the letter and purpose of the statutory grant of diversity jurisdiction.

The existence of these two conceptions, with respect to the same procedural device, is a problem for two reasons. First, application of both conceptions to the certification procedure would lead to inconsistent legal rules. For example, application of the binary conception of certification allows the state court the freedom to find facts, while application of the unitary conception does not. Second, were certification subject to both conceptions, it would be the only procedural setting in which that is the case. It seems clear that the two conceptions do not coexist with respect to other procedural devices. For example, it is clear that the unitary conception aptly describes the appeal of a case from a trial court to an appellate court within one jurisdiction and, moreover, that the appeal device is not susceptible to description under the binary conception. It would be strange indeed if certification were the only procedural device that bridged the gap between two otherwise incompatible conceptions.

The inherent incompatibility of the binary and unitary conceptions denies certification its strongest defense against both constitutional and statute-based jurisdictional attack, thus leaving the binary conception to offer the better, more *consistent* defense of certification against both lines of attack. It insulates certification fully against constitutional attack and, with some changes to the governing certification jurisprudence, can allow for harmony between certification and the letter of the federal diversity statute as interpreted by the Supreme Court. However, application of the binary conception of certification frustrates the goals underlying federal diversity jurisdiction, unless the view that state high courts are far less likely than lower state courts to discriminate against out-of-state residents is accepted. This is a thin reed on which to peg certification's viability.

Federal courts often need to resolve undecided questions of state law. Part I of this Article begins by discussing that need and by describing how certification assists in meeting that need under our federal system. It next presents an overview of the evolution and general features of certification. It also presents the costs and benefits that commentators associate with certification. This Article assumes the desirability of retaining the federal diversity jurisdiction—that on balance, certification is generally desirable and, accordingly, that the case for its viability is worth making.

In Part II of this Article, the unitary and binary conceptions are more fully described. First, the Article describes procedural devices other than certification that clearly fall within the binary conception. These devices are used to sketch the contours of the binary conception. The Article then performs a similar task for the unitary conception. Next, the Article demonstrates that certification, unlike other procedural devices, is amenable to both the unitary and binary conceptions. Last, the Article explores the compatibility of the unitary and binary conceptions and concludes that, while each conception may describe different procedural doctrines and settings without conflict or tension, they cannot both apply—cannot, in other words, both be "right"—with respect to the same procedural doctrine or setting.

Part III questions whether certification procedure is compatible with the federal courts' constitutional and statutory jurisdiction. The Article demonstrates that, to maintain certification against constitutional problems, it is necessary to rely upon a binary conception of certification. In contrast, the Article recommends a unitary conception as the appropriate conception to address statutory concerns. Note that there are options available to transform certification jurisprudence uniformly to a binary conception, such that certification would still withstand the challenge that its exercise is inconsistent with the diversity statute. The Article also demonstrates, however, that these transformation options do little to address the inconsistency of certification with the purposes underlying the diversity statute (if not the letter of the statute itself), because there is insufficient basis to believe that the binary conception of certification insulates out-of-state litigants against bias by state courts.

I
THE ROLE OF CERTIFICATION IN THE FEDERAL SYSTEM

A proper evaluation of the validity of the binary and unitary conceptions of certification necessarily requires an understanding of the details of certification procedure. This Part presents a summary of the purpose, history, workings, and associated costs and benefits of certification.

A. Federalism and the Judiciary

Certification is designed to mitigate the problem of state courts' inability to decide definitively issues of state law arising in cases heard in federal court. The federal system[10] at times calls upon state courts

[10] *See generally* Younger v. Harris, 401 U.S. 37, 44–45 (1971) (discussing the importance and implications of "Our Federalism").

to hear cases that raise issues of federal law,[11] and upon federal courts to hear cases that raise issues of state law.[12] To the extent that state courts are called upon to determine matters of federal law, the United States Supreme Court has the power to hear appeals from such determinations,[13] thereby affording it the opportunity to rectify erroneous interpretations and to ensure uniform application of federal law. The Court thus has the prerogative to be the final arbiter of disputes arising under federal law.[14]

State high courts do not enjoy the same prerogative with respect to state law. Under *Erie Railroad Co. v. Tompkins*,[15] federal courts faced with questions of state law are obligated to apply state law in the way, as best it can determine, that the state high court would.[16] Accord-

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11 State courts have inherent authority to hear federal civil claims; Congress divests the state courts of such authority only where it explicitly confines jurisdiction over a particular sort of claim to the federal courts. *See* Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990).

12 Federal courts, by virtue of diversity jurisdiction, *see* U.S. CONST. art. III, § 2; 28 U.S.C. § 1332 (2000), and supplemental jurisdiction, *see* 28 U.S.C. § 1367 (2000); United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966), have the authority, and sometimes the obligation, *see infra* notes 27–32 and accompanying text (discussing *Meredith v. Winter Haven*, 320 U.S. 228 (1943)), to hear certain matters arising purely under state civil law.

13 *See* 28 U.S.C. § 1257 (2000).

14 The Supreme Court will hear an appeal from a state court case only when one of the parties petitions for review. *See id.* Moreover, the Court accepts only a small fraction of the petitions it receives each term. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 164 (7th ed. 1993). Thus, in most cases, the Supreme Court is the final arbiter of federal law in name only. While the Supreme Court retains the prerogative to have the final word, in practice, state courts can usually expect to have the final word on issues of federal law.

15 304 U.S. 64 (1938).

16 Unless it can obtain a definitive statement of state law—whether through certification or abstention—the federal court must endeavor to divine, through an examination of existing state law precedent, how the state high court would rule on the issue. *See, e.g.*, Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967); Teague v. Bakker, 35 F.3d 978, 991 (4th Cir. 1994). Where the state law on point is not clear, the federal court "'must exhaustively dissect each piece of evidence thought to cast light on what the highest state court would ultimately decide.'" Sloviter, *supra* note 2, at 1676 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 142 (1973)). *See id.* at 1675–77.

Bradford Clark identifies two approaches that federal courts use in determining how a state supreme court would decide a currently unsettled or unclear issue of state law. *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1495–1515, 1535–39 (1997). Under the "predictive approach," the federal court "attempts to forecast the development of state law by asking what rule of decision the state's highest court is likely to adopt in the future." *Id.* at 1497. *See generally id.* at 1495–1515 (describing the predictive approach). Federal courts that employ this approach may recognize new causes of action, *see id.* at 1502–03, as well as novel defenses, *see id.* at 1508–10. By contrast, under the "static approach," federal courts will "adjudicate the rights and duties of the parties without regard to novel rules proposed by the parties, but not yet recognized authoritatively by an appropriate organ of the state." *Id.* at 1537. *See generally id.* at 1535–39 (describing the static approach).

Michael Dorf identifies three methods, one predictive and two nonpredictive, by which federal courts might ascertain a governing rule of state law. *See* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 661–71 (1995). Under the prediction model, a federal court would endeavor to determine exactly how the judges of the relevant

ingly, it is often said a state's highest court is the definitive authority of the law of that state,[17] much as the United States Supreme Court is the definitive authority of federal law. This statement, however, may be somewhat misleading because, unlike the United States Supreme Court, state high courts often do not enjoy the right to rule definitively in all cases involving state law. Indeed, in most federal court cases involving issues of state law, no state court has any opportunity to rule upon the state law questions at issue.[18]

Certification provides some remedy to state high courts in that it gives them the opportunity to provide definitive interpretations on matters of state law in federal court cases. It is the most common method affording states such an opportunity. Under certification procedure, a federal court "certifies" to a state's high court a question or questions of state law with which it is faced and upon which it would like the state court to rule.[19] The state court then responds to the question if it wishes.

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state high court would resolve the issue. *See id.* at 661–64. Under the execution model, the federal court would "execute the law as found in already decided cases, but not . . . craft novel interpretations." *Id.* at 664 (footnote omitted). *See generally id.* at 664–65 (describing the execution model). In contrast, the elaboration model affords the federal court far more freedom. Although the federal court cannot overrule existing decisions of the state high court, it "will have at its disposal all of the legal tools that the high court has." *Id.* at 666; *see id.* at 665–66 (describing the elaboration model). Dorf argues against the use of the prediction model, both as a general matter, *see id.* at 679–89, and in particular in diversity cases, *see id.* at 695–715.

17 *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("This Court . . . repeatedly held that state courts are the ultimate expositors of state law . . . ." (citations omitted)); Nemours Found. v. Manganaro Corp., 878 F.2d 98, 101 (3d Cir. 1989) ("Patently [a state high] court is the final arbiter of that state's law."); Olsen v. Shell Oil Co., 561 F.2d 1178, 1194 (5th Cir. 1977) ("[T]he Supreme Court of Louisiana is the final expositor of Louisiana law. . . ."); Tarr v. Manchester Ins. Corp., 544 F.2d 14, 14 (1st Cir. 1976) (A federal court cannot "'correct' a state court's interpretation of its own law." (citation omitted)).

In rare cases, the Supreme Court may review a state court determination of state law where the state law issue is antecedent to an issue of federal law. *See generally* Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80 (2002) (discussing the precedent behind and justifications of Supreme Court review of state court, state law decisions).

18 One commentator accuses the federal diversity jurisdiction, as the prime culprit for this state of affairs, of "siphoning away the opportunity to resolve cases at the state level that would enrich and refine the body of state law to which federal and state judges could refer with confidence." L. Lynn Hogue, *Law in a Parallel Universe:* Erie*'s Betrayal, Diversity Jurisdiction, Georgia Conflict of Laws Questions in Contracts Cases in the Eleventh Circuit, and Certification Reform*, 11 GA. ST. U. L. REV. 531, 532 (1995).

Theoretically, it is possible for states to create an opportunity for a state court to decide issues of law that arise in federal court cases: The state could authorize a specialized tribunal charged with reviewing the dockets of federal courts to determine cases in which questions of state law—or, more practically, important and undecided questions of state law—might arise. The tribunal could in theory render decisions on the state law issues that, under *Erie*, the federal courts would be obligated to follow. *See infra* note 259.

19 State laws vary as to which federal courts are authorized to certify questions to the state high court. *See* 17A WRIGHT ET AL., *supra* note 8, § 4248, at 167–68 & nn.31–32. In addition, some states permit courts of other states to certify questions of state law to the

B. Evolution of *Pullman* Abstention and Certification

Today, certification is the primary method by which federal courts faced with undecided questions of state law are able to enlist the aid of state courts to resolve those questions. Before the rise of certification, however, federal courts looked to *Pullman* abstention as a means to elicit the assistance of state courts.[20] This section presents a brief review of the history of *Pullman* abstention. This review focuses on two cases: *Railroad Commission v. Pullman Co.*[21] and *Meredith v. Winter Haven.*[22] It then examines the rise of certification, and explains how certification has moved beyond the moorings and limitations that still restrict *Pullman* abstention.

1. *History of* Pullman *Abstention*

In *Railroad Commission v. Pullman Co.*, the Supreme Court held that, under certain limited circumstances, it is appropriate for a federal court, faced with a case raising issues of state law, to abstain from exercising jurisdiction over the case either altogether or pending state court resolution of the state law issues.[23] The Court in *Pullman* considered challenges, based on state law and the federal constitution, to a Texas Railroad Commission order. The Supreme Court agreed with the three-judge district court's decision to turn first to the state law claims, since a determination that the Commission acted in violation of state law would terminate the case and, therefore, obviate any need to address the federal constitutional issues.[24] Nonetheless, the Court

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state high court. *See* 17A *id.* § 4248, at 168 & n.33. Concerns analogous to those addressed herein might be raised where the court of one state certifies questions of law to the high court of another state. A discussion of such concerns, however, lies beyond the scope of this Article.

For a discussion of the jurisprudential implications of certification, see generally Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999 (1985) (arguing that certification is consistent with a legal positivist conception of law). *Cf.* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998) (arguing that *Erie*'s commitment to legal positivism is conceptually and normatively independent of its constitutional holding).

20 *See* John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 416 (1988) ("In many respects, certification is an outgrowth of the [*Pullman*] abstention era."); *see also* Arizonans for Official English v. Arizona, 520 U.S. 43, 75 (1997) ("Certification today covers territory once dominated by a deferral device called '*Pullman* abstention,' . . . ."); Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 688 n.41 (1995) ("[O]nly *Pullman* abstention implicates the certification process."). While the Supreme Court has recognized limited forms of "*Erie* abstention"—when a federal court abstains from a federal diversity case that raises no issue of federal law pending resolution of a state case that resolves the governing state law questions—the scope of *Erie* abstention is quite circumscribed. *See* Clark, *supra* note 16, at 1517–24; *infra* notes 34–41 and accompanying text.

21 312 U.S. 496 (1941).

22 320 U.S. 228 (1943) (limiting the applicability of *Pullman* abstention).

23 *See* 312 U.S. at 499–501.

24 *See id.* at 498.

reversed the district court's judgment on the ground that, instead of ruling on the state law claims, the trial court should have abstained from moving forward in the case until a proceeding to determine the matters of state law was litigated in the Texas state courts.[25]

Pullman abstention doctrine, as it has evolved, applies when a federal court is faced with undecided questions of federal constitutional and state law, and determination of the state law questions likely would obviate the need to address important and undecided federal constitutional questions.[26] Soon after *Pullman*, the question arose as to whether the doctrine extended to cases where a federal court is faced with undecided, solely state law questions. This question was answered in *Meredith v. Winter Haven.*

Meredith v. Winter Haven originated as a diversity action in federal district court in Florida.[27] Examining the district court's dismissal of the case on the merits, the United States Court of Appeals for the Fifth Circuit found that the governing law of Florida was unclear. Relying upon the Supreme Court's decision in *Pullman*, the court of appeals directed the district court to abstain from further action until the Florida state courts resolved the relevant questions of Florida law.[28] The Supreme Court agreed with the Fifth Circuit that the governing Florida law was unresolved,[29] but nonetheless rejected the proposed application of *Pullman* abstention. Speaking through Chief Justice Stone, the Court explained:

> [T]he difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.
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> The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. When such exceptional circumstances are not present, denial of that opportu-

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25 *See id.* at 501–02.

26 *See* 17A WRIGHT ET AL., *supra* note 8, § 4242, at 30 (describing the application of *Pullman* abstention to cases raising constitutional questions).

27 *See* 320 U.S. at 229.

28 *See id.* at 231.

29 *See id.* at 232–35. The Court also agreed that at least one of the state law issues presented, "so far as appear[ed], [had] not been passed upon by the Florida courts." *Id.* at 232.

> nity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.[30]

Finding no such equitable circumstances present,[31] the Court concluded that abstention was inappropriate.[32]

Meredith's prohibition against the use of *Pullman* abstention where an unclear issue of state law is presented in a pure diversity case remains valid today.[33] While the Supreme Court has endorsed the use

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30 *Id.* at 234–35 (citations omitted).

31 One of the equitable grounds that might justify abstention identified by the *Meredith* Court but not found in *Meredith* itself, was the "salutary policy," enunciated in *Pullman*, "of refraining from the unnecessary decision of constitutional questions." *Id.* at 236.

32 The Court further elaborated:

> Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. The decision of this case is concerned solely with the extent of the liability of the city on its Refunding Bonds. Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it.

Id. at 236–37.

33 *See* 17A WRIGHT ET AL., *supra* note 8, § 4246, at 106 ("The leading case was—and except where the special procedure of certification is involved probably still is—Meredith v. City of Winter Haven." (footnotes omitted)); 17A *id.* § 4246, at 111 ("There are a few . . . cases . . . in which [lower] federal courts have abstained merely because a state law question was difficult but those cases are exceptional. Most courts when confronted with the issue have held that the difficulty of determining state law is not in itself sufficient ground for abstention." (footnotes omitted)). *See generally* 17A *id.* § 4246 (discussing abstention doctrines and the resolution of unsettled questions of state law).

In contrast to the Supreme Court's emphatic rejection of *Pullman* abstention solely to allow resolution of unclear issues of state law in *Meredith*, the Court was more equivocal in addressing whether *Pullman* abstention might be justified where resolution of an issue of state law might obviate the need for the federal court to resolve an unclear issue of federal *statutory* (as opposed to constitutional) law. In *Propper v. Clark*, 337 U.S. 472 (1949), the petitioner (in an argument raised for the first time in his Supreme Court briefs) asked the Court to remand the case to the federal district court with instructions that the district court abstain pending resolution of a state law issue by the state courts of New York because resolution of the state law issue might obviate the need to resolve a federal *nonconstitutional* issue. *Id.* at 482–88. Without rejecting the possibility of abstention in any such setting, the Court explained that generally "[w]here a case involves a nonconstitutional federal issue . . . , the necessity for deciding which depends upon the decision on an

of this so-called "*Erie*-based abstention"[34] in a few pure diversity cases, it has continued to stress that the use of abstention in such cases is the exception rather than the rule. In *Louisiana Power & Light Co. v. City of Thibodaux*,[35] the Supreme Court recognized the discretionary authority of a federal district court to stay federal proceedings pending resolution of a question of state eminent domain law by the Louisiana Supreme Court.[36] The Court, however, limited the scope of its holding by stressing that the "special nature"[37] of eminent domain—"it is intimately involved with sovereign prerogative"[38]—"justifies" a federal court's power to "ascertain" an interpretation of state law from the state court system.[39] Similarly, in *Kaiser Steel Corp. v. W. S. Ranch Co.*,[40] the Court reversed the Tenth Circuit's denial of a stay pending resolution of a state court declaratory judgment suit that would address the pertinent state constitutional question.[41] The Court rested its decision on the ground that the state law issue—whether the state constitutional provision regarding compensation for property taken for "public use" applied where a state statute authorized one party to tres-

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underlying issue of state law, the practice in federal courts has been, when necessary, to decide both issues." *Id.* at 490. The Court then concluded that abstention was improper in the case before it: "We reject the suggestion that a decision in this case in the federal courts should be delayed until the courts of New York have settled the issue of state law." *Id.* at 492. Some commentators read *Propper* to preclude abstention based solely on the ground that resolution of a state law issue might obviate the need for the federal court to decide a novel question of nonconstitutional federal law. *See* Charles L. Gowen & William H. Izlar, Jr., *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEX. L. REV. 194, 212–13 (1964).

34 *See* Clark, *supra* note 16, at 1517–24.

35 360 U.S. 25 (1959).

36 *See id.* at 26–27.

37 *Id.* at 29.

38 *Id.* at 28.

39 *See id.* at 29. In a footnote, the Court distinguished *Meredith* on potentially broader grounds:

> Here the issue is whether an experienced district judge, especially conversant with Louisiana law, who, when troubled with the construction which Louisiana courts may give to a Louisiana statute, himself initiates the taking of appropriate measures for securing construction of this doubtful and unsettled statute (and not at all in response to any alleged attempt by petitioner to delay a decision by that judge), should be *jurisdictionally disabled* from seeking the controlling light of the Louisiana Supreme Court. The issue in *Winter Haven* was not that. It was whether jurisdiction *must be* surrendered to the state court.

Id. at 27 n.2 (emphases added). Nonetheless, the Court's subsequent language in the text of its opinion, *supra* note 37 and accompanying text, and reaffirmance of *Meredith* in later cases, *infra* notes 43–48 and accompanying text, confirm the narrow reading of *Thibodaux* and the continued general vitality of *Meredith*. As one leading treatise explains, *Thibodaux* can be justified without disturbing *Meredith* on the ground that "the special nature of eminent domain proceedings, combined with difficulties in ascertaining state law, will permit abstention even though neither of the circumstances individually would suffice." 17A WRIGHT ET AL., *supra* note 8, § 4246, at 107 (footnote omitted).

40 391 U.S. 593 (1968) (per curiam).

41 *See id.* at 594.

pass on another party's property in order to use water rights granted by the state—was "one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources."[42]

While the Court has recognized limited exceptions to the *Meredith* rule in *Thibodaux* and *Kaiser Steel Corp.*, it has never overruled *Meredith*.[43] To the contrary, the Court has continued to cite the case favorably. For example, in *Lehman Bros. v. Schein*,[44] the Court reaffirmed *Meredith*'s continuing validity in diversity cases where *Pullman* abstention is under consideration. The Court stated that *Meredith* "teaches that the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit."[45] Two years later, in *Colorado River Water Conservation District v. United States*,[46] the Court decided that a federal district court lacked discretion under *Pullman* to abstain from hearing a case involving the allocation of water rights under state law.[47] The Court distinguished *Thibodaux* on the ground that "[n]o questions bearing on state policy are presented for decision,"[48] and again referred favorably to *Meredith* for the proposition that "the mere potential for conflict in the results

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42 *Id.* at 593–94. Justice Brennan's concurrence, joined by Justices Douglas and Marshall, emphasized that the special nature of the state law question alone justified the Court's decision:

> I concur solely on the ground that this case presents one of the "narrowly limited 'special circumstances'" which justify the invocation of "[t]he judge-made doctrine of abstention" . . . . The "special circumstances," as the Court states, arise from the fact that "[t]he state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources."

Id. at 594–95 (citations omitted) (quoting Zwickler v. Koota, 389 U.S. 241, 248 (1967), and *Kaiser*, 391 U.S. at 595 (majority opinion)).

43 One leading federal jurisdictional resource notes that the Court has applied *Pullman* in diversity cases, citing for this proposition *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960), *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134 (1962) (per curiam), and *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970) (per curiam). RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1236 (4th ed. 1996). In *Clay*, however, as discussed below, *see infra* text accompanying note 54, the Court remanded the case with the expectation that the court of appeals would employ certification, not *Pullman* abstention. And, while *Clay*, *United Gas Pipe Line* and *Fornaris* were brought as diversity cases, the courts of appeals in each case held that pertinent statutes were unconstitutional, thus introducing a federal constitutional issue into the mix. *See Fornaris*, 400 U.S. at 42; *United Gas Pipe Line*, 369 U.S. at 135; *see infra* text accompanying note 52. Thus, while the Court has applied *Pullman* abstention in cases brought initially under the diversity grant, it has done so only in cases that, on appeal, are circumstantially similar to *Pullman*. Such a result is entirely consistent with *Meredith*.

44 416 U.S. 386 (1974).

45 *Id.* at 390.

46 424 U.S. 800 (1976).

47 *See id.* at 813–17. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Id.* at 813.

48 *Id.* at 815.

of adjudications, does not, without more, warrant staying exercise of federal jurisdiction."[49]

2. *History of Certification*

The cumbersome *Pullman* abstention procedure remained for two decades the primary vehicle by which federal courts could avoid deciding federal constitutional questions by enlisting the state courts to resolve undecided questions of state law. However, the dominance of *Pullman* abstention ended with the rise of certification in the 1960s.

The first case in which certification was used, *Clay v. Sun Insurance Office Ltd.*,[50] involved circumstances akin to those presented in *Pullman*.[51] *Clay* itself was a diversity case, but a federal constitutional question arose when the Fifth Circuit ruled that a Florida statute—which rendered contractual provisions, purporting to limit the time in which lawsuits arising out of contracts could be brought, unenforceable—could not be applied to out-of-state contracts as a matter of due process.[52] In an opinion by Justice Frankfurter, the Supreme Court chastised the Fifth Circuit for having reached this constitutional question without first considering whether, as a matter of state law, the Florida statute applied to the contract at issue.[53] Further, the Supreme Court, although it stopped short of certifying state law questions to the Florida Supreme Court itself, strongly suggested that the Fifth Circuit avail itself of the procedure on remand.[54] The Fifth Circuit followed this

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49 *Id.* at 816.

Although the Court concluded that none of the standard bases for abstention were applicable, it ultimately held that the federal district court properly dismissed the case in favor of a pending state court proceeding. *See id.* at 817–21. Some commentators refer to *Colorado River* as having given rise to a new form of abstention. *See, e.g.*, 17A WRIGHT ET AL., *supra* note 8, § 4241, at 27, 29 (noting that the Supreme Court in *Colorado River* "was unwilling to call it abstention," but employing the terminology "abstention to avoid duplicative litigation, now frequently referred to as Colorado River-type abstention"). The fact remains, however, that *Colorado River* is consistent with both *Pullman* and *Meredith*.

50 363 U.S. 207 (1960), *on remand to* Sun Ins. Office Ltd. v. Clay, 319 F.2d 505, 512 (5th Cir. 1963), *rev'd*, 377 U.S. 179 (1964).

51 In their treatise, *Federal Practice and Procedure*, Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper explain:

> Although this case went beyond the situations in which the Court had previously ordered Pullman-type abstention, in that it was an action at law between private parties, the reasons for Pullman-type abstention applied to it fully. Interpretation of the state statute might avoid the need to decide a federal constitutional question and an interpretation of the statute by the federal court would have been only a forecast rather than an authoritative determination of what the statute meant. Thus, it would not have been surprising if Pullman-type abstention had been ordered.

17A WRIGHT ET AL., *supra* note 8, § 4248, at 160.

52 Sun Ins. Office Ltd. v. Clay, 265 F.2d 522, 527–28 (5th Cir. 1959), *vacated by* 363 U.S. 207 (1960).

53 *See Clay*, 363 U.S. at 209–10.

