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Cooperative Interbranch Federalism: Certification of State-Law Questions By Federal Agencies

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COOPERATIVE INTERBRANCH FEDERALISM:
CERTIFICATION OF STATE-LAW QUESTIONS BY FEDERAL AGENCIES

Verity Winship*

ABSTRACT

When an unresolved state-law question arises in federal court, the court may certify it to the relevant state court. The practice of certification from one court to another has been widely adopted and has been touted as “help[ing] build a cooperative judicial federalism.” This article proposes that states promote cooperative interbranch federalism by allowing federal agencies to certify unresolved state-law questions to state courts. It draws on Delaware’s recent expansion of potential certifying entities to the Securities and Exchange Commission to argue that this innovation should be extended to other states and other federal agencies.

Certification from federal agencies to state courts promotes cooperative interbranch federalism by preserving state control over certain primary conduct and allocating decisionmaking according to institutional expertise, allowing an agency that is expert in a specialized federal statutory and regulatory scheme to certify questions to a court that is expert in state law. Because the proposed certification procedure is interbranch as well as interjurisdictional, its effect depends on the type of activity in which the agency is engaged: adjudication, rulemaking, or informal action. Federal agency certification has the potential to speed resolution of state-law questions when a federal agency acts as an adjudicator and would add another tool for informed rulemaking. The article concludes that the need for certification is particularly acute, however, when the agency is engaged in informal actions in which no recourse may otherwise be had for interpretations of state law that ultimately the state may reject.

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INTRODUCTION

When an unresolved state-law question arises in federal court, the court may “certify” it to the relevant state court. The practice of certification from one court to another has become widely accepted: most states allow their highest court to answer certified questions from federal judges and sometimes from other states’ courts as well. Certification by federal courts (what this article terms “judicial certification”) has been touted as “sav[ing] time, energy and resources and

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This article proposes that states promote cooperative *interbranch* federalism by allowing federal agencies to certify unresolved state-law questions to state courts.

Interbranch certification may be thought of broadly as any certification process between different branches of the government. Certification by federal agencies to state courts (what this article calls “federal agency certification”) is a special species of interbranch certification. It is this article’s focus because it raises fundamental questions about when and how federal administrative agencies decide issues of state law. Moreover, unlike certification from a federal court to a state court, it operates along the two axes of interjurisdictional (federal to state) relations and interbranch (agency to judiciary) relations.

Because federal agency certification is interjurisdictional, a certification procedure would address some of the same problems that certification by federal courts to state courts does. General notions of comity and federalism are often evoked to explain the benefits of judicial certification – federal entities can show respect for state sovereignty by refraining from deciding certain state-law questions. This general rationale extends to any certifying entity (including federal agencies) when the certification is between the federal and state systems. This article goes beyond this general rationale to identify the more particular benefit to state courts: namely, allowing the state courts additional opportunities to decide state-law questions and preserving their control over certain primary conduct, particularly when a question implicates state policy.

The fact that a federal agency rather than a court is the certifying entity (that certification is interbranch as well as interjurisdictional) complicates the picture. In the context of the federal agency, even more so than a federal court, certification allocates decisionmaking according to institutional expertise. It reflects the judgment that a state court expert in the laws of the state in which it sits is more institutionally suited to deciding unresolved state-law issues that impact state policy than is a federal agency that is expert in a national federal statutory and regulatory scheme, usually in a specialized or technical area.

Furthermore, whether federal agency certification makes sense depends on the type of action the agency undertakes: adjudication, rulemaking or informal action. Federal agency certification has the potential to speed resolution of difficult or important state questions when a federal agency acts as an adjudicator. In the rulemaking context, certification would add another tool for informed rulemaking. The need for certification is particularly acute, however, when the agency is engaged in informal actions; that is, outside of the context of formal

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adjudication or rulemaking by the agency. In this context, absent certification, no recourse may be had for interpretations of state law that ultimately the state may reject. Federal agency certification also gives the agency a mechanism for seeking expert resolution of an issue that is simply unresolved or controversial and particularly linked to state policy decisions.

Part One outlines existing certification procedures, beginning with the widespread practice of allowing state courts to consider state-law questions certified from federal (and sometimes other states’) courts. It then examines the limited existing examples of interbranch certification: Delaware’s recent expansion of potential certifying entities to the Securities and Exchange Commission (“SEC”) and a few states’ inclusion of non-Article III courts in the permissible certifying courts.

Part Two examines the potential practical need for a federal agency certification process by identifying instances in which federal agencies determine state law or when they are faced with the type of unresolved or important state-law issues that lend themselves to certification. Although the variety of federal agencies and the legislative and regulatory schemes they administer makes generalizing difficult, this Part draws on examples from such agencies as the Securities and Exchange Commission, Internal Revenue Service, and Commodity Futures Trading Commission to suggest that some agencies frequently make state law determinations and, even when infrequent, agencies may face state-law questions that are unresolved and important, making certification to a state court appropriate. In other words, federal agency certification solves a real problem.

The argument that certification promotes cooperative interbranch federalism is developed in Part Three. Federal agency certification enhances states’ control of the primary conduct of those subject to state law and can avoid putting the federal agency in the position of predicting state law – and potentially “getting it wrong.” Furthermore, focusing on the “interbranch” aspect of certification, Part Three argues that federal agency certification allocates decisionmaking according to institutional expertise: while federal agencies are expert in the federal law they administer, agencies are less expert in state law than either federal or state courts, making certification particularly appropriate in the interbranch context. This Part also focuses on the different aspects of federal agency activity. Breaking down the actions into adjudication, rulemaking and informal action, the Part examines the benefits of federal agency certification for each activity, concluding that the mechanism is particularly needed when the agency engages in informal action because of the absence of judicial review.

Part Four considers implementation and addresses the most significant concerns with agency certification: that they result in impermissible advisory opinions on the side of the state or impermissible subdelegation by agencies, and that some of the most difficult questions to resolve may inextricably mix state and federal law. Finally, it details the proposed certification procedure and examines how it would modify current practices. Drawing on the earlier debate over judicial certification, the Part suggests several bases for resolving the concerns with advisory opinions, subdelegation and mixed questions of federal and state law.

1. Certification Procedures

Defined broadly, certification is a procedure by which one entity is able to obtain from the determining entity a conclusive answer to a question of law.\footnote{Cf. Allan D. Vestal, *The Certified Question of Law*, 36 Iowa L. Rev. 629, 629-30 (1950) (“[C]ertification of questions of law is a procedure by which an inferior court is able to obtain from a defining court a conclusive answer to a material question of law.”).} One of its defining characteristics is that a decision of the certifying entity would not bind anyone beyond the parties involved in the particular matter. Even within a single branch, certification may be intra-jurisdictional, taking the form of lower courts certifying questions to the appellate court. Within the federal court, for instance, the Courts of Appeals and the Court of Claims may certify questions to the United States Supreme Court,\footnote{28 U.S.C. §§ 1254-1255; Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 Va. L. Rev. 1 (1940).} and several states have similar procedures for intra-jurisdictional certification.\footnote{Vestal, supra note [], at 632; Unif. Certification of Questions of Law (Act) (Rule) 95 Refs & Annos n.1 (1995) (tracing the history of certification procedures).} Certification may also be inter-jurisdictional. The widespread practice of what this article terms “judicial certification” is a procedure by which a court (usually federal, but sometimes another state’s) can refer an unresolved question of state law to the state court for decision.\footnote{Jona Goldschmidt, *Certification of Questions of Law: Federalism in Practice* 1 (American Judicature Society 1995) (describing certification as “the procedure by which a court (usually federal), when faced with an issue of unclear state law, can request a decision on the point from that state’s supreme court”). As has been pointed out, existing judicial certification procedures are not symmetrical: state courts do not certify questions of *federal law to federal courts*. Selya, supra note [], at 684-85. Accordingly, although this article uses the term “judicial certification” narrowly to refer to certification from federal (and sometimes other state’s) courts to state courts, one can imagine a more expansive definition that included (currently non-existent) certification from state to federal court or, indeed, from any court to any other court.}

Certification can be understood broadly as one of several mechanisms that mediate among different levels and branches of government, each of which could legitimately make decisions in that area. It arises, for instance, when a federal
court has subject matter jurisdiction over a state-law issue because the requirements of diversity jurisdiction are fulfilled, but nonetheless seeks an opinion from a state court on an unsettled issue of state law.

