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Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina

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AVOIDING PROGNOSTICATION AND PROMOTING FEDERALISM: THE NEED FOR AN INTER-JURISDICTIONAL CERTIFICATION PROCEDURE IN NORTH CAROLINA

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In this Article, Ms. Smith examines inter-jurisdictional certification procedures by which federal courts obtain authoritative answers to state law questions from a state's highest court. Exploring other states' resolutions of common objections to certification procedures, the author advocates that North Carolina adopt such a procedure in order to avoid difficulties in federal courts applying unsettled state law, to ensure state sovereignty over state lawmaking, to foster comity between state and federal courts, and to promote judicial economy.

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INTRODUCTION

North Carolina is one of only four states yet to adopt an inter-jurisdictional certification procedure allowing federal courts to obtain authoritative answers to doubtful questions of state law from the state's highest court.[1] The utility of such a procedure is aptly illustrated by an example from North Carolina case law in which the federal courts grappled with the novel and unclear question of whether North Carolina would recognize a new basis of liability in automobile accident cases known as the "second impact" or "enhanced injury" theory.[2] Under this theory, a plaintiff may obtain recovery against an automobile manufacturer when defects in a vehicle enhance or increase the plaintiff's injuries in an accident, even though the defect did not cause the accident itself.[3]

Alexander v. Seaboard Air Line Railroad Co.[4] was the first federal case to address whether North Carolina would recognize the second-impact doctrine. In that case, the United States District Court for the Western District of North Carolina predicted that the North Carolina Supreme Court would reject the theory.[5] Five years later, in *Isaacson v. Toyota Motor Sales*,[6] the United States District Court for the Eastern District of North Carolina disagreed.[7] In 1977, the Middle District weighed in, following *Alexander* and rejecting the theory.[8] In 1980, the issue again came before the Eastern District, and following *Isaacson*, that court concluded that North Carolina would adopt the second impact doctrine.[9] One year later, the United States Court of Appeals for the Fourth Circuit came to the opposite conclusion.[10] In 1989, eighteen years after the first federal court decision, the question finally came before the North Carolina Court

1. See *infra* note 55 and accompanying text for a list of states that have adopted inter-jurisdictional certification procedures.

2. *See* Sealey v. Ford Motor Co., 499 F. Supp. 475, 477-78 (E.D.N.C. 1980); Warren v. Colombo, 93 N.C. App. 92, 94, 377 S.E.2d 249, 250 (1989).

3. *See* Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968). *Larsen* is the leading second impact doctrine case.

4. 346 F. Supp. 320 (W.D.N.C. 1971).

5. *See id.* at 326-27.

6. 438 F. Supp. 1 (E.D.N.C. 1976).

7. *See id.* at 6.

8. *See* Simpson v. Hurst Performance, Inc., 437 F. Supp. 445, 447 (M.D.N.C. 1977), *aff'd on other grounds*, 588 F.2d 1351 (4th Cir. 1978) (unpublished table decision).

9. *See* Sealey v. Ford Motor Co., 499 F. Supp. 475, 478-79 (E.D.N.C. 1980).

10. *See* Wilson v. Ford Motor Co., 656 F.2d 960, 960 (4th Cir. 1981) (per curiam); *see also* Erwin v. Jeep Corp., 812 F.2d 172, 173 (4th Cir. 1987) (per curiam) (following *Wilson*); Martin v. Volkswagen of Am., Inc., 707 F.2d 823, 824 (4th Cir. 1983) (per curiam) (same).

of Appeals.[11] Judge (now Justice) Orr held that a cause of action based on the second impact theory was permissible under North Carolina law.[12] The question has yet to be presented to the North Carolina Supreme Court and thus yet to be definitively resolved. If North Carolina had a certification procedure in place, the question could have been settled some twenty-eight years ago, thus avoiding the costs and inefficiencies associated with erroneous federal decisionmaking.

By adopting an inter-jurisdictional certification procedure, the state of North Carolina would provide a mechanism for avoiding the difficulties and undesirable results associated with the federal courts' "predictive approach" to deciding unsettled questions of state law.[13] Such a procedure also would ensure state sovereignty over state lawmaking, foster comity between the state and federal courts, and promote judicial economy. Finally, if carefully drafted, a certification procedure would not run afoul of the North Carolina Constitution and would not inundate the state court system with additional cases.

Part II of this Article traces the development of certification in this country and generally describes the certification procedures in place in other jurisdictions. Part III discusses the benefits of certification, including avoiding prognostication by the federal courts, promoting comity and federalism, and providing a quicker and cheaper alternative to abstention. Part IV addresses the possible objections to certification and argues that none justifies rejection of the procedure. Part V concludes by suggesting that the State of North Carolina should join the majority of states and adopt the simple and efficient procedure of inter-jurisdictional certification.

I. EVOLUTION OF CERTIFICATION

Inter-jurisdictional certification is a procedure whereby a federal court faced with an unclear question of state law may refer that question to the relevant state high court for resolution.[14] Although certification has a long history in English law,[15] inter-jurisdictional

11. *See* Warren v. Colombo, 93 N.C. App. 92, 96, 377 S.E.2d 249, 252 (1989).

12. *See id.* at 96, 377 S.E.2d at 252.

13. The phrase "predictive approach" is borrowed from Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1461 (1997).

14. *See* ERWIN CHEMERENSKY, FEDERAL JURISDICTION 711 (1994). The procedure differs from abstention in that the litigants are not required to undertake an entirely separate litigation at the bottom rung of the state judicial system. *See id.* at 710-11.

15. *See* UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 67 n.1 (1995) [hereinafter 1995 UNIF. ACT] (noting that the British Law Ascertainment Act of 1859

certification did not make its debut in the United States until 1945, when the State of Florida enacted the first certification statute.[16] Ten years later, Hawaii became the second state to adopt an inter-jurisdictional certification procedure.[17] These procedures, however, remained dormant until 1960, when the United States Supreme Court, in *Clay v. Sun Insurance Office Ltd.*,[18] extolled the Florida legislature's "rare foresight" in enacting a certification statute.[19]

In *Clay*, the plaintiff purchased an Illinois-made insurance policy from the defendant, an insurance company.[20] The policy provided for worldwide coverage on certain items of personal property and required that any claim be brought within one year of the discovery of the loss ("suit clause").[21] While in Florida, the plaintiff's property was damaged by his wife.[22] When the plaintiff submitted his claim, the defendant denied coverage.[23] Then, more than two years after discovering the loss, the plaintiff brought a diversity action against the insurance company in federal district court in Florida.[24] The insurer defended on two grounds: (1) that the suit clause barred the claim; and (2) that the policy did not cover losses resulting from willful injury to the property caused by the plaintiff's wife.[25]

The case went to trial and the jury found for the plaintiff.[26] The defendant then moved for judgment notwithstanding the verdict, relying in part on the suit clause.[27] The district court denied the defendant's motion, apparently believing that a state statute rendered the suit clause ineffective.[28] The Fifth Circuit reversed, holding that

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allowed for certification of questions of law within the British Empire and the Foreign Law Ascertainment Act of 1861 allowed for certification of questions to foreign states).

16. *See* FLA. STAT. ANN. § 25.031 (West 1998).

17. *See* HAW. REV. STAT. § 602-5(2) (1993).

18. 363 U.S. 207 (1960).

19. *Id.* at 212. One commentator has suggested that the Florida statute lay dormant because the Florida Supreme Court did not adopt implementing rules. *See* Vincent L. McKusick, *Certification: A Procedure For Cooperation Between State and Federal Courts*, 16 ME. L. REV. 33, 34 (1964). Another has suggested that the statute remained unused because the Fifth Circuit either was unaware of it or apprehensive about using it. *See* John R. Brown, *Certification—Federalism in Action*, 7 CUMB. L. REV. 455, 457 (1977).