54 *Id.* at 212. Florida had enacted a statute that contemplated certification of questions to its supreme court—the first such statute in the nation, Clark, *supra* note 16, at 1553

suggestion on remand.[55] Notably, Justice Frankfurter's opinion in *Clay* did not address the applicability of the Court's *Pullman* abstention jurisprudence.[56] Justice Douglas's dissenting opinion, however, relied on and quoted from *Meredith*, and concluded that "[t]he parties are entitled—absent unique and rare situations—to adjudication of their rights in the tribunals which Congress has empowered to act."[57]

Shortly after *Clay*, in *Green v. American Tobacco Co.*,[58] an appeal of a diversity case[59] that raised no issue of federal law, the Fifth Circuit certified questions of law to the Florida Supreme Court.[60] The opinion made no mention of the *Pullman* abstention doctrine, *Meredith*, or the argument raised by Justice Douglas's dissent in *Clay*.

Four terms after *Clay*, the Supreme Court itself certified questions of law to the Florida Supreme Court in two cases, *Dresner v. City of Tallahassee*[61] and *Aldrich v. Aldrich*.[62] Both cases were appeals from state supreme courts and, as such, did not fit squarely into the *Pullman* model. Further, the Court's use of certification was not motivated solely by a desire to obtain a definitive answer to an unresolved ques-

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n.502—in 1945. 17A WRIGHT ET AL., *supra* note 8, § 4248, at 160. The Court in *Clay* recommended that the Fifth Circuit employ certification despite the fact that the Florida Supreme Court had not yet adopted rules that would have implemented the procedure. *See id.* at 161.

55 In response to the Fifth Circuit's certification, the Florida Supreme Court held that the statute at issue did indeed apply to the contract at issue. Now forced to readdress the constitutional issue it had previously addressed, the Fifth Circuit issued a new opinion adhering to its original view. *See Clay*, 319 F.2d at 512. The case again went up to the United States Supreme Court, which unanimously reversed the Fifth Circuit's disposition. *See* Clay v. Sun Ins. Office Ltd., 377 U.S. 179, 183 (1964). This first foray into certification, which the Supreme Court's original opinion in the case viewed so optimistically, thus ended with a note of irony in that "four years after certification had first been ordered," the Supreme Court "affirmed the judgment . . . in favor of the insured that the district court had entered long before." 17A WRIGHT ET AL., *supra* note 8, § 4248, at 162 (footnote omitted).

56 *See* 363 U.S. 207. In fact, the *Clay* majority opinion includes only an oblique reference to *Meredith*, citing it with a "*see also*" signal for the proposition that, "[e]ven without such a facilitating statute we have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law." *Id.* at 212 (citing Meredith v. Winter Haven, 320 U.S. 228, 236 (1943)). The *Meredith* opinion includes references to numerous cases, including *Pullman*, in which the Court deferred to state court determinations of state law, *see* 320 U.S. at 236, although the *Meredith* Court ultimately determined that none of those cases was applicable in the case then before it, *id.*

57 363 U.S. at 228 (Douglas, J., dissenting).

58 304 F.2d 70 (5th Cir. 1962), *cert. denied*, 377 U.S. 943 (1964).

59 *Id.* at 77 (granting petition for rehearing per curiam).

60 *Id.* (granting petition for rehearing per curiam).

61 375 U.S. 136 (1963).

62 375 U.S. 249 (1963); *see also* Aldrich v. Aldrich, 375 U.S. 75, 75 (1963) (announcing the intention to certify questions to the Supreme Court of Florida).

tion of state law in either case. In other words, the use of certification in these cases was not consistent with the rule of *Meredith*.[63]

The Supreme Court gave its express approval to the use of certification in pure diversity cases that raise no federal question in *Lehman Bros. v. Schein*.[64] The *Schein* Court praised certification, explaining that "[i]t does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism."[65] The Court suggested that *Pullman* abstention would be inappropriate in the pure diversity case before it, noting that *Meredith* "teaches that the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit."[66] Implicitly distinguishing certification from abstention, the Court proceeded to note that certification was "particularly appropriate in view of the nov-

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63 *Aldrich* reached the United States Supreme Court on the question of whether the state courts of West Virginia had violated the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, by refusing to enforce a divorce decree issued by a Florida state court. 375 U.S. at 251. The Court certified questions to the Florida Supreme Court relating to the propriety of the Florida divorce decree, the subject matter jurisdiction of the court that issued the decree, and how the decree, if improper, might be challenged. 375 U.S. at 75–76. The answer to these certified questions would affect the Court's federal constitutional analysis. *See* Aldrich v. Aldrich, 378 U.S. 540, 543 (1964) (basing the holding that West Virginia did violate the Full Faith and Credit Clause on the answers (provided by the Florida Supreme Court) to the certified questions).

In *Dresner*, the Court was unsure whether it had jurisdiction to hear the petitioners' federal constitutional challenge to their state criminal convictions. The relevant jurisdictional statute required that the petitioners obtain a decision from the highest state court from which a decision could issue before seeking certiorari. *See* 375 U.S. at 138 (citing 28 U.S.C. § 1257 (1958)). Interpreting that statute as incorporating by reference certain elements of Florida law, the Court certified to the Florida Supreme Court questions about the appellate jurisdiction of the Florida courts. *Id.* at 138–39. Although the state law question did not directly bear on the federal constitutional issues in the case, the determination of the state law question nevertheless might obviate the need to engage in the constitutional analysis.

64 416 U.S. 386, 387–88, 391–92 (1974). *Lehman Bros.* was a shareholders' derivative action, brought in the District Court for the Southern District of New York, based upon a theory of misappropriation of information by a corporate insider. *See id.* at 388. While New York state courts had approved of liability under a misappropriation theory, *see* Diamond v. Oreamuno, 248 N.E.2d 910 (N.Y. 1969), the courts of Florida—whose laws governed the dispute under applicable choice-of-law rules, Schein v. Chasen, 478 F.2d 817, 821 (2d Cir. 1973), *vacated sub nom.* Lehman Bros. v. Schein, 416 U.S. 386 (1974)—bad yet to rule definitively on whether such a theory was viable, *id.* The federal district court and court of appeals reached opposite results as to the right result under Florida law, with the district court determining that Florida law did not support a misappropriation theory, *see* Gildenhorn v. Lum's Inc., 335 F. Supp. 329, 333–34 (S.D.N.Y. 1971), *rev'd sub nom.* Schein v. Chasen, 478 F.2d 817 (2d Cir. 1973), *vacated sub nom.* Lehman Bros. v. Schein, 416 U.S. 386 (1974), and the court of appeals concluding that it did, Schein v. Chasen, 478 F.2d at 821–23. The Supreme Court granted certiorari solely to consider whether "the Court of Appeals for the Second Circuit err[ed] in not certifying the question of Florida law to the Florida Supreme Court pursuant to Florida's certification procedure." Lehman Bros. v. Schein, 414 U.S. 1062, 1062 (1973).

65 416 U.S. at 391 (footnote omitted).

66 *Id.* at 390.

elty of the question and the great unsettlement of [state] law,"[67] and remanded the case, requiring the court of appeals to consider the possibility of employing certification.[68]

The Supreme Court has echoed its complimentary treatment of certification in the decades since *Schein*.[69] Indeed, the procedure has, where it is available, supplanted *Pullman* abstention as the preferred method of securing from a state court the proper interpretation of state law.[70] In addition, twice since *Schein*, the Court has certified questions of state law, but on both occasions the cases fit squarely into the *Pullman* model.[71]

In summary, there is a class of cases, pure diversity cases in which unsettled questions of state law are presented, no substantial state in-

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67 *Id.* at 391.

68 *See id.* at 391–92.

69 *See, e.g.*, Arizonans for Official English v. Ariz., 520 U.S. 43, 77–80 (1997); Bellotti v. Baird, 428 U.S. 132, 150–51 (1976).

70 *See Arizonans for Official English*, 520 U.S. at 75 ("Certification today covers territory once dominated by a deferral device called '*Pullman* abstention' . . . ."); *cf.* Vickers v. Trainor, 546 F.2d 739, 744–46 (7th Cir. 1976) (unavailability of certification makes it less likely that a federal court will afford the state court system the chance to rule on questions of state law). Certification's ascension is due largely to its ability to offer definitive answers to state law questions while reducing the prime *Pullman* abstention drawback: delay in resolving cases. *See infra* notes 106–07 and accompanying text.

71 *See* Fiore v. White, 528 U.S. 23 (1999); Elkins v. Moreno, 435 U.S. 647 (1978).

In *Elkins*, nonimmigrant alien students challenged, as violative of federal constitutional and statutory law, a decision by the University of Maryland that the students could not, as a matter of law, become residents of Maryland eligible for in state tuition rates. *See* 435 U.S. at 652–55. The Supreme Court observed that reversing the lower courts' rejection of this argument would ultimately require it to overrule one of its own prior constitutional interpretations. *Id.* at 660–61. It also noted, however, that resolution of a subsidiary question might obviate the need to confront this earlier interpretation, *see id.* at 661, and that "the resolution of this [subsidiary] question turn[ed] on federal statutory law and Maryland common law as to each of which there are no controlling precedents. . . ." *Id.* at 662. Accordingly, after clarifying the governing federal statutory law, *see id.* at 663–68, the Court certified questions of state law to the Maryland Court of Appeals, *see id.* at 668–69.

Fiore involved a petition for habeas relief. *See* 528 U.S. at 25. The Commonwealth of Pennsylvania convicted the petitioner and his codefendants of a crime under a Pennsylvania statute. *See id.* at 24. Each defendant appealed to a different intermediate appellate court. *See id.* The court considering the habeas petitioner's appeal affirmed the conviction, and when the Pennsylvania Supreme Court declined to review the case that conviction became final. *Id.* at 26. However, the appellate court hearing the petitioner's codefendant's appeal reversed the codefendant's conviction. *Id.* at 26–27. The Pennsylvania Supreme Court reviewed and affirmed that decision, thus rendering an interpretation of the relevant Pennsylvania statute favorable to the petitioner. *Id.* at 27.

After two more denied review requests, the petitioner sought habeas relief in federal court on the ground that, by failing to apply the Pennsylvania Supreme Court's decision in his case, the state had violated his rights under the Fourteenth Amendment's Due Process Clause. *See id.* at 28. The Court explained that "[t]he validity of [the petitioner's] federal claim may depend upon whether the interpretation of the Pennsylvania Supreme Court in [the subsequent case] was always the statute's meaning, even at the time of [the petitioner's] trial." *Id.* Accordingly, the Court certified that question to the state high court. *See id.* at 29.

terests are implicated, and no issue of federal law lurks,[72] for which certification may be justified but, if *Meredith* remains good law, *Pullman* abstention is not.[73] Neither the Supreme Court nor any other federal court has addressed in any detail either the federal jurisdictional basis for certification or the propriety, in light of the constitutional and statutory grants of diversity jurisdiction, of certification in pure diversity cases where no questions of federal law can be found.

C. Overview of the Certification Procedure

Certification involves one court system enlisting the aid of a second court system to resolve a case, while affording the second court system the opportunity to announce a rule of law. The jurisprudence of certification reflects this judicial interdependence.

Assuming certification is an available option,[74] one or more of the parties to the federal case may request that the federal court in-

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72 For ease, I refer generally to diversity cases in which there is no federal law issue and in which no substantial state interest is implicated (and which meet none of the other justifications for *Pullman* abstention elucidated in *Pullman*, *Meredith*, and their progeny) simply as "pure diversity cases."

73 In addition to pure diversity cases, *Meredith*'s rule presumably also applies in cases that are in federal court pursuant to jurisdictional provisions which favor federal court jurisdiction based upon the identity of one or more of the parties as opposed to the legal basis for any cause of action raised. An example would be a case brought pursuant to the jurisdictional provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330(a), 1441(d) (2000), where all the causes of action sound in state law. *See* Jonathan Remy Nash, *Pendent Party Jurisdiction Under the Foreign Sovereign Immunities Act*, 16 B.U. INT'L L.J. 71, 117 (1998) ("The prime jurisdictional goal of the [Foreign Sovereign Immunities Act] is to guarantee foreign states facing claims in U.S. courts access to a federal forum in order to ensure uniform judicial treatment.") (footnote omitted)); *see also* 12 U.S.C. § 1819(b)(2)(B) (2000) (authorizing the Federal Deposit Insurance Corporation to remove state court actions to which it is a party); *id.* § 1441a(*l*)(3)(A) (authorizing the Resolution Trust Corporation to remove state court actions involving a financial institution for which the Corporation has been appointed receiver or conservator); 28 U.S.C. § 1442(a) (2000) (permitting removal of civil actions and criminal prosecution commenced in state court against officers of the United States acting under color of their authority); *id.* § 1442a (provision analogous to § 1442(a), applicable to members of the United States armed forces); *id.* § 1444 (allowing the United States to remove foreclosure actions brought against it in state court).

It is also possible that certification may be justified, while *Pullman* abstention is not, where resolution of a state law issue might obviate the need for the federal court to resolve a federal law issue not of constitutional magnitude. However, it is not clear that *Pullman* abstention is precluded in such a circumstance. *See supra* note 33. Moreover, the rationale of *Meredith*—that federal courts should exercise their diversity jurisdiction in order to vindicate the decision of Congress to vest the courts with that jurisdiction, *see supra* text accompanying note 30—is far less applicable in federal question cases where state law issues are intertwined with federal law issues.

74 As a threshold matter, certification of a question of state law will be an available option to a federal court only if the state whose law is at issue offers a certification procedure for the federal court to exercise. A federal court will not ask a state high court to respond to any questions of state law if there is no procedure under state law that authorizes certification. *See* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 493 n.21 (1983). A more difficult question is whether federal courts might have the *power* to certify

questions in the absence of a state certification procedure. *See* Weaver v. Marine Bank, 683 F.2d 744, 747 n.3 (3d Cir. 1982), holding that,

> [w]hen the authority for a federal court to certify a question to the state court, absent a state statute allowing the procedure has been questioned, it has not been from the perspective of the federal court's power to do so. Rather, the issue has been whether the state courts can constitutionally be compelled to answer a certified question if they lack constitutional or legislative authority to do so.

For example, Wright, Miller, and Cooper describe it as "clear that a federal court cannot compel a state court to answer questions in the absence of a state procedure." 17A WRIGHT ET AL., *supra* note 8, § 4248, at 163 (footnote omitted). Other commentators assert that Congress has the authority to imbue the federal courts with this power. *See* Hogue, *supra* note 18, at 541 (suggesting that Congress could and should use its power under the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1 to "prescribe the . . . [e]ffect of state judgments . . . [by] enact[ing] a federal statute imposing on state supreme courts an obligation to decide unclear issues of state law certified by federal courts, trial and appellate, for resolution" (alterations added) (footnote omitted)); Selya, *supra* note 20, at 683–84 (noting that that Congress can require state courts to entertain federal causes of action under *Testa v. Katt*, 330 U.S. 386 (1947), and that "Congress . . . might possibly be able to compel state courts to accept and answer questions anent state law posed by federal courts"); J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 325 (1967) (finding no constitutional infirmity with the idea that "Congress may have authority to require state courts to accept and decide certified questions"). *But see* FALLON, JR. ET AL., *supra* note 43, at 39–41, 169 (4th ed. Supp. 2002) (suggesting that the Supreme Court's opinion in *Alden v. Maine*, 527 U.S. 706 (1999), may draw into question *Testa*'s vitality, and that this may "bear on the question of Congress'[s] power to require state courts to answer certified questions"). One student commentator speculated, before the advent of certification, that federal courts of equity might have inherent nonstatutory power to certify cases, *see* Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358, 1368 (1960), in which case "it is arguable that the state courts, even in the absence of state enabling legislation, would be constitutionally obliged to give an answer [to a certified question]," *id.* at 1369 (footnote omitted). *See generally* 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 (1999) (exploring whether Congress has the ability to allow federal courts to order state courts to answer certified questions of state law).

In fact, most states, as well as the District of Columbia and Puerto Rico, offer federal courts the option to certify questions of state law to the state high court. Lists of the various state enactments on certification are found in 17A WRIGHT ET AL., *supra* note 8, § 4248, at 167 n.30 and 17A WRIGHT ET AL., *supra* note 8, § 4248, at 28 n.30 (Supp. 2002). *See also* Hogue, *supra* note 18, at 536 & nn.18–20 (surveying state statutes and rules authorizing certification in effect in 1995). The procedures of many states are based on the Uniform Certification of Questions of Law Act, the current version of which is found at 12 U.L.A. 67, 67–98 (1996). *See* 17A WRIGHT ET AL., *supra* note 8, § 4248, at 167; Corr & Robbins, *supra* note 20, at 418; Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 128–29 (1992).

Many states also allow lower federal courts and courts of other states to submit certified questions to their highest courts. *See* 17A WRIGHT ET AL., *supra* note 8, § 4248, at 167–68 & nn.31–33 (2d ed. 1988 & Supp. 2002). Not every state that has a certification procedure allows every federal court to certify questions to its state high court, however. Judge Frank Easterbrook (sitting by designation as a district court judge) complained of just such a shortcoming in Illinois's certification procedure in *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation*, 750 F. Supp. 330, 336 (N.D. Ill. 1990):

> I doubt very much that Illinois would interpret the fiduciary shield doctrine to protect those who may be liable under [a federal patent statute] from any suit, anywhere in the world. Of course I cannot be sure of this. Because federal courts have exclusive jurisdiction of patent cases, the question could

voke certification,[75] or the federal court may choose that option *sua sponte*.[76] Either way, the federal court has final discretion over whether or not to employ certification.[77] It is the federal court, not

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> not be submitted to the state courts except by certification. And Rule 20 of the Rules of the Supreme Court of Illinois provides that only the Supreme Court of the United States or the United States Court of Appeals for the Seventh Circuit may certify questions of state law to that court—neither this court nor the Federal Circuit, to which an appeal lies from my decision, has been invited to certify questions of law.

75 *See, e.g.*, 7TH CIR. R. 52 (permitting the court to certify questions of state law to a state high court on motion of a party); *In re* Badger Lines, Inc., 140 F.3d 691, 698–99 (7th Cir. 1998) (certifying a question of state law on motion of a party); 17A WRIGHT ET AL., *supra* note 8, § 4248, at 176 ("There is nothing to bar a party from suggesting the desirability of certification . . . ."); *see also* James A. Parker et al., *Certification and Removal: Practices and Procedures*, 31 N.M. L. REV. 161, 170 (2001), noting that:

> Only thirty percent of the requests by counsel to certify a question to a state court have been honored by the Tenth Circuit Court of Appeals; seventy percent of the time they turn down the request to certify. These are figures from 1990 through 1994, the best that we could get, and that's the highest rate of refusals by a circuit court in the United States. Some refuse only about fifteen percent of the time. (footnote omitted).

However, federal courts have the discretion to consider the posture of the party seeking certification in determining whether to grant the request. *See* sources cited *infra* note 77.

76 *See, e.g.*, 7TH CIR. R. 52 (permitting the court to certify questions of state law to a state high court *sua sponte*); Elkins v. Moreno, 435 U.S. 647, 662 (1978) (certifying a question of state law *sua sponte*); 17A WRIGHT ET AL., *supra* note 8, § 4248, at 176 ("Ordinarily a court will order certification on its own motion." (footnote omitted)).

77 *See, e.g.*, Barnes v. Atl. & Pac. Life Ins. Co. of Am., 514 F.2d 704, 705 n.4 (5th Cir. 1975).

A federal court will consider numerous factors in deciding whether to exercise its discretion to certify questions of state law to a state high court. *See* Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 274–75 (5th Cir. 1976); 17A WRIGHT ET AL., *supra* note 8, § 4248, at 172–75. *But see* Clark, *supra* note 16, at 1549 ("[C]ertification patterns vary widely among federal courts and are largely ad hoc."). Perhaps the most important factor is the degree to which state law on the issue in question is unclear and difficult to predict: A federal court is not likely to certify a question of state law, the answer to which is clear or easy to anticipate. *See* City of Houston v. Hill, 482 U.S. 451, 471 (1987). A federal court also might refuse to certify a question of state law that it feels is either unlikely to recur, *see, e.g.*, Dominick's Finer Foods, Inc. v. Mason (*In re* Makula), 172 F.3d 493, 496–97 (7th Cir. 1999); *see also* Messenger *ex rel.* Messenger v. Gruner + Jahr Printing & Publishing, 175 F.3d 262, 264, 266 (2d Cir. 1999) (court decided to certify a state law question in part because of the question's importance), or does not raise significant issues of public policy, *see, e.g.*, *Dominick's Finer Foods, Inc.*, 172 F.3d at 496–97; Diginet, Inc. v. W. Union ATS, Inc., 958 F.2d 1388, 1395 (7th Cir. 1992). *But cf.* Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1420–21 (1999) (suggesting that cases which raise parallel state and federal constitutional issues may be "less suitable for certification than cases in which the federal issue turns on the construction of a disputed provision of state law" on the grounds that state courts may require a more developed factual record to respond to state constitutional questions than is likely to be assembled in such cases, and that the presence of a federal constitutional issue in such cases means that a potentially dispositive federal issue that can render the resolution of the state constitutional issue irrelevant always exists, making it less likely for the state courts to accept certification in the first instance).

Further, the posture of the parties might affect a federal court's willingness to certify questions of state law. *See* 17A WRIGHT ET AL., *supra* note 8, § 4248, at 176 ("[T]he court should be slow to honor a request for certification from a party who chose to invoke fed-

the parties, that invokes the procedure by promulgating and sending to the state high court a certificate that sets forth the questions of state law for which answers are sought.[78] The certifying court normally includes a statement of the necessary background facts to provide context for the certified questions.[79]

A state high court has discretion to accept or reject the certifying court's questions.[80] Assuming it chooses to accept the certification,

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eral jurisdiction."). Some courts have indicated that they will be less receptive to a certification request from a plaintiff who opted to bring a diversity case in federal court, *see, e.g.*, Fischer v. Bar Harbor Banking & Trust Co., 857 F.2d 4, 8 (1st Cir. 1988), or from a defendant who, after receiving an adverse ruling from a state trial judge, removed the case to federal court, *see, e.g.*, Nat'l Bank of Wash. v. Pearson, 863 F.2d 322, 327 (4th Cir. 1988). *But see infra* note 168 (referring to a survey indicating that the sizeable majority of judges do not object to a party who has removed a case to federal court seeking to have questions of state law certified to the state high court). Finally, courts are reluctant to grant a request for certification from an appellant who received an adverse ruling below and seeks certification for the first time on appeal. *See, e.g.*, *In re* McLinn, 744 F.2d 677, 681 (9th Cir. 1984).

In determining whether to invoke certification procedure, federal courts also will balance the benefits of certification in the particular case against the delay inherent in using the procedure. *See, e.g.*, Erie Ins. Group v. Sear Corp., 102 F.3d 889, 892 (7th Cir. 1996); Lehman v. Dow Jones & Co., 783 F.2d 285, 294 n.9 (2d Cir. 1986); *see generally infra* note 108 and accompanying text (discussing the delay inherent in certification). In particular, while certification in theory can be invoked at any stage of a case, a court likely will consider a tardy request for certification less favorably than a request made early in a proceeding. *See, e.g.*, Nieves v. Univ. of P.R., 7 F.3d 270, 278 & n.15 (1st Cir. 1993) (rejecting request for certification first raised on appeal); *Fischer*, 857 F.2d at 8 (same); Perkins v. Clark Equip. Co., 823 F.2d 207, 209–10 (8th Cir. 1987) (noting that requests for certification made only after adverse judgments "should be discouraged"); *see also* 17A WRIGHT ET AL., *supra* note 8, § 4248, at 25 (Supp. 2002) (noting that "the failure of a party to suggest certification until a late stage in the proceeding considerably weakens this insistence on certification").

78 The certifying court promulgates the certificate, which is directed to the judges of the state high court. *See, e.g.*, Wilson v. Bryan (*In re* Wilson), 162 F.3d 378, 378 (5th Cir. 1998) (certificate addressed to the "TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF LOUISIANA").

79 *See, e.g.*, *Wilson*, 162 F.3d at 378–79. Indeed, state certification statutes or rules generally require a statement of facts. *See, e.g.*, FLA. R. APP. P. 9.150(b) ("The certificate shall contain . . . a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise . . . ."). Further, a state court may decline to decide the certified questions in the absence of a statement of facts. *See infra* note 82 and accompanying text.