One such mechanism is the (badly named) doctrine of primary jurisdiction, which allows a federal court that has jurisdiction over a matter to stay a proceeding and refer it to an administrative agency for initial resolution where the area lies peculiarly within the expertise of the agency. Advisory opinions also serve this function—legislatures or executives request an opinion from a court on a legal question with which they are faced. Similarly, abstention doctrine and procedures identify instances in which the federal courts, despite having jurisdiction, should refrain from deciding an unsettled issue of state law where the issue’s resolution by the state court may make it unnecessary for the federal court to decide a federal constitutional question, to avoid interfering with a state administrative scheme, to allow states to resolve state-law questions, or to avoid duplicative litigation. Indeed, certification developed as a response to abstention, either as a more efficient alternative to it or as an alternative when abstention was a close call. As is explored below, federal agency certification has aspects of several of these mechanisms, depending on whether the state-law

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8 See, e.g., Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644, 673, 123 S.Ct. 1855, 1873 (2003) (Breyer, J., concurring) (“[T]he legal doctrine of ‘primary jurisdiction’ permits a court itself to “refer” a question to the [agency]. That doctrine seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency’s specialized knowledge, expertise, and central position within a regulatory regime.”) (citing United States v. Western Pacific R. Co., 352 U.S. 59, 63-65, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956)).

9 See Comment, The State Advisory Opinion in Perspective, 44 Fordham L. Rev. 81, 81 (1976) (describing an advisory opinion as an “answer given by the justices of a state’s highest court acting in their individual capacities, at the request of a coordinate branch of government, to a legal question regarding a matter pending before the requesting authority”).


11 When a federal court abstains, parties must refile in state court and work through the state court system from the trial court up to the highest court to get the resolution they sought initially in federal court. See John B. Corr & Ira P. Robbins, Interjurisdictional Certification and Choice of Law, 41 Vand. L. Rev. 411, 415 (1988). Although certification’s genesis was as an alternative to abstention, use of certification has extended beyond the limits of abstention and courts – like agencies – would generally not abstain if certification were not available. Empirical evidence supports this suggestion that certification has not simply replaced abstention but is used even when abstention would be inappropriate. All judges responding to a 1985 survey of federal and state judges’ experience of certification said that they would not have abstained from deciding the case if certification had not been an option. Id. at 448. In 1985, they surveyed state and federal judges experienced with certification. Their results are derived from the questionnaire responses of 31 state court judges and 18 federal judges. Id. at 445. Moreover, the “attractiveness as an alternative to complete abstention” was one of the factors to which the judges gave little weight in the choice of certifying or accepting a certified question. Id. at 450-51, Tables 2 & 3.
question arises when the agency is acting through rulemaking, adjudication, or informal action.

This Part describes the current uses of certification, beginning with the well-established practice of judicial certification. It then discusses the limited existing instances of interbranch certification: Delaware’s recent experiment with allowing certification from the Securities and Exchange Commission and some states’ inclusion of non-Article III courts in their certification procedures.

A. Widespread Judicial Certification

The Supreme Court and others have lauded certification by federal courts to state courts as a pragmatic mechanism that promoted the speedy resolution of controversies and, in the Supreme Court’s words, “cooperative judicial federalism.” Such certification grew out of Supreme Court’s decision in Erie Railroad Co. v. Tompkins, in which the Court directed federal courts sitting in diversity to apply state law to resolve substantive issues. In a series of cases beginning in the 1970s, the Supreme Court has encouraged its use. The Supreme Court’s approval was not lost on state legislatures or on state courts. The procedure has become widespread, with all but one state allowing the state’s highest court to answer certified questions from federal judges and sometimes from other states’ courts as well.

The form of state authorization (whether by statute, constitution, common law, or court rule) varies, as does the particular language of the authorization. One characteristic of most states’ procedures is that the procedure is voluntary on

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13 304 U.S. 64 (1938).
14 Certification was first introduced by Florida in a 1945 statute that allowed the Supreme Court of Florida to adopt rules allowing it to accept certified questions from federal circuit courts. Despite the fact that this statute had been ignored and the Florida court had never adopted such rules, in 1960 the U.S. Supreme Court in Clay v. Sun Insurance Office, Ltd. praised the Florida Legislature’s “rare foresight” in enacting a certification statute and encouraged its use. 363 U.S. 207, 212, 80 S.Ct. 1222, 1226 (1960). See generally Goldschmidt, supra note [], at 4-5 (tracing the introduction of certification). In 1974, in Lehman Brothers v. Schein, the Court again endorsed certification procedures, directing the Court of Appeals for the Second Circuit to “reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court.” Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). Two years later, in Bellotti v. Baird, the Court held that the district court “should have certified” to the highest court of Massachusetts the question of interpretation of a new state statute governing abortion by minors. 428 U.S. 132, 151, 96 S. Ct. 2857, 2868 (1976). For more recent Supreme Court encouragement of certification, see City of Houston v. Hill, 482 U.S. 451, 470-71 (1987), appeal dismissed and cert. denied, 483 U.S. 1001 (1987).
15 Goldschmidt, supra note [], at 15-17; Eisenberg, supra note [], at n.13. Note that Missouri has suggested that its certification procedure would be unconstitutional. Grantham v. Mo. Dep't of Corr., No. 72576, 1990 WL 602159, at 1 (Mo. July 13, 1990) (en banc).
both sides. That is, federal courts (or other states’ courts) are under no obligation to certify state-law questions, no matter how unresolved or policy-driven.\textsuperscript{16} Moreover, even if a court certifies a question, the state court is under no obligation to answer it and, in fact, in many instances state courts have declined to do so.\textsuperscript{17} Nonetheless, both certifying and answering courts have used the procedure. The subject matter of the issues that federal courts have certified has been varied and has included questions about the scope of abortion statutes\textsuperscript{18} the power of cities,\textsuperscript{19} the standing rules for claims of tortious interference with a corpse,\textsuperscript{20} whether an internet domain name is “property” subject to the tort of conversion,\textsuperscript{21} and the scope of a state’s long-arm statute.\textsuperscript{22}

The basis for many states’ language is the 1967 or 1995 version of Uniform Certification of Law Act. The Uniform Act proposed the following language for defining the powers of the answering court:

