A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted?

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A STATE COURT'S REFUSAL TO ANSWER CERTIFIED QUESTIONS: ARE INFERENCES PERMITTED?

Certified questions provide a mechanism for a federal court considering an unclear question of a state's law to ask the highest court of that state to declare its position on the issue. Answers to

1 See Gerald M. Levin, Note, Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism, 111 U. Pa. L. Rev. 344, 348 (1963). There are two types of certification—interjurisdictional and intrajurisdictional. Id. Intrajurisdictional certification occurs when the certifying and answering courts are from the same state or are both federal courts. Id. Interjurisdictional certification occurs when a federal court horizontally certifies a question to a state court or when the certifying and answering courts are from two different states. Id. Interjurisdictional certification can also refer to certification from a state court to a federal court. See id. at 348 n.37. This type of certification is unnecessary, however, since the Supreme Court can review a state court's determination of a federal question. Id.

In 1945, Florida became the first state to enact a certification statute, allowing the federal courts and the Supreme Court to certify questions of state law to Florida's Supreme Court. Richard B. Lillich & Raymond T. Mundy, Federal Court Certification of Doubtful State Law Questions, 18 UCLA L. Rev. 888, 891 (1971); see Fla. Stat. Ann. § 25.031 (West 1988) (authorizing use of certification). However, the Florida certification procedure was not utilized until the 1960 case of Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960), in which the Supreme Court indicated that the Florida certification statute should have been used to obtain a clear view of the uncertain state law involved in the case. Id. at 212. Justice Frankfurter stated that "[t]he Florida legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision." Id. at 212.

certified questions provide the certifying court with an authoritative determination of the state law and relieve it of the onerous task of predicting how the state court would decide the matter.


A recent study on the use of certification among federal and state judges indicated that there was “overwhelming judicial support” of the certification procedure as a means of determining unclear state law. See Corr & Robbins, supra, at 457.

See Clay, 363 U.S. at 212; United States v. Buras, 475 F.2d 1370, 1371, 1375 (5th Cir. 1972) (Brown, J., dissenting) (through the certification procedure “the objective of an authoritative determination with finality can be attained”). In National Educ. Ass’n v. Lee County Bd. of Pub. Instruction, 467 F.2d 447 (5th Cir. 1972), the court of appeals, noting that “the wisdom of certification ... is apparent,” id. at 449-50, stated that, in light of the Florida Supreme Court’s response to a certified question, it was able to conclude with “absolute assurance” that the district court incorrectly decided the case, id. at 448.

See Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943). In Meredith, the Supreme Court held that even though the state law is contradictory or difficult to ascertain, a federal court cannot refuse jurisdiction. Id.

In the absence of certification, many federal courts use the prediction method as a means of determining state law. See Note, The Uniform Certification of Questions of Law Act, 55 IOWA L. REV. 465, 466 (1969) [hereinafter Note, Uniform Certification of Law Act]. Under this procedure, a federal court must anticipate how the state’s highest court would resolve the state law issues in the case. Id. at 466-67; John D. Butzner, Jr. & Mary N. Kelly, Certification: Assuring the Primacy of State Law in the Fourth Circuit, 42 WASH. & LEE L. REV. 449, 449 (1985); Levin, supra note 1, at 345. One guideline established for predicting state law required federal judges to determine “[w]hat would be the decision of reasonable intelligent lawyers, sitting as judges of the highest [state] court, and fully conversant with [the state] ‘jurisprudence?’” Cooper v. American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945).

A federal judge employing the prediction method must examine and weigh the philosophy, background, and personality of the state’s highest court and determine how these factors influence the court’s decision. Note, Uniform Certification of Law Act, supra, at 466. Furthermore, “[h]e must decide if the state court is developing or would want to develop a trend away from older decisional law, whether the state court would be influenced by analogous cases in related areas of law, and whether the state court would rely heavily on the decisions of lower state courts.” Id. The federal judge may also consider to what extent the state court would be influenced by restatements, law review articles, treatises, decisions from other jurisdictions and public policy. Id. at 466-67; see, e.g., Southern Farm Bureau Casualty Ins. Co. v. Mitchell, 312 F.2d 485, 497 (8th Cir. 1963) (determining outcome with aid of Arkansas Law Review); Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159, 161 (D.S.D.
The majority of states recognize the advantages of certification and have adopted some version of a certification statute. The mere existence of such a statute, however, does not guarantee a response to all certified questions. Presumably, when a state's highest court

(1967) (deciding case after resorting to Restatement of Torts), aff'd, 408 F.2d 978 (8th Cir. 1969); see also Jack H. Friedenthal et al., Civil Procedure § 4.6, at 221-22 (1985) (discussing use of scholarly works to ascertain state law).