20. *See Clay*, 363 U.S. at 208.

21. *See id.*

22. *See id.* The plaintiff's wife stole some property from the plaintiff's home, burned some of his clothing, and slashed a painting. *See id.* at 208, 209 n.1.

23. *See id.* at 208.

24. *See id.*

25. *See id.* at 208-09.

26. *See id.* at 209.

27. *See id.*

28. *See id.* The relevant Florida statute made illegal and void any contractual term that fixed the time in which suits must be brought to a period less than that provided by

due process would not permit Florida to apply its statute to the Illinois-made contract.[29]

The Supreme Court vacated and remanded the case, criticizing the Fifth Circuit for deciding the constitutional question before determining the non-constitutional state law questions of whether the Florida statute even applied to the contract at issue and whether the losses were excluded because they had been caused by deliberate acts of the plaintiff's wife.[30] The Court continued, noting that while both questions involved local law, the state court's determination on the statutory question was controlling.[31] Holding that a "confident guess" could not be made as to how the Florida Supreme Court would construe the statute, the Court praised the Florida legislature for its "rare foresight" in adopting a certification procedure.[32]

In 1962, just two years after *Clay*, the Fifth Circuit, on its own initiative, certified a question of Florida law to the Florida Supreme Court. In *Green v. American Tobacco Co.*,[33] plaintiff Green claimed that he had contracted lung cancer as a result of smoking defendant American Tobacco Company's Lucky Strike cigarettes.[34] Green—and after he died, his widow and his estate—asserted numerous claims, including breach of implied warranty.[35] The case went to trial and the jury found for the defendant.[36] On appeal to the Fifth Circuit, the issue presented was whether, under Florida law, the defendant could be liable for Green's death on a breach of warranty theory.[37]

The Fifth Circuit answered the question in the negative.[38] The panel was divided, however, and on rehearing the court recognized that there was no Florida law on point and certified the question to the Florida Supreme Court.[39] On certification, the Florida Supreme

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the state's statute of limitations. *See id.* at 209 n.2. The relevant statute of limitations was five years. *See id.*

29. *See id.* at 209.

30. *See id.* at 209-10.

31. *See id.* at 212.

32. *Id.* On remand, the Fifth Circuit certified two questions to the Florida Supreme Court: (1) whether the Florida statute applied to the insurance contract at issue; and (2) whether, under the circumstances, the policy covered losses resulting from acts of vandalism and theft committed by the insured's wife. *See* Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 737, 738-39 (Fla. 1961). The Florida Supreme Court answered both questions in the affirmative. *See id.* at 738-39.

33. 304 F.2d 70 (5th Cir. 1962).

34. *See id.* at 71.

35. *See id.*

36. *See id.* at 72.

37. *See id.* at 86.

38. *See id.* at 76-77.

39. *See id.* at 86.

Court answered the question in the affirmative, holding that the defendant could be liable under Florida law.[40] When the case came back to federal court, the Fifth Circuit expressed great appreciation to the Florida court for saving it "from committing serious error as to the law of Florida which might have resulted in a grave miscarriage of justice."[41]

In the early 1960s, the Supreme Court continued to take advantage of available certification procedures.[42] By the mid-1960s, Maine and Washington joined Florida and Hawaii and adopted their own certification statutes.[43] In 1967, the Commissioners on Uniform State Laws approved the Uniform Certification of Questions of Law Act.[44] Shortly thereafter, the American Law Institute voted to incorporate a certification provision into its proposed revisions of the United States Code.[45]

Certification received further recognition in 1974, when the Supreme Court again praised the procedure. In *Lehman Bros. v. Schein*,[46] shareholders sued a corporate fiduciary in federal district court in New York, alleging that the fiduciary used inside information for profit.[47] The district court determined that Florida law governed and mandated dismissal of the complaint.[48] On appeal, the Second Circuit agreed that Florida law governed but held that it allowed

40. *See* Green v. American Tobacco Co., 154 So. 2d 169, 172 (Fla. 1963).

41. *Green*, 325 F.2d at 674 (citations omitted). After its experience in *Green*, the Fifth Circuit continued to employ Florida's certification procedure. *See, e.g.*, Life Ins. of Va. Co. v. Shifflet, 370 F.2d 555 (5th Cir. 1967) (per curiam); Hopkins v. Lockheed Aircraft Corp., 358 F.2d 347 (5th Cir. 1966) (per curiam).

42. *See* Dresner v. City of Tallahassee, 375 U.S. 136 (1963) (per curiam) (employing Florida's certification procedure); Aldrich v. Aldrich, 375 U.S. 75 (1963) (per curiam) (same).

43. *See* ME. REV. STAT. ANN. tit. 4, § 57 (West Supp. 1998); WASH. REV. CODE ANN. § 2.60.020 (West Supp. 1998). Maine's procedure was first put to use in 1966. *See In re* Richards, 223 A.2d 827 (Me. 1966); Norton v. Benjamin, 220 A.2d 248 (Me. 1966). Washington's was not used until 1968. *See In re* Elliot, 446 P.2d 347 (Wash. 1968) (en banc).

44. *See* UNIF. CERTIFICATION OF LAW ACT OF 1967, 12 U.L.A. 81 (1996). The Uniform Law was revised in 1995. *See* 1995 UNIF. LAW, *supra* note 15. The provisions of the 1995 Uniform Act are summarized *infra* note 57.

45. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371(e) (1969) [hereinafter AMERICAN LAW INSTITUTE]. The ALI proposal would have allowed a federal court to certify a question to a state's highest court if: (1) the state had a certification procedure in place; (2) the state law question "may be controlling" and could not "be satisfactorily determined in light of the State authorities;" and (3) certification would not "cause undue delay or be prejudicial to the parties." *Id.*

46. 416 U.S. 386 (1974).

47. *See id.* at 387-88.

48. *See id.* at 388-89.

recovery.[49] A lone dissenting judge challenged the majority's analysis and argued that, because of the uncertainty of Florida law, the question should have been certified.[50]

The Supreme Court vacated and remanded the case for the Second Circuit to reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court.[51] The Court made clear that resorting to certification is not obligatory, even where there is doubt as to state law and certification is available.[52] It noted, however, that "in the long run [certification] save[s] time, energy, and resources and helps build a cooperative judicial federalism."[53] As for the case at hand, the Court indicated that certification was particularly appropriate given the Second Circuit's unfamiliarity with Florida law.[54]

After *Schein*, numerous states jumped on the certification bandwagon. Currently, the vast majority of states have adopted certification procedures.[55] In fact, North Carolina is one of only four

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49. *See id.* at 389.

50. *See id.* at 389-90.

51. *See id.* at 391-92.

52. *See id.* at 390-91.

53. *Id.* at 391.

54. *See id.* Justice Douglas, who wrote the majority decision in *Schein*, had been critical of certification in *Clay*. *See* Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 227-28 (1960) (Douglas, J., dissenting).

On remand, the Second Circuit certified the question to the Florida Supreme Court. *See* Schein v. Chasen, 519 F.2d 453, 454 (2d Cir. 1975) (per curiam) (recounting the procedural history of the case). The Florida Court held that under Florida law, the plaintiffs' suit could not succeed. *See id.* at 462. Accordingly, the Second Circuit affirmed the judgment below. *See id.* at 454.