80 *See, e.g.*, Cuesnongle v. Ramos, 835 F.2d 1486, 1493 (1st Cir. 1987) ("[W]e acknowledge that the power of the Commonwealth court to answer questions certified to it by a federal court is discretionary, not mandatory." (citation omitted)); Schlieter v. Carlos, 775 P.2d 709, 710 (N.M. 1989) ("[W]e may undertake at our discretion to answer [certified] questions when the answers are 'determinative' of the cause before the federal court."); Tunick v. Safir, 731 N.E.2d 597, 598–99 (N.Y. 2000) (declining to answer questions certified by the Second Circuit); *see also* Corr & Robbins, *supra* note 20, at 456 n.174 (citing source which states that the decision to answer a certified question is usually at the discretion of the state court); Parker et al., *supra* note 75, at 170 ("Between 1990 and 1994 there were 284 requests [to answer certified questions] from district courts and all the circuit courts in the United States, to state courts, and of these requests, there were only seven refusals to accept the certification."); Geri J. Yonover, *A Kinder, Gentler* Erie*: Reining in the*

the state high court proceeds in accordance with any governing statutes or rules.[81] State courts considering certified questions do not engage in fact finding. Certification applies only to questions of law; thus, state courts have treated the collection by the certifying federal court of all necessary ancillary factual findings as a prerequisite to proper certification.[82]

Use of Certification, 47 ARK. L. REV. 305, 323–24 (1994) (discussing the reasons a state court might decline to answer a certified question). Some state provisions on certification make this discretion explicit. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 500.17(d) (2001). *But see supra* note 74 (discussing the possibility that Congress might have the power to mandate state courts to accept certified questions).

If the state court determines that its responses to fewer than all of the questions certified resolves the controversy before the certifying court, thereby obviating the need to address the remaining questions, the state court may so inform the certifying court and decline to proceed further. *See, e.g.*, County of Westchester v. Town of Greenwich, 629 A.2d 1084, 1086 n.4 (Conn. 1993). Along similar lines, the state court has discretion to rephrase the questions if it feels that doing so would be appropriate. *See, e.g.*, County of Westchester v. Comm'r of Transp., 9 F.3d 242, 247 (2d Cir. 1993); Victor v. State Farm Fire & Cas. Co., 908 P.2d 1043, 1044 n.2 (Alaska 1996); *see* 17A WRIGHT ET AL., *supra* note 8, § 4248, at 178, observing:

> [I]t is now the common practice of many courts, when certifying, to emphasize that the particular phrasing used in the certified question is not to restrict the state court and that the state court is free to reformulate the questions as it sees fit. State courts have availed themselves of this freedom whether or not it is expressly stated in the certificate. (footnotes omitted).

81 *See supra* note 73. State statutes or court rules governing certification generally assert only minimal procedural instructions. Rules governing payment of fees, the filing of briefs, and oral arguments are, in most states, provided by state statutes or court rules of general applicability. *See* Corr & Robbins, *supra* note 20, at 418; Jack J. Rose, Note, Erie R.R. *and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 HOFSTRA L. REV. 421, 428 (1989). *See also* Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 728 (1969) ("All of the present certification procedures require that briefs be filed along with the question that is certified. It is usually necessary and desirable for the record on appeal to be transmitted to the court that is to answer the question."). *But see, e.g.*, FLA. R. APP. P. 9.150 (providing for specific procedures for certification proceedings); N.Y. COMP. CODES R. & REGS. tit. 22, § 500.17(d), (e) (2001) (same).

82 *See* Nieves v. Univ. of P.R., 7 F.3d 270, 277 n.11 (1st Cir. 1993) ("The Puerto Rico Supreme Court would reject any certification of this factually undeveloped issue." (citation omitted)); Catlin v. Ambacb, 820 F.2d 588, 591 n.2 (2d Cir. 1987) ("We deem abstention preferable to use of the . . . certification procedure because the resolution of the state law issue might require factfinding in the state courts."); Santasucci v. Gallen, 607 F.2d 527, 529 (1st Cir. 1979) (noting that the district court's decision not to certify questions of state law was "reasonable" where there were "a number of disputed factual issues") (footnote omitted); Sangamo Weston, Inc. v. Nat'l Sur. Corp., 414 S.E.2d 127, 130 (S.C. 1992) (holding that the court was unable to accept the certified question because the factual record was not developed sufficiently and the court would not "issue advisory opinions and cannot alter precedent based on questions presented in the abstract"); Hanchey v. Steighner (*In re* Certified Question from the U.S. Dist. Court, Dist. of Wyo.), 549 P.2d 1310, 1311 (Wyo. 1976) (rejecting a certification request as "premature" in light of the absence of factfinding); 17A WRIGHT ET AL., *supra* note 8, § 4248, at 174 ("Certification is not appropriate if there are a number of disputed factual issues making it difficult or impossible to agree on what the legal questions are.") (footnote omitted).

The state high court's involvement ends when it returns answers to the question or questions certified to the certifying court.[83] Federal courts were initially uncertain as to whether a state court's response to a certified question bound the certifying court with respect to the question certified. In 1963, the Fifth Circuit allowed for the possibility that answers given by state high courts in response to certified questions could be either "merely advisory and entitled, like dicta, to be given persuasive but not binding effect as a precedent, or . . . credited under Erie-Tompkins doctrine and the rule of stare decisis as though it were the ratio decidendi of a decision made in adversary litigation before the court."[84] Although statements to the contrary have not disappeared entirely,[85] modern federal courts generally agree that they are bound to follow state court responses to certified questions.[86] The

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83 *See* Corr & Robbins, *supra* note 20, at 419 ("When a certified question is answered and returned to the certifying court, . . . the state high court's influence over the case is effectively ended.").

84 Sun Ins. Office, Ltd. v. Clay, 319 F.2d 505, 509 (5th Cir. 1963) (footnotes omitted), *rev'd on other grounds*, 377 U.S. 179 (1964); *see In re* Richards, 223 A.2d 827, 830–32 (Me. 1966) (discussing concern that federal court would not feel bound by state high court's answers to certified questions); United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 858–59 (Tex. 1965) (same); *cf.* Stanton S. Kaplan, Note, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and Its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413, 432 (1962) (arguing that a state high court answering certified questions "does not acquire jurisdiction ultimately to decide a controversy before the federal courts, but renders only an *advisory opinion* to the federal judiciary" (emphasis in original)).

In elucidating the possibility that a state high court's answer to a certified question might be dicta, the Fifth Circuit, in *Clay*, cited several Florida Supreme Court cases discussing when language of that court constituted dicta. *See* 319 F.2d at 509 & n.3. It thus appears that the Fifth Circuit considered that question to be governed by state law rather than federal law. The Fifth Circuit explained that it did not have to decide how determinative the certified answer of the Florida Supreme Court standing alone would be, because a lower Florida court had already followed the opinion of the Florida Supreme Court and the federal court felt obligated to follow the lower court's opinion under *Erie* and its progeny. *See id.* at 508–09.

85 *See* United States v. Rural Elec. Convenience Coop. Co., 922 F.2d 429, 438 (7th Cir. 1991) (describing, in dicta, the Supreme Court's decision to certify a state law question to a state supreme court as "direct[ing] that the relevant state law question be certified to the state courts for an advisory opinion"); Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States*, 46 S.C. L. REV. 835, 865 (1995) (noting that, as an alternative to abstention, "a litigant can wait for a state advisory opinion through the mechanics of certification of the state law issue. . ."); *cf.* Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) ("As [A]rticle III courts, the district courts must always be free to decline to follow [Bankruptcy Appellate Panel] decisions and to formulate their own rules within their jurisdiction.").

86 *See, e.g.*, Purifoy v. Mercantile-Safe Deposit & Trust Co., 567 F.2d 268, 269 (4th Cir. 1977) (describing the Maryland state court's response to a certified question of Maryland law as "definitive"); Coastal Petroleum Co. v. Sec'y of Army of U.S., 489 F.2d 777, 779 (5th Cir. 1973) (noting that Florida Supreme Court's response to a certified question of Florida law is the "*last* word" on the law of that state); *see* 17A WRIGHT ET AL., *supra* note 8, § 4248, at 179; *see also* Sunshine Mining Co. v. Allendale Mut. Ins. Co., 666 P.2d 1144, 1148 (Idaho 1983) (asserting that the Idaho Supreme Court expects its answers to certified questions to be determinative of the law of Idaho).

federal courts predominately base this view on the belief that *Erie* and its progeny require them to follow the answers rendered by state high courts in response to certified questions.[87] However, a few opinions reach the same result via an alternative reasoning: these courts hold that state high court opinions are to be followed under the "law of the case" doctrine.[88]

D. Costs and Benefits of Certification

Certification is generally viewed as furthering the interests of judicial federalism. Moreover, many commentators laud the procedure for imposing fewer costs on litigants than alternative systems with simi-

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Instructive in this regard is the Sixth Circuit's opinion in *Grover ex rel. Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6th Cir. 1994). There, the federal district court had, at plaintiffs' request, certified a question of state law to the Ohio Supreme Court. The state supreme court, by a vote of four to three, answered the question in the defendant's favor, whereupon the federal district court granted plaintiffs' motion to dismiss their complaint without prejudice. *Id.* at 717–19. Apparently, the district court contemplated allowing the plaintiffs to bring their action anew in the future, should the dissenting view on the Ohio Supreme Court attain a majority over time, because the district court favored the plaintiffs' case. *See id.* at 719.

The Sixth Circuit chided the district court for having "ignored the binding effect of the Ohio Supreme Court's majority opinion. . . ." *Id.* It explained: "A federal court that certifies a question of state law should not be free to treat the answer as merely advisory unless the state court specifically contemplates that result." *Id.* Accordingly, the federal court of appeals remanded the case to the district court for entry of judgment, with prejudice, in the defendant's favor. *See id.*

87 *See, e.g.*, Tarr v. Manchester Ins. Corp., 544 F.2d 14, 14 (1st Cir. 1976) (noting that a federal court "cannot 'correct' a state court's interpretation of its own law"); Allen v. Estate of Carman, 486 F.2d 491, 492 (5th Cir. 1973) (citing *Erie* as the reason that the state supreme court's decision is definitive); Nat'l Educ. Ass'n v. Lee County Bd. of Pub. Instruction, 467 F.2d 447, 450 & n.6 (5th Cir. 1972) (same); Martinez v. Rodriquez, 410 F.2d 729, 730 (5th Cir. 1969) (same).

88 *See, e.g.*, Sifers v. Gen. Marine Catering Co., 892 F.2d 386, 391–92 (5th Cir. 1990) (noting that a state court's answer to a certified question "generally is the 'law of the case' in any further federal court proceeding involving those parties," and as a result, "it is binding as well upon those parties in this appeal who were not parties to the certified case" (footnote omitted)); *see also Grover*, 33 F.3d at 719 (citing *Sifers* favorably for the proposition that "parties are bound by an answer to a certified question because it is the law of the case"). The "law of the case" doctrine instructs courts to adhere to previous decisions rendered within that case absent extreme circumstances such as an intervening change in the controlling law, the discovery of new evidence, or where the previous decisions reflect clear error or manifest injustice. 18B WRIGHT ET AL., *supra* note 8, § 4478, at 637, 670–72 (2d ed. 2002). Thus, as the first quoted excerpt from the *Sifers* case reflects, the "law of the case" doctrine does not mandate that a court follow previous decisions within that case without exception, but only "generally." 892 F.2d at 391. It is unclear whether, as a consequence, courts that follow state high court answers to certified questions based on the "law of the case" doctrine have a wider (or narrower) berth to choose whether or not to do so than do courts that follow such answers under an *Erie* theory.

It seems that the Fifth Circuit added teeth to this "law of the case" approach in *Blair v. Sealift, Inc.*, 91 F.3d 755 (5th Cir. 1996). There, the court of appeals held that the application of the "law of the case" doctrine to a prior ruling that "effectively implement[s] a state supreme court's response to a question certified earlier [in] the case [directs that] deference to the ruling is particularly appropriate." *Id.* at 761.

lar goals, such as abstention. While this may be true, certification costs, both temporal and monetary, are not insignificant. Indeed, a minority of commentators suggests that the procedure's costs outweigh its benefits. This section surveys the benefits and the costs generally associated with certification, but takes no position on whether, on balance, certification is a beneficial procedure.

One benefit of certification is that it furthers the interests associated with judicial federalism.[89] First, the procedure offers benefits to states in general, and to state judicial systems in particular. The prerogative of a state government to establish and define its own state law is enhanced by such a procedure, and it gives the state judiciary the opportunity to rule on important issues of state law in cases in which it might not otherwise have had the chance.[90] Second, certification offers a federalism benefit to federal courts. Insofar as it allows a state court to determine pertinent issues of state law, certification spares a federal court the difficult chore of determining state law.[91] Moreover,

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89 *See* Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (noting that certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism" (footnote omitted)); Nat'l Educ. Ass'n v. Lee County Bd. of Pub. Instruction, 467 F.2d 447, 449 (5th Cir. 1972) (stating that certification "minimiz[es] or eliminat[es] entirely the confusion, uncertainty and juridical friction inherent in a system of Federalism that frequently forces Federal Judges to assume—often with extreme reluctance—a decisional rule that properly belongs to their brethren on the State bench"); AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 293 (1969) noting that

> [t]he argument for certification, accepted by the Institute, is that it makes it possible for the federal court to obtain a quick and authoritative answer to difficult state law questions that the case may present while preserving the parties' right to a federal determination of fact questions and issues of federal law in the case.

Clark, *supra* note 16, at 1550 ("Certification is perhaps uniquely suited to further the principles of judicial federalism underlying the Supreme Court's decision in *Erie*."); Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. REV. 2123, 2132–36 (1999); Beth A. Hardy, Note, *Certification Before Facial Invalidation: A Return to Federalism*, 12 W. NEW ENG. L. REV. 217, 221–22 (1990).

90 *See, e.g.*, Amberboy v. Societe de Banque Privee, 831 S.W.2d 793, 798 n.9 (Tex. 1992).

91 *See* United States v. Buras, 475 F.2d 1370, 1375 (5th Cir. 1972) (Brown, C.J., dissenting from denial of rehearing en banc) ("Our wide experience with certification to the Florida Supreme Court has . . . proved its utility in sparing this Court—and more importantly, the litigants—the risk of a wrong decision . . . ." (footnote omitted)); McCarthy v. Olin Corp., 119 F.3d 148, 158–59 & n.3 (2d Cir. 1997) (Calabresi, J., dissenting) (describing the Second Circuit's difficulties in predicting state law); Hakimoglu v. Trump Taj Mahal Assocs., 70 F.3d 291, 302–03 & n.11 (3d Cir. 1995) (Becker, J., dissenting) (describing the Third Circuit's difficulties in predicting state law); United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483, 486–87 (5th Cir. 1964) (Brown, J., concurring) (lamenting occasions on which the Fifth Circuit had endeavored, but failed, to predict accurately state law); *see also* Clark, *supra* note 16, at 1553–54.

For additional discussion of the difficulties faced by federal courts in their efforts to determine state law, see Sloviter, *supra* note 2, at 1675–76 and Clark, *supra* note 16, at 1495–1544.

certification offers three important benefits that abstention does not. First, it guarantees that the state's highest court—the only court capable of rendering a "definitive" statement of state law under *Erie* and its progeny[92]—will decide the state law question where the state court accepts the certified question.[93] Second, certification avoids procedural complications that might hinder the state court system's resolution of the state law question were abstention employed.[94] Third, certification offers a federalism benefit to litigants in the form of "fairness." Specifically, it provides federal court litigants the benefit of a resolution of their case based upon definitive state law, as determined by the state high court.[95]

Although it does provide federalism benefits, certification does not uniformly advance the interests of judicial federalism. First, to the extent that one believes that diversity jurisdiction intentionally allows certain cases to be heard in a federal forum in order to avoid the possibility or appearance of bias that likely would be found in a state forum,[96] certification hinders federalism because it may undermine that design by rechanneling cases to the state courts. As the Court explained in *Meredith*, the federal courts should not lightly shirk their responsibility to fulfill their "duty . . . , if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment."[97]

Second, Geri Yonover argues that federal courts' attempts to predict state law has a salutary impact on the subsequent development of state law.[98] Third, James Rehnquist broadly criticizes the abstention doctrine on the ground that the Constitution remains neutral as to

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92 *See supra* note 17 and accompanying text. *But cf.* Larry M. Roth, *Certified Questions from the Federal Courts: Review and Re-proposal*, 34 U. MIAMI L. REV. 1, 11 (1979) (suggesting that certified questions be heard not by the state supreme court, but rather by a "special court," the members of which would be appointed by the state's chief judicial officer).

93 *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) (comparing *Pullman* abstention to certification, and finding that certification "increas[es] the assurance of gaining an authoritative response").

94 An entire state court proceeding well might involve multiple hearings and appeals. Moreover, a state court hearing an independent case is free presumably to engage in factfinding, *see infra* notes 158-60 and accompanying text, and to add or dismiss parties, *see* text accompanying *infra* note 264. In contrast, a state high court answering certified questions does not enjoy these prerogatives, *see infra* notes 160, 264, and accompanying text.

95 *See* Selya, *supra* note 20, at 690.

96 Such a view accords generally with Richard Fallon's ideology of federal courts law. *Cf.* Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1159 (1988) (noting that the Nationalist model understands the Constitution to "contemplate[ ] a special role for the federal judiciary, different in kind from that assigned to state courts, in ensuring the supremacy of national authority"); *id.* at 1223 (suggesting that the Federalist and Nationalist models explain different decisions under the *Pullman* regime, so one cannot say definitively that either model, standing alone, explains the doctrine).

97 Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943).

98 *See* Yonover, *supra* note 80, at 334–42.

whether a federal or state forum is preferable in any particular case.[99] As such, he argues that there is no federal interest in abstaining from hearing a pending case[100] unless a case that raises identical issues was already filed in state court.[101] Fourth, Judge Bruce Selya argues that certification's "fairness" benefit is generally overvalued and somewhat ephemeral.[102] He notes that a litigant who loses a case by virtue of a federal court's ruling on state law, which ultimately is revealed to be flawed in a subsequent decision of the relevant state high court, "is no more greatly disadvantaged than a litigant who loses in a lower state court and is thereafter denied discretionary review, only to have the state's high court decide the issue favorably in some other case at a later date."[103] Judge Selya further notes that, "[m]ore generally, litigants do not have an entitlement to something identifiable in the abstract as a 'right' answer."[104]

Notwithstanding the above listed criticisms, the majority of commentators agree that certification furthers several highly valued federalism interests, and poll results show that this is also the view of a majority of federal and state judges.[105] By contrast, the value of certification from the perspective of judicial economy and cost to litigants, both temporal and monetary, is subject to greater disagreement. As a threshold matter, it seems indisputable that, given a choice between abstention and certification, the latter procedure imposes less cost than does the former. First, because certification entails resort to only one court in the state judicial system (the highest court of the state), in most cases it will not result in as much delay as abstention. Second, along similar lines, it will not impose as much monetary cost.[106] Thus,

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99 *See* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1053–57 (1994).

100 *See id.* at 1072–73, 1077–78, 1081–82 (critiquing various forms of abstention because they do not require that a state case be pending before abstention is used).

101 *See id.* at 1063–69, 1110–14.

102 Selya, *supra* note 20, at 690.

103 *Id.* Query also whether a litigant who wins a case based on a federal court's interpretation of state law, which a subsequent state high court case reveals to be erroneous, would likely claim either that the federal court interpretation was in fact "wrong" or that the federal court's decision did not provide a "benefit" to him or her.

104 *Id.*

105 *See* JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 66 (1995) (noting that in a survey conducted under the auspices of the American Judicature Society and the State Justice Institute, "[a]lmost all of the circuit judges (93%), district judges (86%), and state justices (87%) *agree* that certification improves federal-state comity"); Corr & Robbins, *supra* note 20, at 457 ("[F]ederal and state judges responding to [a] survey [on certification] concluded that the federal courts' use of certification improves federal-state comity.").

106 *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) (comparing *Pullman* abstention to certification, and stating that certification "reduc[es] the delay, [and] cut[s] the cost"). *But see* William C. Bednar, Jr., Comment, *Abstention Under* Delaney*: A Current Appraisal*, 49 TEX. L. REV. 247, 264 (1971) (asserting that the advantages of certification "only mute the criticism of abstention—they do not silence them," and that certifi-

the Supreme Court has explained that, as compared to *Pullman* abstention, certification saves "time, energy, and resources."[107]

Despite general recognition that the delay inherent in certification is less than the delay inherent in *Pullman* abstention, some commentators assert that delay under certification is generally underestimated or undervalued by courts and in fact argues for more judicious use of the procedure.[108] Generally, however, this is the minority view.[109] Overall, the legal community views certification favorably; in particular the reaction of members of the federal and state judiciaries is overwhelmingly positive.[110]

This Article takes no view as to whether, on balance, the benefits of certification outweigh the costs. However, it should be noted that the federalism benefits which certification offers mirror the reasons for eliminating or at least restricting the federal diversity jurisdiction. If one accepts the advisability of retaining the federal diversity jurisdic-

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cation actually introduces a "new difficulty," in that "[t]he abstract form of the certified question itself may well distort the state court's answer" (footnotes omitted)).

107 Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

108 *See, e.g.*, Mattis, *supra* note 81, at 725–27; Selya, *supra* note 20, at 681 & nn.16–19, 688; Yonover, *supra* note 80, at 324–25 & n.115, 332–33. The delay may be particularly nettlesome where the state court ultimately refuses to answer the certified question.

109 *See, e.g.*, GOLDSCHMIDT, *supra* note 105, at 67 ("Most circuit judges (83%) and strong majorities of district judges (67%) and state justices (76%) *disagree* with the proposition that the delay and expense of certification make it an impractical procedure for litigants."); Clark, *supra* note 16, at 1558–61; Richard B. Lillich & Raymond T. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888, 908–09 (1971).

110 *See generally* GOLDSCHMIDT, *supra* note 105, at 41–74 (reporting the results of a survey studying judges' views on certification); CARROLL SERON, CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES 10 (1983) (same); Corr & Robbins, *supra* note 20, at 457 (same). Indeed, the esteem in which members of the judiciary hold certification is reflected by academic works written by federal judges, which endorse, or speak favorably of, certification. *See also* William G. Bassler & Michael Potenza, *Certification Granted: The Practical and Jurisprudential Reasons Why New Jersey Should Adopt a Certification Procedure*, 29 SETON HALL L. REV. 491 (1998) (coauthored by a U.S. District Court judge); John R. Brown, *Fifth Circuit Certification—Federalism in Action*, 7 CUMB. L. REV. 455 (1977) (coauthored by Fifth Circuit Court of Appeals chief judge); John D. Butzner, Jr. & Mary Nash Kelly, *Certification: Assuring the Primacy of State Law in the Fourth Circuit*, 42 WASH. & LEE L. REV. 449 (1985) (coauthored by a Fourth Circuit judge); Karen LeCraft Henderson, *Certification: (Over)due Deference?*, 63 GEO. WASH. L. REV. 637 (1995) (authored by a District of Columbia Circuit Court judge); Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373 (2000) (coauthored by a New York Court of Appeals judge); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 774–75 (1989) (Second Circuit judge advocating the expansion of certification "by permitting the entire appeal of a diversity case to be routed into the state appellate court system, where it would normally be adjudicated, as it should be, by an intermediate state appellate court, with only optional review by the state's highest court").

At the same time, the view of the federal judiciary is not monolithic. *See* Selya, *supra* note 20 (critiquing certification, and authored by a First Circuit Court of Appeals judge); Sloviter, *supra* note 2, at 1684–85 ("I am skeptical that certification presents a viable solution to either the problem of federal encroachment on state sovereignty or the more limited problem of error in prophecy.").

tion,[111] then the federalism benefit it provides must outweigh the benefits of restricting. The balance of this Article assumes that federal diversity jurisdiction is desirable and therefore that its benefits outweigh any countervailing federalism benefit that certification might offer. This Article also accepts the view of the majority of commentators and jurists that certification's benefits outweigh its costs. Regardless of its costs and benefits, the focus here is on determining whether certification is defensible against constitutional and statutory challenge.

II
THE UNITARY AND BINARY CONCEPTIONS

The vulnerability of certification to challenge on constitutional and statutory grounds turns on whether one conceives of it as a binary or unitary procedure. This Part defines and elucidates these competing conceptions.

The binary and unitary conceptions describe certification and other procedural devices and settings. Part II.A provides a basic definition of the binary conception, and refines the definition through identification of jurisdictional and procedural situations and doctrines that fall clearly within that conception. Part II.B performs a similar task for the unitary conception. Part II.C describes how certification, as currently understood, is amenable to both conceptions. Finally, Part II.D discusses the limited reconcilability of the binary and unitary conceptions. Although—as Parts II.A and II.B indicate—the conceptions apply to different procedural settings and devices without giving rise to any conflict or tension, the conceptions logically cannot apply to the same procedural setting or device.

A. Contours of the Binary Conception

The binary conception describes situations in which there are two distinct "cases" under consideration. The most obvious example of this is the common situation in which there are two cases, each pending before a different court and each with distinct parties. Each court has jurisdiction over the case before it, and the two courts' jurisdictions are unrelated.