The prediction method has several drawbacks. First, “[i]t is time consuming and difficult to administer.” Note, Uniform Certification of Law Act, supra, at 467. Second, “[s]ince the state court could subsequently decide the same issue differently, other individuals cannot safely rely on the federal court's prediction in conducting their affairs.” Id.; see also John M. Dunn, Case Note, Exercising the Power to Answer Federal Court Certification of State Law Questions: Hanchey v. Steighner, 12 LAND & WATER L. REV. 337, 337 (1977) (“The drawback [for a federal court] in predicting state law is that the rule laid down may later be reversed by state decision . . . .”); see also Peterson v. U-Haul Co., 409 F.2d 1174, 1177 (8th Cir.) (prediction “is a hazardous and unsatisfactory method of deciding litigation”), modified, 421 F.2d 837 (8th Cir. 1969). For a discussion of the prediction method, see Note, The Ascertainment of State Law in a Federal Diversity Case, 40 IND. L.J. 541, 549-55 (1965) [hereinafter Note, Ascertainment of State Law].

In Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940), the Supreme Court allowed federal courts to apply the decisions of lower state courts as a way of ascertaining state law. See id. at 177 (“[I]t is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State.”) (footnote omitted). As a result of Field, federal courts began to rely on decisions of state courts even where the precedential value was weak. See, e.g., Gustin v. Sun Life Assurance Co., 154 F.2d 961, 962 (6th Cir.) (applying unreported state court decision), cert. denied, 328 U.S. 866 (1946).

The Supreme Court retreated from this extreme view in King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 162 (1948). The Court held that a decision in the South Carolina Court of Common Pleas would not be binding on other federal courts since it was not binding on other South Carolina courts. Id. at 161. The Supreme Court finally came to a definitive conclusion on the function of lower state court decisions in Commissioner v. Bosch, 337 U.S. 456 (1949). There the Court held that “[i]f there be no decision by [the state's final appellate court] then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State.” Id. at 465. See generally Friedenthal et al., supra § 4.6 at 217-21 (tracing development of function of lower court decisions in determining applicable state law).

See Note, New York's Certification Procedure: Was it Worth the Wait?, 63 St. John's L. Rev. 539, 545 n.26 (1989) (listing jurisdictions that have adopted certification statutes). Certification statutes vary from state to state; some authorize certification from federal district and appellate courts, while others allow certification only from federal appellate courts and the Supreme Court. See id.

See UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 1 Commissioner's cmt., 12 U.L.A. 49, 52 (1980). The Commissioner's comment to § 1 of the Uniform Act states that a court is not required to answer a certified question. Id.; see also Abrams v. West Virginia Racing Comm'n, 263 S.E.2d 103, 105 (W. Va. 1980) (concluding that West Virginia certification statute “does not impose an absolute duty on this Court to answer such questions”).

State courts have refused to respond to certified questions for a variety of reasons. See, e.g., Thompson v. State, 170 N.W.2d 101, 103 (Minn. 1969) (abstract question); Cowan v. Ford Motor Co., 437 So. 2d 46, 47 (Miss. 1983) (statute previously ruled upon by state's highest court); Holden v. N L Indus., Inc., 629 P.2d 428, 430 (Utah 1981) (violate of state
refuses to respond to a certified question, the certifying court must resolve the unsettled state law issue itself. However, in Hotvedt v. Schlumberger Ltd., a recent fifth circuit case, Judge Garza argued in his dissent that the Texas Supreme Court's refusal to answer a certified question gave rise to an inference that the Texas court agreed with the fifth circuit's earlier ruling on an unresolved question of Texas law. Thus, according to Judge Garza's view, it would be fruitless for the certifying court to attempt to resolve the issue. It is submitted that permitting inferences from a state court's refusal to answer a certified question would defeat the purposes and policies underlying the certification process and that the Hotvedt dissent was mistaken in suggesting that such inferences could logically be drawn.

Part One of this Note will explore the development of the certification procedure and analyze how allowing an inference from the refusal of a state's highest court to reply to a certified question undermines the purposes and policies behind these questions. Part Two will discuss the various reasons why a state's highest court would refuse to answer a certified question. Finally, Part Three

constituion). The Committee on Federal Courts has noted that "there are many reasons why . . . state courts on occasion have chosen not to answer the questions certified at all or in the manner in which they were presented." The Committee on Federal Courts, Analysis of State Laws Providing for Certification by Federal Courts of Determinative State Issues of Law, 42 Rec. Ass'n B. Cty N.Y. 101, 102 (1987); see also infra notes 42-59 and accompanying text (discussing reasons for refusing to answer certified questions).

7 See supra note 4 (discussing methods for determining state law).
8 942 F.2d 294 (5th Cir. 1991).
9 Id. at 298. (Garza, J., dissenting). In Hotvedt, the Texas saving statute would have tolled the statute of limitations on the plaintiff's suit if, as a matter of Texas law, the granting of a stay in a California court on forum non conveniens grounds was equivalent to a dismissal for lack of jurisdiction. Id. The original panel decision of the Court of Appeals for the Fifth Circuit held that the stay in the California court on the grounds of forum non conveniens was a disclaimer of jurisdiction. Id. at 296. On a petition for rehearing, the court of appeals reversed and concluded that the California court's stay is not considered tantamount to a dismissal. Id. at 297. Before the second panel hearing, the issue was certified to the Texas Supreme Court, which refused to answer. Id. at 296. Judge Garza concluded: "[T]he most logical inference to be drawn is that the Supreme Court of Texas agreed with our original panel opinion . . . . I cannot believe that if the majority of the Texas Supreme Court Justices had thought our opinion was wrong that they would have allowed it to stand." Id. at 298 (Garza, J., dissenting).
10 See id. at 298 (Garza, J., dissenting). Judge Garza believed that the court did not have to decide any issues since the Texas Supreme Court, by its silence, concluded that a stay on the basis of forum non conveniens was equivalent to a dismissal due to lack of jurisdiction under the Texas saving statute. Id. Under his theory, the issue was already resolved, and there was nothing for the certifying court to do. Id.
11 See infra notes 12-41 and accompanying text.
will analogize the refusal of a state's highest court to answer a certified question with the Supreme Court's denial of certiorari, and conclude that an inference is impermissible when a certified question is not answered.