\textsuperscript{16} See, e.g., Second Circuit Rule 0.27 (“Where authorized by state law, this Court may certify to the highest court of a state an unsettled and significant question of state law that will control the outcome of a case pending before this Court.”) (emphasis added)).
\textsuperscript{17} See, e.g., Yesil v. Reno, 92 N.Y.2d 455, 682 N.Y.S.2d 663, 705 N.E.2d 655 (1998), opinion after certified question declined, 175 F.3d 287 (declining to hear a certified question concerning personal jurisdiction over a federal immigration official because the issue was not dispositive and was unlikely to arise in state court); Goldschmidt, supra note [], at 35 (describing the reasons state supreme courts decline to answer certified questions, including where the issue is not one of public importance, not dispositive, or where, in the state court’s view, binding precedent already exists).
\textsuperscript{18} Cf. Bellotti v. Baird, 428 U.S. 132, 151 (1976) (holding that the federal District Court should have certified to the state court the question of the procedure for parental consent for abortions by unmarried women under 18).
\textsuperscript{19} See City of New York v. Smokes-Spirits.Com, Inc., 541 F.3d 425, 457 (2d Cir. 2008) (certifying the question of the city’s power to assert a common law nuisance suit against cigarette manufacturers); cf. Hamilton v. Beretta U.S.A. Corp., 222 F.3d 36, 42 (2d Cir. 2000) (certifying the question of whether gun manufacturers owe a duty to exercise reasonable care in marketing and distributing their products in New York because “[w]hether defendants owe a duty to the plaintiffs’ victims is ... a particularly thorny inquiry, implicating questions of policy that cannot adequately be resolved by reviewing New York state precedents”).
\textsuperscript{20} Amaker v. King County, 540 F.3d 1012, 1013 (9th Cir. 2008) (asking the state supreme court “to determine whether ... the decedent's sister ... has standing to bring a claim for tortious interference with a corpse, and whether the [Washington Anatomical Gift Act] creates a private right of action”).
\textsuperscript{21} Kremen v. Cohen, 325 F.3d 1035, 1038 (9th Cir. 2003).
\textsuperscript{22} Landoil Resources Corp. v Alexander & Alexander Servs., 77 N.Y.2d 28, 31, 565 N.E.2d 488, 563 N.Y.S.2d 739 (1990) (deciding whether a syndicate was “doing business” in New York such that it was subject to personal jurisdiction under New York’s long-arm statute); Internet Solutions Corp. v. Marshall, 2009 WL 311301 (11th Cir. 2009) (deciding whether the posting of an allegedly defamatory story about a Florida-based company on a website owned and operated by a nonresident with no other connection to Florida was “electronic communications into Florida” and accordingly subjected the website owner to personal jurisdiction under Florida’s long-arm statute).
The [Supreme Court] of this State may answer a question of law certified to it by a court of the United States or by [an appellate] [the highest] court of another State [or of a tribe] [or of Canada, a Canadian province or territory, Mexico, or a Mexican state], if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.\(^{23}\)

Although the breadth of state authorizations vary, two requirements suggested by the Uniform Law are common to most states. First, most states include language requiring that the question certified be “determinative” or that it “may be determinative” of the litigation in federal court.\(^{24}\) In part because this requirement is aimed at lessening the concern that answering courts generate impermissible advisory opinions,\(^{25}\) most states have adopted such a requirement and judges (especially state court judges) take them seriously.\(^{26}\) Moreover, state courts have rejected a request for an answer where they have found that the question is not dispositive or determinative of the federal case.\(^{27}\) Second, most states’ judicial certification procedures require that no controlling precedent exist in state law.\(^{28}\)

Florida’s certification procedure provides an example. The Florida constitution allows the Florida Supreme Court to answer questions certified by the U.S. Supreme Court or a U.S. Court of Appeals as long as the question is “determinative of the cause” and “there is no controlling precedent of the supreme court of Florida.”\(^{29}\) The court rule that implements this certification procedure mirrors this language,\(^{30}\) allowing certification as broad as the constitution permits.

\(^{24}\) Goldschmidt, supra note [], at 18-19.
\(^{25}\) See Part 4A below.
\(^{26}\) A 1985 survey of state and federal judges found that state court judges were particularly concerned that “only issues determinative of the case should be certified.” Corr & Robbins, supra note [], at 455.
\(^{27}\) See Corr & Robbins, supra note [], at 455 n.168 (citing cases); Schlieter v. Carlos, 775 P.2d 709, 710 (N.M. 1989) (declining to answer certified question about the constitutionality of a medical malpractice act under the state constitution in because the answer would not be determinative of the motion to bifurcate pending before the certifying federal court).
\(^{28}\) Goldschmidt, supra note [], at 19 (noting that states that require absence of precedent either say that “it appears to the certifying court there is no controlling precedent” or “there is no controlling precedent”).
\(^{29}\) Fla. Const. art. V, § 3(b)(6).
It also details such procedural requirements as “a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise.”

In addition to these state constitutional, statutory and rule-based requirements, both answering and certifying courts have sorting mechanisms designed to gauge the importance of the state-law issue. So, for example, state courts will sometimes consider the importance of a question, declining to answer if “the issue is of such limited legal consequence that it is inappropriate to take the time to produce” an answer. Federal courts have also incorporated some notion of the “importance” of the state law issue into their rules or caselaw concerning when a state-law question should be certified. The United States Court of Appeals for the Second Circuit considers, among other things, “the importance of the issue to the state and whether the question implicates issues of state public policy” when deciding whether to certify a state-law issue. Similarly, the United States Court of Appeals for the Seventh Circuit has said that questions are appropriately certified when, among other requirements, “the case concerns a matter of vital public concern.”

The practice of judicial certification has given rise to an extensive academic literature. Proponents have suggested that certification of state-law issues promotes “judicial economy, comity, ease of application, fairness to the

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32 Western Helicopter Services, Inc. v. Rogerson Aircraft Corp., 311 Or. 361, 369, 811 P.2d 627, 633 (Or. 1991) (“Another factor that goes into our discretionary calculation is the decisional effect of our answer. … We therefore are called on to decide whether we wish to have a decision of our court on the subject of the certified question or whether, on the other hand, the issue is of such limited legal consequence that it is inappropriate to take the time to produce an opinion of this court concerning it.”).
33 O’Mara v. Town of Wappinger, 485 F.3d 693, 698 (2d Cir. 2007) (“In deciding whether to certify, we consider three main issues: (1) the absence of authoritative state court decisions relating to the issue; (2) the importance of the issue to the state and whether the question implicates issues of state public policy; and (3) the capacity of certification to resolve the litigation.”); see also Fidelity & Guar. Ins. Underwriters, Inc. v. Jasaam Realty Corp., 540 F.3d 133 (2d Cir. 2008) (“Where unsettled and significant questions of New York law will control the outcome of a case, Court of Appeals may certify those questions to the New York Court of Appeals.”) (emphasis added).
34 Rennert v. Great Dane Ltd. Partnership, 543 F.3d 914, 918 (7th Cir. 2008) (“Certification is appropriate when the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue.” (quoting State Farm Mut. Auto. Ins. Co. v. Pate, 275 F.3d 666, 672 (7th Cir.2001)); see also Kamaole Pointe Development LP v. County of Maui, 573 F.Supp.2d 1354, 1378 (D.Hawai‘i 2008) (requiring that the certified question involve an “important question of state law”).
35 See, e.g., Goldschmidt, supra note [ ], at 119-37 (providing an annotated bibliography of select literature).
litigants, and most importantly ... avoid[s] judicial guesswork.” Critics have objected on pragmatic grounds that certification may simply be a costly interruption to federal court litigation and on policy grounds that certification is inconsistent with the goals of federal diversity jurisdiction or that federal courts’ discretion to certify makes the procedure “a handout” from federal courts, which “apes federalism, but does not advance it.” As a practical matter, however, the debate over certification from federal courts to state courts is largely over as the last states to hold out have adopted certification procedures. In contrast, certification from federal agencies is a new area of experimentation, with Delaware taking the lead, that scholars and other commentators have largely ignored.