However, the binary conception is not concerned with the fact that the two cases are on two different courts' dockets: It would not affect the applicability of the binary conception if the two cases were pending before the same court or even before the same judge. Nor is the binary conception concerned with the identity of parties: It re-

111 The question of whether federal diversity jurisdiction should be retained is the subject of much debate. *See infra* note 223.

mains applicable even if the parties to the two cases are identical if, for example, the issues in the two cases are unrelated. The jurisdictional settings of certain procedural doctrines are well described by the binary conception. When a court in one case looks to the decision of a court in another case for guidance, there are two distinct cases. The binary conception thus aptly describes the jurisdictional settings attendant to the doctrines of legal precedent and stare decisis. It similarly applies to cases in which federal courts follow decisions of state courts under the *Erie* doctrine.[112]

Just as the binary conception applies when one court looks to another court's decision for legal guidance, so too does it apply when one court looks to another court for disposition of issues previously litigated and decided under the doctrine of issue preclusion.[113] It also applies to describe applications of the claim preclusion doctrine.[114] Similarly, the binary conception describes collateral challenges to the decision of one court in a second court. Thus, the binary conception describes the two paths open to criminal defendants to challenge their convictions—trial and direct appeal on the one hand, and habeas review on the other—regardless of any clear relationship between the two cases.[115] The binary conception also describes actions to enforce a judgment obtained in a prior case.[116]

Applications of abstention doctrines also fall within the rubric of the binary conception. When one court abstains in favor of another court proceeding (either one that is pending or one that the federal court contemplates will be filed in state court), there are two distinct

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112 In other words, the conception applies whether a court looks for precedential guidance from inside or outside that court's own system.

113 *See generally* 18 WRIGHT ET AL., *supra* note 8, §§ 4406–15 (2d ed. 2002).

114 *See generally id.* §§ 4416–26.

115 *See generally* 17A WRIGHT ET AL., *supra* note 8, § 4261. This result may not hold for review of federal convictions in federal court under 28 U.S.C. § 2255. *See* Rule 1 of the Rules Governing Section 2255 Adv. Cmt. Note ("[A] motion under § 2255 is a further step in the movant's criminal case and not a separate civil action. . . ."). If the governing state law also provides for a state habeas collateral challenge to the state conviction, then there may be three distinct cases. The binary conception still applies. *E.g.*, S.C. R. Civ. P. 71.1(c) ("An application filed under the [Uniform Post-Conviction Procedure] Act is an independent civil action which should be separately filed and indexed by the clerk of court.").

116 At first blush, this might seem somewhat anomalous because the entire proceeding might constitute a single case were the victorious party simply to seek enforcement of judgment from the issuing court as part of the original case. However, the fact still remains that a court must have proper, independent subject matter jurisdiction over a separate case seeking enforcement of a judgment previously entered *by that court*, even if the court would have had ancillary jurisdiction had the victorious party sought to enforce the judgment as part of the original proceeding. *See* Peacock v. Thomas, 516 U.S. 349, 355 (1996) ("In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction.").

cases, usually before two distinct courts.[117] The jurisdiction each court enjoys over the case before it is wholly independent of the other court's jurisdiction. The mere fact that the first court has decided to suspend proceedings in the case before it does not disturb its jurisdiction over that case,[118] and the second court's jurisdiction is independent from the first court's jurisdiction, even if the first court contemplated that the second court's case would be filed or if it directed that it be filed.

B. Contours of the Unitary Conception

The unitary conception describes situations where there is a single case with different courts exercising jurisdiction over the case at different times. In effect, jurisdiction begins in one court, and then a "jurisdictional wave," propagated by the original court's jurisdiction, shifts jurisdiction to another court, and then possibly back to the original court (or to other courts altogether).

One simple example of a situation described by the unitary conception is a case where one judge assumes responsibility from another judge. In such a situation, the case over which the second judge assumes responsibility is clearly the same as the case over which the first judge had responsibility. In these situations, the second judge generally will follow the rulings of the first judge under the "law of the case" doctrine.[119]

Another simple example of a situation described by the unitary conception is that of transfer of venue by one federal court to another.[120] Again, the case before the second federal court is clearly the same as the one that originated before the first federal court. Thus, the second federal court's subject matter jurisdiction is derivative of that of the first. While one might argue that the second federal court necessarily would have independent subject matter jurisdiction if the first court had jurisdiction, the fact that the second court's jurisdiction is resultant of the first court's jurisdiction (i.e., that there is in fact a

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117 *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) (noting that *Pullman* abstention "entail[s] a full round of litigation in the state court system"); Lehman Bros. v. Schein, 416 U.S. 386, 390 (1974) (describing abstention as involving "[remission of] the parties to a state tribunal for the start of another lawsuit"). *But see* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 12.3, at 760 (3d ed. 1999) (noting that under *Pullman* abstention, "[t]he federal court stays its proceedings and *sends the case* to state court for a ruling on the state law question" (emphasis added)).

118 *See* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 415–19 (1964).

119 *See supra* note 88.

120 *See* 28 U.S.C. § 1404(a) (2000) (authorizing transfer of venue from one district where venue is proper to another district of proper venue based upon a balancing of the equities); *id.* § 1406(a) (authorizing transfer of venue when the venue is improper in the district where the case was brougbt); *id.* § 1631 (authorizing transfer of venue to cure a lack of jurisdiction in the transferor court).

single case) is aptly demonstrated by the fact that the second court does not treat the case it receives as newly filed. The second court applies the "law of the case" doctrine,[121] and it examines statutes of limitation from the date that the original court action was filed, not the date of transfer.[122]

A third simple example of a situation described by the unitary conception is that of a direct appeal. Jurisdiction originally vests in the trial court. Upon appeal, jurisdiction as to matters falling within the scope of the appeal shifts to the appellate court.[123] The appellate court's jurisdiction is derivative or resultant of the trial court's original jurisdiction. The appellate court must have appellate jurisdiction, but its jurisdiction rests upon, and is nonexistent without, the lower court's jurisdiction. This is true even in a case where a party appeals a lower court ruling which holds that there is no jurisdiction. In such a case, the trial court has jurisdiction to decide the issue of whether or not it has proper jurisdiction,[124] and the appellate court's jurisdiction is derivative of that jurisdiction.

The unitary conception continues to apply if the appellate court remands the case to the lower court either for entry of judgment or for further proceedings.[125] The unitary conception views this as yet

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121 *E.g.*, Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815–17 (1988) (holding that the transferee court should apply the law of the case doctrine to the transfer decision by the transferor court); *see* 15 WRIGHT ET AL., *supra* note 8, § 3827, at 276 (2d ed. 1986) ("The doctrine of law of the case applies to transfer orders under [28 U.S.C.] § 1406(a) as it does to other interlocutory orders." (footnote omitted)). *See generally supra* note 88 (addressing the law of the case doctrine).

122 *E.g.*, Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467 (1962).

123 *See* Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). The fact that some matters, specifically those unrelated to the appeal, may remain within the district court's jurisdiction does not render the unitary conception inapplicable, since those are the very issues that do not fall within the appellate court's jurisdiction. *See generally* Apostol v. Gallion, 870 F.2d 1335, 1337–38 (7th Cir. 1989).

124 *See, e.g.*, Home Savs. Bank, F.S.B. v. Gillam, 952 F.2d 1152, 1157 (9th Cir. 1991); 13A WRIGHT ET AL., *supra* note 8, § 3536, at 535 (2d ed. 1984).

125 *See, e.g.*, Kusay v. United States, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court. Until the mandate issues, the case is 'in' the court of appeals, and any action by the district court is a nullity." (citation omitted)).

In limited circumstances, such as where the appellate court requires clarification from the trial court in order to determine whether appellate jurisdiction properly lies, an appellate court may remand a case to the trial court while retaining jurisdiction pending the trial court's compliance with its mandate. *See generally* 16 WRIGHT ET AL., *supra* note 8, § 3937.1 (2d ed. 1996). This procedure simply obviates the need for a litigant to file a new notice of appeal once the trial court has fulfilled its mandate in cases where the appellate court knows at the time of remand that it will again consider the appeal. *See id.* § 3937.1, at 704–05 (citing United States v. Jacobson, 15 F.3d 19 (2d Cir. 1994)). Even if the two courts retain jurisdiction over aspects of the case, the fact remains that the two courts do not act simultaneously with respect to the same matter. While this procedure may be seen as akin

another shift in jurisdiction, again beginning with the trial court's original jurisdiction. The same holds if a party appeals the appellate court's determination to a superior court. In short, multiple shifts in jurisdiction are entirely consistent with the unitary conception.

Whether the direct appeal is within or outside the court system of which the trial court is a part does not affect application of the unitary conception. Thus, the direct appeal of a state court case to the United States Supreme Court falls within the scope of the unitary conception. The Supreme Court is hearing an appeal *of the very case* in which the state trial court entered judgment and as to which state appellate courts conducted review. The Supreme Court's jurisdiction rests upon, and is absent without, the state courts' jurisdiction.[126]

The unitary conception also governs if the Supreme Court, in hearing an appeal of a decision from a state supreme court, remands the case to the state court for the sole purpose of clarifying its decision. The Supreme Court has taken such action on rare occasions in order to determine the extent to which the state court decision relied upon federal law in reaching its decision, so that the Supreme Court can determine the propriety of hearing the case.[127] In such a circumstance, the state court receives back from the Supreme Court *the very case* that it previously decided and that has been appealed to the Supreme Court. The fact that the state court's freedom to act is severely circumscribed is unimportant: The situation is similar to that of a trial court that receives a case back from an appellate court with a narrow mandate.

The procedural doctrine of intrajurisdictional certification of questions of law bears significant resemblance to an appeal, and may also be explained by reference to the unitary conception. Federal law authorizes federal courts of appeals to certify "any question of law" to

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to abstention (and therefore also as amenable to a binary conception), the better understanding is that the procedure is simply a legal fiction that allows the appellate court to retain jurisdiction in name only in order to ensure that the district court does not exceed the scope of its mandate. Thus, the procedure is quite distinct from abstention, where the court in respect of which the first court abstains is free to adjudicate the independent case before it as it sees fit.

126 This is especially clear where the Supreme Court reviews a state court judgment in a case in which the Article III standing requirements would have precluded a federal court from hearing the underlying case in the first instance. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 623–24 (1989), holding that

> [w]hen a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.

127 *See, e.g.*, Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (remanding the case to the Florida Supreme Court for a clarification of the precise grounds for the state high court's decision).

the United States Supreme Court.[128] The federal judicial code provides that, "upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."[129] The Supreme Court Rules expand upon this certification procedure. Rule 19(1) provides:

> A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified. . . .[130]

The rule explains that the Supreme Court has discretion to order a case "briefed, set for argument, or dismissed,"[131] and that the Court, "on its own motion or that of a party, may consider and decide the entire matter in controversy."[132]

Certification to the United States Supreme Court is rarely used and today is virtually a dead letter.[133] Nonetheless, the scant jurisprudence surrounding this procedure suggests that this form of certification is best explained by a unitary conception. First, the Supreme Court has held that it exercises its constitutional *appellate* jurisdiction[134] when it determines questions on certification from a federal court of appeals.[135] Second, since in any case in which it accepts certi-

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128 28 U.S.C. § 1254(2) (2000). The Supreme Court's certification jurisdiction dates back to 1802. *See* 17 WRIGHT ET AL., *supra* note 8, § 4038, at 103 (2d ed. 1988). Congress initially authorized certification to the Supreme Court by the courts of appeals when it created the courts of appeals in 1891. *See* Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826. For a brief historical overview, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1650–57 (2000).

129 28 U.S.C. § 1254(2).

130 S. CT. R. 19(1).

131 S. CT. R. 19(3).

132 S. CT. R. 19(2).

133 "[I]n recent years only three [Supreme Court] cases have been decided on certified questions. Although outright repeal has been recommended, it would be little more than an official obituary." 17 WRIGHT ET AL., *supra* note 8, § 4038, at 102–03 (2d ed. 1988) (footnotes omitted). Edward Hartnett argues that the Supreme Court discouraged lower courts from certifying questions, and that the practical elimination of intrajurisdictional certification undermined the original congressional intention to have the lower federal courts share the role of controlling the content of the Supreme Court's docket with the highest court. *See* Hartnett, *supra* note 128, at 1710–12.

134 *See* U.S. CONST. art. III, § 2, cl. 2.

135 *See* Felker v. Turpin, 518 U.S. 651, 667 (1996) (Souter, J., concurring) (describing the Court's consideration of questions certified to it by a federal court of appeals as an exercise of the Court's "appellate jurisdiction"); Old Colony Trust Co. v. Comm'r, 279 U.S. 716, 728–29 (1929) ("The certification of . . . a question by the [c]ircuit [c]ourt of [a]ppeals is an invocation of the appellate jurisdiction of this Court and therefore within the Constitution."); *cf.* Wheeler Lumber Bridge & Supply Co. v. United States, 281 U.S. 572, 576 (1930), holding that

fication the Supreme Court has discretion to decide the entire case (instead of limiting its action to deciding the specific questions certified), it must be that the Court in all certified cases takes jurisdiction over the very case that was before the court of appeals.[136]

The unitary conception also describes the role of Article I decisionmakers—specifically federal magistrate judges[137] and bankruptcy judges[138]—in handling cases filed in federal court. Federal law allows district courts to refer certain matters to these individuals.[139] In some

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> to accept [from the court of original jurisdiction] a certification and proceed to a determination thereon, in advance of a decision by that court, would be an exercise of original jurisdiction by this Court contrary to the constitutional provision which prescribes that its jurisdiction shall be appellate in all cases other than those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. (citing U.S. CONST. art. III, § 2, cl. 2).

136 It might be argued that this point cuts the other way, that is, that certification to the United States Supreme Court is, like *Pullman* abstention, better explained by reference to a binary conception of jurisdiction. One could argue that since the Supreme Court is under no obligation to preserve the case in the form in which it was certified by the federal court of appeals for final resolution (just as in *Pullman* abstention cases), the Supreme Court is in the same position as state courts, which generally are under no obligation to preserve the federal court case. *See infra* note 158 and accompanying text. The salient point, however, is not that the Supreme Court is under *no obligation* to preserve the case in the form that it was certified, but rather that the choices available to the United States Supreme Court on certification, and a state court hearing a case while a federal court abstains under the *Pullman* doctrine, are quite different.

Once it accepts certified questions from a federal court of appeals, the United States Supreme Court has two distinct options. In the typical case in which the Supreme Court opts simply to answer the questions certified, it does indeed *preserve* the case (other than the legal questions that it answers) for ultimate decision by the federal court of appeals (allowing, however, for the possibility of remand to the district court, and of subsequent Supreme Court review). *See, e.g.*, United States v. Barnett, 376 U.S. 681, 689 & n.6 (1964). On the other hand, if the Supreme Court elects to decide the entire matter in controversy, it may do so *to the exclusion* of the court of appeals; there may be nothing left for the certifying court of appeals to do. *See, e.g.*, Alison v. United States, 344 U.S. 167, 170 (1952).

By contrast, a state court acting while a federal court abstains has many options. Indeed, the only constraint on the state court's action is that the plaintiff in the federal court case may reserve disposition of any federal law matters for the federal court to decide in the federal case. *See* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 415–17 (1964) (discussing right of party to federal court case where federal court has abstained pending resolution of state court case to reserve issues of federal law for resolution in federal court). In general, unlike Supreme Court certification, a state court typically does *not* preserve issues for disposition by the abstaining federal court. *Cf.* 17A WRIGHT ET AL., *supra* note 8, § 4248, at 26 (2d ed. Supp. 2002) ("The expectation on certification is that there will be further proceedings in federal court in the light of the state court's answers to the questions." (footnote omitted)). Moreover, even if the state court acts to the full extent of its jurisdiction and decides all the issues before it, that does not necessarily mean that the federal court will have nothing left to do in the federal court case. In other words, unlike the Supreme Court, the state high court does not enjoy the absolute prerogative to decide all pending issues *to the exclusion* of the federal court.

137 *See* 28 U.S.C. §§ 631–639 (2000).

138 *See id.* §§ 151–158.

139 Section 636(b) of the Judiciary and Judicial Procedure Code authorizes district judges to "designate" magistrate judges to hear certain matters. *See id.* § 636(b)(1)(A).

instances, the magistrate judge or bankruptcy judge issues a report that, upon objection of one of the parties, the district court reviews de novo.[140] In other instances, they will issue a final order that the district court reviews for clear error upon a party's objection.[141]

In such circumstances, the magistrate judge or bankruptcy judge handles the same case that was filed in federal district court, and it is that same case that is returned to the district court after the judge's involvement. This is made clear by the language used by Congress in the statutes that establish magistrate and bankruptcy judges as adjuncts to the district court.[142] The fact that Congress has authorized district courts to review the findings and recommendations issued by magistrate and bankruptcy judges[143] also indicates congressional understanding that these judges handle the very cases that are pending before the district court. Further, the Supreme Court has considered, and rejected, the notion that magistrate judges improperly exercise the Article III federal judicial power when undertaking certain tasks;[144] if the Court understood magistrate judges to be presiding

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Section 157 allows district courts to refer to bankruptcy judges "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11." *Id.* § 157(a).

140 *See id.* § 157(c)(1) (regarding bankruptcy judges); *id.* § 636(b)(1)(B), (C) (regarding magistrate judges).

141 *See id.* § 157(b), 158(a) (bankruptcy judges); *id.* § 636(b)(1)(A) (magistrate judges).

Section 158(b)(1) allows, in the alternative, for appeals of bankruptcy judges' determinations to be heard, with the consent of the parties, by a "bankruptcy appellate panel" consisting of three bankruptcy judges from districts located within the circuit. *See id.* § 158(b)(1). Section 158(b) creates a presumption in favor of the establishment of bankruptcy appellate panels in each circuit, but ultimately leaves it to the discretion of each circuit to decide whether or not to establish such panels. *See id.* § 158(b)(1)(A)–(B). The § 158(b) presumption notwithstanding, many circuits have yet to establish bankruptcy appellate panels. *See* Eugene R. Wedoff, *BAPs—Good, but Not Good Enough*, 19 AM. BANKR. INST. J. 32, 32 (2000). Appeals from bankruptcy appellate panels are heard by the court of appeals for the jurisdiction. *See* 28 U.S.C. § 158(d).

Section 636(c) allows magistrate judges to preside (as a district judge would) over jury or nonjury civil proceedings with the consent of the parties. *See id.* § 636(c). Appeals from judgments entered by magistrate judges under section 636(c) are heard by the court of appeals for the jurisdiction. *Id.* § 636(c)(3).

142 *See, e.g.*, 28 U.S.C. § 151 ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."); *id.* § 636(b)(1)(A) (authorizing a district judge to designate a magistrate judge to hear and determine certain pretrial matters "pending before the court").

143 *See supra* notes 140–41 and accompanying text.

144 *E.g.*, Peretz v. United States, 501 U.S. 923, 936–37 (1991) (holding that a magistrate's supervision of voir dire for a felony trial with consent of parties did not violate Article III because (i) litigants may waive the right to voir dire supervision by an Article III judge and (ii) the magistrate acted as an adjunct to the district court); United States v. Raddatz, 447 U.S. 667, 683 (1980) (concluding that a magistrate's handling of an evidentiary suppression hearing, subject to the district court's review of the magistrate's recommended determination, did not violate Article III because "the ultimate decision is made

over a separate Article 1 case, there would have been no Article III issue for the Court to address in the first place. Conversely, the Court held that, under the Bankruptcy Reform Act of 1978, with only appellate review available in an Article III court,[145] a bankruptcy judge's adjudication of a state law contract claim violated Article III.[146] This confirms that magistrate and bankruptcy judges indeed preside over the very cases which were originally filed in the federal district court when cases are referred to them.

The jurisdictional setting of the procedural device of removal also falls within the scope of the unitary conception. When a case brought originally in state court is removed to federal court, the latter court's removal jurisdiction results from the state court's original jurisdiction over the claim. Thus, the federal court's jurisdiction does not result from the filing of a complaint and the invocation of the court's original jurisdiction, but rather arises upon the accomplishment of three steps: filing a notice of removal in federal court, filing a copy of that notice in state court, and giving prompt written notice to all adverse parties of the removal.[147] That the federal court exerts jurisdic-

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by the district court"); *id.* at 685 (Blackmun, J., concurring) (emphasizing that the use of magistrates does not violate Article III because "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department"). *See generally* Mag. Judges Div. of the Admin. Office of the U.S. Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993).

145 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 55 (1982) (Brennan, J., plurality opinion) (stating that appeals from bankruptcy judges' rulings would be heard by panels of bankruptcy judges if so designated by the chief judge of the circuit, and otherwise by the district court (appeals from rulings of bankruptcy appellate panels or from district courts would be heard by the court of appeals)).

146 *See id.* at 76–87 (Brennan, J., plurality opinion) (finding that the role of the bankruptcy judge violated Article III because the Article I bankruptcy judge was not acting merely as an adjunct to the district court); *id.* at 91 (Rehnquist, J., concurring) (agreeing with the majority on the narrow ground that the role of the bankruptcy judge in question violated Article III).

147 *See* 28 U.S.C. § 1446(a), (d) (2000); Anthony v. Runyon, 76 F.3d 210, 213–14 (8th Cir. 1996). Not all federal courts have adhered to this standard. *See* 14C WRIGHT ET AL., *supra* note 8, § 3737, at 381–83 (3d ed. 1998). A few courts have held that removal is effective simply upon the filing of a notice of removal with the federal court. *See, e.g.*, Berberian v. Gibney, 514 F.2d 790, 792 (1st Cir. 1975). This approach seems irreconcilable with the plain language of section 1446(d). *See* 28 U.S.C. § 1446(d) (2000) (stating that the filing of a copy of the notice in state court and the giving of notice to all adverse parties "shall effect the removal"); *see* 14C WRIGHT ET AL., *supra* note 8, § 3737, at 382 (3d ed. 1998); *cf.* Medrano v. Texas, 580 F.2d 803, 804 (5th Cir. 1978) (holding that notice to state court need not be actual, but may be merely constructive, to effect removal).

Some federal courts have further held that, while the state court is divested of jurisdiction upon satisfaction of all three steps, merely filing a notice of removal in federal court establishes removal jurisdiction in the federal court without divesting the state court of jurisdiction. In other words, until the satisfaction of the remaining two steps, there is concurrent jurisdiction in both state and federal court. *See, e.g.*, *Berberian*, 514 F.2d at 792–93 ("[J]urisdiction of the federal court attaches as soon as the petition for removal is filed with it, and . . . both state and federal courts have jurisdiction until the process of removal is completed."); Burroughs v. Palumbo, 871 F. Supp. 870, 872 (E.D. Va. 1994) ("[F]ederal

tion over the same case which had been before the state court is amply demonstrated by the fact that, under statute, "[a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."[148]

The federal district court to which a state case is removed must entertain, within thirty days of removal, motions to remand the case back to state court on the basis of technical deficiencies in the removal procedure.[149] Also, the federal court must remand the case "[i]f at any time before final judgment it appears that the district

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jurisdiction attached when the notice of removal was filed in federal court . . . and . . . state court jurisdiction continued until the notice was filed in state court . . . ."); *see also* 14C WRIGHT ET AL., *supra* note 8, § 3737, at 382–83 (3d ed. 1988) (stating that there is "authority" for this "reasonable intermediate conclusion"). However, the reasoning employed below to discredit the use of the unitary conception for certification when the doctrine is facing constitutional challenge, *see infra* text accompanying notes 209–13, indicates that this interpretation may not be reasonable after all. Under the unitary (single case) conception of removal, the state court would improperly have jurisdiction over a case that falls within the federal Article III judicial power. This means that (as is the case with certification) resort to the binary conception is required to defend the procedure. However, caselaw addressing the removal procedure does not allow for the use of the binary conception outside of the concurrent jurisdiction theory. Moreover, even the cases that allow for concurrent state and federal jurisdiction speak of concurrent jurisdiction over a single case, not of each court having jurisdiction over its own distinct case. Thus, the unitary conception should apply to the removal procedure's jurisdictional setting; the satisfaction of the three steps effects removal of the *entire case* from state court to federal court. *Cf.* Erkins v. Am. Bankers Ins. Co. of Fla., 866 F. Supp. 1373, 1375 (N.D. Ala. 1994) (describing as a "fundamental misunderstanding of the nature of federal removal jurisdiction" the notion that "some but not all of the state case was removed to [federal] court and that some portion remains within the jurisdiction of the state court").

For a discussion of a similar question, the timing of the resumption of sole state court jurisdiction when a federal court remands a case that was removed from state court, see David A. Furlow & Charles W. Kelly, *Removal and Remand: When Does a Federal District Court Lose Jurisdiction over a Case Remanded to State Court?*, 41 Sw. L.J. 999 (1987).