I. POLICY AND PURPOSE OF CERTIFICATION

A. Development of Certification

The need for the certification process can be traced back to the landmark case of *Erie Railroad v. Tompkins*, in which the Supreme Court held that federal courts exercising diversity jurisdiction must apply state decisional as well as statutory law. Writing for the majority, Justice Brandeis observed that "[t]here is no federal general common law." Consequently, the law applicable in all cases not governed by the United States Constitution or by congressional enactments is the law of the state.

Unfortunately, federal courts often face substantial obstacles when attempting to determine the status of state law on a given issue. These difficulties led to the development of the "abstention

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12 304 U.S. 64 (1938).
14 Erie, 304 U.S. at 78. Erie overruled the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), in which the Supreme Court held that federal courts hearing diversity cases could adopt federal common law if no state statute was applicable, id. at 18-19. In Erie, Justice Brandeis explained that the Swift doctrine created many problems, including discrimination by non-citizens against state citizens in federal courts. See Erie, 304 U.S. at 73-77. See generally FRIEDENTHAL ET AL., supra note 4, §§ 4.1-4.2 (explaining Swift and Erie doctrines).
15 Erie, 304 U.S. at 78.
17 See Note, Ascertainment of State Law, supra note 4, at 542-43. For example, the *Erie* court never explained how a federal court sitting in diversity should choose which state's law to apply. Id. at 540. This problem was later corrected by Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1947), in which Justice Reed declared that the law of the forum state should be applied in diversity cases. Id. at 496. However, determining the law of the forum state proved troublesome; state law "may range from decisions and dicta of the highest court of the state through intermediate state court decisions and even down to trial court decisions, opinions of the state bar, and local administrative rulings." Note, Ascertainment of State Law, supra note 4, at 542-43.

At times, the statute being construed is ambiguous or there are no "clear and control-
doctrine,” under which a federal court, in narrow circumstances, may refuse to decide a case involving unclear issues of state law when a decision on the state law issue might raise a federal constitutional question.\(^8\) Courts employing this doctrine retain jurisdiction while affording the litigants an opportunity to seek an authoritative determination of the issues from the courts of the state whose law controls.\(^9\) However, while the abstention doctrine allows federal courts to avoid predicting a state court’s views, the process is costly and time consuming.\(^2\) The certification process

\(\textsuperscript{8}\) See Railroad Comm’n v. Pullman Co., 312 U.S. 496, 499-500 (1941). The abstention doctrine was first announced in Pullman where the Court held that the district court should not have avoided a fourteenth amendment question through its construction of an ambiguous Texas statute. Id. at 499-500. The Court stayed the federal action and instructed the parties to seek an interpretation of the Texas law from the state courts. Id. at 502. The Pullman abstention doctrine promotes the policy against the unnecessary resolution of constitutional questions by permitting federal courts to evaluate the constitutionality of state laws only where there has been an authoritative determination of those laws. See Theodore B. Eichelberger, Note, Certification Statutes: Engineering a Solution to Pullman Abstention Delay, 59 Notre Dame L. Rev. 1339, 1339-40 (1984). See generally, 17A Wright et al., supra note 2 §§ 4241-4247 (discussing Pullman type abstention and other situations where abstention is allowed).

\(\textsuperscript{9}\) It is important to note that under the Pullman abstention doctrine, the federal courts still retain jurisdiction. The action is held in abeyance while the parties receive a determination from the state courts. Larry M. Roth, Certified Questions from the Federal Courts: Review and Re-Proposal, 34 U. Miami L. Rev. 1, 5 (1979); see also Harrison v. N.A.A.C.P., 360 U.S. 167, 177 (1959) (abstention “does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise”). See generally William C. Bednar, Jr., Comment, Abstention Under Delaney: A Current Appraisal, 49 Tex. L. Rev. 247, passim (1971) (discussing and evaluating abstention process).

\(\textsuperscript{10}\) Supra note 18; see, e.g., Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30 (1959) (upholding abstention order to allow Louisiana Supreme Court to interpret questionable statute); United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483, 484-85 (5th Cir.) (en banc) (ordering abstention so parties can receive state interpretation of insurance contracts), cert. denied, 377 U.S. 935 (1964).