55. *See* ALA. CONST. art. VI, § 6.02(b); ALA. R. APP. P. 18; ALASKA R. APP. P. 407; ARIZ. REV. STAT. ANN. §§ 12-1861 to 12-1867 (West 1994); ARIZ. S. CT. R. 27; CAL. R. OF CT. 29.5; COLO. APP. R. 21.1; CONN. GEN. STAT. ANN. § 51-199a (West Supp. 1999); DEL. CONST. art. IV, § 11(9); DEL. S. CT. R. 41; D.C. CODE ANN. § 11-723 (1981); D.C. CT. APP. R. 54; FLA. CONST. art. V, § 3(b)(6); FLA. STAT. ANN. § 25.031 (West 1998); FLA. R. APP. P. 9.150; GA. CODE ANN. § 15-2-9 (1994); GA. S. CT. R. 46-48; HAW. REV. STAT. § 602-5(2) (1993); HAW. R. APP. P. 13; IDAHO APP. R. 12.1; ILL. S. CT. R. 20; IND. CODE ANN. § 33-2-4-1 (Michie 1998); IND. R. APP. P. 15(O); IOWA CODE ANN. §§ 684A.1-684A.11 (West 1998); IOWA R. APP. P. 451-461; KAN. STAT. ANN. §§ 60-3201 to 60-3212 (1994); KY. R. CIV. P. 76.37; LA. REV. STAT. ANN. § 13:72.1 (West 1983 & Supp. 1999); LA. S. CT. R. XII; ME. REV. STAT. ANN. tit. 4, § 57 (West Supp. 1998); ME. R. CIV. P. 76B; MD. CODE ANN., CTS. & JUD. PROC. §§ 12-601 to 12-613 (1998); MASS. S. JUD. CT. R. 1.03; MICH. CT. R. 7.305; MINN. STAT. ANN. § 480.061 (West 1990); MISS. R. APP. P. 20; MONT. R. APP. P. 44; NEB. REV. STAT. §§ 24-219 to 24-225 (1995); NEV. R. APP. P. 5; N.H. S. CT. R. 34; N.M. STAT. ANN. §§ 39-7-3 to 39-7-13 (Michie Supp. 1998); N.M. R. APP. P. 12-607; N.Y. CONST. art. VI, § 3(9); N.Y. R. APP. CT. § 500.17; N.D. R. APP. P. 47; OHIO S. CT. PRAC. R. XVIII; OKLA. STAT. ANN. tit. 20, §§ 1601-1611 (West Supp. 1999); OR. REV. STAT. §§ 28.200-28.255 (1997); 42 PA. CONS. STAT. RULES REGARDING CERTIFICATION OF QUESTIONS OF PENNSYLVANIA LAW (1999); P.R. S. CT.

states yet to enact the procedure.[56]

Although many states have adopted the Uniform Certification of Questions of Law Act,[57] there is some variation in the statutes followed. With one exception, the only state courts empowered to answer certified questions are courts of last resort.[58] Almost all states allow for certification from the United States Supreme Court or from a federal court of appeals.[59] Most states also permit questions to be certified from federal district courts, as well as other federal courts.[60]

R. 27; R.I. S. CT. R. 6; S.C. APP. CT R. 228; S.D. CODIFIED LAWS §§ 15-24A-1 to 15-24A-11 (Michie Supp. 1998); TENN. S. CT. R. 23; TEX. CONST. art. V, § 3-c; TEX. R. APP. P. 110-114; VA. S. CT. R. 5:42; WASH. REV. CODE ANN. §§ 2.60.010-2.60.900 (West Supp. 1988); W. VA. CODE §§ 51-1A-1 to 51-1A-13 (Supp. 1998); WIS. STAT. ANN. §§ 821.01-821.12 (West 1994); WYO. STAT. ANN. §§ 1-13-104 to -107 (Michie 1997); WYO. R. APP. P. 11.

The Pennsylvania statute is unique in that it allows for certification "on a trial basis" from January 1, 1999, to January 1, 2000. *See* 42 PA. CONST. STAT. RULES REGARDING CERTIFICATION OF QUESTIONS OF PENNSYLVANIA LAW (1999).

Although Utah adopted a certification procedure by court rule, the rule was found to be unconstitutional and was withdrawn. *See* Holden v. N L Indus., Inc., 629 P.2d 428 (Utah 1981). Missouri's certification statute also was found to be unconstitutional. *See* Zeman v. V. F. Factory Outlet, Inc., No. 72613 (Mo. July 13, 1990) (en banc) (unpublished). For a discussion of the constitutionality of a North Carolina certification procedure, see *infra* notes 116-49 and accompanying text.

56. The three other states are Arkansas, New Jersey, and Vermont.

57. *See* UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT OF 1967, 12 U.L.A. 81 (1995) (table of jurisdictions where the act has been adopted); 1995 UNIF. ACT, *supra* note 15 (table of jurisdictions where the act has been adopted). The 1995 Uniform Act provides that a state supreme court may answer a question certified by a federal court if the answer "may be determinative of an issue in [the] ... litigation" and "there is no controlling appellate decision, constitutional provision, or statute of th[e] State." 1995 UNIF. ACT, *supra* note 15, at § 3. The Uniform Act allows the state's highest court to reformulate the certified question, *see id.* § 4, requires that the state court notify the certifying court whether it will entertain the certified question, *see id.* § 7, and directs that the state court respond to an accepted question "as soon as practicable." *Id.* The Uniform Act further provides that certification proceedings are governed by "the rules and statutes governing briefs, arguments, and other appellate procedures," *id.* § 8, and that the high court shall respond to the certified question by written order. *See id.* § 9.

58. Oklahoma vests the power to answer a certified question in the Oklahoma Supreme Court and in the Oklahoma Court of Criminal Appeals. *See* OK. STAT. ANN. tit. 20, § 1602 (West Supp. 1999).

59. *See, e.g.*, N.Y. CONST. art. VI, § 3(9) (allowing state's highest court to answer questions certified from the United States Supreme Court or any United States Court of Appeals). *But see, e.g.*, ILL. S. CT. R. 20(a) (allowing certification only by the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit).

60. *See, e.g.*, IOWA CODE ANN. § 684A.1 (West 1998) (allowing certification from the United States Supreme Court, a United States Court of Appeals, and a United States District Court). A minority of states restrict certifications from federal district courts to those sitting in the state. *See* IND. R. APP. P. 15(O) (allowing certification from, inter alia, "any United States District Court sitting in Indiana"); TENN. S. CT. R. 23(1) (allowing certification from, inter alia, "a District Court of the United States in Tennessee, or a United States Bankruptcy Court in Tennessee").

Some states also allow certification from courts of other states.[61]

In all jurisdictions, the power to answer the certified question is discretionary,[62] and in many, the state court has the power to reformulate the question if necessary.[63] Typically, certification is available only when the state law question is both unclear[64] and likely to be determinative of the federal action.[65]

In most states, the certified question must be accompanied by relevant findings of fact.[66] A number of jurisdictions specifically provide that briefing is either required[67] or permitted[68] and allow for oral argument.[69] A minority of states provide that when the constitutionality of a state statute is at issue, the state must be notified and either be allowed to intervene or permitted to participate as an amicus curiae.[70] At least one jurisdiction provides that its supreme

61. *See, e.g.*, WIS. STAT. ANN. § 821.01 (West 1994) (providing that the state supreme court may answer questions certified from "the highest appellate court of any other state"). Although state-to-state certification is permitted in a number of jurisdictions, it reportedly never has been used. *See* John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 431 (1988) (finding no published opinions in which state-to-state certification was employed).

62. *See, e.g.*, WYO. STAT. ANN. § 1-13-106 (Michie 1997) ("The supreme court *may* answer questions of law . . . .") (emphasis added). Although the Washington statute uses the word "shall," *see* WASH. REV. CODE ANN. § 2.60.020 (West Supp. 1998) ("the supreme court shall render its opinion"), the Washington Supreme Court has held that "[i]n this field of legal inquiry the word 'shall' does not necessarily mean 'must,' but may mean 'may.' " *In re* Elliot, 446 P.2d 347, 352 (Wash. 1968) (en banc).