B. Experiments in Interbranch Certification

Certification by federal agencies, as opposed to courts, was not contemplated in the early development of certification, particularly given the roots of federal court certification in Erie and diversity jurisdiction and certification’s role as a practical alternative to abstention. Nonetheless, states have experimented in extending certification practices to a federal agency and to some non-Article III courts.

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37 Selya, supra note [, at 687-88; Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 Va. L. Rev. 1671, 1684-85 (1992) (noting that she was “skeptical that certification presents a viable solution to either the problem of federal encroachment on state sovereignty or the more limited problem of error in prophecy”).

38 See Jonathan Remy Nash, Examining the Power of Federal Courts to Certify Questions of State Law, 88 Cornell L. Rev. 1672, 1675 (2003) (“At the very least certification is in tension with the fundamental purpose of federal diversity jurisdiction.”).

39 Hon. Bruce M. Selya, Certified Madness: Ask a Silly Question . . . ., 29 Suffolk U. L. Rev. 677, 683 (1995) (“[I]f the federal judiciary really is regarded as an 800-pound gorilla, certification is exactly the wrong device for keeping the beast at bay. . . . State courts have absolutely no say in what questions federal courts choose to certify; a state court can refuse to answer a certified question, but it cannot insist that a question be certified in the first instance. In this way, certification is little more than a handout; it is cooperation by way of the gorilla's benevolence. This apes federalism, but does not advance it. At any rate, it is not the kind of federalism on which states can rest serious expectations.”).

40 Eisenberg, supra note [], at 71-72.

41 But see J.W. Verret, Federal vs. State Law: The SEC’s New Ability to Certify Questions to the Delaware Supreme Court, The Corporate Governance Advisor 12, 12 & n.1 (Mar./Apr. 2008), available at http://ssrn.com/abstract=1156527 (focusing on Delaware's new certification procedures); Paul L. Caron, The Role of State Court Decisions In Federal Tax Litigation: Bosch, Erie, and Beyond, 71 Or. L. Rev. 781, 850-52 (1992) (briefly considering the possibility of using certification in “federal tax controversies that turn on the application of state law”).
1. Delaware’s Experiment With SEC Certification—Delaware, like most states, allows its highest court to answer certified questions. Its certification procedure, implemented through a constitutional provision and Supreme Court rules, specifies that the Delaware Supreme Court may hear certified questions from the U.S. Supreme Court, U.S. Courts of Appeals, states’ courts of last resort, other Delaware courts and U.S. District Courts. Unlike many states, which have adopted the Uniform Act’s requirement that the state-law question be “determinative” or “dispositive” of the matter before the certifying court, Delaware adopted a more flexible standard. It must “appear[] to the [Delaware] Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it.” The court rule lists instances in which acceptance of a certified question may be appropriate – when the question is of first impression or “unsettled,” or when conflicting lower-court opinions exist – but does not limit the Delaware Supreme Court to this list.

Delaware’s relatively broad certification procedure became even more expansive in the summer of 2007 when the Delaware legislature amended the Delaware constitution and court rules to allow the state supreme court to hear certified questions from the SEC. The sparse legislative history merely notes that the amendment is intended to allow the state court to hear questions from the SEC, as the text suggests, and points to the fact that “[m]ore than half of the publicly traded companies in the United States are Delaware corporations.”

Although the SEC could have ignored Delaware’s innovation, it instead chose to use the procedure. The agency certified a question in June 2008 and the Delaware Supreme Court answered it soon after. At issue was whether a company — CA, Inc. — could exclude a particular shareholder proposal from its
proxy materials. Under Rule 14(a) of the Exchange Act, the SEC is tasked with regulating proxy solicitations. The SEC’s proxy rules list the permissible bases for exclusion, two of which explicitly involve state law. The proposal may be excluded “[i]f the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company’s organization” or “[i]f the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject.” A third basis for exclusion sometimes involves an evaluation of state law: proposals may also be omitted if “[t]he company would lack the power or authority to implement the proposal.” If a company wants to exclude a shareholder’s proposal, it may request a “no-action letter” from the SEC staff. These SEC “no-action letters” indicate whether the agency would take enforcement action against the company for omitting the proposal.

CA, Inc., sought to exclude a shareholder proposal mandating reimbursement of dissident shareholders’ proxy solicitation expenses. To evaluate the company’s request for a no-action letter, the SEC had to determine whether such reimbursement was a proper subject for action by shareholders under Delaware law and whether, if adopted, it would cause the company to violate Delaware law. The shareholder and the company each submitted an opinion from a Delaware law firm concerning the content of Delaware law. Faced with competing interpretations, the SEC certified the question to the Delaware Supreme Court. The Court concluded that shareholders have the power to pass bylaws but that, as phrased, the proposal would violate Delaware law because it could prevent the board from exercising its fiduciary duties to decide whether reimbursement was appropriate at all.

Although this article suggests that federal agency certification should be adopted more widely, the SEC example can be understood narrowly as part of an ongoing dialog between Delaware and other states and between Delaware and the federal government about control over corporate law. It fits into the long-standing academic debate over whether states compete over corporate charters and the effects of such competition, as well as more recent arguments that Delaware is

52 Id. 14a-8(i)(1), 14a-8(i)(2).
53 Id. 14a-8(i)(6).
56 See William L. Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663 (1974) (arguing that Delaware had led a “race to the bottom” in corporate law by providing law
instead competing with the federal government—including with the SEC—over control over the content and administration of U.S. corporate law.\textsuperscript{57} Seen this way, the expansion of certification is an ingenious move through which the Delaware legislature signals the continuing predominance of Delaware in corporate law.\textsuperscript{58} The introduction of SEC certification might also been seen as a “process innovation” that, with Delaware’s cultivated expertise and a set of specialized courts that is unrivaled in the United States, is part of the innovative and specialized package that Delaware offers corporations.\textsuperscript{59} In sum, there are good reasons for Delaware to be the early adopter and to limit its certification to the SEC,\textsuperscript{60} although, as seen below, this analysis does not answer the question of whether broader adoption makes sense.

2. Certification from Non-Article III Courts—Although the majority of existing state certification procedures permit the state’s highest court to answer certified questions from certain federal courts and occasionally other states’ courts, a few provide that other, non-Article III courts may certify questions.\textsuperscript{61}

\textsuperscript{57} See, e.g., Mark Roe, \textit{Delaware’s Competition}, 117 Harv. L. Rev. 588, 592 (2003) (arguing that Delaware’s real competition comes from the federal government, not other states).

\textsuperscript{58} Delaware predominates incorporation in the United States: as of the beginning of 2000, 57\% of corporations were incorporated in Delaware. Lucien Arye Bebchuk & Alma Cohen, \textit{Firms’ Decisions Where to Incorporate}, 46 J. L. & Econ. 383, 390 (2003) (analyzing publicly traded firms with their headquarters and incorporation in the United States). No other state rivals this percentage; the remaining incorporations are spread among states, often reflecting the corporation’s home state. \textit{Id}. These numbers translate into the wide application of Delaware law, in part because the “internal affairs doctrine” provides that the law of the state of incorporation governs the internal affairs (notably the relationship between shareholders and directors) of the corporation. \textit{See} Restatement (2d) of Conflict of Laws \textsection{} 302.