\(\textsuperscript{20}\) See Levin, supra note 1, at 346-47. To obtain a definitive disposition of state law, the litigants must proceed to the final appellate court in the state. Id. If the final appellate court has original jurisdiction, the parties can proceed directly to it. Otherwise, they must pass through the state judicial hierarchy. Id.; see Bellotti v. Baird, 428 U.S. 132, 150 (1976) (noting time delays created by abstention process); Clay v. Sun Ins. Office Ltd. 363 U.S. 207, 227 (1960) (Douglas, J., dissenting) (criticizing “practice of making litigants travel a long, expensive road in order to obtain justice”); see also Charles E. Clark, Federal Procedural Reform and States’ Rights; to a More Perfect Union, 40 Tex. L. Rev. 211, 221 (1961) (“As a result of this doctrine ... cases have been dragged out over eight and ten year periods.”); Corr & Robbins, supra note 2, at 416 (“Abstention’s consequence for the swift, efficient application of justice is obvious.”); Mattis, supra note 17, at 719 (explaining time delay caused by ab-
was first utilized as a means to avoid the delay and expense created by abstention,21 but its use has not been limited to situations in which abstention would be required.22

B. Obtaining an Authoritative Determination of State Law

Certification satisfies the need for authoritative determinations of unclear state law,23 while mitigating the disadvantages caused by abstention.24 For instance, the Uniform Certification of Questions of Law Act ("Uniform Act")25 insures an authoritative determination and concluding "the abstention doctrine cannot be viewed as a particularly bright chapter in the history of American jurisprudence").

21 See Clay, 363 U.S. at 209-12. In Clay, the first case in which the Court directed the use of a certification statute, see supra note 1, the case was remanded to determine questions of state law in order to avoid a constitutional question which was also presented. Clay, 363 U.S. at 213 (Black, J., dissenting).

22 See 17A WRIGHT ET AL., supra note 2, § 4248, at 157-58.

23 See supra note 3 and accompanying text (discussing how certification provides an authoritative determination of state law).

24 See Virginia v. American Booksellers Ass'n, 484 U.S. 383, 396 (1988) (comparing certification to "more cumbersome and . . . problematic abstention doctrine"); Unif. Certification of Questions of Law Act, Commissioner Prefatory note, 12 U.L.A. 49, 52 Commissioner’s cmt. (1990). The comments to the Uniform Act note that certification "is a more rapid method than the use of the abstention doctrine and seems to be a much more orderly way of handling the problem." Id. This policy was recognized in Griffin Hosp. v. Commission on Hosp. & Health Care, 782 F.2d 24, 25-26 (2d Cir. 1986). In Griffin, the Second Circuit held that the district court should have utilized Connecticut's certification statute rather than exercise abstention and stated that, by using certification, "a federal court can obtain definitive and speedier answers to the quandaries prompting it to abstain." Id. at 26; see also Corr & Robbins, supra note 2, at 416-17 (discussing advantages of certification over abstention); Vincent L. McKusick, Certification: A Procedure for Cooperation Between State and Federal Courts, 18 ME. L. REV. 33, 38 (1964) (advocating Florida's certification statute as a way to apply abstention "without at the same time setting procedural traps for the unwary litigant"). But see Clay, 363 U.S. at 224 (Black, J., dissenting) ("Litigants have a right to have their lawsuits decided without unreasonable and unnecessary delay or expense."); L. Cohen & Co. v. Dun & Bradstreet, 629 F. Supp. 1419, 1424 (D. Conn. 1988) (refusing certification because of "time and expense inherent in the certification procedure"); see also Mattis, supra note 17, at 726 (noting that delays of one year were common when certification was used); Theodore B. Eichelberger, Note, Certification Statutes: Engineering a Solution to Pullman Abstention Delay, 59 Notre Dame L. Rev. 1339, 1357-58 (1984) (noting that certification does not completely eliminate the problems of delay).

25 The Uniform Act states, in pertinent part: § 1. [Power to Answer.] The [Supreme Court] may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, the United States Court of International Trade, the Judicial Panel on Multidistrict Litigation, the United States Claims Court, the United States Court of Military Appeals, the United States Tax Court [or the highest appellate court or the intermediate appellate court of any other state], when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of
disposition of the state law issues by requiring that the certification order include all facts necessary to fully disclose the nature of the controversy.\textsuperscript{26} Furthermore, an answering court's determination of a certified question is considered both a binding judicial decision and authoritative state law precedent.\textsuperscript{27}

It is submitted that if federal courts are permitted to draw inferences from the refusal of a state's highest court to answer a certified question, the goal of obtaining an authoritative determination of state law will be defeated. While such inferences would provide for speedy determinations of state law, clearly, no certain conclusions should be drawn from a state court's inaction. It is untenable that these inferences could be accorded the same authoritative status as the carefully researched and thought out opinions that accompany an answer to a certified question.\textsuperscript{28} Thus, such in-

\textsuperscript{26} See, e.g., Tarr v. Manchester Ins. Corp., 544 F.2d 14, 14 (1st Cir. 1976) (refusing to "correct" state court interpretation of statute rendered after certified question); Wolner v. Mahaska Indus., Inc., 325 N.W.2d 39, 41 (Minn. 1983) (stating that response to certified question is "pronouncement of law with the same effect as our pronouncements of law in cases arising in the courts of this state").