63. *See, e.g.*, W. VA. CODE § 51-1A-4 (Supp. 1998) ("The supreme court of appeals of West Virginia may reformulate a question certified to it.").

64. This requirement is formulated in a number of different ways. *Compare* WYO. STAT. ANN. § 1-13-106 (Michie 1997) ("no controlling precedent in the existing decisions of the supreme court"), *with* WIS. STAT. ANN. § 821.01 (West 1994) ("no controlling precedent in the decisions of the supreme court and the court of appeals of this state"), *and* HAW. R. APP. P. 13(a) ("no clear controlling precedent in the Hawaii judicial decisions").

65. *See, e.g.*, WYO. STAT. ANN. § 1-13-106 (Michie 1997) (providing that supreme court may answer questions certified from a federal court "which may be determinative of the cause"). Other formulations of this requirement exist. *See, e.g.*, IDAHO R. APP. P. 12.1(a)(1) (requiring the question to be a "controlling question of law in the pending action"). For a discussion of interpretations of the "may be determinative" language, see *infra* note 132 and accompanying text.

66. *See, e.g.*, HAW. R. APP. P. 13 (requiring "a statement of facts showing the nature of the cause"); WIS. STAT. ANN. § 821.03 (West 1994) (requiring "[a] statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose").

67. *See, e.g.*, ALA. R. APP. P. 18(g).

68. *See, e.g.*, ARIZ. S. CT. R. 27(d)(1).

69. *See, e.g.*, ALA. R. APP. P. 18(h).

70. *See* IOWA R. APP. P. 460 (providing that the state may participate as amicus curiae); LA. S. CT. R. XII § 8 (providing that the state may intervene); ME. R. CIV. P. 76B(f) (same); N.Y. R. APP. CT. § 500.17(f) (providing that the state must be notified);

court must notify the certifying court and the parties within a specified period of time as to whether the question will be accepted.[71] Another requires its high court to provide an expedited briefing and hearing process.[72] Several states provide that the state's highest court must respond to the certified question "as soon as practicable."[73] Most jurisdictions require that the state's high court issue a written opinion answering the certified question.[74] Finally, some procedures expressly provide that the state court's answer has res judicata effect as to the parties[75] and has the same precedential effect as any decision of the court.[76]

II. THE BENEFITS OF CERTIFICATION

Certification offers significant benefits, including avoiding prognostication by the federal courts, promoting comity and federalism, and providing a better alternative to abstention.

A. *Avoiding Guesswork and Obtaining Authoritative, Correct Answers to Questions of State Law*

Federal courts deal with issues of state law in both diversity and federal question cases. In the latter, state law issues may arise in conjunction with the court's exercise of supplemental jurisdiction or in deciding the federal claim itself.[77] In the former, *Erie Railroad Co. v. Tompkins*[78] requires federal courts to apply state law when deciding questions of substantive law.[79]

Where the relevant state law is clear, the process of applying that law is not particularly problematic. State law, however, is often unclear—either because the issue never has been addressed or, if it has, because the controlling state decision is old or because intervening trends have called the decision into question.[80]

TEX. R. APP. P. 58.8 (providing that the state may intervene).

71. *See* S.C. R. App. P. 228(c) (setting a time limit of 45 days).

72. *See* NEB. REV. STAT. ANN. § 24-224 (Michie 1995).

73. *E.g.*, N.M. STAT. ANN. § 39-7-8 (Michie 1998 & Supp. 1997) (providing that the state supreme court must "respond to an accepted certified question as soon as practicable").

74. *See, e.g.*, W. VA. CODE. § 51-1A-9 (Supp. 1998).

75. *See* ALASKA R. APP. P. 407(f); MINN. STAT. ANN. § 480.061(7) (West 1990).

76. *See* ALASKA R. APP. P. 407(f).

77. For example, a suit challenging the constitutionality of a state statute may first require interpretation and application of the statute.

78. 304 U.S. 64 (1938).

79. *See id.* at 78-79.

80. *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1676 (1992).

Uncertainty also results when the language in the controlling decision is dictum or when less than a majority of the court joined the relevant holding.[81]

The most difficult situations arise where there are no state court decisions on point.[82] When faced with such a situation, federal courts must attempt to predict how the state's highest court would decide the issue.[83] This approach is a complex one, requiring the federal judge to consider, among other things, the entire body of relevant state law, any pertinent trends bearing on the particular issue before him, treatises, restatements, law review articles or other materials that he thinks the state court might find persuasive, as well as decisions from other jurisdictions upon which the court might choose to rely.[84] Thus, it has been said that "the federal judge must often trade his judicial robes for the garb of a prophet."[85] Faced with an unclear question of state law, Judge Friendly put it this way: "Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."[86]

In applying the predictive approach, more than one court has expressed skepticism that its prediction will be accurate.[87] In fact, the evidence reveals that federal courts "get it wrong" in a significant number of cases. Judge Sloviter of the United States Court of Appeals for the Third Circuit has summarized some of the predictive errors made by the federal courts in her circuit in interpreting Pennsylvania law. She indicated that the federal courts "guessed wrong" on questions regarding the breadth of the arbitration clauses in automobile insurance policies, the availability of loss of consortium damages for unmarried cohabitants, the "unreasonably dangerous"

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81. *See id.*

82. *See id.*

83. *See, e.g.*, Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114, 119 (2d Cir. 1994) ("Where the substantive law of the forum state is uncertain or ambiguous, the job of the federal courts is carefully to predict how the highest court of the forum state would resolve the uncertainty or ambiguity.").

84. *See* Note, *The Uniform Certification of Questions of Law Act*, 55 IOWA L. REV. 465, 466-67 (1969).

85. Brown, *supra* note 19, at 455.

86. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960), *rev'd*, 365 U.S. 293 (1961).

87. *See, e.g.*, Blue Cross & Blue Shield of Ala., Inc. v. Nielsen, 116 F.3d 1406, 1413 (11th Cir. 1997) ("[T]he task is less like applying a scientific formula and more like painting a picture. We could take up the brush ourselves, but we are not at all confident our painting would resemble the one the Alabama Supreme Court would have produced.").

standard in products liability cases, and the applicability of the "discovery rule" to wrongful death and survival actions.[88] Not surprisingly, the federal courts in the Third Circuit are not the only ones to have guessed erroneously.[89]

The problem, of course, is that when a federal court "gets it wrong," the litigants are denied the proper application of the law. Also, until the erroneous decision is corrected, non-parties conform their behavior to an improper legal norm.[90] This problem persists if there is a delay in the presentation of the issue to the state courts or if, when finally presented with the issue, the lower state courts fail to perceive the error in the federal decision and instead treat it as applicable precedent.[91]

To the extent a schism develops between the federal court's guess as to state law and the lower state court's determination on the issue, the divergence may encourage forum shopping.[92] Parties who find federal law more advantageous will sue in federal court or remove to that forum; parties who prefer the state court law will opt for that jurisdiction.

By ensuring that federal courts properly apply state law, certification avoids the costs and inefficiencies associated with incorrect federal decisionmaking.[93] Recognizing this, some federal judges faced with applying unsettled questions of state law have openly lamented the lack of a certification procedure.[94] Others have

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88. *See* Sloviter, *supra* note 80, at 1679-80.

89. *See, e.g.*, Brown, *supra* note 19, at 455 n.2 (cataloging erroneous guesses made by the Fifth Circuit); John D. Butzner, Jr. & Mary Nash Kelly, *Certification: Assuring the Primacy of State Law in the Fourth Circuit*, 42 WASH. & LEE L. REV. 449, 449 n.3 (1985) (discussing one of the Fourth Circuit's wrong guesses).

90. *See* Wade H. McCree, *Foreword*, 23 WAYNE L. REV. 255, 257 n.10 (1977) (noting that the erroneous decision "frustrates the state's policy that would have allocated the rights and duties differently").