148 28 U.S.C. § 1450 (2000). Section 1450's effect may be quite limited as a result of the time limitations on removal. *See id.* § 1446(b) (providing time limits requiring removal of civil actions soon after filing). There are, however, some provisions that allow more time in which to remove a case. *See, e.g., id.* § 1441(d) (providing, in suits against foreign states, that "the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown"); *id.* § 1446(c)(1) (providing that notice of a removal of a criminal prosecution must be filed no later than thirty days "after the arraignment in the State court, or at any time before trial, whichever is earlier, *except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time*" (emphasis added)). Moreover, some federal courts of appeals have held that, under a special provision which allows the Resolution Trust Corporation to remove to federal court any case in which it is a party, *see* 12 U.S.C. § 1441a(*l*)(3) (2000), cases can be removed at any time, *even after judgment has been entered by the state court.* In these cases, the federal courts of appeals consider the state court judgment valid, subject only to ordinary post judgment remedies by the losing party. *See, e.g.*, Resolution Trust Corp. v. Allen, 16 F.3d 568, 573 (4th Cir. 1994); Resolution Trust Corp. v. Nernberg, 3 F.3d 62, 67–69 (3d Cir. 1993).

149 *See* 28 U.S.C. § 1447(c).

court lacks subject matter jurisdiction."[150] The fact that remand is appropriate in a particular case does not necessarily render the unitary conception inapplicable. Instead, the jurisdictional wave simply proceeds from the state court to the federal court, and then back again.

Although the issue is more complicated, the unitary conception is not necessarily inapplicable in cases in which removal jurisdiction exists notwithstanding improper state court jurisdiction.[151] In such circumstances, the state court never ruled that it lacked jurisdiction. Thus, at the time of removal, jurisdiction in the state court was effective, even if ultimately the state court ruled that its jurisdiction was invalid.[152] Accordingly, it can be argued that federal removal jurisdiction is the result of that limited, original state court jurisdiction,[153] and, therefore, the removed federal action is a continuation of the case initiated in state court.

C. Amenability of Certification to the Binary and Unitary Conceptions

Unlike other procedural devices that are aptly described by either the binary or the unitary conception (but not both), certification is amenable to both conceptions. This is due in large part to the common features that certification shares with both *Pullman* abstention[154] and intrajurisdictional certification of questions of law.[155] Because the former doctrine is paradigmatic of the binary conception, and the

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150 *Id.*

151 Removal jurisdiction is proper in such cases: "The court to which a civil action is removed . . . is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." *Id.* § 1441(f).

152 At least the state court had, at the time of removal, jurisdiction to decide the issue of whether its assertion of jurisdiction over the case was proper. It can be said (though it is perhaps not fully satisfying) that federal removal jurisdiction is resultant of this limited jurisdiction, just as federal appellate jurisdiction can be resultant of lower court jurisdiction even if the appellate court reviews a decision by a lower court in which jurisdiction was absent. *See supra* note 124 and accompanying text.

153 Prior to the 1986 addition of subsection (e) to section 1441, an action was removable only if it was within the subject matter jurisdiction of the state court in which the action was commenced. *See* 14B WRIGHT ET AL., *supra* note 8, § 3721, at 304–05 (3d ed. 1998). This requirement was called the "derivative jurisdiction principle." *Id.* § 3721, at 304 (internal quotation marks omitted). However, the description of federal removal jurisdiction being the result of the state court's initial jurisdiction is unrelated to the now defunct principle of derivative jurisdiction. *Id.* § 3721, at 305–06.

154 *Cf.* LeBel, *supra* note 19, at 1003 ("[T]he exercise of placing certification within the broader categories of adjudicatory techniques with which it shares some key features sharpens the focus on the ways in which certification differs from closely analogous techniques such as *Pullman* abstention."). The doctrine of *Pullman* abstention is discussed above. *See supra* Part I.B.1.

155 Intrajurisdictional certification is discussed above. *See supra* text accompanying notes 128–36.

latter is aptly described by the unitary conception, both conceptions find support in certification jurisprudence.

It is analytically helpful to consider the support for each conception of certification found in three categories: procedural aspects, the perspective of the federal court that certifies questions to the state high court, and the perspective of the state high court that considers the certified questions.

1. *Procedural Aspects*

a. *Unitary Conception*

The unitary conception of certification draws support from the differences in the roles of the state judiciary with respect to certification and *Pullman* abstention. As discussed above, a state court dealing with certified questions enjoys limited powers.[156] For example, it generally engages in no factfinding,[157] and has no power to do that which a state court exercising plenary jurisdiction could do in a case filed in state court from which a federal court abstained under *Pullman*.[158] The upshot is that a state high court acting on certification has no authority to disturb the fundamental structure of the federal case. Rather, it must *preserve* the status of the singular case while it is in its custody so that it can return the case to the federal court intact.[159] This suggests that the case before the state high court and that before the federal court are one and the same.

b. *Binary Conception*

The procedural arguments in support of the unitary conception are not conclusive. The limitations on the state high court's powers can be understood as a voluntary accommodation to the federal courts to provide, with ease and relative speed, dispositive answers to

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156 *See supra* notes 82–83 and accompanying text.

157 *See supra* note 82 and accompanying text.

158 A state high court exercising standard appellate review (even over a case in the state court system while a federal court abstains over a parallel federal case) has limited powers. For example, it can overturn factual findings made below, under the usual standard for appellate review of factual findings. *See, e.g.*, *In re* T.A.G., 39 P.2d 686, 687 (Mont. 2002). Nevertheless, it is clear that the powers of a state high court on certification are even more circumscribed. Moreover, the powers of the state court system *taken as a whole* are even more limited under certification, because the state court system does not enjoy plenary powers, as it would in a case brought in state court while a federal court exercised *Pullman* abstention with respect to factual matters underlying the state law issues as well as issues with respect to which no federal court reservation had been taken. *See* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 417, 420–22 (1964) (discussing right of parties to have federal law issues, and factual issues related thereto, adjudicated in a federal forum, but also requiring parties explicitly to reserve this right in abstention cases).

159 *See* Wade H. McCree, *Foreword*, 23 WAYNE L. REV. 255, 262 (1977) (Certification "preserves the benefits of the federal factfinding process for federal movants.").

difficult, unanswered questions of state law, rather than as a recognition that the state and federal courts are dealing with a single case.[160]

Moreover, there is procedural support for the binary conception. In certification cases, federal courts act as though they are abstaining from proceeding with the case on their docket while the state court considers the certified questions. In other words, they refrain from action while the state court considers the certified questions and, once the state high court has responded, they follow the state court's interpretation of state law.

2. *Perspective of the Certifying Court*

a. *Unitary Conception*

The notion that it is the law of the case doctrine which requires federal courts to follow state court answers to certified questions[161] supports the unitary conception. A federal court's application of the law of the case doctrine to a state court decision implies that both the state and federal courts have been involved in one and the same case.

Also in accord with this view is language of federal courts regarding whether or not they will "certify the case" to the state high court.[162] Although this is largely a matter of semantics, and as such is

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160 *See infra* text accompanying notes 264–65 (arguing that, in theory, state high courts are free under the binary conception of certification to make factual findings).

161 *See supra* note 88 and accompanying text.

162 *See, e.g.*, Peerman v. Ga.-Pac. Corp., 35 F.3d 284, 286–87 (7th Cir. 1994) ("[W]e see no need to certify *this case* to the Indiana Supreme Court . . . ." (emphasis added)); United States *ex rel.* Farmers Home Admin. v. Kennedy (*In re* Kennedy), 785 F.2d 1553, 1557 (11th Cir. 1986) ("Since the only issue remaining to be resolved is a novel question of state law, we think it proper to certify *this case*." (emphasis added)); United States v. Travelers Indem. Co., 729 F.2d 735, 737 (11th Cir. 1984) ("Since the only issues remaining to be resolved are novel questions of state law, we think it proper to certify *this case*." (emphasis added)); Gen. Tel. Co. of the Southeast v. Trimm, 706 F.2d 1117, 1120 (11th Cir. 1983) ("[W]e certify *this case* to the Georgia Supreme Court for a resolution of this and other state law questions." (emphasis added)); Miree v. United States, 565 F.2d 1354, 1355 (5th Cir. 1978) ("[W]e certify *this case* to the Georgia Supreme Court." (emphasis added)); Wansor v. George Hantscho Co., 570 F.2d 1202, 1208 (5th Cir. 1978) ("[W]e certify *this case* to the Georgia Supreme Court for a resolution of this and other state law questions." (emphasis added)); Nat'l Educ. Ass'n v. Lee County Bd. of Pub. Instruction, 467 F.2d 447, 448 (5th Cir. 1972) (noting that it had "previously certified *this case* to the Supreme Court of Florida" (emphasis added)); *see also* City of Houston v. Hill, 482 U.S. 451, 475 (1987) (Powell, J., concurring in part and dissenting in part) ("I therefore would vacate the judgment below and remand with instructions to certify *the case* to the Texas Court of Criminal Appeals to allow it to interpret the intent requirement of this ordinance." (emphasis added)).

It is interesting to note that, of all the federal courts of appeals, the Fifth Circuit and the Eleventh Circuit (which split off from the Fifth Circuit in 1981, *see* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 3, 94 Stat. 1995; Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc)) speak most often of certifying a case. Because Florida was the first state to have a certification procedure in place, the Fifth Circuit was the first to make significant use of certification procedure and as such was at the forefront of the certification frontier. *See* 17A WRIGHT ET AL., *supra* note 8, § 4248, at 160–62.

far from conclusive, this language nonetheless reflects to some degree the view of these federal courts; they are not certifying only questions of state law to the state high court, but instead entire cases.

Further supporting the unitary conception is that federal courts see themselves as initiating the certification process; it is the federal courts, not the parties, who certify cases (or questions) to state courts.[163] In some cases, federal courts have decided to invoke certification *sua sponte*.[164]

Consistent with the foregoing, federal courts generally refer to abstention and certification as separate and distinct doctrines.[165] Although again largely a matter of semantics, this also reflects some federal courts' understanding of certification as distinct from abstention—the paradigm of a binary conception of jurisdiction.

In *Lehman Bros. v. Schein*, the Supreme Court held that *Pullman* abstention requires federal courts to "remit[ ] the parties to a state tribunal for the *start of another lawsuit*."[166] The Court concluded that *Pullman* abstention was unavailable pursuant to *Meredith*, yet proceeded to recommend that the lower court consider certification on remand. In so holding, the Court seems to have implicitly distinguished certification from *Pullman* abstention on the ground that the former does not entail the "start of another lawsuit."[167]

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163 *See supra* notes 77–78 and accompanying text.

164 *See supra* note 76 and accompanying text.

165 *See, e.g.*, Copier v. Smith & Wesson Corp., 138 F.3d 833, 839 (10th Cir. 1998) (noting that previous cases had "discussed abstention as well as certification"); Fleet Bank, Nat'l Ass'n v. Burke, 160 F.3d 883, 892 (2d Cir. 1998) (suggesting that a court should "consider . . . whether the uncertain nature of state law warrants abstention, or perhaps certification"); Mitcheson v. Harris, 955 F.2d 235, 238 (4th Cir. 1992) ("[The] state interest in having state courts resolve difficult questions of state law is recognized in the practice of certification . . . and in the various forms of federal abstention . . . ." (citations omitted)); *see also* Nemours Found. v. Manganaro Corp., New Eng., 878 F.2d 98, 101 (3d Cir. 1989) (rejecting the contention that "a certification order is a species of abstention" and, as such, is immediately appealable).

166 416 U.S. 386, 390 (1974) (emphasis added).

167 *Id.* One might read this comment to mean that *Pullman* abstention entails the start of another lawsuit, while certification entails the start of something else, something less than a full fledged lawsuit, but some form of independent legal proceeding in state court. One also might read the comment to emphasize that abstention remits "*the parties*" to a state tribunal where "*the parties*" start a lawsuit, while under certification it is the certifying court, not the parties, that commences the proceedings. *See id.* (emphasis added). These different emphases are supported by the juxtaposition, which the Court employed in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), of *Pullman* abstention which the Court found to "entail[ ] a full round of litigation in the state court system before any resumption of proceedings in federal court," with certification which the Court found to "allow[ ] a federal court faced with a novel state-law question to put the question directly to the [s]tate's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Id.* at 76. Nevertheless, the plainest interpretation of *Schein* is that advanced in the text above.

Finally, a survey of members of the judiciary reveals that "[m]ost [federal] circuit judges (92%) . . . [and] district judges (86%) . . . *disagree* that sending a certified question of law to another court amounts to a 'surrender' of control over that case."[168] These results reflect an understanding that there is one case, over which two courts exercise jurisdiction, but over which the federal court retains control.[169]

b. *Binary Conception*

The arguments set forth immediately above—that some federal courts may perceive of certification as falling within the unitary conception—are hardly conclusive. Reliance on the law of the case doctrine to justify following state court responses to certified questions is by far the minority position.[170] Most federal courts rely upon the *Erie* doctrine instead.[171] Similarly, most federal courts that invoke certification speak of certifying questions rather than cases.[172] In addition,

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168 GOLDSCHMIDT, *supra* note 105, at 60. The vast majority of state justices (85%) also disagree with this proposition. *Id.*

The same survey reveals that "[s]izeable majorities of circuit judges (69%), district judges (66%), and state justices (75%) *disagree* with the proposition that parties who remove their cases to the federal courts 'should not be allowed to seek certification of questions of law.'" *Id.* at 64. This finding also supports the inference that judges consider a case where a federal court certifies questions of law to a state high court to remain, at all times, a unitary case subject to the jurisdiction of the federal court. If federal judges considered certification to result in an independent state court proceeding, then they would be more likely to object when a litigant acted to remove a case from state court jurisdiction, only later to seek the jurisdiction of the state court to resolve some of the same issues. By contrast, if judges perceive a case in which questions are certified as remaining one case before the federal court, then the objection is less well-founded.

169 One could argue that the survey's findings indicate that a state high court's action involves another aspect of the dispute between the parties, so that the case pending in federal court remains there and, accordingly, no surrender of control occurs. However, the strength of this argument is decreased by another finding of the same survey that "[a] substantial majority of circuit judges (77%), district judges (74%), and state justices (66%) *disagree* with the proposition that certification 'creates piecemeal litigation.'" *Id.* at 66.

170 *See supra* note 88 and accompanying text.

171 *See supra* note 87 and accompanying text.

172 *See, e.g., Arizonans for Official English*, 520 U.S. at 77 (speaking of "certification of . . . *questions* of state law" (emphasis added)); Richardson v. Navistar Int'l Transp. Corp., 170 F.3d 1264, 1264 (10th Cir. 1999) (captioning opinion with "CERTIFICATION OF *QUESTION* OF STATE LAW" (emphasis added)); Reagan v. Racal Mortgage, Inc., 135 F.3d 37, 45 (1st Cir. 1998) ("[W]e elect to certify this *question* to the Maine Supreme Court." (emphasis added)); Aguilar v. Southeast Bank, N.A., 117 F.3d 1368, 1369 (11th Cir. 1997) (per curiam) ("We therefore certify the *question* to the Supreme Court of Florida." (emphasis added)); *see also* Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 914 (1st Cir. 1988) (en banc) (Bownes, J., concurring in part and dissenting in part), stating that

> the majority of this court has confused the procedure of certifying questions of state law to a state court with the procedure of certifying entire cases to state courts. Federal courts do not certify cases to state courts. They certify questions of law and then apply the answers to those questions to reach a result which represents the combined effect of majority, not minority, positions.

the Supreme Court, albeit in dicta, has described a federal court that certifies state law questions as "abstain[ing] pending certification."[173] Finally, to the extent that federal court initiation of certification is problematic under the binary conception, this problem may be resolved by understanding federal courts to have final discretion only over whether to abstain pending certification. Such an understanding allows the parties to retain authority over whether to commence the certification proceeding in state court. This analysis, however, seems to clash with at least the wording of most federal court certification orders.[174]

Perhaps the greatest support for the binary conception of certification is the fact that federal courts understand state courts to be under no obligation to respond to questions certified by federal courts. State courts have discretion to decline to respond to certified questions.[175] The traditional view is that federal courts lack the power to compel state high courts to accept and respond to certified questions,[176] and several states do not even have a certification procedure. The law thus suggests that the state court systems do not act as mere adjuncts of the federal courts in certification cases. Rather, they enjoy full autonomy over their dockets with respect to certification cases, and *federal courts respect that autonomy.* This implies that federal courts are of the opinion that, when state courts do accept certified questions, they do so purely under their own jurisdiction.

This argument proves too much, however. Congress can create federal causes of action that the state courts are not at absolute liberty to decline to adjudicate.[177] Thus, state court docket control over cases arising under federal law is limited by Congress, yet there can be no question that state courts hearing such cases are exercising purely state, and not federal, jurisdiction. A state court's autonomy over its docket, therefore, is not an absolute measure of whether the court is operating under federal or state jurisdiction.

The question of whether a state court responds to individual questions or decides a case as a whole affects the proper aggregation of votes where the federal court certifies more than one question to the state court. On the topic of the proper way to aggregate the votes of appellate judges, see generally Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. (forthcoming 2003).

173 City of Houston v. Hill, 482 U.S. 451, 471 (1987) ("We therefore see no need in this case to abstain pending certification"); *see id.* at 470–71 ("[T]he availability of certification is not in itself sufficient to render abstention appropriate.").

174 *See supra* text accompanying notes 162–63.

175 *See supra* note 80 and accompanying text.

176 This question remains unsettled. *See supra* note 74 and accompanying text.

177 *See, e.g.*, Testa v. Katt, 330 U.S. 386 (1947) (holding that a Rhode Island state court could not decline to hear action arising under federal law if court would hear similar actions arising under state law).

3. *Perspective of the Court Accepting Certification*

a. *Unitary Conception*

Although clearly in the minority, some state high courts understand their role with regard to certification to be that of an adjunct to the certifying federal court, considering a singular case. The Supreme Judicial Court of Maine offered the following explanation of certification, which embodies the unitary conception of certification:

> With certification available the litigant is able to submit his federal claims for decision by the federal Court and still enjoy the benefit that both his federal and state claims will be settled in the substantial equivalent of a single lawsuit. It is likely that the litigant will look upon the federal [c]ourt's certification, to the [state court] of last resort, of the state law questions involved as, essentially, an aspect of the underlying federal [c]ourt proceedings . . . .[178]

This understanding accords with the United States Supreme Court's understanding of its role where a federal court of appeals invokes certification to the federal high court. As described above, the United States Supreme Court exercises jurisdiction over the very case that was certified to it by the federal court of appeals.[179]

b. *Binary Conception*

The view expressed by the Supreme Judicial Court of Maine in the excerpt quoted above is the minority view. Most state high courts have treated their dispositions of certified questions as unexceptional exercises of their own jurisdiction, not as derivative of federal court jurisdiction.[180] This suggests that most state courts understand consideration of certified questions as an exercise that is wholly independent from the federal court cases in which the questions arose.

There are several reasons why the state court majority view on this point is not conclusive. First, no state high court has ever directly confronted the question of whether dispositions of certified questions constitute exercises of federal jurisdiction. Second, the mere fact that state courts have concluded that their dispositions of certified questions constituted exercises of their own jurisdiction does not preclude the possibility that they are simultaneously exercising federal jurisdiction. Third, it is not clear that state courts have the authority to raise

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178 White v. Edgar, 320 A.2d 668, 683 (Me. 1974).

179 *See supra* notes 134–36 and accompanying text.

180 *See, e.g., In re* Richards, 223 A.2d 827, 833 (Me. 1966) (state high court refers to the state certification statute as "conferring jurisdiction upon us"); *id.* at 828–33 (determining whether the state certification statute conforms with the state constitution's judicial provisions); *see also* Fischer v. Bar Harbor Banking & Trust Co., 857 F.2d 4, 7 n.2 (1st Cir. 1988) (describing a state statute authorizing certification as, inter alia, "a basis of jurisdiction" in the state court).

or address the issue of whether they are exercising federal jurisdiction, or that the state court is the proper forum in which such an issue should be decided. Such a determination likely would lie outside the state courts' proper scope of action on certification. Fourth, and along the same lines, even if state courts had explicitly considered and rejected the notion that they were exercising federal jurisdiction when answering certified questions, it is clear that their determinations would not be binding on the federal courts.[181]

Especially in light of the focus of this Article—that is, the *federal* jurisdictional underpinnings of certification—the jurisdictional perspective of the state high courts that accept certified questions should be accorded less weight than the other categories and factors discussed above. Moreover, the United States Supreme Court takes a different view of its role in certification (albeit under a different, intrajurisdictional certification procedure). Thus, while this factor offers some support for a binary conception of certification, it is not conclusive.

4. *Summary of the Three Factors*

Consideration of the procedural aspects of certification, probably the most important category addressed, weighs in favor of a unitary conception of certification. Consideration of the perspective of certifying federal courts supports a binary conception. Finally, consideration of the perspective of the state courts that accept certification offers some support for a binary conception, but this factor is due less weight than the others. Thus, both conceptions are at least somewhat descriptive of certification.

D. The Limited Reconcilability of the Binary and Unitary Conceptions

The preceding sections raise the question of whether, and to what degree, the binary and unitary conceptions are reconcilable. As an initial matter, there is no reason that either conception should be wholly inapplicable in a judicial system. Indeed, both conceptions apply to various jurisdictional procedural settings. This duality gives rise to neither conflict nor tension. It is simply a matter of grouping one set of procedural settings and devices under one category, and another set under a second category.

The analysis in section C suggested that perhaps certification, which is alone among procedural devices and settings, could be described by both the unitary and the binary conceptions. However, the two conceptions are internally irreconcilable. Therefore, both cannot

181 *See infra* note 199 and accompanying text.

apply in describing any one procedural setting or device. This is because the two conceptions of certification offer considerably different theories of the jurisdiction underlying certification: whether (i) the federal and state courts enjoy jurisdiction over the same case, or (ii) there are separate cases in the federal and state courts. Common sense indicates that there simply cannot be a single case in the federal and state courts, and separate cases in each court, at the same time.

Moreover, the two scenarios lead to antinomic rules. For example, under the unitary conception, a state court that accepts a certified case acts under a limited mandate from the certifying federal court. The state court is constrained from making any findings of fact. In contrast, under the binary conception, the state court is in theory free to engage in factfinding. If it does not do so, it is only because it has chosen not to (whether on a case-by-case basis, or as a general rule covering response to certified questions). Even if the state court does engage in factfinding, the federal court presumably would be free to ignore those factual findings to the extent that they might bear on any issues before the federal court which were not the subject of the certified questions.[182]

That the unitary and binary conceptions are internally irreconcilable is evidenced by the fact that no other procedural device or doctrine squares with both conceptions: each fits neatly under one conception or the other. There is no reason to think that the doctrine of certification is or should be an outlier in this regard.

To explicate the limited irreconcilability of the unitary and binary conceptions, it is helpful to compare the conceptions to, and distinguish them from, Richard Fallon's Federalist and Nationalist interpretive models.[183] The Federalist model sees the federal government as limited to the powers assigned to it under the Constitution, with the states retaining significant sovereign powers.[184] The Nationalist model understands the Constitution to establish a "strong conception of national supremacy that exalts federal interests."[185] Fallon suggests that one or the other of these guides underlies and explains many decisions regarding federal courts law. He notes that the two models rest on "antinomic premises"[186] and that "both models cannot be valid . . . [because] each denies the most fundamental claims of the

182 *Cf.* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 415–19 (1964) (discussing the right of a party to a federal court case to reserve issues of federal law for resolution in federal court when the federal court has abstained pending resolution of the state court case).

183 *See generally* Fallon, *supra* note 96.

184 *See generally id.* at 1151–57 (describing the Federalist model).

185 *Id.* at 1158 (emphasis omitted). *See generally id.* at 1158–64 (describing the Nationalist model).

186 *Id.* at 1223.

other."[187] Nonetheless, he observes that "Supreme Court decisions accept and legitimate the premises of both models."[188] As a result, "federal courts law is contradictory and unstable at its foundations."[189] In the end, he advocates the development of a moderate interpretive model that navigates between the poles represented by the Nationalist and Federalist models.[190]

In one sense, the unitary and binary conceptions are more compatible than are the Federalist and Nationalist models. The unitary conception applies to the doctrine of intrajurisdictional certification, while the binary conception applies to the doctrine of abstention; there is no contradiction, or even any tension, under that analysis. By contrast, a decision arrived at under the Federalist model rests on premises that a decision arrived at under the Nationalist model rejects; as such, there will be tension between the two decisions, even if there is not an outright conflict.

However, in another sense, the unitary and binary conceptions are less compatible than are the Federalist and Nationalist models. The models are mere interpretive guides, while the conceptions determine the more concrete issue of which court has jurisdiction over which case. Thus, while some decisions in a particular area of federal courts law rest on the Federalist model and others on the Nationalist model, which will lead to tension among those decisions, the decisions need not be facially contradictory (for example, the Supreme Court need not overrule all prior Nationalist based decisions when it issues a Federalist based decision in the same area of law). In contrast, the unitary and binary conceptions cannot apply concurrently to describe a single jurisdictional setting or doctrine. Further, while Fallon can recommend a moderate interpretive model that lies between the poles of the Federalist and Nationalist models, it is difficult to imagine how one might develop a conception for certification that lies between the unitary and binary conceptions.