\textsuperscript{27} See, e.g., Spencer v. Aetna Life & Casualty Ins. Co., 611 P.2d 149, 151 (Kan. 1980) (certified question examining duty of good faith in insurance law); White v. Edgar, 320 A.2d

\textsuperscript{28} The comment to § 3 emphasizes that thorough factual disclosure is important to the authoritative disposition of the issues; answers should not be given "in a vacuum." Id. § 3, at 53 Commissioner's cmt. Accordingly, the certifying court is encouraged to submit any material that may be of assistance to the answering court, including exhibits, excerpts from the record, and a summary of the facts. Id. Inadequate factual disclosure will cause difficulties for the answering court and may be grounds for refusing to answer the certified question. See, e.g., In re Question Concerning State Judicial Review of Parole Denial, 610 P.2d 1340, 1341 (Colo. 1980) (en banc) (reluctantly answering certified question where limited record made it difficult to give definitive answer to question); In re Beverly Hills Fire Litig., 672 S.W.2d 922, 927 (Ky. 1984) (Vance, J., dissenting) (criticizing lack of factual background in certified questions); In re Richards, 223 A.2d 827, 833 (Me. 1966) (refusing to answer certified question because of lack of necessary findings); Hanchey v. Steighner, 549 P.2d 1310, 1311 (Wyo. 1976) (implying lack of complete factual background justifies refusing certified question); see also infra notes 47-51 and accompanying text (discussion of factual obscurity and vagueness).
ferences are inappropriate where certainty in the state law is the predominant goal.\textsuperscript{28}

C. Certification Promotes Cooperative Judicial Federalism

Another goal of certification is to relieve the tension in the relationship between state and federal courts\textsuperscript{30} by promoting federalism and comity between them.\textsuperscript{31} A federal court demonstrates respect for state sovereignty when it certifies a question to the state's highest court and defers to its judgment on unresolved issues of state law.\textsuperscript{32} The federal courts also benefit because "[t]he feeling

\begin{footnotesize}
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\item[28] See supra notes 18-20 and accompanying text (discussing need for authoritative state law when federal constitutional questions may arise from a decision on state law). It should be noted that state courts are unlikely to refuse a certified question when \textit{Pullman} type abstention is liable to result. Western Helicopter Servs. v. Rogerson Aircraft Corp., 811 P.2d 627, 632 (Or. 1991); supra note 16 (discussing \textit{Pullman} abstention).
\item[32] See Mattis, supra note 17, at 724-25; Scanelli, supra note 2, at 641; see also Florida \textit{ex rel. Shevin v. Exxon Corp.}, 526 F.2d 266, 275 (5th Cir.) (en banc), (noting importance of comity considerations in determining whether to certify questions), \textit{cert. denied}, 429 U.S. 829 (1976); \textit{White}, 320 A.2d at 676 (certification promotes federal-state comity).
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that the federal court [is] ‘cooperating’ in the search for state law rather than seeking to impose its will upon the state might . . . make state judges more receptive to federal views, when federal questions [are] before state judiciaries.”

Furthermore, certification enables a federal court to avoid the embarrassment of having its prediction on a state law issue later overruled by a state’s highest court. Thus, certification provides benefits for both state and federal judiciaries and is accomplished by a “cooperative effort of the federal and State governments.”

It is submitted that this “cooperative judicial federalism” will suffer if inferences are drawn when a state court does not respond to a certified question. Once a certified question is refused, the federal court must resolve the state law question or, in proper circumstances, abstain from hearing the case until the state law issue is resolved. Whenever a federal court attempts to predict how the state’s highest court would decide an issue, it creates a danger that the state court may perceive the federal court as trying to “influence the development of state law.”

If a certifying court may draw inferences from a state court’s refusal to answer a certified question, there is added potential for friction; the state court may perceive that it is being forced to answer a certified question to which it would not otherwise have responded. Thus, the state court’s discretion whether to answer certified questions will be restrained.

promote federalism, the *Cohen* court warned “[t]he interests of comity and federalism would hardly be served if the certification of questions . . . were to become so widespread.”

Id.

Note, *Abstention and Certification in Diversity Suits: “Perfection of Means and Confusion of Goals”*, 73 *Yale L.J.* 850, 865 (1964); see also *White*, 320 A.2d at 675 (certification can “minimize the potential for state-federal tensions arising from actual, or fancied, federal court efforts to influence the development of state law”).

See *Brown*, supra note 30, at 455.


See *supra* note 4.

See *supra* notes 18-21 (discussing abstention).

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

See *Warren*, *supra* note 30, *passim* (discussing various conflicts between state and federal judiciaries throughout history).

See *infra* notes 42-59 and accompanying text (discussing reasons why state courts refuse certified questions).

See *supra* note 6.
II. REASONS FOR REFUSING CERTIFICATION

State courts have refused to answer certified questions for various reasons, and allowing a federal court to draw an inference based on a refusal would blatantly disregard a specific judicial decision to refrain from adopting a position. Some state courts refuse to answer certified questions on the ground that these questions are requests for advisory opinions which are beyond the court's power to issue. The parties must present a "concrete dispute," rather than a hypothetical question, before these courts are within their state constitutional powers to decide the matter.