91. *See* Sloviter, *supra* note 80, at 1681 ("[The erroneous federal decisions] may even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent.").

92. *See* Todd v. Societe Bic, S.A., 9 F.3d 1216, 1222 (7th Cir. 1993) (Easterbrook, J.) ("[A]ny substantial divergence between the federal court's estimate of state law and the state's view of its own law will funnel all similar litigation to federal court.").

93. *See id.* (Easterbrook, J.) ("Certification is an alternative to prognostication."). Certification thus promotes the "twin aims" of *Erie*: discouraging forum shopping and avoiding inequitable administration of the laws. *See* Hanna v. Plumer, 380 U.S. 460, 468 (1965).

94. *See* Currie v. United States, 836 F.2d 209, 214 (4th Cir. 1987) ("We share the regret expressed by the district judge that North Carolina has no certification statute."). For other cases in the Fourth Circuit lamenting the absence of a North Carolina certification procedure, see Luck v. GSSW Ltd. Partnership, No. 97-1578, 1997 WL 755409, at *2 fn. (4th Cir. Dec. 8, 1997) (per curiam) ("We would no doubt

expressly advocated for the adoption of one.[95]

B. *Promoting Comity and Federalism*

When a federal court decides unsettled issues of state law, state sovereignty is threatened.[96] If, in deciding such an issue, a federal court applies different legal rules than the state court would have applied, the federal court has effectively usurped the state court's lawmaking function.[97] And when federal courts decide unsettled questions of state law in cases involving policy judgments with widespread impact, the intrusion on state sovereignty is at its greatest.[98] Although in theory this intrusion is temporary, lasting only until the state's high court corrects the erroneous federal decision, it may have a more enduring effect when the issue is not presented to the state courts for some time. This could happen for a number of reasons, such as when advantageous law in the federal system encourages litigants to "forum shop," thus delaying presentation of the state law issue to the state courts.[99]

In a federal system, questions of law that are local and important

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certify the state law question presented here to the North Carolina Supreme Court if there was a procedure available to do that."); Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313, 1316 n.4 (M.D.N.C. 1984) ("Presently there is no procedure available for certifying controlling questions of unsettled state law to the North Carolina Supreme Court. This case presents a persuasive argument for adoption of such a procedure."). Judges in other jurisdictions without certification procedures have expressed similar sentiments. *See, e.g.*, School Employees Credit Union v. National Union Fire Ins. Co., Nos. 93-3402, 94-3008, 1995 WL 231370, at *2 n.3 (10th Cir. Apr. 7, 1995) ("It is unfortunate indeed that Arkansas lacks a certification procedure.").

95. *See* Hakimoglu v. Trump Taj Mahal Assocs., 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting) ("This case is its own best evidence, as the majority observes, of the utility of a certification procedure; I respectfully urge New Jersey to adopt one."); Gill v. General Am. Life Ins. Co., 434 F.2d 1057, 1061 (8th Cir. 1970) (advocating adoption of a certification procedure in Arkansas).

96. As one federal judge stated: "When federal judges make state law—and we do, by whatever euphemism one chooses to call it—judges who are not selected under the state's system and who are not answerable to its constituency are undertaking an inherent state court function." Sloviter, *supra* note 80, at 1687.

97. *See* Scott v. Bank One Trust Co., N.A., 577 N.E.2d 1077, 1080 (Ohio 1991).

98. *Cf.* Blue Cross & Blue Shield of Ala., Inc., v. Nielsen, 116 F.3d 1406, 1413 (11th Cir. 1997) ("Having the most authoritative voice on Alabama law decide the state law issues in this case is especially important because the decision will affect the rights of so many of the state's citizens, perhaps more than half."); Pyle v. South Hadley Sch. Comm., 55 F.3d 20, 22 (1st Cir. 1995) (acknowledging reluctance "to burden the Court with certification, and the litigants with the attendant delay, were we not convinced that the statutory question is of sufficient and prospective importance to state policy in the administration of its school system, and affects students and school administrators statewide for us to make a far-reaching decision without advice").

99. *See supra* note 92 and accompanying text.

to a wide spectrum of state government activities should be decided in the first instance by state courts.[100] In *Younger v. Harris*,[101] the Supreme Court explained that the notion of comity encompasses "a proper respect for state functions" and "a recognition of the fact that ... the National Government will fare best if the States ... are left free to perform their separate functions in their separate ways."[102] The Court continued, noting that this concept, also referred to as "Our Federalism," contemplates a system in which the federal government is sensitive to the legitimate interests of the states and endeavors to act in ways that will not "unduly interfere" with state activities.[103] By providing a means for federal courts to afford states the opportunity to authoritatively declare their own law, certification "helps build a cooperative judicial federalism."[104]

C. *Fostering Judicial Economy by Avoiding the Costs and Delay Associated with Abstention*

Abstention doctrines permit a federal court to decline to hear a case where all of the jurisdictional requirements have been met.[105] Abstention was first applied by the United States Supreme Court in *Railroad Commission of Texas v. Pullman Co.*[106] In that case, the Supreme Court articulated what has come to be known as "*Pullman* abstention." Under *Pullman* abstention, where resolution of unsettled questions of state law may obviate the need for a federal court to decide a federal constitutional question, the federal court should abstain until the state court has resolved the state law issue.[107] Since *Pullman*, the Supreme Court has developed other abstention

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100. *See* Elkins v. Moreno, 435 U.S. 647, 663 n.16 (1978).

101. 401 U.S. 37 (1971).

102. *Id.* at 44.

103. *Id.*

104. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). In considering whether to answer certified questions, one state court explained that:

> [A]part from a most fundamental principle of "our federalism"—that the state court of last resort is alone the supreme arbiter of the substantive content of the law of the State—a concern to promote federal-state comity would counsel that, wherever reasonably possible, the state court of last resort should be given opportunity to decide state law issues on which there are no state precedents which are controlling or clearly indicative of the developmental course of the state law.

White v. Edgar, 320 A.2d 668, 675 (Me. 1974) (footnote omitted).

105. *See* 17 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 122, at 122-1 (3d ed. 1997).

106. 312 U.S. 496, 501 (1941).

107. *See* 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4241, at 8 (2d ed. 1988).

doctrines,[108] including "*Thibodaux* abstention."[109] Under *Thibodaux* abstention, a federal court may abstain in a diversity case if the litigation includes an unresolved question of state law on an issue intimately involved with the sovereign prerogative of the state.[110]

When either *Pullman* or *Thibodaux* abstention is employed, the parties must initiate a separate lawsuit in the state trial court. By the time the state action progresses from trial to appellate court, the costs and delay are significant. Additionally, before the litigants even initiate suit in state court, there may be a full round of appeals challenging the federal district court's decision to abstain.[111]

Certification achieves the same goal as *Pullman* and *Thibodaux* abstention: obtaining an authoritative answer from the state court on a difficult question of state law. But by allowing the unclear question to be presented directly to the state's highest court, certification mitigates the costs and delay associated with abstention and, therefore, offers a better option for the courts and the litigants.[112]

III. ASSESSING THE POTENTIAL OBJECTIONS TO CERTIFICATION

The three most significant objections to certification are the unconstitutionality of the procedure,[113] the additional cost and delay it

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108. *See generally* 17 MOORE, *supra* note 105, §§ 122.02-122.06 (describing the development of abstention doctrine).

109. *See* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

110. *See id.* at 28.

111. *See* Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 & n.2 (1962) (per curiam).

112. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) (noting that certification, as compared to abstention, reduces the delay, cuts the cost, and increases the likelihood of an "authoritative response"); City of Houston v. Hill, 482 U.S. 451, 470 (1987) (noting that certification reduces "the substantial burdens of cost and delay that abstention places on litigants").