\textsuperscript{59} Steven J. Cleveland, \textit{Process Innovation in the Production of Corporate Law}, 41 U.C. Davis L. Rev. 1829, 1846-59 (2008). Delaware’s courts might also lend themselves to certified questions for an additional reason: Delaware courts’ notorious indeterminacy. \textit{See}, e.g., Jill E. Fisch, \textit{The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters}, 68 U. Cin. L. Rev. 1062, 1075 (1999) (arguing that Delaware courts are atypical in that they function like a legislature, with policy-driven changes in the law, specialized courts, dictum directed at giving guidance to corporations, and a relaxed use of stare decisis that enables this quasi-legislative functioning). Delaware’s corporate law is unsettled or unpredictable, making it particularly appropriate to defer to the state for both federalism and interbranch reasons.

\textsuperscript{60} It is worth noting that certification does not raise a question about federalization of corporate law, which concerns when a federal statute assigns traditionally state-law areas (e.g., corporate governance) to a federal agency based on federal standards. Instead, this article is concerned with when a federal agency—here the SEC—is tasked with determining and applying state law.

Often the language of the statute is that certification is allowed from “a court of the United States,” which has been interpreted to include bankruptcy courts, military courts, and courts of claims.\textsuperscript{62} Indeed, the 1995 revision of the Uniform Certification of Questions of Law proposes this language (“a court of the United States”) with the express purpose of allowing certification from any United States court, “including bankruptcy courts.”\textsuperscript{63}

As is true of existing certification procedures in general, participation in certification from non-Article III courts is voluntary on both sides in the sense that the certifying court chooses whether to certify and, even when a question has been certified, the responding court can choose whether to answer. Although empirical studies have not focused on certifications by non-Article III courts, one can point to several examples. In Oklahoma, which permits certification from “a court of the United States,” for instance, a bankruptcy court certified two state law questions to the Oklahoma state court, including whether Oklahoma’s motor vehicle lien perfection statute could be interpreted using UCC caselaw regarding substantial compliance and the perfection of a security interest.\textsuperscript{64} Another certified question from a bankruptcy court involved “[w]hether a divorce decree which specifically did not award support alimony may be modified to award alimony.”\textsuperscript{65}

The practical experience with certification by non-Article III courts suggests that expansion of certification procedure is feasible. However, the

\textsuperscript{62} Minn. S.A. § 480.065 (allowing certification from “a court of the United States”). See generally Goldschmidt,\textit{ supra} note [ ], at 17 (listing states that allow certification from non-Article III courts such as the U.S. Bankruptcy Court).

\textsuperscript{63} Unif. Certification of Questions of Law (Act) (Rule) 95 § 3 (1995). The language “a court of the United States” replaced the 1967 version of the Uniform Act that listed particular federal courts. The comments indicate that “This [revision] is intended to permit a court in a State adopting the section to answer questions certified by any United States court including bankruptcy courts. Ultimately, the receiving court retains the power to accept or reject a certified question so that it can control its docket even though the number of courts from whom it may receive a certified question has been expanded.”


\textsuperscript{65} See\textit{ In re Key}, 930 P.2d 383, 384 (Okl. 1996) (answering question certified to it by the U.S. Bankruptcy Court for the Northern District of Oklahoma); see also\textit{ Pioneer Title Co. of Kootenai County v. Cougar Crest Lodge, LLC (In re Weddle)}, 2006 Bankr. LEXIS 3468 (Bankr. D. Idaho, 2006) (certifying question to the Idaho Supreme Court of the priority of liens between a judgment creditor and beneficiary of a deed of trust under Idaho law); see generally Sharron B. Lane,\textit{ To Certify or Not to Certify: When Can a Bankruptcy Court Certify Questions of State Law?} 2004 No. 1 Norton Bankr. L. Adviser 3 (arguing that bankruptcy courts should be able to certify questions of state law).
apparent lack of state interest in following the 1995 Uniform Law’s recommended scope may indicate that states are protective of their courts’ dockets.\textsuperscript{66}

2. When Federal Agencies Determine State Law

This section delineates the practical scope of federal agency certification by considering when federal agencies have to decide issues of state law. Enlarging certification procedures is not costless: costs include amending existing provisions and rules, resolving concerns with advisory opinions and agency subdelegation, and potentially burdening answering state courts. Given these costs, certification only makes sense if the type of unresolved state-law question we would want to be certified actually arises in the agency context.

The question is peculiar to the agency context because agencies are designed to administer federal law and because they have no equivalent to diversity jurisdiction. Certification has its roots in the Supreme Court’s watershed decision in \textit{Erie Railroad Co. v. Tompkins},\textsuperscript{67} in which the Court directed federal courts that were sitting in diversity to apply state law, including state common law, to resolve substantive issues. Federal courts often have to decide issues of state law because of diversity jurisdiction and \textit{Erie}-driven choice-of-law rules,\textsuperscript{68} as well as supplemental jurisdiction.

In contrast, federal agencies have no equivalent of diversity jurisdiction. Instead, federal agencies decide state law when it is incorporated into the federal statute they administer or when the rules and regulations they are empowered to promulgate include state-law standards. So, for instance, in the \textit{CA, Inc.}, example above, the SEC itself allowed exclusion of shareholder proposals based on state law through its proxy rules. In the case of the IRS, state law creates the underlying rights and duties and federal law determines the federal tax consequences of these rights and duties.\textsuperscript{69}

While it is difficult to generalize about the myriad federal agencies, this section draws on examples from such agencies as the Commodity Futures Trading Commission, the SEC, and the Internal Revenue Service to suggest that, although agencies and specialized courts may be thought of as concerned primarily with the

\textsuperscript{66} Cf. Selya, \textit{supra} note [], at 682 (“Certified questions also add to the workload of the responding court, a fact that may dampen its ardor for using scarce judicial resources to tackle what it may view as ‘somebody else’s problem.’”).

\textsuperscript{67} 304 U.S. 64 (1938).

\textsuperscript{68} Approximately 33% of the typical federal court’s docket is based on diversity jurisdiction. See, e.g., 13E Wright et al., \textit{Federal Practice and Procedure: Civil} § 3601 n.77 (2008) (“In the twelve-month period that ended on March 31, 2007, of the 278,272 civil cases commenced in the district courts 92,557 were based on diversity. That represents 33.3% of the cases.”) (citing Administrative Office of the United States Courts, \textit{Federal Judicial Caseload Statistics}, 2007, p. 44, C-10).

\textsuperscript{69} \textit{Morgan v. Commissioner}, 309 U.S. 78, 80 (1940).
federal statutes and schemes they administer, certification of state-law issues solves a real problem: state law arises frequently in the context of some agencies and, even when it arises less frequently, may raise important state-law questions. Moreover, these examples illustrate a certification problem unique to the agency context. Rather than being restricted to unresolved state-law questions that arise during adjudication, agencies may also face such questions in the context of rulemaking or informal action.