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42 The Committee on Federal Courts, supra note 6, at 102. When a certified question complies with the state's certification statute, the state court still has the discretion to accept or deny certification. See Western Helicopter Servs. v. Rogerson Aircraft Corp., 811 P.2d 627, 629-34 (Or. 1991) (outlining statutory requirements and discretionary factors for accepting certification); infra notes 42-59 and accompanying text.

43 An advisory opinion has been defined as:
[A] formal opinion by a judge or judges of a supreme court, or by a supreme court, in answer to a question of law, submitted by a legislative body or a governor, a council, or a governor and council, of a state, which question is not related to nor concerned with a case or controversy in actual litigation at the time, and which does not involve private rights.

George N. Stevens, Advisory Opinions - Present Status and an Evaluation, 34 WASH. L. REV. 1, 1-3 (1959). For a general discussion of advisory opinions, see id. passim.

Under the United States Constitution, the judicial power of the United States extends to "Cases" and "Controversies." U.S. CONST. art. III, § 2, cl. 1. Following this requirement, federal courts have refused to render decisions where no "case" or "controversy" was involved. See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937) ("It must be a real and substantial controversy... through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts."). State courts have regularly followed this requirement and have refused to render advisory opinions. See United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 859 (Tex. 1965) ("The giving of advisory opinions is generally recognized as a nonjudicial function... ") (quoting Douglas Oil Co. v. State, 81 S.W.2d 1064, 1075 (Tex. Civ. App. 1935)); Brehm v. Retail Food & Drug Clerks Union No. 1105, 102 P.2d 685, 686 (Wash. 1940) ("The court will not decide a case where the controversy has ceased and there would be nothing upon which a judgment could operate.").

45 In re Question Concerning State Judicial Review of Parole Denial, 610 P.2d 1340, 1340 (Colo. 1980) (en banc) provides an example of a typical certified question: "Under the law of Colorado is there an effective available procedure by which a person confined in a Colorado correctional facility can seek state judicial review of the denial of parole by the Colorado State Board of Parole?" Id. This type of question, without any accompanying facts, presents a hypothetical situation, and a court may feel an answer would be an advisory opinion.

46 See Thiry v. Atlantic Monthly Co., 445 P.2d 1012, 1013-14 (Wash. 1968) (en banc). In Thiry, the certified question asked whether the courts of Washington state can "obtain in personam jurisdiction over an out-of-state publisher who has circulated an alleged libel in the state of Washington" Id. at 1013. Judge Weaver explained that the question should not have been certified on the ground that the court does not have the power to issue advisory
Some states have averted the problem of advisory opinions by requiring that a response to a certified question be determinative of the case, thus assuring that the state's courts resolve only actual controversies.\(^6\)

State courts will decline to answer certified questions that are based on hypothetical fact patterns or are insufficienly grounded in fact; such questions are deemed abstract.\(^7\) It has been suggested


Federal courts have also considered these statutes in determining whether or not to certify a question to the state courts. See, e.g., Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1149 (10th Cir.) ("[C]ertification ... is not appropriate when ... the issue certified would not be determinative of the issues before us on appeal."); cert. denied, 459 U.S. 838 (1982); Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1242 n.5 (6th Cir. 1980) (quoting Mississippi certification statute requiring response to be "determinative of said cause"), cert. denied, 452 U.S. 962 (1981). It should be noted that this requirement is a modification of the Uniform Act, which states that questions "may be determinative of the cause" Unif. Certification of Laws Act § 1, 12 U.L.A. 49, 52 (1990) (emphasis added); supra note 25 (text of § 1). However, some state courts have interpreted certification statutes which read "may be determinative of the cause," as "must be determinative of the cause," and thus apply a stricter standard. See Retail Software Servs., Inc. v. Lashlee, 525 N.E.2d 737, 737 (N.Y. 1988) (per curiam). In Retail Software, although the New York certification statute requires that questions "may be determinative of the cause," the court of appeals refused to answer the certified question stating that the requirement had not been met. Id.; see also Masters Mach. Co. v. Brookfield Athletic Shoe Co., 663 F. Supp. 439, 441 (D. Me. 1987) (refusing to grant motion for certification due to lack of determinability even though statute did not require such).

\(^7\) See Levin, supra note 1, at 351; Kaplan, supra note 16, at 431; see also In re Question Concerning State Judicial Review of Parole Denial, 610 P.2d 1340, 1341 (Colo. 1980) (en banc) (answering certified question but noting limited record accompanying question); Thompson v. State, 170 N.W.2d 101, 103 (Minn. 1969) ("An appellate court will not con-
that abstract questions prevent the answering court from focusing on the critical issues, and thus generate conjectural responses.48 Furthermore, some commentators have asserted that an abstract question amounts to an improper demand that a state's highest court settle an academic dispute.49 To prevent abstractness, several states require certified questions to be briefed and argued.50 However, if the questions are still too abstract to be resolved, the state court will refrain from answering them.51 As with a refusal to issue an advisory opinion, the state court has not addressed the legal issues presented in a certified question when it refuses to answer due to abstractness in the question, and likewise no inferences as to the court's view should be drawn from its refusal to respond.