Because the other abstention doctrines allow a federal court to decline to exercise jurisdiction for reasons other than unclear questions of state law, certification does not provide a procedural alternative where those doctrines are applied. Under the *Burford* abstention, for example, federal courts abstain to defer to comprehensive state administrative procedures. *See* 17 MOORE, *supra* note 105, § 122.04[1]. Certifying a question to the state's highest court would not serve this objective. *See generally id.* §§ 122.05-122.06 (discussing the purposes of *Younger* and *Colorado River* abstention).

113. Constitutional objections to certification procedures have been raised by litigants, *see In re* Richards, 223 A.2d 827, 828 (Me. 1966) (challenging the certification proceeding on the grounds that it violated the Maine constitution); Holden v. N L Indus., Inc., 629 P.2d 428, 429, 431 (Utah 1981) (noting that defendant filed a motion in opposition to acceptance of certification and argued that the procedure was unconstitutional), and by state supreme court judges. *See, e.g.*, Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 739 (Fla. 1961) (raising sua sponte the constitutional question of its jurisdiction to answer certified questions); *In re* Certified Question, 443 N.W.2d 112, 123 (Mich. 1989) (Levin, J., separate opinion) (noting that the court was not asked to consider whether the certification

imposes on the parties,[114] and the potential to inundate an already overburdened state court system with additional cases.[115] None of these objections should forestall adoption of a certification procedure in North Carolina.

A. *Constitutionality*

The principal constitutional issues concerning certification procedures have been: (1) whether they run afoul of constitutional requirements that the state supreme court not render advisory opinions or rule on abstract questions;[116] and (2) whether they are prohibited by specific constitutional limitations on the state court's jurisdiction.[117] The majority of state courts that have addressed these possible constitutional flaws have found them to be without merit.[118] For the reasons discussed below, these issues pose no barrier to implementation of a certification procedure in North Carolina.

1. Advisory Opinions and Abstract Questions

Article IV, section 12 of the North Carolina Constitution deals with the jurisdiction of the North Carolina Supreme Court. It provides that the supreme court "shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference" and "may issue any remedial writs necessary to

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procedure was constitutional but addressing that question nevertheless). Legislators have also raised constitutional issues when contemplating enactment of certification procedures. *See* Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 174-75 (1992) (noting that Connecticut legislators raised the question of constitutionality when considering a certification procedure for that state).

114. Concerns regarding the additional costs and delay associated with certification have been voiced by judges, *see* Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 227-28 (1960) (Douglas, J., dissenting); *id.* at 224 (Black, J., dissenting); *Holden*, 629 P.2d at 431 n.13, commentators, *see* Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 725-27 (1969) (presenting the delay associated with certification as part of "the case against certification"); Larry M. Roth, *Certifying Questions from the Federal Courts: Review and Re-proposal*, 34 U. MIAMI L. REV. 1, 9 (1979) (suggesting that the delay associated with certification "threaten[s] its use and effectiveness"), and legislators, *see* Robbins, *supra* note 113, at 175 (noting that Connecticut legislators were concerned with unreasonable delay in case resolution).

115. Concerns with overburdening state court systems also have cropped up throughout the years. *See Holden*, 629 P.2d at 431 n.13 (noting the issue of crowded dockets); Robbins, *supra* note 113, at 137 (noting "prevalent fear of inundation").

116. *See* Gerald M. Levin, Note, *Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 350 (1963).

117. *See Holden*, 629 P.2d at 428.

118. *See infra* notes 121-28, 137-40 and accompanying text.

give it general supervision and control over the proceedings of the other courts."[119] The North Carolina Supreme Court has interpreted the state constitution to prohibit it from rendering advisory opinions or ruling on abstract questions.[120] The decisions of other state supreme courts addressing these issues reveal that careful drafting can obviate any problems that they may pose.

In *In re Richards*, the Maine Supreme Court rejected the contention that questions presented to it under the state's certification procedure amounted to requests for advisory opinions.[121] Noting that the parties are before the court and are given the opportunity to present briefs and oral arguments, the court concluded that it is clear that there is a genuine live controversy pending in the federal court which will be determined its response.[122] The court noted that its response would be like a declaratory judgment and would have res judicata and stare decisis effect.[123] Notwithstanding this conclusion, however, the *Richards* court reluctantly declined to answer the certified question before it on grounds that operative facts remained unresolved. The court explained that in order to avoid rendering advisory opinions, its response to a certified question also must be "determinative of the cause,"[124] a requirement that could not be met where, as in the case before it, material facts were in dispute.[125]

Citing *In re Richards*, the Washington Supreme Court held that certified questions were not requests for advisory opinions and did not involve abstract questions.[126] Following the reasoning of *Richards*, the Washington court concluded that certification proceedings involve actual controversies in which there are no disputed facts and result in judgments that have res judicata and stare

119. N.C. CONST. art. IV, § 12(1).

120. *See In re* Advisory Opinion, 335 S.E.2d 890, 891 (N.C. 1985) ("The North Carolina Constitution does not authorize the Supreme Court as a Court to issue advisory opinions."); Boswell v. Boswell, 241 N.C. 515, 519, 85 S.E.2d 899, 902 (1955) ("[This] court will not give advisory opinions or decide abstract questions."). The supreme court has stated that individual members have given advisory opinions occasionally "as a matter of courtesy, and out of respect to a coordinate branch of the government." *In re Advisory Opinion*, 335 S.E. 2d at 891 (quotation omitted). The court has cautioned, however, that under the constitution, these opinions "can only [] be opinions of individual members of the Court and not the Court itself," and as such do not have the force of law. *Id.* (quotation omitted).

121. 223 A.2d 827 (Me. 1966).

122. *See id.* at 832.

123. *See id.*

124. *Id.* at 833. In fact, the Maine certification statute so required. *See id.*

125. *See id.*

126. *See In re* Elliot, 446 P.2d 347, 354 (Wash. 1968) (en banc).

decisis effect.[127] Other state courts have reached similar conclusions.[128]

Thus, the existing case law suggests that a certification procedure will not conflict with a constitutional prohibition on answering abstract questions or rendering advisory opinions if: (1) there is an actual controversy between the parties;[129] (2) the state court decision will serve as the law of the case and qualify as a res judicata and stare decisis adjudication of the state rights involved;[130] (3) the relevant facts have been stipulated or decided;[131] and (4) the state court's answer will resolve an issue in the case.[132] These requirements easily

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127. *See id.* at 354. In *In re Elliot*, the Washington court went on to hold in the alternative that it had the authority to render advisory opinions. *See id.* at 355.

128. *See, e.g.*, Spencer v. Aetna Life & Cas. Ins. Co., 611 P.2d 149, 151 (Kan. 1980) (holding that the certified question presented "neither violates the case or controversy requirement nor the separation of powers doctrine on advisory opinions"); Wolner v. Mahaska Indus., Inc., 325 N.W.2d 39, 41 (Minn. 1982) (rejecting a party's argument that the court's prior decision responding to a certified question was advisory and not binding precedent).

129. This prerequisite could be satisfied simply by requiring that certifications only be made from cases "pending" in the federal system. *See* U.S. CONST. art. III, § 2 (articulating the case or controversy requirement).

130. Some states have expressly drafted this requirement into their certification statutes. *See supra* notes 75-76 and accompanying text.

131. Although this requirement is probably best seen as addressing the issue of abstractness, *see* Richard B. Lillich & Raymond T. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A. L. REV. 888, 901 (1971) ("[T]o the extent that the state court requires findings by the federal court before it will make a determination, it cannot plausibly be argued that the state court is presented with a question of law devoid of a concrete factual setting."), some courts have viewed it as resolving the advisory opinion issue. *See* Schlieter v. Carlos, 775 P.2d 709, 710 (N.M. 1989) (per curiam) (noting that the court will avoid rendering an advisory opinion on a certified question "if the certification of facts and the record contain the necessary factual predicates to our resolution of the question certified, and it is clear that evidence admissible at trial may be resolved in a manner requiring application of the law in question"). The third requirement is satisfied if the procedure permits certification only from appellate courts. *See In re Richards*, 223 A.2d at 833.