A. When Federal Agencies May Determine State Law

A useful starting point for identifying instances of federal-agency determination of state law is the example of the Commodity Futures Trading Commission (CFTC), the independent federal agency with jurisdiction over futures trading. In common with the IRS and SEC examples below, state-law issues are embedded in the federal scheme the agency administers and the agency may address such issues in rulemaking, adjudication or informal action. Beyond this, the CFTC’s determination of state law provided the U.S. Supreme Court an opportunity to determine the permissible limits of federal agency adjudication of state-law issues in *CFTC v. Schor*. The CFTC is home to a dispute resolution mechanism called the Reparations Program. The agency provides a forum and a decisionmaker for

Contrast the majority and dissenting opinions in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (expressing outrage when non-Article III bankruptcy courts were empowered to consider state-created rights and suggested that administrative agencies “adjudicate only rights of Congress’ own creation”); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 96-97 (1982) (White, J., dissenting) (pointing out that “in the ordinary bankruptcy proceeding the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy—claims for goods sold, wages, rent, utilities, and the like” and that “the bankruptcy judge is constantly enmeshed in state-law issues”).

The CFTC is an independent federal agency created in 1974 through the Commodity Futures Trading Commission Act (CFTCA), which provides,

The Commission shall have exclusive jurisdiction . . . with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an “option”, “privilege”, “indemnity”, “bid”, “offer”, “put”, “call”, “advance guaranty”, or “decline guaranty”), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated or derivatives transaction execution facility registered pursuant to section 7 or 7a of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title.


resolving disputes between private parties, in particular “futures customers and commodity futures trading professionals.” Although triggered by claims of a violation of a federal statute and regulations (the Commodity Exchange Act or the CFTC Rules), the statute and rules also allow the CFTC to hear counterclaims, including state-law counterclaims.

The CFTC’s power to hear such state-law counterclaims was challenged in CFTC v. Schor on the grounds that the grant of power violated Article III of the Constitution. At issue was a reparations complaint by Schor against a commodity futures broker for alleged violations of the CEA. The broker made a counterclaim for the debit balance, insisting that the debit was a result of Schor’s trading and was a “simple debt owed by Schor.” At the time, the CFTC regulations allowed the agency to adjudicate all counterclaims “arising out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint.” In other words, the CFTC had the rough equivalent of supplemental jurisdiction over state-law counterclaims.

The Supreme Court concluded that “the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims” – the CEA violations – “willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.” Packed into this conclusion were indications that the Court was swayed by the consent of the now-complaining party (the counterclaiming party voluntarily moved its claim to the reparations forum), protections provided by judicial review (“initial agency adjudication”), and the continuing centrality of the federal claim.

CFTC v. Schor indicates that the permissible reach of state-law decisions by agencies is fairly broad and pragmatically drawn. However, federal agencies

75 See 17 C.F.R. § 12.13 (describing the criteria for filing a reparations complaint with the CFTC).
76 17 C.F.R. § 12.19 (“A registrant may, at the time of filing an answer to a complaint, set forth as a counterclaim … (b) Any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.”).
77 478 U.S. at 835-36.
78 478 U.S. at 837-38.
79 Id. at 838.
81 Cf. 28 U.S.C. § 1367 (allowing federal courts supplemental jurisdiction over state-law claims that formed part of the same case or controversy as the claim within original jurisdiction, with a few enumerated exceptions).
82 478 U.S. 857.
are appropriately in the business of making such decisions when they are “incidental to, and completely dependent upon, adjudication of reparations claims created by federal law,” which comports with the understanding of federal agencies as primarily concerned with administering federal law.

**B. When Federal Agencies Decide**

**Unresolved or Important Questions of State Law**

Federal agencies may decide state-law issues, at least in the circumstances described by *CFTC v. Schor*, but more is needed for the purposes of determining whether a new federal agency certification procedure is warranted. Federal agencies must be put in the position of determining the type of state-law questions that are appropriately certified; primarily those unresolved by the highest state court and implicating state policies. The aim of this section is not to give an exhaustive account of all of the unresolved state-law issues that have arisen or that may arise in the course of agency activity. Just as in judicial certification, the argument is not that certifiable questions are ubiquitous or that all unresolved state-law questions implicate high profile political controversies. Judicial certification is neither – it is widely accepted, but not all state law issues decided by a federal court are certifiable. The issues may be settled in state law, unlikely to recur, or may not implicate important state policies. In the context of certification from federal courts to state courts, some certifiable questions concern hot button issues such as abortion, while others concern contract interpretation or the scope of personal jurisdiction. The point is that federal agency consideration of certifiable state-law questions is frequent enough for states to consider putting in place a flexible mechanism to address them; namely federal agency certification. The number and variety of agencies and types of activities, many of which are inaccessible, make generalizing difficult. Nonetheless, through examples, this section suggests that federal agencies are faced with the type of state-law questions that would be appropriately certified to a state court.

**1. The SEC Example**—As the single certified question to date illustrates, the federal securities laws and regulations sometimes put the SEC in the position of deciding state-law issues. One indicator is the extent to which reported decisions by the SEC, both formal and informal, include consideration of state law. State-law issues occasionally arise in SEC adjudication. For instance, an

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83 Id. at 856.
84 See *supra* [p9].
SEC administrative law judge had the occasion to apply state law about piercing the corporate veil.\textsuperscript{87} Moreover, whether a shareholder proposal may be excluded from a proxy statement will sometimes turn on its consistency with state law, as it did in the matter of \textit{CA, Inc}. Indeed, the Director of the Division of Corporate Finance at the SEC identified certification to the Delaware court as a “very useful tool” for resolving no-action letters concerning shareholder proposals.\textsuperscript{88}

To get a sense of just how frequently these shareholder proposal no-action letters may give rise to certifiable questions, consider that, out of the approximately 373 no-action letters issued by the SEC from October 1, 2007 to October 1, 2008, the SEC had to determine state law in approximately 32 (or 9%). This percentage gives a rough estimate of the frequency of state-law issues, although of course not all state-law questions are unresolved or otherwise appropriate for certification and the percentage may vary as the subject matter of shareholder proposals vary from year to year.\textsuperscript{89}

The proxy example is not the only instance in which the federal securities laws or regulations incorporate state law and put the SEC in the position of determining state-law issues. Examples in the SEC context include certain exemptions: Some securities are exempt from federal registration when they are exempt under the laws of a particular state.\textsuperscript{90} Likewise, common trust funds can avoid classification as an investment company if certain conditions are met, including when its fees and expenses are “not in contravention of fiduciary

\textsuperscript{88} John W. White, Director, Div. of Corp. Fin., U.S. Sec. Exch. Comm'n., Address at the American Bar Association, Section of Business Law, Committee on Federal Regulation of Securities: Corporation Finance in 2008-A Year of Progress (Aug. 11, 2008), available at http://www.sec.gov/news/speech/2008/spch081108jww.htm (calling certification a “very useful tool” as the division of Corporate Finance “review[s] the hundreds of no-action requests we receive each year on shareholder proposals.”).
\textsuperscript{89} One year may be dominated by proposals for a shareholder vote on executive pay, for instance, while in the next proposals to declassify boards of directors predominate. See, e.g., RiskMetrics Group, 2008 Post-Season Report Summary, available at http://www.riskmetrics.com/docs/2008postseason_review_summary (surveying proxy trends).
\textsuperscript{90} Thomas Lee Hazen, Law of Securities Regulation § 4.16; Rule 1001, 17 C.F.R. § 230.1001, adopted in Sec. Act Rel. No. 33-7285, 1996 WL 225996 (SEC May 1, 1996). For small offerings to qualify for an exemption under Section 3(b) of the Securities Act and SEC Rule 504, issuers must either be issued under a state-law exemption allowing general solicitation and advertising for sales to “accredited investors” or they must be registered under a state law requiring public filing and delivery of a disclosure document. Marc I. Steinberg, Understanding Securities Law § 3.09[1] (4th ed. 2007); Securities Act Release No. 7644 (1999); Rule 504(b)(1), 17 C.F.R. § 230.504(b)(1); Hazen, \textit{supra}, § 4.20; see also Steinberg, \textit{supra}, § 3.11 (describing the “California exception” in which SEC Rule 1001 exempts from registration “offers and sales up to $5,000,000 that are exempt from state qualification” under a section of the California Corporations Code).
The question was unresolved and was a high-stakes corporate law question; the *CA, Inc.*, example concerns the relative power of shareholders and directors, a balance at the heart of U.S. corporate law. Moreover, states have traditionally been the source of the corporate law governing the corporation’s internal affairs, more so than in other areas of the law. The Supreme Court has repeatedly emphasized the predominance of state corporate law: “Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.”94 While in some ways Delaware’s experiment in interbranch certification may seem *sui generis* because of its special combination of the question’s subject matter and the particular and peculiar state, it may serve as a model for the broader federal agency certification that this article proposes.