State courts have refused certification, in other circumstances, without ever reaching the state legal issue presented by the question. Thus, if the state court perceives that the question presents a federal constitutional issue,52 or if the state court finds that there is already state law precedent on which the federal court could have relied,53 certification will be denied. Furthermore, if a party removes a case from state to federal court, a state court may rule later that the litigant forfeited the right to certification.54

In other situations, certification has been refused based on the

48 See Levin, supra note 1, at 351; Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 275 (5th Cir.) (en banc), cert. denied, 429 U.S. 829 (1976) (noting that framing of issue is key factor to be considered in deciding on certification).
49 Lillich & Mundy, supra note 1, at 901. A state's highest court should not "resolve academic disputes submitted by federal judges, nor should federal judges be encouraged to make such demands." Id.
51 See supra notes 47-48.
52 See, e.g., White v. Edgar, 320 A.2d 668, 678 (Me. 1974) ("Federal constitutional issues should not be decided if they may be reasonably avoided."); Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921, 927 (Md. 1984) (declining certified question since argument was "essentially one of federal court jurisdiction and federal constitutional law"); Abrams v. West Va. Racing Comm'n, 263 S.E.2d 103, 106 (W. Va. 1980) (declining to answer certified question dealing with constitutional claim).
53 Western Helicopter Servs. v. Rogerson Aircraft Corp., 811 P.2d 627, 630-31, 635 (Or. 1991) (holding that appellate court decision was precedent on which the federal court could rely). The Uniform Act allows the state court to answer certified questions where there is "no controlling precedent." Unif. Certification of Laws Act § 1, 12 U.L.A. 49, 52 (1990); supra note 25 (text of § 1).
54 Rose, supra note 2, at 440.
state court's deliberate decision not to address a particular legal issue. For instance, state courts have refused certification when no recurrent state issues are involved,55 when the issue was not ripe for determination,56 or when the court wished to afford lower courts the opportunity to rule on the particular issue.57 In addition, a state court may prefer to delay adjudication of a particularly controversial issue58 and at least one court has refused to answer a certified question where the case did not "involve any matter of great public interest presenting any unique or unusual legal problem not already decided by this Court."59 Thus, because a refusal by a state supreme court to answer a certified question may occur for various reasons, permitting an inference based on such a refusal would be illogical.

III. REFUSAL TO TAKE CERTIFICATION AND DENIAL OF CERTIORARI

Certification of questions in some aspects resembles the Supreme Court writ of certiorari.60 A writ of certiorari "will be

55 See Brown, supra note 30, at 457; see, e.g., Unigard Sec. Ins. Co. v. North River Ins. Co., 949 F.2d 630 (2d Cir. 1991) (noting that question presented "is likely to recur"); Barnes v. Atlantic & Pac. Life Ins. Co., 514 F.2d 704, 706 (5th Cir. 1975) (granting certification because of ordinary and repetitive nature of contract dispute); Motor Vehicle Casualty Co. v. Atlantic Nat'l Ins. Co., 374 F.2d 601, 602 n.1 (5th Cir. 1967) (refusing certification where issue was not repetitive).

56 See Lawrence L. Piersol, Note, Certifying Questions to State Supreme Court as a Remedy to the Abstention Doctrine, 9 S.D. L. Rev. 158, 173 (1964). If an issue is not "ripe," a court often feels that the question is not ready for determination. Id.; see also United Pub. Workers v. Mitchell, 330 U.S. 75, 88-91 (1947) (plaintiffs' claim not ripe because while they expressed desire to engage in prohibited political activity they had not yet done so); cf. Hanchey v. Steighneer, 549 P.2d 1310, 1310-11 (Wyo. 1976) (denying certification and noting that federal case was only in pleading stage).

57 See Rufino v. United States, 506 N.E.2d 910, 911 (N.Y. 1987) (resolution of important state issues is preferable to "secure the benefit afforded by our normal process—the considered deliberation and writing of our intermediate appellate court[s]"); see also Allan D. Vestal, The Certified Question of Law, 36 Iowa L. Rev. 629, 635 (1951) (noting that highest state court may desire to wait a period of time before addressing issue).

58 See Levin, supra note 1, at 360 n.102 (citing Moore & Vestal, Present and Potential Role of Certification in Federal Appellate Procedure, 35 Va. L. Rev. 1, 43 (1949)).

59 Cowan v. Ford Motor Co., 437 So. 2d 46, 47 (Miss. 1983). The Cowan court also declined to answer the question on the ground that it involved the interpretation of a state statute that had previously been construed. Id.; see also Stein v. Darby, 134 So. 2d 232, 237 (Fla. 1961) (denying appeal to Supreme Court of Florida due to lack of "great public interest").