For all these reasons, it is clear that the unitary and binary conceptions cannot apply at the same time to describe any one procedural device or setting. In particular, then, they cannot both describe certification procedure.

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187 *Id.*

188 *Id.*

189 *Id.*

190 *See id.* at 1228–31; *see also id.* at 1231–48 (providing examples of "adjudication between the poles").

III
EXAMINATION OF THE FEDERAL JURISDICTIONAL UNDERPINNINGS OF CERTIFICATION

This Part examines two federal jurisdictional issues raised by certification: (i) Is certification consistent with constitutional limits on federal court jurisdiction, and (ii) is certification consistent with Congress's statutory grant of diversity jurisdiction to the federal courts? This Part argues that defense of certification against constitutional challenge requires resort to a binary conception of certification. Although (as demonstrated below) a unitary conception of certification offers the best lens through which to view certification as consistent with the diversity grant, that option is unavailable insofar as reliance on the binary conception is constitutionally required. This Part next suggests approaches by which the second issue might be addressed even under a binary conception of certification. This Part also addresses problems with those approaches. First, reliance upon the binary conception poses problems for the suggestion that the use of certification in diversity cases should be expanded. Second, even if reliance upon the binary conception is consistent with the letter of the diversity statute as interpreted by the Supreme Court, the binary conception nonetheless frustrates the fundamental purpose of the federal diversity jurisdiction.

A. Does Certification Violate Article III of the U.S. Constitution?

At the center of the constitutional concerns raised by certification is the fact that, under certification, federal jurisdiction is the trigger of the state court's authority to act. That is, but for the initial case brought under federal jurisdiction, there would be no case, and therefore no jurisdiction, in state court.[191] Thus, the state court jurisdiction is derivative of, and resultant from, the federal court jurisdiction. Although the state high court exercises power over the litigants, it is the federal court's certification that causes and allows the state court to exercise such power.[192] In other words, were the federal court to decline to exercise its discretion and certify the question at issue, the state court would have no authority to act.[193] The question thus arises

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191 Of course, it is possible that such a case could have initially been brought in state court. However, the jurisdictional posture of, and freedom of the state court to act in a case brought initially in state court (as opposed to a case on certification) are presumably quite different. *See supra* text accompanying notes 156–58.

192 *See* Kitsap County v. Allstate Ins. Co., 964 P.2d 1173, 1178 (Wash. 1998) ("[W]e recognize that when a federal court certifies a question to this court, this court answers only the discrete question that is certified and *lacks jurisdiction* to go beyond the question presented." (emphasis added)).

193 *Blasband v. Rales*, 979 F.2d 324 (3d Cir. 1992), is instructive in this regard. There, the district court initially rendered a decision in favor of defendants on the ground that

whether a state court acting upon certification of questions of state law by a federal court thereby exercises, in violation of Article III of the Constitution, the federal judicial power.

The Constitution confines the "judicial Power of the United States" to "one supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish."[194] Because state courts are not created by Congress and thus constitute judicial systems entirely independent of and distinct from the federal judiciary,[195] action by a state court upon certification of questions by a federal court is unconstitutional if the state court thereby exercises the judicial power of the United States.[196]

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plaintiff had failed to meet the governing standing requirements for a shareholder derivative suit under Delaware law. *See* Blasband *ex rel.* Danaher Corp. v. Rales, 772 F. Supp. 850 (D. Del. 1991), *rev'd*, 971 F.2d 1034 (3d Cir. 1992). The district court reached this conclusion on its own, without certifying any questions to the Supreme Court of Delaware. On appeal, the Third Circuit reversed, expressly concluding that plaintiff *had* met the relevant standing requirements under Delaware law. Blasband v. Rales, 971 F.2d 1034, 1046 (3d Cir. 1992). On remand, the district court decided to certify the issue of standing to the Delaware Supreme Court because it disagreed with the appellate court's conclusion. *See Blasband*, 979 F.2d at 325–26.

Dissatisfied with the district court's action, plaintiff petitioned the court for a writ of mandamus. *Id.* at 326. The court of appeals granted the petition. *Id.* at 328. It reasoned that the district court had exceeded its mandate on remand by choosing to employ certification:

> Whether the Delaware Supreme Court might have reached a different result if the derivative suit had been brought in the state courts, or if the standing question had been certified to it before the district court dismissed the action, our opinion nevertheless was conclusive on the standing point in the derivative suit.

Id.

Accordingly, the court of appeals issued an order directing the district court to vacate its certification order, and to notify the Delaware Supreme Court that the request for certification was withdrawn. Regarding the response of the Delaware Supreme Court, the court of appeals commented:

> The Delaware Supreme Court became involved in the derivative suit only because it was invited to do so by the district court. Then when the Supreme Court became aware of Blasband's petition, it stayed the certification proceedings. Accordingly, we cannot presume that if we issue a writ of mandamus to the district court compelling it to withdraw its order of certification, the Supreme Court will continue the certification proceedings.

Id. at 327. And, indeed, upon receipt of the federal district court's order withdrawing the certified question, the Delaware Supreme Court dismissed the certification proceedings. *See* Rales v. Blasband, No. 410, 1992 WL 397477 (Del. Nov. 25, 1992) (referenced in table of unpublished decisions at 620 A.2d 858 (Del. 1992)).

194 U.S. CONST. art. III, § 1.

195 *See, e.g.*, Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525, 537 (1958) ("The federal [judicial] system is an independent system for administering justice to litigants who properly invoke its jurisdiction."); Linn County v. City of Hiawatha, 311 N.W.2d 95, 97–99 (Iowa 1981) (discussing the different roles of state and federal courts in certification cases).

196 *But cf.* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 119–29 (arguing that some of the Framers, their contem-

1. *Threshold Questions*

There are three threshold, and ultimately unpersuasive, arguments against the notion that a state court acting upon certified questions might be exercising federal jurisdiction. The first argument asserts that federal jurisdiction clearly is not being exercised because consideration of certified questions involves parties appearing before a state court. How, this argument asks, can there be an exercise of federal jurisdiction when the parties are appearing before a state court?

The short answer to this question is that there can be no such exercise of federal jurisdiction under the Constitution. This, however, does not end the inquiry. The mere fact that the Constitution prohibits something does not mean that it cannot happen, only that its occurrence is unconstitutional. Thus, the first argument merely restates the underlying question.

The second threshold argument is based on the fact that state high courts accepting certified questions generally consider themselves to be acting only pursuant to state jurisdictional authority.[197] Why, this argument asks, is that not dispositive with regard to whether state courts acting on certification exercise federal judicial power?

As set forth above (in the context of discussing why the majority view of state courts with regard to certification does not dispositively establish the validity of a binary conception[198]), are several answers to this question. These answers resonate loudly here because this subpart centers on federal jurisdiction, an issue on which state courts lack authority to rule definitively.[199]

The third threshold argument relies on the fact that state and federal courts share concurrent jurisdiction over certain types of cases, such as diversity and federal question cases.[200] How, this argu-

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poraries, and early members of Congress in fact understood the Constitution to allow for the appointment of state judges to serve as members of the federal judiciary).

197 *See supra* text accompanying note 180.

198 *See supra* Part II.C.3.b.

199 State courts are occasionally called upon to determine the scope of federal jurisdiction: for example, when determining whether a case brought in state court falls within exclusive federal court jurisdiction, the state court must rule on the federal court's jurisdiction, *see, e.g.*, 28 U.S.C. § 1333 (2000) (establishing exclusive federal jurisdiction over admiralty claims). But any such determination is subject to Supreme Court review. Moreover, a legal conclusion as to federal jurisdiction by a state court presumably would have no binding effect on a federal court. *Cf.* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817–18 (1988) (holding that the Federal Circuit erred in accepting an appeal returned from the Seventh Circuit after the Federal Circuit previously had concluded that it lacked jurisdiction and transferred the appeal to the Seventh Circuit, and that the Seventh Circuit's reasoning was not binding on the Federal Circuit under a law of the case theory).

200 *See, e.g.*, Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 826 (1990) (determining that federal courts do not have exclusive jurisdiction over civil actions brought under Title VII of the Civil Rights Act of 1964).

ment asks, can a state court improperly exercise the federal judicial power by responding to certified questions when the state court system could have properly exercised jurisdiction over the entire case had it been brought in state court in the first instance?

The mere fact that a state court exercises jurisdiction as to a case that falls within the ambit of Article III does not render the exercise constitutionally infirm. That this must be true is evident from the fact that the Constitution does not require Congress to create any inferior federal courts.[201] Had Congress decided not to create any such inferior courts, the federal judicial power would be vested solely in the United States Supreme Court, with state courts hearing all cases (except perhaps those falling within the Supreme Court's original jurisdiction[202]) in the first instance.

Of course, Congress has decided to create inferior federal courts. However, it has not seen fit to confer on the federal courts the full extent of the federal judicial power authorized by Article III,[203] and has generally allowed state courts to exercise concurrent jurisdiction over cases that the federal courts are authorized to hear.[204] It is clear that state courts constitutionally exercise the federal judicial power when they hear cases that either (i) fall within the ambit of Article III yet do not fall within the federal courts' statutory subject matter jurisdiction, or (ii) fall within the ambit of Article III yet do not fall within the federal courts' *exclusive* statutory subject matter jurisdiction.

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201 *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress *may from time to time ordain and establish.*" (emphasis added)); FALLON ET AL., *supra* note 43, at 7–9 (describing the evolution of the Madisonian Compromise, under which delegates to the constitutional convention agreed to establish a Supreme Court but left the establishment of lower federal courts to the discretion of Congress). *But see* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 333–36 (1816) (Story, J.) (suggesting, in dicta, that the Constitution obligated Congress to create lower federal courts to the extent cases within Article III's ambit fall neither within the original jurisdiction of state courts nor within the original jurisdiction of the Supreme Court); Collins, *supra* note 196 (questioning the force and meaning of the Madisonian Compromise, and suggesting that many delegates to the constitutional convention understood the Constitution to mandate the establishment of lower federal tribunals).

202 *See* U.S. CONST. art. III, § 2, cl. 2. In fact, Congress generally has not made the Supreme Court's original jurisdiction exclusive, *see* 28 U.S.C. § 1251(b) (2000). It has conferred exclusive original jurisdiction on the Supreme Court only as to "controversies between two or more States," *id.* § 1251(a). However, despite the language of § 1251(b), the Court has at times declined to hear cases falling within the ambit of that provision, in favor of cases before other tribunals raising similar issues. *See* Louisiana v. Mississippi, 488 U.S. 990 (1988); Arizona v. New Mexico, 425 U.S. 794 (1976) (per curiam).

203 For example, as discussed below, *see infra* text accompanying notes 224–27, the statutory diversity jurisdiction conferred by Congress is narrower than the constitutional diversity grant. Also, the Court has held that that Congress has not conferred by statute the full scope of the constitutional federal question jurisdictional grant. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

204 *See supra* authority cited in note 200.

The foregoing might seem to suggest that no case, with the possible exception of a case arising under the Supreme Court's original jurisdiction, truly falls within the federal judicial power. On reflection, however, that is not a valid statement: if Congress chooses (as it in fact has) (i) to create inferior federal courts and (ii) to vest in those courts some subset (whether proper or improper) of the Article III judicial power, then a case proceeding in federal court under that jurisdictional grant falls within the constitutional federal judicial power. The question remains how a state court can exercise jurisdiction in such a case, consistent with the Constitution.

The fact that a federal court's exercise of such jurisdiction is not mandatory does not resolve the issue. David Shapiro has demonstrated that federal courts have, in effect, read into almost every statutory jurisdictional grant the discretion to decline to hear cases that fall facially within that grant.[205] One example of this is the federal court authority, which is not found in any statute, to engage in *Pullman* abstention.[206] Shapiro's description and conception of federal court jurisdiction do not resolve the question currently under discussion because certification may be seen, through the lens of the unitary conception, to differ from other instances in which a federal court defers to another judicial system to resolve some or all of a case properly before the federal court.[207] Declining jurisdiction completely, in favor of allowing a distinct proceeding to be brought (or to proceed) in another judicial system, is quite different from having the *same proceeding* continue in another judicial system and then return to federal court.[208]

2. *State Court Jurisdiction in Certification Cases*

It is thus clear that neither the fact that the consideration of certified questions involves parties appearing before a state court, nor the fact that the state courts have treated their consideration of certified questions as an exercise of their own jurisdiction, nor the fact that state and federal courts share concurrent jurisdiction over many cases, ends the constitutional fitness inquiry. It is therefore appropriate to consider the question of whether state courts considering certified questions are exercising some form of the federal judicial power, which would necessarily be inappropriate. The answer to this ques-

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205 *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985). Shapiro also argues that such interpretations, and reasonably guided invocations of discretion to decline federal jurisdiction, are appropriate. *See id.*

206 *See id.* at 551.

207 *See supra* notes 163–65 and accompanying text.

208 Were this not the case, the concept of the federal judicial power would be quite meaningless. *Cf.* Meredith v. Winter Haven, 320 U.S. 228, 234–35 (1943) (discussing the duty of federal courts to hear cases falling within their diversity jurisdiction).

tion depends upon whether certification is perceived under a unitary or binary conception. As discussed above, support exists for both conceptions and neither can be pronounced definitively correct under current certification jurisprudence.[209]

Under a binary conception, the certifying federal court abstains from proceeding on the case in federal court, while another (albeit procedurally truncated) case is begun and concluded in state court. Under the binary conception then, it seems clear that certification does not result in state court exercise of the federal judicial power.

The result is far murkier under the unitary conception. The mere fact that the unitary conception applies in a case which falls under the jurisdiction of both federal and state courts does not alone mean that an Article III problem exists. For example, although the Supreme Court clearly exercises the federal judicial power while hearing an appeal of a state court case, the state court that originally heard the case did not improperly exercise the federal judicial power, nor will state courts that will hear the case on remand from the Supreme Court.[210]

But, from an Article III perspective, certification is not similar to an appeal of a state court case to the United States Supreme Court. In the standard appellate setting, the Supreme Court's jurisdiction is derivative of the state court's jurisdiction. On remand, the state court's jurisdiction is, even if in some limited sense, derivative of the Supreme Court's jurisdiction which resulted from the state court system's earlier jurisdiction.[211]

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209 *See supra* Part II.C.

210 *See supra* text accompanying note 126 (discussing the application of the unitary conception to appeals of state court cases to the United States Supreme Court). Indeed, there are situations in which the case that the Supreme Court ultimately reviews *could not* have been heard in federal court as an initial matter. The Supreme Court has jurisdiction to review such state court decisions because the state court judgment on the matter converts the case into one that meets the Article III requirements. *See* ASARCO, Inc. v. Kadish, 490 U.S. 605, 623–24 (1989). In this sense, the Court's jurisdiction is very much derivative of the state court's jurisdiction. *See supra* note 126. Also, Supreme Court precedent suggests that the Eleventh Amendment does not circumscribe Supreme Court appellate review of a state court judgment even if it would, if asserted, preclude initial federal court treatment of the underlying case. *See* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 28 & n.9 (1990); *see also* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1653–54 (2002) (arguing that the seeming inconsistency in Supreme Court precedent on this point results from the Supreme Court's "[failure] to recognize the difference between the 'personal jurisdiction' type of immunity that Madison and Marshall discussed . . . and the 'subject matter jurisdiction' type of immunity that the Eleventh Amendment later created," meaning that the Eleventh Amendment only entitles states to assert an absence of federal court personal jurisdiction over them, but does not affect the federal courts' subject matter jurisdiction over cases).

211 This is true even if the Supreme Court remands the case to the state court for the limited purpose of having the state court clarify its prior holding. *See supra* note 127 and accompanying text.

Under a unitary conception of certification, by contrast, the state court's jurisdiction is entirely derivative of the federal court's jurisdiction. It is clearly the federal court and not the parties that instigates certification proceedings under the unitary conception.[212] Moreover, the federal court instigates the action as to a case that is properly within the federal judicial power; the case presumably falls within the court's constitutional and statutory jurisdiction and is pending in federal court. The state court, then, exercises jurisdiction by virtue of the federal judicial power, and it exercises jurisdiction as to a case properly within the federal judicial power. It cannot be argued that the federal judicial power is properly interpreted as restricted to some proper subset of the case, as it can for an appeal of a state court case to the Supreme Court. Under these circumstances, the state court can be seen as improperly exercising the federal judicial power.[213]

Thus, although the unitary conception of certification raises problems under Article III, the binary conception does not. Which conception is more valid? The best answer available is that current certification procedures are consistent with the binary conception that the federal court abstains while the state high court, under its own jurisdiction and of its own volition, conducts and resolves a truncated and limited independent state case. It is also consistent, however, with the unitary conception that the state court merely assumes control, for a time, over a federal case. Given the dominant view that certification procedures contribute positively to both the federal and state judicial systems, a federal court faced with the question likely would avoid the significant constitutional issues presented by the latter paradigm and rely instead on a binary conception of certification in order to justify the procedure.[214]

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212 Under the binary conception, the federal court's only decision is to abstain; it is the parties who commence the separate certification action in state court. *See supra* note 173 and accompanying text.

213 *But cf.* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 267 (1990) (arguing that Article III "does not give specific *content* to the concept that the federal judicial power must be exercised by the courts specified therein"). Bator, however, was concerned with the propriety of federal legislative and administrative tribunals hearing matters falling under the Article III categories in the first instance. He thus proceeded to emphasize his conclusion that Article III "in particular does not specify that the exercise of federal judicial power must involve the initiation of the case in an article III court." *Id.* The setting of certification is more complex in two ways. First, unlike a federal legislative or administrative tribunal, a state court is not under the control of the certifying federal court in any sense. *See infra* text accompanying notes 217–19. Second, unlike federal court review of legislative and administrative tribunals, certification involves state court jurisdiction sandwiched between exercises of federal court jurisdiction.

214 A basic tenet of statutory construction is that a statute should be construed so as to avoid either an unconstitutional interpretation or an interpretation that raises constitutional questions and doubts. *See* United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that

A final question is whether the Article III problem that would arise under the unitary conception of certification can be waived by litigants. If it can be waived, then the suggestion that the availability of certification should be constrained to cases in which "both parties agree to its use"[215] might be sufficient to insulate certification against constitutional attack under the unitary conception. Ultimately, however, the Article III problem is not waivable. Although the Supreme Court has recognized that litigants may waive their right to have certain matters proceed before Article III judges in favor of magistrate judges,[216] it has rested its reasoning on the notion that magistrate judges operate under the "'total control and jurisdiction'" of the district court.[217] This retention of ultimate control by the district court removes any possible "'threat to the judicial power or the independence of judicial decisionmaking that underlies Art[icle] III.'"[218] In contrast, state courts are in no sense under the control of any federal court with respect to issues of state law—the subject matter of certified questions. As such, it seems clear that litigants' consent to certification is not sufficient to overcome the Article III difficulties raised by the unitary conception.[219]

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it is unconstitutional, but also grave doubts upon that score."); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45.11, at 48–49 (5th ed. 1992) ("[A] court should construe legislative enactments to avoid constitutional difficulties if possible."); *see also* Frisby v. Schultz, 487 U.S. 474, 483 (1988) ("[S]tatutes will be interpreted to avoid constitutional difficulties."). Courts likely would apply this doctrine in construing state certification statutes and procedural rules. To the extent that the court understands that its role is not to determine the proper construction of a certification statute or rule, but rather to construe properly certification procedure, the rule of statutory interpretation should apply by analogy to such construction.

215 Rehnquist, *supra* note 99, at 1113 n.366. In addition, Rehnquist would limit certification to cases in which both "the state court has a track record of promptly answering such questions" and "certification will not delay the litigation any more than would resolution of the issue by the federal court." *Id.* Finally, he would mandate that "[d]ecisions not to certify . . . be nonreviewable." *Id.*

216 *See* Peretz v. United States, 501 U.S. 923 (1991) (holding that a criminal defendant may waive his right to have voir dire for his felony trial presided over by an Article III judge, by consenting to having a magistrate preside over the proceeding).

217 *Id.* at 937 (quoting United States v. Raddatz, 447 U.S. 667, 681 (1980)).

218 *Id.* at 938 (quoting *Raddatz*, 447 U.S. at 686 (Blackmun, J., concurring)).

219 The ability of a litigant's approval of certification to overcome Article III concerns is also precarious because the Supreme Court has yet to approve the broad proposition that non Article III tribunals can decide legal questions in matters that fall within Article III. *Cf.* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986) (upholding agency's ability to preside over brokerage customer's common-law counterclaims where customer approved of agency's role, but noting specifically that the agency's legal determinations were subject to de novo review by the federal courts). However, the federal courts of appeals have unanimously upheld the ability of magistrate judges to hear civil matters filed in federal court when the parties so consent. *See, e.g.*, Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984); Mag. Judges Div. of the Admin. Office of the U.S. Courts, *supra* note 144, at 252 n.3.

Thus, such Article III concerns are structural. As a result, in order to uphold certification in the face of constitutional challenge, courts must embrace the binary conception of the procedure.

B. Is Certification Inconsistent with the Grant of Federal Diversity Jurisdiction?

In subpart A, this Article considered questions raised by certification which are addressed by reference to a binary conception of certification. This subpart considers a second question raised by certification: whether federal court use of certification is inconsistent with the federal diversity grant. The resolution of this question could have a large impact on the use and value of certification, as "most certified questions are asked by federal courts sitting in diversity jurisdiction."[220] This subpart demonstrates that, given the current shape of certification jurisprudence and the precedential standard set by *Meredith*, the unitary conception of certification offers the best answer to the federal diversity grant consistency question. It also considers the possibility of harmonizing the diversity statute with the use of certification under a binary conception. Such an approach is possible, but it requires limiting, if not repealing or overruling, *Meredith*. Moreover, it is inconsistent with the fundamental purpose of the federal diversity jurisdiction—to provide out-of-state residents with a neutral forum.

The Constitution authorizes federal courts to hear "Controversies . . . between Citizens of different States."[221] The Supreme Court has explained that "[d]iversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State."[222] In *The Federalist*, Alexander Hamilton justifies the decision to allow federal courts to hear diversity cases on the ground that "the [s]tate tribunals cannot be supposed to be impartial and unbiased" in such cases.[223]

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220 Selya, *supra* note 20, at 688 (citing GOLDSCHMIDT, *supra* note 105, at 41); *accord* SERON, *supra* note 110, at 7 (reporting results of a study which found that nearly two-thirds of all cases in which certification was employed were diversity cases); *cf.* GOLDSCHMIDT, *supra* note 105, at 64 ("Most circuit judges (96%), district judges (83%), and state justices (87%) *disagree* with the proposition that certification from a federal court 'should only be allowed when a federal constitutional issue would be avoided by a state's response.'"). In this regard, consider also proposals to expand the use of certification. *See infra* notes 266–68 and accompanying text.

221 U.S. CONST. art. III, § 2.

222 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938).

223 THE FEDERALIST No. 80, at 500 (Alexander Hamilton) (Benjamin F. Wright ed. 1961). Hamilton also indicated that the diversity grant was appropriate to ensure the "peace of the Union." *Id.* at 501.

As is often the case with the origins of constitutional provisions, "the original purposes of diversity jurisdiction remain subject to dispute." Schapiro, *supra* note 77, at 1442; *see, e.g.*, William A. Braverman, Note, *Janus Was Not a God of Justice: Realignment of Parties in*

Despite the broad constitutional grant of diversity jurisdiction, the federal courts are empowered to exercise jurisdiction in diversity cases only to the extent that Congress opts to confer all, or some part, of the Constitutional diversity grant to the courts.[224] In fact, Congress has chosen to confer some, but not all, of the diversity jurisdictional power authorized by the Constitution. For example, Congress's diversity statute requires complete diversity among plaintiffs and defendants,[225] while the Constitution requires only minimal diversity.[226] Also, the diversity statute includes a minimum amount-in-controversy requirement, set today at $75,000; that is not required by the Constitution.[227]

The congressionally created diversity jurisdiction is not discretionary, in that the federal courts may not decline to hear diversity cases that are properly brought within their jurisdiction. Indeed, this fact underlay the Court's holding in *Meredith*, which stated that allowing a federal court to apply *Pullman* abstention in a pure diversity case, which implicates no substantial state interest, would be inconsistent with the federal diversity statute.[228] Nonetheless, as explained above, the federal courts, including the Supreme Court, have con-

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Diversity Jurisdiction, 68 N.Y.U. L. REV. 1072, 1078 (1993) (identifying four rationales underlying the Founders' inclusion of diversity jurisdiction in the Constitution: "diversity would increase harmony between the states; it would protect out-of-state citizens from state court bias, or the *fear* of local court bias; it would provide citizens of different states access to superior federal courts; and it would encourage interstate commerce and investment"). *See generally* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928). In any event, there can be no doubt that "one prominent rationale was, and is, the need to protect outsiders against bias from local state judges." Schapiro, *supra* note 77, at 1442.