132. This requirement ensures that the state court is not engaging in a superfluous exercise. Many certification statutes require that the answer to the certified question "be determinative of the cause" but most courts interpret such language liberally, requiring only that the certified question resolve an issue in the pending litigation. *See, e.g.*, *Schlieter*, 775 P.2d at 710 (noting that an answer to certified question will not constitute an advisory opinion if the answer is "determinative in that it resolves the issue in the case . . . and the resolution of this issue materially advances the ultimate termination of the litigation"); Western Helicopter Servs. v. Rogerson Aircraft Corp., 811 P.2d 627, 630 (Or. 1991) ("The ... requirement ... that the question must be one whose answer may determine the cause, means that our decision must ... have the potential to determine at least one claim in the case."). At least one court, however, has interpreted the "determinative of the cause" language narrowly, requiring that its decision be determinative of the claim. *See* Matter of Certified Question from U.S. Dist. Ct., 549 P.2d 1310, 1311 (Wyo. 1976). In other words, all that can be left for the certifying court to do is

could be drafted into a certification procedure for North Carolina.[133]

2. Constitutional Limits on Jurisdiction

The North Carolina Constitution, like state constitutions generally, acts as a limitation on power, not a grant of power.[134] As the North Carolina Supreme Court has stated: "All power which is not *expressly limited* by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution."[135] If there is any doubt as to the legislature's power to act in any particular situation, the court has stated that the doubt should be resolved in favor of the legislative action.[136]

Relying on these principles, high courts in other jurisdictions have upheld the constitutionality of their states' certification procedures. In *Sun Insurance Office, Ltd. v. Clay*,[137] the Florida Supreme Court considered whether the state's certification procedure violated a provision in the Florida Constitution delineating the appellate jurisdiction of the supreme court and providing for the court's issuance of certain named writs. Because the named writs did not cover certification, the constitutionality of the certification statute hinged on whether the constitutional provision was a grant of or limitation on judicial power.[138] The court upheld the statute, stating:

> [I]n the absence of a constitutional provision expressly or by necessary implication limiting the jurisdiction of the Supreme Court to those matters expressly conferred upon it, and in the absence of a constitutional provision expressly conferring upon another court jurisdiction to exercise the judicial power which is the subject matter of [the certification procedure], and in the light of the well settled

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to enter judgment consistent with the answer to the certified question. *See id.* Such a view strips the certification procedure of any real utility, *see* 17A WRIGHT, *supra* note 107, § 4248, at 169, and has been rejected by the Uniform Law drafters. *See* 1995 UNIF. ACT, *supra* note 15, § 2 (providing for certification of questions that "may be determinative of an issue in the pending litigation").

133. *See* Lillich & Mundy, *supra* note 131, at 904 ("The problem of advisory opinions, like the problem of abstractness, can be solved by careful drafting.").

134. *See* Baker v. Martin, 330 N.C. 331, 337, 410 S.E.2d 887, 891 (1991); McIntyre v. Clarkson, 254 N.C. 510, 514, 119 S.E.2d 888, 891 (1961).

135. *Baker*, 330 N.C. at 336-37, 410 S.E.2d at 891 (quoting State *ex rel.* Martin v. Preston, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989)).

136. *See id.* at 338, 410 S.E.2d at 891.

137. 133 So. 2d 735 (Fla. 1961); *see supra* notes 18-32 and accompanying text (discussing prior federal court history of this case).

138. *See Clay*, 133 So. 2d at 741.

> rule that all sovereign power, including the judicial power, not limited by a state constitution inheres to the people of the state, such power may be granted to this court by statute if it is deemed to be a substantive matter, or by a rule of this court if it is deemed to be a matter of practice and procedure.[139]

Other high courts have followed *Clay* and have upheld the constitutionality of their states' certification procedures.[140]

By contrast, in *Holden v. N L Industries, Inc.*,[141] the Utah Supreme Court reluctantly held its certification rule unconstitutional because of an express limitation on the supreme court's jurisdiction contained in the state constitution.[142] The relevant portion of the Utah Constitution gave the state supreme court original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus and " '[i]n other cases ... appellate jurisdiction only.' "[143]

The *Holden* court began by noting that since the named writs did not include certification, the supreme court had no original jurisdiction to answer certified questions.[144] The court then turned to the " '[i]n other cases ... appellate jurisdiction only' " clause and concluded that an answer to a certified question was not an exercise of appellate jurisdiction.[145] The court reasoned that, as used in the Utah Constitution, the term "appellate jurisdiction" connotes review of actions by courts subordinate to the state supreme court, a description inapplicable to the federal courts.[146] The court noted that comparable provisions in most state constitutions omit the word "only," thus making the constitutional conferral of appellate jurisdiction amenable to the construction that the high court's jurisdiction could be enlarged by an exercise of legislative or judicial power. It held, however, that the presence of that word in the Utah Constitution precluded such a construction and required that the

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139. *Id.* at 742-43 (quotations omitted).

140. *See In re Elliot*, 446 P.2d 347, 350-52 (Wash. 1968) (en banc) (following *Clay*); Sunshine Mining Co. v. Allendale Mut. Ins. Co., 666 P.2d 1144, 1147-48 (Idaho 1983) (following *In re Elliot* and *Clay*).

141. 629 P.2d 428 (Utah 1981).

142. *See id.* at 430. Notwithstanding its holding that the state's certification rule was unconstitutional, the *Holden* court described certification as "a commendable effort to further the interest of justice through cooperative efforts by state and federal courts." *Id.* at 431.

143. *Id.* at 430 (quoting UTAH CONST. art. VIII, § 4).

144. *See id.*

145. *Id.* at 431.

146. *See id.*

certification rule be found unconstitutional.[147]

The North Carolina Constitution does not contain a jurisdictional limitation such as that addressed in *Holden*.[148] Because of this fact and because all sovereign power not limited by the state constitution remains with the people, there is no constitutional impediment to the legislature's adoption of a certification procedure.[149]

B. Undue Delay and Excessive Cost

Another objection leveled at certification procedures is that they produce undue delay.[150] Justice Black first articulated this concern in his *Clay* dissent, arguing that "[l]itigants . . . have a right to have their lawsuits decided without unreasonable and unnecessary delay or expense."[151] Justice Douglas, also dissenting, argued against the

147. *See id.* at 430-32. At one time, Alabama's constitution paralleled Utah's, granting its supreme court "appellate jurisdiction only." ALA. CONST. of 1901, art. VI. In 1973, that provision was amended, authorizing the Alabama Supreme Court to answer "questions of state law certified by a court of the United States." ALA. CONST. art. VI, amend. 328. After the 1973 amendment, the Alabama Supreme Court adopted a certification procedure by court rule. *See* ALA. R. APP. P. 18. A constitutional amendment was also thought necessary before New York could adopt a certification procedure. *See* Robbins, *supra* note 113, at 167-68 (describing the proposal and adoption of a certification procedure in New York).

148. *See supra* note 119 and accompanying text (quoting relevant portion of North Carolina Constitution).

149. *See* Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 742-43 (Fla. 1961). In addressing the constitutionality of their certification procedures, two state supreme courts have held that answering certified questions is not an exercise of jurisdiction. The Ohio Supreme Court reasoned: " 'Jurisdiction' means the power to hear and determine a cause. By answering a state-law question certified by a federal court, we may affect the outcome of the federal litigation, but the federal court still hears and decides the cause." Scott v. Bank One Trust Co., N.A., 577 N.E.2d 1077, 1079 (Ohio 1991) (quotation and citation omitted); *see also* Shebester v. Triple Crown Insurers, 826 P.2d 603, 606 n.4 (Okla. 1992) (holding that answering certified questions is not an exercise of jurisdiction). Considering the status that must be given to answers to certified questions—res judicata and stare decisis—in order to avoid problems related to abstractness and advisory opinions, these decisions seem unsound.