60 The writ of certiorari is the discretionary device used by the Supreme Court to determine which cases it will hear. See Richard L. Revesz & Pamela S. Karlan, Nonmajority Rules and the Supreme Court, 136 U. Pa. L. Rev. 1067, 1068-70 (1988). The Supreme Court's "Rule of Four" requires that four justices must vote to hear a case in order to grant
granted only where there are special and important reasons therefor." Similarly, it is not mandatory that a state supreme court respond to a certified question. Just as some state courts refuse certification where the issue involved is not recurrent or does not involve great public interest or importance, the Supreme Court, in deciding whether to grant certiorari, may consider "whether the questions as presented are sufficiently important . . . to justify and require the court to let the case into the court for a full hearing on the merits." Moreover, both certification and certiorari are procedural devices through which courts determine unresolved issues. The procedures are analogous in that a federal court will certify a question to receive an authoritative determination of state law and the Supreme Court will grant certiorari in order to make an authoritative determination of an unresolved issue when, for example, there are conflicting interpretations of an issue in different jurisdictions.

certiorari. Id. Generally, once this requirement is met, the Supreme Court will schedule briefing and oral argument. Id. at 1069. See generally Robert L. Stern et al., Supreme Court Practice §§ 2.1-2.19, 3.1-3.18, at 40-144 (6th ed. 1986) (discussing Supreme Court's certiorari jurisdiction to review federal and state court decisions).

Id. at 1072 (quoting Sur. Cr. R. 17); see also John M. Harlan, Manning the Dikes, Address Before the Eighteenth Annual Benjamin N. Cardozo Lecture Delivered Before the Association of the Bar of the City of New York (Oct. 28, 1958), in 13 Rec. A. B. Cty. N.Y., (Dec. 1958), at 541, 543. Prior to the Judiciary Act of 1925, the Supreme Court's jurisdiction was approximately 80% obligatory and 20% discretionary. Id. at 543. The discretionary jurisdiction of the Court was greatly increased after the Act was passed, while the obligatory jurisdiction was limited. Id.

See supra notes 6, 42-59 and accompanying text.

See supra note 55 and accompanying text.

See supra note 59 and accompanying text.

Revesz & Karlan, supra note 60, at 1072 (quoting Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearings on the H.R. 10479 Before the House Comm. on the Judiciary, 67th Cong., 2d Sess. 2 (1922) (testimony of Chief Justice Taft)).

See supra notes 3, 23-27 and accompanying text.

See Revesz & Karlan, supra note 60, at 1072. The Supreme Court may exercise its discretion and grant certiorari in the following circumstances:

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has
It is suggested that because numerous analogies may be drawn between the certification and certiorari procedures, the two devices should be treated similarly. Therefore, since a denial of certiorari "carries with it no implication whatever regarding the Court's views on the merits of a case," federal courts should be precluded from drawing an inference from a state court's refusal to answer a certified question. The denial of certiorari "simply means that fewer than four members of the Court deemed it desirable to re-view a decision of the lower court as a matter 'of sound judicial discretion,'" such a denial cannot be construed as evidence that the Court believed the decision of the lower court was correct. Just as narrow technical or public policy reasons may cause the Court to deny certiorari, similar reasons may exist for the highest court of a state to refuse to accept a certified question. Therefore, since an inference is prohibited when the Supreme Court denies certiorari, likewise it should not be permitted when a state's highest court declines to answer a certified question.

decided a federal question in a way in conflict with applicable decisions of this Court.

Id. at 1072-73 (quoting Sup. Ct. R. 17).


See Baltimore Radio Show, 338 U.S. at 917; see also Stern, supra note 60, at 269 (explaining that denial of certiorari only "expresses the Court's discretionary refusal to give any kind of appellate review to the decision below").

See William J. Brennan, Jr., State Court Decisions and the Supreme Court, Address Before the Annual Meeting of the Pennsylvania Bar Association (Feb. 3, 1960), in 31 Pa. B.A. Q. June 1960, at 393, 402. Justice Brennan stressed that a denial of certiorari is not an affirmance. Id. He explained that he has often denied certiorari even when he thought the lower court decision was wrong. Id.

See Baltimore Radio Show, 338 U.S. at 918. Justice Frankfurter laid out various reasons why the Court denies certiorari. See id. For example, the issue may be moot or not ripe, the record may be unclear, the lower court's judgment may not be determinative or the judgment may not be from a court of last resort. Id.; see also Brennan, supra note 70, at 402-03 (listing possible reasons for denial of certiorari).

See supra notes 43-59 and accompanying text (discussing ripeness and abstractness as reasons for refusing to take certification).
Conclusion

Certification allows a federal court to obtain an authoritative determination of state law from the highest court of the state without imposing undue delays or expenses upon the litigants. Because the device will continue to be used by federal courts in the future, it is important to realize that a state court’s refusal to answer a certified question should not be construed as an acceptance of a prior federal decision on that issue. Permitting such an inference would amount to a disregard for the various reasons why a state court may refuse certification and would defeat the purposes and policies behind the procedure. This Note has suggested that, because the certification of questions is similar to the writ of certiorari and because inferences based on the Supreme Court’s denial of certiorari are prohibited, federal courts, reciprocally, should not be permitted to make assumptions when a certified question is refused. If certification is to be widely used in the future, it must be used correctly; otherwise, its benefits will be lost.

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