A robust debate has raged among lawyers, legal academics, and legislators as to whether Congress should expand, contract, or eliminate federal diversity jurisdiction. *See, e.g.*, Ian Anderson et al., *Report of the New York County Lawyers' Association Committee on the Federal Courts on the Recommendation of the Federal Courts Study Committee to Abolish Diversity Jurisdiction*, 158 F.R.D. 185 (1995); Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 655 n.168 (1999); Braverman, *supra*, at 1077 n.20. At bottom, however, "[e]ven though some critics have expressed doubts about the continued need for certain categories of federal jurisdiction—particularly diversity jurisdiction—they remain a given whose provision and presumed purposes the judicial branch is obliged to honor." Woolhandler & Collins, *supra*, at 655 (footnote omitted).

224 *Cf.* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 218–19 (1985) (noting that Article III directs that the federal judicial power "shall extend to 'all cases' in the first three categories (defined by subject matter)," but arguing that it "need not . . . extend to 'all' cases in the last six (defined by party)" (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 334–36 (1816).

225 Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

226 State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967).

227 *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (amending 28 U.S.C. § 1332 (1994) by changing the required minimum amount in controversy to $75,000).

228 *See supra* text accompanying note 30 (quoting from the Court's opinion in *Meredith*).

cluded that they can properly invoke certification in pure diversity cases. This raises the question of how invocation of certification can be consistent with the federal diversity grant.

As an initial matter, it is clear that invocation of certification in a diversity case is consistent with the constitutional diversity grant.[229] Because Congress is free to confer as much or as little of the constitutional grant as it chooses, it could constitutionally include an authorization for federal courts to utilize, in their discretion, state court certification procedures. Doing so would merely carve out a piece of the statutory diversity grant. At the same time, it is clear that Congress, consistent with the Constitution, could choose *not* to carve out an exception for certification in diversity cases. Congress chose the latter option.

There are various possible reasons for rejection of such a carve out by Congress. For example, Congress reasonably could conclude, in keeping with Hamilton's analysis,[230] that the tribunals of the states—including the states' high courts—might discriminate against out-of-state residents.[231] Further, although one might suggest that the limited role of the state high court in deciding questions of law greatly limits its ability to discriminate against a particular party, state high courts considering certified questions do not decide these questions of law in a vacuum. Rather, they decide questions of law against the backdrop of a well-developed factual record.[232] Surely it would not be inconceivable for a state high court to decide a certified legal question one way based upon animus towards a particular party, and then in a later case to limit the legal rule to the factual setting in which the question was presented.

The statutory diversity grant enacted by Congress includes no explicit carve out for the use of certification.[233] How, then, can the use of certification by federal courts be harmonized with the statutory diversity grant? There are two possible justifications. First, one can argue that Congress has implicitly approved of certification, and incorporated it into the diversity jurisdiction statute, by modifying the statute during the period in which federal courts have made great use of certification procedure without expressly *disallowing* such action

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229 *See* Gowen & Izlar, *supra* note 33, at 207 ("[T]he *Meredith* right is not a constitutional right but merely a statutory right . . . ." (footnote omitted)).

230 *See supra* note 223 and accompanying text.

231 *See infra* text accompanying notes 271–308.

232 Indeed, absent a well developed factual record, a state high court is unlikely to accept certified questions in the first place. *See supra* note 79 and accompanying text.

233 *See* 28 U.S.C. § 1332 (2000). Some federal courts have adopted local rules that authorize those courts to utilize certification procedure. *See, e.g.*, 7TH CIR. R. 52. Such rules, however, are adopted under Federal Rules of Appellate Procedure Rule 47, pursuant to which courts are authorized to "make and amend rules governing its practice," provided that such rules are "consistent with . . . Acts of Congress." FED. R. APP. P. 47(a)(1).

(the "legislative ratification argument").[234] Second, one can argue that federal courts generally have discretion (albeit limited and directed) to decline to exercise jurisdiction over cases that otherwise fall within their constitutional and statutory subject matter jurisdiction, and that it is within the federal courts' discretionary power to employ certification procedure in diversity cases is on that same basis (the "implicit discretion argument").[235]

However, neither of these arguments, standing alone, is sufficient to overcome the apparent inconsistency of employing certification in diversity cases against the backdrop of *Meredith*, in that neither argument attempts to distinguish certification from *Pullman* abstention. Without such a distinction, the notion that Congress has legislatively ratified the option to incorporate certification procedure into the diversity statute is difficult to square with the Court's reaffirmations of *Meredith*.[236] Similarly, even if one accepts David Shapiro's general proposition, the Court in *Meredith* seemed to reject squarely the notion that federal courts have discretion, under the guise of *Pullman* abstention, to decline to decide state law issues in diversity cases in favor of a state court proceeding.[237]

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234 *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975) ("The longstanding acceptance by the courts, coupled with Congress's failure to reject [a lower court's previous] reasonable interpretation of the wording of § 10(b), . . . argues significantly in favor of acceptance of the [lower court's] rule by this Court." (footnote omitted)); *see also* United States v. Wells, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents . . . ." (citation omitted)). Courts have applied this reasoning in the context of interpreting federal jurisdictional statutes. *See, e.g.*, Nolan v. Boeing Co., 919 F.2d 1058, 1064 (5th Cir. 1990) ("The distinctive language contained in the [Foreign Sovereign Immunities Act removal jurisdiction provision] should be interpreted against a background of congressional understanding of the possibilities inherent in the doctrine of pendent jurisdiction. Congress enacted the [Foreign Sovereign Immunities Act] well after the Supreme Court's [approval of] pendent claim jurisdiction.").

235 *See supra* note 205 and accompanying text. *But cf.* Henderson, *supra* note 110, at 640 (courts should not "unilaterally act to contract or otherwise control their jurisdiction when the Constitution expressly delegates that task to Congress").

236 *See supra* text accompanying notes 44–49; Clark, *supra* note 16, at 1531–33 (rejecting the notion that the 1948 recodification of the diversity statute resulted in the legislative ratification of *Erie* based abstention).

Brian Mattis laments that "[t]he availability of a certification procedure has resulted in the federal courts forgetting the teaching of *Meredith v. City of Winter Haven*, and using the procedure merely to resolve difficult questions of state law." Mattis, *supra* note 81, at 729–30 (footnote omitted). He proceeds to cite favorably the American Law Institute's then recently proposed codification of abstention that would allow federal courts to abstain only if one of two circumstances were met: where such a course might avoid the necessity of deciding a substantial question of federal constitutional law, or where failure to abstain might lead to a serious danger of embarrassing the effectuation of state policies. *See id.* at 731. He concludes by arguing that this requirement be extended to certification: "It is suggested that, if certification is to be permitted at all, one of these two circumstances must be found to exist." *Id.*

237 *Cf.* Clark, *supra* note 16, at 1530–31 (discussing the limitations of Shapiro's reasoning as a justification for *Erie* based abstention).

Both the unitary and binary conceptions of certification offer the possibility of harmonizing certification with the diversity statute. A unitary conception permits preservation of *Meredith*, but, as described above, is constitutionally problematic.[238] Alternatively, a binary conception requires a limited reading of *Meredith*, if not its outright repeal.[239] Moreover, the binary conception is irreconcilable with the fundamental premise underlying diversity jurisdiction.

1. *Attempting to Harmonize* Meredith *and Certification Under a Unitary Conception*

A unitary conception of certification buttresses both the legislative ratification argument and the implicit discretion argument. The conception fundamentally distinguishes certification from the paradigmatic binary doctrine of *Pullman* abstention. Further, the apparent problem of invoking certification in pure diversity cases is reduced under a unitary conception of certification, in that it allows one to conceive of a single case with jurisdiction moving from federal to state court, then back again. That, in turn, allows one to conclude that a federal court invoking certification does not shirk its duty (as the Court in *Meredith* asserted) to decide cases within its jurisdiction.[240] Indeed, the state law questions are resolved in *the very case* that is before the federal court. Even though it is a state court that resolves the state law questions, the state court jurisdiction is derivative of the federal court's jurisdiction.

The unitary conception of certification thus takes steps to preserve the reasoning of *Meredith*, as well as its holding. Still, for many for the reasons discussed below in the context of the binary conception, some inconsistencies remain;[241] resort to the unitary conception is not wholly satisfying. Moreover, as described above, the unitary con-

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238 *See supra* Part III.A.

239 Harmonizing certification and the diversity statute through the limitation or repeal of *Meredith* will work under a unitary conception, as well as under a binary conception. However, as explained earlier, the Constitution demands that certification be understood under the binary conception, *see supra* Part III.A, and the two conceptions cannot both apply in respect of any one procedural device, *see supra* Part II.D. Thus, given the option between the two conceptions, the binary conception is preferable.

240 Along these lines, one early student commentator suggested:

> Another question to be answered is whether the objection to the abstention doctrine relating to the unauthorized relinquishment of federal jurisdiction is a valid one. It seems that, in those cases which are *dismissed* by the federal courts, there is an unauthorized relinquishment of federal jurisdiction. When a case is *stayed*, the federal forum retains jurisdiction, and there is only postponement of decision. The use of abstention in the "stay" situation does not defeat diversity jurisdiction. In dealing with [certification], the federal forum parts with no jurisdiction.

Kaplan, *supra* note 84, at 431–32 (footnote omitted).

241 *See infra* Part III.B.2.b.

ception leaves certification susceptible to constitutional challenge. Accordingly, the next issue is the possible harmonization of *Meredith* with certification under the binary conception.

2. *Attempting to Harmonize* Meredith *and Certification Under a Binary Conception*

Pullman abstention is the paradigm of a binary conception of jurisdiction in an interjurisdictional setting. As such, the notion of harmonizing the Court's holding in *Meredith* with the use of certification in pure diversity cases, using a binary conception, appears difficult if not impossible. Thus, despite some commentators' characterization of certification as a form of abstention,[242] Paul LeBel explains: "So long as the Supreme Court's decision in [*Meredith*] . . . is read as precluding abstention for the sole purpose of avoiding the decision of a difficult question of state law, . . . federal courts certifying questions of state law need to find a label other than abstention for what they are doing."[243]

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242 *See* AM. LAW INST., *supra* note 89, at 293 (observing that under ALI's proposed codification of certification, "the federal court retains jurisdiction and can vacate its stay if at any time it appears that the state's certification is not proving to be effective in reaching a prompt and final disposition of the certified question"); CHEMERINSKY, *supra* note 117, § 12.3, at 765 (referring to certification as a subset of *Pullman* abstention); FALLON ET AL., *supra* note 43, at 1256 (asserting that "both courts and commentators have frequently treated federal courts' decisions to certify questions to state courts as decisions to abstain"); LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 142 (1994) ("[S]tate certification schemes should be regarded as fitting occasions for abstention . . . ."); Mattis, *supra* note 81, at 723 ("Since the federal court retains jurisdiction over the entire case, it may vacate its stay and decide all of the issues, state and federal, if it appears that the state court is not acting with proper dispatch." (footnote omitted)).

243 LeBel, *supra* note 19, at 1002 n.13. *Cf.* CHEMERINSKY, *supra* note 117, § 12.3, at 765 ("There is a strong argument that the existence of certification should not increase the frequency of abstention. Certification modifies the procedure by which a case is returned to state court, but certification does not provide an additional reason for abstention.").

Richard Lillich and Raymond Mundy acknowledge that "some commentators . . . have concluded that 'the availability of a certification procedure may tempt a federal court to abstain by certification where there is no justification for abstention except that the state question is difficult.'" Lillich & Mundy, *supra* note 109, at 899 (quoting CHARLES ALAN WRIGHT, FEDERAL COURTS § 52, at 204 (2d ed. 1970)). They respond that "[c]riticism of this nature, of course, goes more to the abstention doctrine itself than to the certification process," *id.*, and that "[c]riticizing certification on this ground is like condemning drink because some persons occasionally use it immoderately," *id.* at 899 n.80. However, neither of their criticisms is valid. First, the criticism is directed not at the abstention doctrine (the availability of which is subject to the holding in *Meredith*) but to the notion of exempting certification from *Meredith*'s reach. Second, contrary to Lillich and Mundy's proffered analogy, the criticism does not compare to "condemning drink because some persons occasionally use it immoderately." After all, the criticism does not suggest that certification should be eliminated altogether, but only that its use should be restricted in pure diversity cases where the only justification for its use is that an undecided question of state law exists. A far better analogy, and one that reveals certification's potential inconsistency with *Meredith*, is to condemning a legal regime that makes no distinction between those who drink immoderately and those who drink responsibly.

An obvious way to overcome this objection is for Congress to repeal *Meredith* by enacting a statute that explicitly authorizes federal courts to employ a certification procedure in pure diversity cases that turn on undecided questions of state law.[244] This would offer the benefit of codifying, and thus clearly sanctioning, the use of certification in diversity cases. However, what may seem in theory to be the simple task of codifying the use of a discretionary device such as certification may prove in practice to be far more difficult because it may lead to numerous and unintended changes to existing law.[245] For this reason and others, it may be unrealistic to expect the Congress to pass, and the President to sign, such a bill.[246]

Perhaps a cleaner, and more reliable, way to remove *Meredith*'s specter would be for the Court itself explicitly to overrule *Meredith.* The Court, however, has shown no such inclination. Over the years, the Court has reaffirmed *Meredith*'s continuing vitality.[247]

The objection raised by LeBel and other commentators also may be overcome by merely pruning *Meredith.* In particular, one can read *Meredith* to hold that *Pullman* abstention is inappropriate in pure di-

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Larry Roth asserts that "[t]he Florida certification statute was designed to be consistent with the theory behind the abstention doctrine and yet not do violence to the *Meredith* principle." Roth, *supra* note 92, at 7. However, Roth provides no authority for this proposition. Indeed, to the contrary, he notes that "[t]here are no known recorded reports or hearings with regard to the legislative history" of the Florida certification statute. *Id.* at 6 n.28. Thus, Clark comments only that it is "*perhaps* no coincidence" that Florida adopted its certification statute less than two years after the Supreme Court handed down its decision in *Meredith,* Clark, *supra* note 16, at 1545 (emphasis added), and acknowledges that "[w]hether the Florida legislature adopted the certification procedure in direct response to *Meredith* is difficult to determine given" the absence of legislative history, *id.* at 1545 n.451. *See also* Selya, *supra* note 20, at 680 (surmising that the Florida legislature that enacted the certification statute was "no doubt licking its wounds over some real or imagined intrusion by a federal court into the exclusive domain of state suzerainty").

244 There have in the past been proposals to codify certification procedure in federal law. *See* YACKLE, *supra* note 242, at 143–44 (suggesting language for a certification statutory provision); AM. LAW INST., *supra* note 89, § 1371(e), at 50 (same). A proposal by the ALI includes an express codification of the rule of *Meredith* in general abstention cases but not in certification cases, and thus, by omission, would limit *Meredith* to full-fledged cases of abstention. *Compare id.* § 1371(c), at 49, *with id.* § 1371(e), at 50; Mattis, *supra* note 81, at 731 (suggesting an amendment to the ALI proposal, which would apply *Meredith*'s rule to certification as well). "A bill offered by Charles Mathias and Edward Brooke in 1977 included the ALI's proposal regarding certification almost verbatim." YACKLE, *supra* note 242, at 142 (citing S. 35, 95th Cong. (1978) (footnote omitted)).

245 Consider, for example, the substantial time and effort devoted to "fix" the codification of supplemental jurisdiction authorized under 28 U.S.C. § 1367 (2000). *See, e.g.,* AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT: PROPOSED REVISION OF 28 U.S.C. § 1367 (1997); Symposium, *A Reappraisal of the Supplemental-Jurisdiction Statute: Title 28 U.S.C. § 1367,* 74 IND. L.J. 1 (1998).

246 Consider the fate of the ALI's proposal (discussed *supra* notes 236, 244). Erwin Chemerinsky notes, "Although the ALI's recommendations were made . . . in 1969, Congress has shown no indication that they are likely to be adopted." CHEMERINSKY, *supra* note 117, § 12.3, at 767.

247 *See supra* text accompanying notes 44–49.

versity cases, and not to hold that there is a blanket rule against abstention in pure diversity cases. This conclusion rests on the costs and delays inherent in full fledged *Pullman* abstention. Under this reading, certification—as a streamlined abstention procedure—may pass muster under *Meredith.*

Meredith held that a federal court cannot invoke *Pullman* abstention simply because it was faced with difficult, undecided questions of state law.[248] Later courts have emphasized that one of the factors a court should consider in deciding whether or not to engage in abstention in general, and in *Pullman* abstention in particular, is the cost and delay inherent in the procedure.[249] Of course, insofar as *Pullman* abstention requires a full round of litigation in the state courts, on top of proceedings in the federal court before which the original case is pending, that procedure necessarily imposes relatively large costs and delays on the litigants and on the courts.[250] Thus, it is possible to interpret *Meredith* to mean that, in the absence of a compelling interest to engage in *Pullman* abstention (in a pure diversity case, for example), the cost and delay that would inhere in such a procedure precludes that course as a matter of law. In contrast, under *Pullman* (as *Meredith* acknowledges), the presence of a federal constitutional question, the resolution of which might be rendered unnecessary by a definitive resolution of a state law question, is enough to overcome *Meredith*'s presumption against *Pullman* abstention.[251]

Pullman abstention hardly covers the landscape of federal court abstention doctrines. It applies only to situations where (i) a federal court abstains from proceeding in a case before it, in order that (ii) the parties can engage in a full round of state court litigation as to certain issues of state law, in the hope that (iii) (as *Meredith* mandated) the resolution of the issues of state law obviates the need for the federal court to confront a serious federal constitutional issue. There is no reason, then, that *Meredith*'s per se rule need apply to other forms of abstention. Indeed, the Court has approved of *Erie* based abstention in rare diversity cases.[252] As the Court explained in *Louisiana Power & Light Co. v. City of Thibodaux*,[253] *Meredith* did not

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248 *See* Meredith v. Winter Haven, 320 U.S. 228, 236–37 (1943).

249 *See, e.g.*, Duncan v. Poythress, 657 F.2d 691, 697 (5th Cir. 1981) (resolving whether using *Pullman* abstention requires a court to "assess the totality of circumstances[,] . . . which should include consideration of the rights at stake and the costs of delay pending state court adjudication").

250 *See supra* note 106 and accompanying text.

251 *See Meredith*, 320 U.S. at 236 ("[A] federal court . . . may stay proceedings before it, to enable the parties to litigate first in the state courts questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented.").

252 *See supra* notes 34–42 and accompanying text.

253 360 U.S. 25 (1959).

hold that federal courts are "jurisdictionally disabled from seeking the controlling light" of a state supreme court.[254] This and other cases suggest that *Meredith*'s rule is not absolute.

As explained above, it is entirely possible to view a federal court that has decided to certify questions of law to a state high court as abstaining from jurisdiction until the state court answers those questions (or otherwise responds to the certification request). In other words, it is possible to conceive of certification under a binary conception.[255] In effect, the only major procedural difference between *Pullman* abstention and certification abstention is that the former envisions a full round of litigation in the state courts (prong (ii) in the definition of *Pullman* abstention proffered just above) while the latter allows use of a specialized, expedited procedure for state court resolution of the certified questions.

From the standpoint of the restricted interpretation of *Meredith* that is now suggested, the availability of this streamlined state review in certification allows relaxation of the threshold requirement for invocation of the procedure (prong (iii) in the definition of *Pullman* abstention), which *Meredith* itself imposed as a prerequisite to the application of *Pullman* abstention.[256] Thus, while *Meredith* precludes conceiving of certification as a form of *Pullman* abstention[257] (a conclusion that, incidentally, is already precluded by the differences between the two procedures that have evolved over the years[258]), this interpretation of *Meredith* allows one to conceive of certification as a form of abstention generally, or to rely on a binary conception of certification. It makes reliance on a binary conception possible by strictly limiting *Meredith*'s scope to consideration of *Pullman* abstention.[259]

But the binary conception of certification is not a panacea. First, the binary conception limits the scope of certification procedure. In particular, it does not allow the certification doctrine to stretch to the limits that some commentators have supposed.[260] Second, even if the binary conception allows certification to be harmonized with a narrow

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254 *Id.* at 27 n.2.

255 *See supra* Part II.C.

256 *See Meredith*, 320 U.S. at 236.

257 *See supra* note 243.

258 *See supra* Parts I.B.2, II.C.1.a.

259 In addition, the binary conception of certification is attractive in that it squares nicely with the heuristic device which understands certification as akin to having a panel of state judges attend hearings of federal cases and issue determinations of state law issues as they arise. *Cf.* Roth, *supra* note 92, at 11 (suggesting that states form specialized tribunals to handle certified questions from federal courts); Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 205 (1995) ("Federal and state judges in charge of 'All Brooklyn Navy Yard' asbestos cases literally sat in the same room, jointly convening a 'state and federal court' and ruling together on issues." (footnote omitted)); *supra* note 18.

260 *See supra* notes 89–95 and accompanying text.

reading of *Meredith*, the fact remains that a binary conception of certification remains inconsistent with *Meredith*'s central theme and the fundamental purpose of the federal diversity jurisdiction: securing a neutral judicial forum for out-of-state residents.[261]

a. *Ramifications of the Binary Conception for Certification Jurisprudence*

Uniform application of the binary conception of certification would have ramifications for certification jurisprudence. In order to limit *Meredith* such that it allowed certification in pure diversity cases consistent with a binary conception, the courts would have to abandon the reasoning—suggested by language of the Supreme Court in *Lehman Bros. v. Schein*,[262] and also by federal court opinions that adhere to state court responses to certified questions based upon the law of the case doctrine[263]—that *Pullman* abstention, but not certification, involves the commencement of a new litigation in state court. The explanation that the use of certification does not frustrate the duty of the federal courts to hear diversity cases, which the Supreme Court recognized in *Meredith*, would replace this reasoning. Also, reliance upon the binary conception would clarify that, while the decision to abstain pending certification rests with the federal court, the decision to pursue certification in the state court rests with the parties.

Reliance upon the binary conception, to the extent it is viable, means that state high courts which answer certified questions are in fact administering their own cases while the certifying federal court abstains from proceeding forward with independent federal cases. As a result, contrary to the prevailing wisdom, state high courts answering certified questions in theory should be free to engage in factfinding. They also should be free to add or dismiss parties in the case before them.[264] Of course, state courts voluntarily may agree (or the drafters of state law may choose to direct them) not to engage in these acts in order to induce federal courts to make use of the certification abstention process. In any event, were a state high court to engage in such acts, the certifying federal court should be free to ignore them for purposes of the federal case to the extent that they exceed the scope of the federal court's certification.[265]

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261 *See Meredith*, 320 U.S. at 234–36.

262 416 U.S. 386, 391 (1974); *see supra* notes 166–67 and accompanying text.

263 *See supra* note 88 and accompanying text.

264 Under a unitary conception, a state court presumably would not be free to act this way. A state court's answer to a federal court might result in the dismissal of one or more parties, but the federal court effects this result—the state court merely renders answers to legal questions.

265 *See supra* note 182 and accompanying text.

Application of the binary conception of certification also poses an obstacle for commentators who advocate expanding the scope of certification. For example, Bradford Clark proposes to broaden certification by creating a "presumption in favor of certification whenever the procedure is available and [federal courts] are presented with unsettled questions of state law that call for the exercise of significant policymaking discretion more appropriately left to the states."[266] The class of cases in which questions require "significant policymaking discretion" that might be "more appropriately left to the states" is not small. Thus, a presumption in favor of certification abstention in that class of cases would expand the use of abstention doctrine beyond its current scope. For many of these cases, one would expect this expansion to run afoul of *Meredith*, given the degree to which one must restrict that case's holding just to square it with the binary conception of certification in its current form.[267]

The binary conception is even more problematic for Judge Jon Newman's proposal to expand certification "by permitting the entire appeal of a diversity case to be routed into the state appellate court system, where it would normally be adjudicated, as it should be, by an intermediate state appellate court, with only optional review by the state's highest court."[268] In addition to the previously identified problems with expanding the class of cases in which certification might be available, Judge Newman's proposal would undo the tenuous harmonization of *Meredith* with certification (achievable under current law) by introducing lower state courts, which may be more

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266 Clark, *supra* note 16, at 1544–45; *see also id.* at 1549–56. Clark's suggestion is reminiscent of Larry Roth's proposal that the Fifth Circuit adopt a "policy . . . to certify any state law issue where there is no 'clear controlling' precedent." Roth, *supra* note 92, at 10. *Cf.* YACKLE, *supra* note 242, at 143 (proposing a federal statute that would authorize certification if "(1) the state has a [certification procedure]; (2) the question of state law can resolve the dispute between the parties and cannot satisfactorily be determined in light of existing state authorities; and (3) the [federal] court expressly finds that certification will not cause undue delay or prejudice to the parties").