**2. Other Federal Agencies**—The extent to which other federal agencies decide issues of state law is suggested both by the degree to which state law forms part of the federal statutory and regulatory scheme and by the extent to which reported agency determinations resolve state-law issues.

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91 Investment Company Act § 3(c)(3) (a common trust fund is not an investment company if, among other requirements, “fees and expenses charged by such fund are not in contravention of fiduciary principles established under applicable federal or state law”).
92 Hazen, *supra* note [], § 5.1.
93 Report Pursuant to Section 308(c) of the Sarbanes Oxley Act of 2002, at 2
94 *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977), quoting *Cort v. Ash*. See also Leo E. Strine, Jr. (Vice Chancellor of the Delaware Court of Chancery), *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 Bus. Law. 1079, 1079 (2008) (calling himself a “corporate law federalist” who “believes that the internal affairs of American corporations should continue to be regulated primarily by state law, with the national or ‘federal’ government playing a vitally important, complementary role in ensuring that companies that issue publicly traded securities provide investors with reliable information and conduct their financial affairs in accordance with accepted accounting standards”).
Some particular areas of the law tend to be defined by state law. For instance, state-law definitions of family relationships often underlie determinations of rights or responsibilities in federal law. In the immigration context, for example, determining whether an individual is a legitimate child of a U.S. citizen may be part of a defense to removal or exclusion actions: the defense is that the person is a U.S. citizen based on birth.95 “Legitimacy” is defined by the law of the child’s or father’s residence or domicile, which includes state law.96 Similarly, the Board of Veterans’ Appeals is often in the position of determining whether someone is a “surviving spouse” entitled to benefits.97 This determination depends in part on state rules about marriage and, in particular, common law marriage.98

As well as particular subject areas, some agencies are continually involved in determining state law. The Internal Revenue Service is one such example. As the Supreme Court made clear years ago: “State law creates legal interests and rights” while “[t]he federal revenue acts designate which interests or rights, so created, shall be taxed.”99 So, for example, the Service looks to the underlying

95 See, e.g., In re Joseph Cabilte Anderson, 2009 WL 263034 (BIA Appeal 2009) (unpublished) (denying a motion to cancel removal because petitioner was not a U.S. citizen based on the requirements of blood relationship and legitimacy); 1963 BIA LEXIS 27 (B.I.A. 1963) (applying California law to determine legitimacy of child).
96 8 U.S.C. § 1101(c)(1) (1976) (“The term child means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child’s residence or domicile, or under the law of the father’s residence or domicile, whether in the United States or elsewhere ... if such legitimation ... takes place before the child reaches the age of sixteen years, and the child is in the legal custody of the legitimating ... parent ... at the time of such legitimation.”).
97 See, e.g., 38 U.S.C.A. § 103(c) (West 2002) (defining “marriage” as a marriage valid under “the law of the place where the parties resided at the time of the marriage, or the law of the place where the parties resided when the rights to benefits accrued.”); 38 C.F.R. § 3.1(j).
98 See, e.g., 2007 BVA LEXIS 25776, 6-7 (BVA 2007) (applying Iowa state law to determine whether woman who divorced a veteran with Alzheimer’s, allegedly for financial reasons, was in a common law marriage post-divorce so entitled to pension benefits); 2005 BVA LEXIS 110301 (BVA 2005) (considering whether woman was a surviving spouse based on a common law marriage).
99 Morgan v. Commissioner, 309 U.S. 78, 80 (1940), quoted in Paul L. Caron, The Role of State Court Decisions In Federal Tax Litigation: Bosch, Erie, and Beyond, 71 Or. L. Rev. 781, 782 (1992). Professor Caron points out that, while this aspect of allocation between state and federal law is long-established, a conflict continues over whom should be the “ultimate arbiter of the meaning and application of state law in a federal tax controversy.” Id. at 783. He is concerned in particular with the degree of deference federal courts should give to lower state court decisions concerning the particular taxpayer. Id.
state law to determine a taxpayers’ interest in property, partnership and LLC liabilities, or when “theft” that qualifies for a theft deduction has occurred.

To assert that federal agencies often decide issues of state law is not to say that all state-law questions are certifiable – it is merely to suggest that the pool of state-law questions is large and likely includes questions that are unresolved by the highest state court or implicate state policy. In a technical advice memo responding to the question of whether the Tax Court can certify an issue to a state supreme court, IRS staff both acknowledged that “numerous areas of tax law are affected by state law (i.e., alimony, divorce, partnership law, insurance, and estate tax),” and declined to adopt a policy favoring certification, suggesting that certification was appropriate only when “the law is so unclear or unambiguous on an issue and that issue would be dispositive of the tax litigation.”

Another indicator that federal agencies are faced with certifiable questions is the existence of state-law questions that arose in administrative proceedings and that ultimately were certified by a reviewing court. The point here is not whether or not federal agency certification is necessary when the reviewing court can certify a question – a point taken up below – but rather that, applying the standards currently applied to judicial certification, certifiable state-law issues do arise before federal agencies.

A good example is provided by decisions by the National Labor Relations Board ("NLRB"), an independent federal agency, that determine whether private property rights conflict with rights under the federal labor laws. State law

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102 Rev. Rul. 72-112, 1972-1 C.B. 60, 1972 WL 29725 (IRS RRU) ("Ransom payments qualify as a theft loss deduction if the taking of the money was illegal under the law of the State where it occurred and the taking was done with criminal intent.").
104 Id. Interpreting Montana's certification procedure, it determined that the Tax Court was likely captured by the term “United States Court” on the list of permissible certifying entities, but nonetheless thought certification was inappropriate because resolving the state-law issue would not resolve the case and ample case law existed on the issue. Id.
105 Bristol Farms, Inc. & United Food and Commercial Workers International Union, Local 1442, AFL-CIO, 311 N.L.R.B. 437, 438 (N.L.R.B. 1993) (“When nonemployee union representatives engaging in Section 7 activity are excluded from private property by an employer possessing a property right that (aside from any Sec. 7 privilege the union representatives might have to remain on the property) entitles the employer to exclude them, there is a conflict between the union's Section 7 rights and the employer's property right.”); Glendale Assocs. v. NLRB, 335 N.L.R.B. 27, 28 (N.L.R.B. 2001) (determining that prohibitions on identifying by name the center owner, manager, or any tenant of the shopping center were content restrictions that could not be imposed under
determines the private property rights, putting the federal administrative agency in the position of determining the content of state law. 106 In Fashion Valley Mall, LLC v. National Labor Relations Board, for instance, the NLRB had to decide whether a California shopping mall that prevented a union from protesting had violated a provision of the labor act defining unfair labor practices. 107 The shopping mall allowed expressive activity by those who obtained a permit and agreed to abide by the mall’s regulations, including one prohibiting expression urging boycotts of mall shops. 108 An administrative law judge found for the Union and the Board affirmed. 109 The basis of the Board’s decision was a holding that California state law allowed “the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner,” but that the anti-boycott rule was a content restriction and thus not allowed by California law. 110 Requiring the Union to adhere to this unlawful rule amounted to a federal labor law violation. 111 The issue reached the U.S. Court of Appeals when the shopping mall petitioned for review and the Board sought enforcement of its order. 112 The Court of Appeals then certified to