Although the North Carolina Constitution does not contain a specific limitation prohibiting certification, it does contain a provision indicating that the actual certification procedure (as distinguished from a legislative provision authorizing the court to accept certified questions) could be adopted only by court rule. Article IV, section 13 of the North Carolina Constitution provides, in relevant part: "The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. CONST. art. IV, § 13(2). By vesting the North Carolina Supreme Court with exclusive authority to make procedural rules for the Appellate Division, this section requires that the certification procedure be adopted by court rule, a method not without precedent. *See supra* note 55 and accompanying text.

150. *See supra* note 114 (citing instances where this concern has been raised).

151. Clay v. Sun Ins. Office Ltd. v. Clay, 363 U.S. 207, 224 (1960) (Black, J., dissenting).

"practice of making litigants travel a long, expensive road in order to obtain justice."[152]

The use of certification in *Clay* resulted in significant delay—four years elapsed from the United States Supreme Court's initial decision extolling certification[153] to the case's final adjudication in federal court with the aid of the Florida Supreme Court's answers to the certified questions.[154] *Clay*, however, does not represent the typical certification experience. *Clay* was the first case handled under an inter-jurisdictional certification procedure; this circumstance alone likely accounts for a significant portion of the delay. In fact, the Florida Supreme Court did not have in place court rules implementing the certification statute and had to adopt such rules before the process could move forward.[155]

Although there is not a large body of empirical evidence on point, the available evidence suggests that certification does not produce delays commensurate with those experienced in *Clay*. A Federal Judicial Center study of forty-eight cases in which certification was used found a median time of only 6.36 months from certification to obtaining the state court's answer, with a range of less than one month to two and a half years.[156] The study pointed out that these calculations of delay were overstated because a true measure would subtract out the time the federal court would need to research and reach its own answer to the state law question.[157] The study also found that although cases involving questions of state law require more time from filing to disposition than more typical cases, only a relatively small proportion of that time is directly attributable to use of the certification procedure.[158] Finally, the study noted that any delay should decrease with greater experience in the certification process.[159]

Similarly, in a survey of six clerks of state high courts, four indicated that the answering court required only three to six months

152. *Id.* at 227 (Douglas, J., dissenting).

153. *See id.* at 207.

154. *See* Clay v. Sun Ins. Office Ltd., 377 U.S. 179 (1964). Citing the delay in *Clay*, one commentator suggested that the case is "another dim chapter in the ... history of certification." Mattis, *supra* note 114, at 726.

155. *See* AMERICAN LAW INSTITUTE, *supra* note 45, § 1371 (e), at 293.

156. *See* CARROLL SERON, CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES 15-16 (Fed. Judicial Ctr. 1983).

157. *See id.* at 16.

158. *See id.* at 16-17.

159. *See id.* at 17.

to dispose of certified questions.[160] One clerk indicated that the relevant time period was six to nine months.[161] Another indicated that it was nine to twelve months.[162] This evidence suggests that the delay (and the accompanying cost) associated with certification is not unmanageable. In any event, whatever the delay associated with certification, where the alternative is abstention, certification results in a quicker and cheaper resolution of the litigation.[163]

Finally, "good adjudication in difficult cases is not likely to be quick or cheap."[164] As one judge queried: "[A]bout the only virtue an immediate decision has is that it is done. It is done now and delay is avoided. Delay, to be sure, is a thing we all strive to avoid and overcome. But what else is served?"[165]

The judicial system should endeavor to reduce cost and delay where possible. With regard to certification, however, the available evidence indicates that the benefits of the process outweigh the additional cost and delay that it creates.[166] At most, concerns regarding cost and delay support the argument that certification should be used wisely, not denied altogether.[167]

C. *Burden on State Courts*

Finally, certification proposals have been met with concern that federal courts will be quick to employ the procedure and that the resulting flood of cases will inundate and overburden the state's highest court.[168] The federal courts, however, do not employ certification lightly. As the Supreme Court has noted with regard to abstention, mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal.[169] Importing this notion into the certification context, the Fifth Circuit has stated that it "use[s] much judgment, restraint, and discretion in certifying" and "[will] not

160. *See* Corr & Robbins, *supra* note 61, at 453.
161. *See id.*
162. *See id.*
163. *See supra* note 112 and accompanying text.
164. Corr & Robbins, *supra* note 61, at 430.
165. W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 266-67 (10th Cir. 1967) (Brown, J., dissenting in part, concurring in part), *rev'd per curiam*, 391 U.S. 593 (1968).
166. *See* Corr & Robbins, *supra* note 61, at 430; *see also* SERON, *supra* note 156, at 17 ("Overall, the findings suggest that the extra time taken by certification does not outweigh the benefits of the procedure.").
167. *See* Hakimoglu v. Trump Taj Mahal Assocs., 70 F.3d 291, 303 (3d Cir. 1995) (Becker, J., dissenting).
168. *See supra* note 115 and accompanying text.
169. *See* Meredith v. Winter Haven, 320 U.S. 228, 234-38 (1943).

abdicate."[170]

Those states that have adopted certification procedures have not reported excessive numbers of certifications.[171] In Florida, for example, the state with the longest history of certification, the number of cases certified to the Florida Supreme Court in any one year for the 1990 to 1997 period ranged from one to ten, with an average of 4.875 cases per year.[172] Moreover, a survey of six state high court clerks indicated that certification increased the highest courts' caseload by less than five percent a year.[173]

Finally, and most significantly, if the certification procedure provides that the high court's decision to accept the question is discretionary, that court will always have a means to control its caseload should the number of certifications exceed expectations.[174]

CONCLUSION

Inter-jurisdictional certification is not a novel procedure; it has been used in other jurisdictions for close to forty years and is in place in all but four states. Time and experience prove that concerns regarding delay, cost, and overburdening the state courts are either unfounded or exaggerated. Moreover, existing case law reveals that any constitutional objections that may be raised with regard to a North Carolina certification procedure can be addressed by careful drafting. Certification offers significant benefits, including avoiding prognostication by the federal courts, obtaining correct answers to questions of state law, and promoting comity, federalism, and judicial economy. These benefits accrue to the litigants in the case employing the certification option, to the state and federal court systems, and to

170. Barnes v. Atlantic & Pac. Life Ins. Co. of Am., 514 F.2d 704, 705 n.4 (5th Cir. 1975); *see also* Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co., 958 F.2d 622, 623 (5th Cir. 1992) (per curiam) (observing that certification "is a valuable resource . . . so we dare not abuse it by over use lest we wear out our welcome").

171. *See* Robbins, *supra* note 113, at 137 ("None of the forty jurisdictions with certification procedures has reported being overburdened by the number of certified questions, despite prevalent fear of inundation.").

172. *See* Telephone Interview with Debbie Causseaux, Chief Deputy, Clerk of the Florida Supreme Court (Feb. 12, 1998). More specifically, the number of certified cases in Florida over the last eight years is as follows: 1990 (3); 1991 (6); 1992 (5); 1993 (10); 1994 (3); 1995 (1); 1996 (5); and 1997 (6). *See id.*

173. *See* Corr & Robbins, *supra* note 61, at 452.

174. *See* Robbins, *supra* note 113, at 137 ("[A]s a practical matter that court completely controls its docket and may reject certified-question cases if the number becomes overwhelming.").

the larger community affected by court decisionmaking. For these reasons, inter-jurisdictional certification is long overdue in North Carolina.