267 The binary conception is similarly problematic for Judge Guido Calabresi's suggestion that "[t]he teaching of *Arizonans* . . . is that we should consider certifying in more instances than had previously been thought appropriate, and do so even when the federal courts might think that the meaning of a state law is 'plain.'" Tunick v. Safir, 209 F.3d 67, 73 (2d Cir. 2000) (per Calabresi, J.; Sack, J., concurred and Van Graafeiland, J., dissented) (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997)). *Cf.* Ellen A. Peters, *State-Federal Judicial Relationships: A Report from the Trenches*, 78 VA. L. REV. 1887, 1892–93 (1992) (noting, in summarizing the conclusions of the National Conference on State-Federal Judicial Relationships, that "[t]he federal certification of issues of state law to state courts would be enhanced by agreement about procedures for the appropriate definition of novel questions of law by the federal courts and for their speedy resolution by the state courts").

268 Newman, *supra* note 110, at 774–75. Judge Newman also advocates making state law cases adjudicated in federal trial court eligible for state court appeal, and federal law cases adjudicated in state trial court eligible for federal court appeal. *See id.* at 774.

likely to engage in bias against out-of-state residents, into the certification process.

b. *Inconsistency Between the Binary Conception of Certification and the Fundamental Purpose of the Federal Diversity Jurisdiction*

While resort to the binary conception of certification allows for greater consistency between certification and *Meredith*'s holding, it clashes with *Meredith*'s central theme: federal courts generally have a duty to hear cases that fall within the diversity jurisdiction as created by the Constitution and conferred by Congress.[269] The reason for the persistence of the clash with *Meredith*'s reasoning is simple: *Meredith* at its core highlights the importance of having federal courts hear cases that fall properly within the diversity jurisdiction. The binary conception of certification is inconsistent with the fundamental purpose of the diversity jurisdiction, which is to afford out-of-state residents the opportunity to have cases heard in a neutral forum.

Applying the binary conception to certification allows one to distinguish *Pullman* abstention from, and hence limit *Meredith*'s applicability to, certification, solely on the grounds that (i) certification entails far less cost and delay than does *Pullman* abstention and (ii) the certification setting is less conducive to bias against out-of-state litigants than the *Pullman* abstention setting. The first ground—that certification reduces cost and delay—relates only tangentially to *Meredith*'s reasoning: The Court in *Meredith* made only one oblique reference to delay.[270] Cost and delay were not central to the reasoning of the Court in *Meredith*.

The second ground on which the binary conception allows one to distinguish between certification and *Pullman* abstention—that the certification setting is less likely to give rise to bias—speaks more to *Meredith*'s rationale. Three arguments suggest that the certification setting protects against the bias that diversity jurisdiction is supposed to protect. First, bias may result substantially from juries in state courts; in the certification setting, there are no juries. Second, lower level state court judges may be more likely to engage in and exhibit bias than their counterparts on higher state courts; certification procedure only enlists judges of the state's highest court. Third, bias is more likely to result where a state court engages in factfinding and less likely to occur when courts are called upon to resolve broad legal questions; certification only calls upon state courts to announce legal

269 *See* Meredith v. Winter Haven, 320 U.S. 228, 236 (1943).

270 The Court explained: "To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision." *Id.* at 237.

rules and, as such, is unlikely to give the state courts freedom to entertain bias against out-of-state litigants. However, none of these arguments sufficiently establishes that the process of having state high courts respond to certified questions will eliminate bias against out-of-state litigants. Further, even if these arguments have some substantive and empirical accuracy, out-of-state litigants reasonably might continue to fear bias against them. It is not only actual bias, but also perception and fear of bias, that motivates diversity jurisdiction. [271]

First, while juries may introduce a particular source of bias against out-of-state residents, the absence of a jury does not eliminate all potential for bias. Indeed, Hamilton's justification for federal diversity jurisdiction rests on the notion that state tribunals, not juries, cannot be supposed to be impartial and unbiased.[272] Moreover, to explain the greater presence of bias against out-of-state litigants in state courts as opposed to federal courts, despite the fact that federal and state trial courts both empanel juries from residents of a single state, some commentators identify the real problem in state trial courts as the failure (or lesser ability) of state judges properly to control and confine the discretion of state court juries.[273] Once again, then, the focus reverts to the tendency of state court judges to tolerate, if not encourage, bias against out-of-state litigants.

Second, the fact that only judges of a state's highest court deal with certified questions does not remove the potential for bias.[274]

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271 *See infra* note 309 and accompanying text.

272 *See supra* note 223 and accompanying text.

273 For example, a New York County Lawyers Association subcommittee on diversity jurisdiction wrote:

> [T]here are significant ways for a federal judge to protect out-of-state litigants against local bias in jury trials. First, a federal judge may be able to guard against a biased jury more effectively than a state court [judge]. For example, a federal judge may comment on testimony, while some state judges cannot. Moreover, federal judges may conduct the voir dire of potential juries, rather than leaving that task to the lawyers. Finally, a federal judge may affect the jury's verdict by fashioning equitable remedies.

Anderson et al., *supra* note 223, at 202 (footnote omitted)); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 415–16, 429 (1992) (presenting empirical evidence which shows that litigating attorneys believe that federal judges rein in jury bias against out-of-state litigants more than state judges); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 330 (1977). *But see* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 148 (1973) ("[T]he aid a federal court can give in avoiding prejudice against an out-of-stater at least in jury cases is exceedingly limited."); *id.* at 149 (questioning whether the possibility that federal judges are better able to control jury bias against out-of-state residents is adequate justification for preserving federal diversity jurisdiction); Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 120–21 (same) (citing FRIENDLY, *supra*, at 149).

274 *Cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 357–59 (1816) (finding that the Supreme Court has appellate jurisdiction to review opinions of a state high court, even where the state court's opinion purports to rest solely on state law grounds, to determine whether the state court structured its decision deliberately to avoid a federal law issue in an effort to insulate its decision from Supreme Court review, and finding that otherwise, Su-

Many states provide for the election of judges on their high courts.[275] Like other politicians, elected judges must concern themselves with campaign fundraising and garnering votes.[276] Thus, they are prone to allow the interests of their constituents to influence their decisions.[277] As such, elected judges are likely more prone to engage in bias against out-of-state interests.[278] Though it may be the case that state trial

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preme Court review "may be evaded at pleasure," *id.* at 357); FALLON ET AL., *supra* note 43, at 495–99 (explaining that *Martin* reviewed an opinion by Virginia's high court on remand from, yet in defiance of, an earlier Supreme Court opinion, and that the state court was dominated by a "political enemy" of then-Chief Justice John Marshall who had an interest in the outcome of *Martin* (citing 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 146, 149–55 (1919)); Kevin R. Johnson, *Why Alienage Jurisdiction?: Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 47 (1996) ("In [*Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984)], the foreign defendant claimed that the Texas Supreme Court applied a more liberal test of personal jurisdiction because the company was foreign. Thus, the concern was not simply antiforeign sentiment by the jury but bias in the highest court of a state." (footnote omitted)).

275 *See* John B. Wefing, *State Supreme Court Justices: Who Are They?*, 32 NEW ENG. L. REV. 49, 55 (1997) ("All but nine states include some form of electoral process as part of the selection of their state supreme court justices." (footnote omitted)). Even if states do not mandate contested election of judges on their high courts, many require selection of high court judges from a pool of judges who at some point were elected to office. *See* Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1134 (1997) ("The justices of supreme courts in twenty-three states face contested elections at some stage in their career." (footnote omitted)). *See generally* 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, 776–81 (1995) (detailing various state judicial selection systems).

276 Richard Hasen explains:

> Elected judges are in many ways indistinguishable from other politicians. In jurisdictions holding partisan judicial elections, judges must gain the party's nomination, and often seek the local party's endorsement. In both partisan and [non]partisan elections, judges (or their surrogates) often must solicit campaign contributions and run a campaign. Even judges standing for retention elections sometimes must raise large sums to support retention. Although ethical canons restrict campaigning by judicial candidates in some significant ways, judicial elections otherwise resemble contests for elected office. Even judges running unopposed in retention elections must garner at least 50% of the vote; in Illinois retention elections, judges must garner 60% of the vote.

Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1313–1314 (1997) (footnotes omitted).

277 *See, e.g.*, Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 438–40, 442–43 (1992) (analyzing data, and concluding that judicial elections impact the voting records on controversial issues of otherwise liberal justices on state supreme courts).

278 *See* RICHARD NEELY, THE PRODUCT LIABILITY MESS 62 (1988) ("At least in the states where judges are directly elected by popular vote, . . . it should be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can't even be relied upon to send a campaign contribution."); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 VA. L. REV. 1769, 1801 (1992) ("[S]tate judges are usually elected and, therefore, are generally more directly tied to the community than are their federal counterparts. As a result, the possibility of prejudice in favor of powerful or

court judges tend to be more parochial in outlook than state appellate court judges,[279] studies have shown that elections for positions on state high courts tend to be especially politicized, with large amounts of money expended.[280] The amount of money and attention lavished on elections for a state's highest court, as compared to lower courts, at least suggests that judges on the state's highest court enjoy more discretion and are more likely to be called upon to make policy decisions than are judges on lower state courts. Thus, judges on a state's highest court are likely to have *greater* leeway to incorporate bias (*sub rosa*, of course) into their decisionmaking, including cases with out-of-state litigants.

Third, the assumption that bias against out-of-state litigants can occur only in factfinding is unwarranted. To the contrary, "it must be

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important in-state interests is at least more than fanciful." (footnote omitted)); Roy A. Schotland, *Judicial-Selection Process Affects Diversity*, NAT'L L.J., May 9, 1988, at 12 ("[T]here is no denying that if there are [judicial] elections there often will be campaigns, and if there is a campaign there must be campaign funds—and where do people expect such funds come from? Surely not from out-of-staters."); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999) (noting that "[r]edistributing wealth from out-of-state defendants to in-state plaintiffs is [an elected] judge's way of providing constituency service," *id.* at 158, positing that "[t]he median voter . . . is likely to support judges who redistribute income to in-state plaintiffs," *id.* at 159, and finding "strong [empirical] evidence that in cases with out-of-state defendants[,] awards are much higher in [states where judges are elected in partisan elections] than in other types of judicial systems," *id.* at 186).

279 *Cf.* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that state trial judges are less likely to be favorable to claimed violations of federal rights than are federal judges).

Neuborne's analysis focuses on the lack of parity between federal trial judges and their state counterparts. He concedes that, "[w]hen comparing federal district and state appellate courts, the comparative advantage which exists at the trial level is substantially diminished." *Id.* at 1116 n.45. Still, he ultimately remains "incline[d] . . . toward a federal trial forum" over a state appellate court. *Id.* In contrast, Paul Bator is "doubtful" of the proposition that federal judges are superior to state high court judges. Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 630 (1981); *see id.* at 630–31; *see also* FRIENDLY, *supra* note 273, at 147 ("At all times in the country's history, it has had state appellate judges of a stature altogether comparable to those on the federal bench." (footnote omitted)).

280 *See, e.g.*, Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 110–13 (1998); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 192–202 (1996). The large amounts of money expended on judicial elections may have a deleterious effect on public confidence in the judiciary. *See Poll: Confidence in Judiciary Eroded by Judges' Need to Raise Campaign Money* (Aug. 12, 2002), *available at* http://www.manningproductions.com/ABA245/OMK/release.html (last visited June 23, 2003), noting that

> [t]he American Bar Association today released results of a poll that shows public trust and confidence in the judiciary is eroded by skyrocketing costs in judicial election campaigns. According to the poll . . . , 72 percent of Americans are concerned that the impartiality of judges is compromised by their need to raise campaign money. Thirty-five percent of the respondents said they were "extremely" or "very" concerned.

supposed that, in making . . . jurisdictional grants, Congress acted upon assumptions about institutional disparities between state and federal courts for resolving not just questions of fact, but *questions of law and issues of law-application as well.*"[281] Further, the suggestion that certification calls upon state courts only to answer questions of law is itself inaccurate. The certification setting hardly precludes state high courts from engaging in bias against out-of-state litigants. In their casebook on administrative law, Justice Breyer, Richard Stewart, Cass Sunstein, and Matthew Spitzer defend the promulgation of regulations by administrative agencies on the ground that regulations are general in nature and the agencies that promulgate them cannot be sure how they will apply in particular settings.[282] While one might try to import this argument to the resolution of certified questions by state courts, the analogy fails.[283] Unlike an agency issuing a general regulation, a state court responds to a certified question in the context of a particular factual dispute between particular parties. Attorneys for the parties submit briefs to and present arguments before the state court.[284] Moreover, state courts refuse to answer certified questions in the absence of a suitably developed factual record.[285] Even if a state court answering a certified question does not have the power actually to apply the rule it announces to the parties to the dispute, it certainly is aware enough of the identity of the parties and the nature of the dispute to predict how the certifying federal court will apply that rule. The state court often will have enough information to structure, if it so chooses, its answer in a way that will bring about a predictable result in the dispute actually before the federal court. Thus, despite the impression that the common terminology "certification of questions of law" conveys, state courts responding to certified questions do not simply decide abstract questions of law in a vacuum. [286]

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281 Woolhandler & Collins, *supra* note 223, at 655 (emphasis added). *But see* GOLDSCHMIDT, *supra* note 105, at 61 ("Circuit judges (96%), district judges (95%), and state justices (96%) overwhelmingly *disagree* that certified questions should not be sent to another court because that court 'may be biased on the question.'").

282 Specifically, they argue that,

> when rules are general and formulated by officials who may find it difficult to estimate how their own interests will be affected by the disposition of particular cases, there is a greater likelihood that the policies adopted will more nearly reflect a broad social judgment about desirable policy than the officials' own private advantage.

STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 33 (4th ed. 1999).

283 *See* Woolhandler & Collins, *supra* note 223, at 678–79.

284 *See supra* note 81 and accompanying text.

285 *See supra* note 82 and accompanying text.

286 *See, e.g.*, Ruiz-Guzman v. Amvac Chem. Corp., 7 P.3d 795, 802–03 (Wash. 2000) ("In answering federal certified questions, we do not seek to make broad statements outside of the narrow questions and record before us." (citation omitted)).

A state high court often can phrase its answer to a certified question generally and *still* retain the ability to fashion a legal regime that in effect is biased against out-of-state litigants. Specifically, in preparing an answer to a certified question, a state high court can announce a general rule that, when applied to the actual dispute pending in the federal forum, achieves a result unfavorable to the out-of-state litigant.[287] Then, in later cases where in-state litigants sit in the same position as the out-of-state litigant did in the certified question case, the state court legitimately might distinguish the answer to the certified question on its facts and conclude that what had seemed to be a rule of general application (the answer to the certified question) was in fact simply a rule that applied in the particular circumstances of that case. As Ann Woolhandler and Michael Collins observe, "the risk of bias against a nonresident in the interpretation of untested state law may be even greater than in cases of routine law application to disputed facts."[288] Indeed, "the obscurity of state law furnishes a unique opportunity for undetectable implementation of bias."[289]

Illustrative in this regard are the opinions of the Texas Supreme Court in *Lucas v. United States*[290] and *Rose v. Doctors Hospital*.[291] *Lucas* involved a medical malpractice claim brought by the parents of a child in federal court under the Federal Tort Claims Act.[292] The parents claimed that their child had suffered permanent injury resulting from the malpractice of doctors at an army hospital. After a trial, the district court awarded damages to the plaintiffs.[293] On appeal, the United States Court of Appeals for the Fifth Circuit decided that a Texas statutory scheme that limited recoverable damages in civil medical malpractice cases was applicable and consistent with both the Due Process and Equal Protection Clauses of the United States Constitution.[294] The federal court of appeals certified to the Texas Supreme Court the question of "[w]hether the [statutory] limitation on medical malpractice damages . . . is consistent with the Texas Constitution . . . ."[295]

The Texas Supreme Court answered the certified question in the negative, concluding that the statutory scheme unreasonably and arbi-

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287 *See* Woolhandler & Collins, *supra* note 223, at 679 (noting "the obviousness of who would stand immediately to benefit from the state-court ruling on unclear state law").

288 *Id.* at 677.

289 David P. Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. CHI. L. REV. 268, 314 (1969). *See* Woolhandler & Collins, *supra* note 223, at 677 n.251 (asserting that, in making this comment, Currie "got it exactly right").

290 757 S.W.2d 687 (Tex. 1988).

291 801 S.W.2d 841 (Tex. 1990).

292 28 U.S.C. §§ 1346(b), 2671-2680 (2000).

293 *See* Lucas v. United States, 811 F.2d 270, 271 (5th Cir. 1987).

294 Lucas v. United States, 807 F.2d 414, 416–22 (5th Cir. 1986).

295 811 F.2d at 271.

trarily limited the right of plaintiffs to pursue legal redress in violation of the "open courts" guarantee of the Texas Constitution.[296] At one point in its opinion, the court suggested that its analysis and holding might be limited, stating, "we . . . conclude that the liability limits . . . are unconstitutional *as applied to catastrophically damaged malpractice victims seeking a 'remedy by due course of law.'*"[297] Still, the court stated its response to the certified question broadly: "[O]ur answer to the certified question is that the [statutory] limitation on medical malpractice damages . . . is inconsistent with and violative of article I, section 13, of the Texas Constitution."[298]

Two years later, in *Rose*, the Texas Supreme Court considered an appeal in a wrongful death case brought by the spouse and parents of a decedent against a hospital in Texas.[299] Writing before the issuance of the supreme court's opinion in *Lucas*, the state court of appeals held that the statutory scheme limiting civil medical malpractice awards was consistent with the state constitution.[300] On appeal, the state supreme court affirmed the court of appeals on this issue.[301] The supreme court distinguished its earlier opinion in *Lucas* on the ground that the malpractice claim therein existed at common law, while the wrongful death claim pressed in *Rose* was of statutory origin.[302] The court reasoned that the Texas Constitution's "open courts" provision protected common law, but not statutory, claims. The court explained that, as a result, its holding in *Lucas* "did not extend to wrongful death actions."[303] The court defended its distinction on the ground that the court rule that authorized the court to respond to certified questions allowed it to do so "only as long as 'there are involved in the proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending.'"[304] The court proceeded to explain:

> Under that rule, we did not decide . . . that the limitation on wrongful death—rather than medical malpractice—damages—is inconsistent with the Texas Constitution. To do so would have been to decide a "cause not then pending before the certifying court," a cause involving wrongful death rather than common law medical malpractice.[305]

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296 *Lucas*, 807 F.2d at 416.

297 757 S.W.2d at 690 (emphasis added; quoting TEX. CONST., art. I, § 13).

298 *Id.* at 692.

299 Rose v. Doctors Hosp., 801 S.W.2d 841, 843 (Tex. 1990).

300 Rose v. Doctors Hosp. Facilities, 735 S.W.2d 244, 249 (Tex. Ct. App. 1987), *aff'd in part and rev'd in unrelated part*, 801 S.W.2d 841 (Tex. 1990).

301 801 S.W.2d at 848.

302 *See id.* at 843–45.

303 *Id.* at 842.

304 *Id.* at 844 (quoting TEX. R. APP. P. 114(a)).

305 *Id.*

Thus, the supreme court retroactively converted what seemed to be a broad response to a legal question into a holding limited to the facts of the particular case before it. Indeed, the dissenting opinions in *Rose* took the majority to task on precisely this ground. One dissenter assailed the majority for limiting the scope of *Lucas*:

> The court concludes today that the . . . question posed in *Lucas* was not "determinative of the cause then pending" because it could have been framed more narrowly. I agree that the question could have been asked differently, but I strongly disagree that it had to be. Our answer to the question as posed was sufficient to enable the federal court to apply state law in deciding the case before it. That a narrower question would also have been determinative does not deprive us of the authority to answer the question as asked, nor does it deprive our response of precedential value. If no answer to a certified question can have precedential value if the question could have been framed with greater specificity or precision, our decisions in such cases will be of little use beyond the federal case in which our assistance was invoked.[306]

Another dissenting opinion described the majority's action in "distinguish[ing] our holding in *Lucas* on the basis that it arose in answer to a certified question from a federal appellate court" as "erod[ing] our authority to answer certified questions."[307]

In short, while certification provides a setting that may ameliorate the likelihood of bias, the potential for bias nonetheless persists. Of course, the foregoing discussion by no means *establishes* that the Texas Supreme Court acted as it did in order to bias the out-of-state litigant. Still, the perception that the court engaged in bias is not unreasonable. Moreover, fear and perception of bias, and not merely actual bias, are motivations for diversity jurisdiction.[308] Even if bias is empirically minimized in certification cases, the discussion above demonstrates that fear and perception of bias reasonably can remain when federal courts certify questions to state courts. Thus, the preclusion of

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306 *Id.* at 849–50 (Phillips, C.J., dissenting) (footnotes omitted).

307 *Id.* at 856–57 (Doggett, J., dissenting).

308 *See* John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 406 (1979) ("The need [for the federal diversity jurisdiction] arose from a fear of prejudice against out-of-staters engaged in regional business" that "was largely a gloomy anticipation of things to come rather than an experienced evil . . . ."); Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 204 (1982) ("[A]ttempts to focus on the extent of empirical evidence showing prejudice against out-of-state litigants is misplaced, since *fear* of prejudice can be as potent as actual bias itself." (footnote omitted)); Douglas D. McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?*, LITIGATION, Fall 1980, at 38, 55–56; Shapiro, *supra* note 273, at 330–32. *See also* Friendly, *supra* note 223, at 493–97 (presenting a limited review of early U.S. state court decisions, and concluding that "there was little cause to fear that the state tribunals would be hostile to litigants from other states," *id.* at 497, although also conceding that "[i]t is, of course, impossible to obtain accurate information on this subject," *id.* at 493).

the certification of questions of law to state courts, solely on the ground that state law is unclear, vindicates the policies underlying the congressional grant of diversity jurisdiction.

The foregoing makes it clear that, assuming state high courts sometimes discriminate against out-of-state residents, the rule of *Meredith* as a policy matter ought not to be overturned. If one is of opinion that state courts' penchant to discriminate against out-of-state residents justifies the continued existence of the federal diversity jurisdiction, then, as *Meredith* holds and its reasoning makes abundantly clear, the set of diversity cases in which federal courts might be justified in relinquishing jurisdiction to state courts should be severely circumscribed. Absent extenuating circumstances, pure diversity cases properly brought before a federal forum should be heard entirely in that forum. That being the case, a change to the law that would alter *Meredith*, or an interpretation of *Meredith* that would shield certification from its holding, would inadvisably eviscerate federal diversity jurisdiction. The expansion of certification beyond the scope of *Pullman* abstention to diversity cases is at odds with federal diversity jurisdiction and—assuming that federal diversity jurisdiction itself is desirable—would be a mistake. At most, certification should be available in cases in which *Pullman* abstention is also available, and in those few cases in which *Pullman* abstention would be available but for the fact that the likelihood of excessive delay and cost precludes invocation of that extensive procedure. In other cases, specifically pure diversity cases, certification should be, like *Pullman* abstention, unavailable.

CONCLUSION

Certification may offer great benefits to the federal and state judicial systems, as well as to litigants. These benefits are not, however, a sufficient base on which to rest jurisdiction.[309] Neither should the fact that certification is an accepted part of the judicial landscape immunize the procedure from judicial scrutiny.[310] This Article has argued that, indeed, despite the many apparent benefits certification has provided during its four decades of use, the procedure raises serious

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309 *Cf.* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) ("[A] court may not in any case, even in the interest of justice, extend its jurisdiction where none exists . . . .").

310 *See* Selya, *supra* note 20, at 678 (noting that certification is so entrenched in our jurisprudence as to have become a judicial "sacred cow," but proceeding nonetheless to examine and question the propriety of the procedure); *cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–78 (1938) (concluding that the constitutional nature of the infirmity of the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), "compel[led]" the Court to re-examine and ultimately to abandon the doctrine, even though the doctrine had been "so widely applied throughout nearly a century").

questions of federal jurisdiction that have, to date, not been examined by the courts.

This Article has demonstrated the weakness inherent in certification's jurisdictional underpinnings and the ramifications of that weakness. Certification, alone among procedural settings and devices, appears to be amenable to both the binary and unitary conceptions. Moreover, to gird certification against constitutional challenge requires reliance upon the binary conception, while the unitary conception provides the best defense of certification against challenge under the diversity statute.

However, the two conceptions cannot apply to the same procedural device or setting. Accordingly, certification can be defended, if at all, uniformly under the binary conception. And even under the current state of the law, application of the binary conception to certification has ramifications. First, certification should be seen as a form of abstention. This, at least in theory, affords state courts greater latitude when they respond to certified questions. Second, the binary conception limits prospects for certification's expansion.

More fundamentally, however, because it cannot be gainsaid that state high courts are unlikely to engage in bias against out-of-state residents when responding to certified questions, the binary conception of certification conflicts with the fundamental purpose of federal diversity jurisdiction: to afford out-of-state litigants the opportunity to have cases heard in a court more likely to be neutral than a state court. As such, the propriety of the procedure in pure diversity cases is highly questionable, as is the prospect of expanded use of certification in diversity cases looming on the horizon.