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106 Id. at 438 (“To determine whether the Respondent had a property right entitling it to exclude the union agents from the sidewalk in front of its store, we must look to the law that created and defined the Respondent's property interest. It is well established that property rights generally are created by state, rather than Federal, law.”).

107 Fashion Valley Mall, LLC v. National Labor Relations Board, 451 F.3d 241, 246-47 (D.C. Cir. 2006) (noting that the union alleged violation of § 8(a)(1) of the Act, HN129 U.S.C. § 158(a)(1), which makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise" of "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, 29 U.S.C. § 157).”)

108 Id.

109 Id.

110 Equitable Life Assur. Soc’y of the United States, 343 N.L.R.B. No. 57 (Oct. 29, 2004) (“[W]e look[] to State law to ascertain whether an employer has a property right sufficient to deny access to nonemployee union representatives…. [A]n employer cannot exclude individuals exercising Section 7 rights if the State law would not allow the employer to exclude the individuals…. California law permits the exercise of speech and petitioning in private shopping centers, subject to reasonable time, place, and manner rules adopted by the property owner…. Rule 5.6.2, however, is essentially a content-based restriction and not a time, place, and manner restriction permitted under California law…. [T]he purpose and effect of this rule was to shield [Fashion Valley’s] tenants, such as the Robinsons-May department store, from otherwise lawful consumer boycott handbilling. Accordingly, we find [Fashion Valley] violated Section 8(a)(1) by maintaining Rule 5.6.2.”) (internal citations and quotations omitted). The Board also held the Company violated § 8(a)(1) by "requir[ing] [the Union’s] adherence to [the] unlawful rule" in its permit application process. Id. Consequently, the Board ordered Fashion Valley to rescind Rule 5.6.2.

111 Id.

the California Supreme Court the question of whether California law permitted the shopping mall to enforce an anti-boycotting rule.\textsuperscript{113} The California Supreme Court, in its response, held that the shopping mall could not enforce such a rule.\textsuperscript{114}

Similarly, in \textit{Waremart Foods, D/B/A Winco Foods, Inc. v. National Labor Relations Board}, the NLRB had to determine whether state law permitted a grocery store to prevent members of the public from engaging in expressive activity on adjacent parking lot and walkway and whether, if they could exclude, state law made an exception for distribution of literature by union leaders.\textsuperscript{115} When the grocery store appealed and the NLRB sued for enforcement, the U.S. Court of Appeals certified the question to California Supreme Court,\textsuperscript{116} although the California state court ultimately declined to answer.\textsuperscript{117}

3. The Special Case of Regulatory Preemption—Finally, federal agencies may be tasked with interpreting state law when deciding the scope of preemption of state law by federal administrative regimes. Regulatory preemption, the “preemption of state law by regulations promulgated by federal agencies,” raises complex issues, including whether an agency’s determination that preemption is appropriate merits \textit{Chevron} deference.\textsuperscript{118} Although analysis of regulatory preemption’s complications and the sizable academic literature discussing it\textsuperscript{119} are largely beyond the scope of this article, a few aspects of regulatory preemption suggest that federal agency certification offers intriguing possibilities as a mechanism to promote the cooperative resolution of questions of preemption.

Questions of preemption can be either general or specific. That is, an agency or a court might have to decide whether the federal regulations preempt

\textsuperscript{113} Id. at 327.

\textsuperscript{114} \textit{Fashion Valley Mall, LLC v. National Labor Relations Bd.}, 42 Cal. 4th 850, 855 (Cal. 2007) (“[W]e hold that the right to free speech granted by … the California Constitution includes the right to urge customers in a shopping mall to boycott one of the stores in the mall.”).


conflicting state law in general\textsuperscript{120} or whether the federal regulations preempt a specific state law. It is this second category that requires the agency to determine the content of state law to evaluate whether state law “stand[s] as an obstacle to,” “impair[s] the efficiency of,” “significantly interfere[s],” “interfere[s],” “infringe[s],” or “hamper[s]” federal law.\textsuperscript{121} Sometimes an argument that federal law preempts state law arises as a defense, and sometimes agencies permit application by a state to determine the extent to which state law is preempted.\textsuperscript{122}

While often state courts and ultimately the U.S. Supreme Court are in the position of determining issues of preemption,\textsuperscript{123} questions of regulatory preemption do arise in the agency context in both adjudicatory and informal settings. So, for instance, in an unpublished interpretive letter, the Office of the Comptroller of the Currency considered whether application of a state statute to the loans held by certain banks was preempted by the banks’ power under federal law to be trustees.\textsuperscript{124} The Federal Communications Commission has determined whether the Communications Act of 1934 preempted state-law claims related to the bundling of local and long-distance telephone service in the context of a petition for a declaratory judgment.\textsuperscript{125}

In some ways when a federal agency must decide whether its regulations preempt state law seems to be a situation in which agency certification of the state-law issue would promote cooperative interbranch federalism.\textsuperscript{126} Certainly the state has a stake in answering the question and state policy is implicated. Given that the procedure would be voluntary on both sides, how certifying federal agencies and answering state courts would use the procedure is uncertain. Even in

\textsuperscript{120} 28 CFR 808.1 (describing the pre-emptive effect of federal regulation of medical devices); see also Amanda Frost, Judicial Review of FDA Preemption Determinations, 54 Food & Drug L.J. 367 (1999).


\textsuperscript{122} See, e.g., 12 C.F.R. 213 (2007) (“A state, through an official having primary enforcement or interpretive responsibilities for the state consumer leasing law, may apply to the Board [of Governors of the Federal Reserve System] for a preemption determination.”); 12 C.F.R. 226 (2009) (detailing the rules for a request for determination that a state law is “inconsistent” or “substantially the same” in the context of federal Truth in Lending requirements).

\textsuperscript{123} See, e.g., Altria Group, Inc. v. Good, 555 U.S. ___ (2008) (agreeing with the FTC that neither the Labeling Act’s preemption clause nor the FTC’s actions preempted a state-law fraud claim based on advertising for “light” cigarettes).

\textsuperscript{124} 12 C.F.R. 34.4; 12 U.S.C. § 92a.

\textsuperscript{125} Linda Thorpe v. GTE Corp., 23 FCC Rcd 6371, 6374 (F.C.C. 2008) (holding that the Communications Act of 1934 preempted state-law claims concerning whether individual was required to have long-distance service on her telephone line).

\textsuperscript{126} Certification would supplement requests for comments, even outside formal notice and comment requirements, which may further some of the same goals. In Linda Thorpe v. GTE Corporation, for example, the FCC requested and considered comments from various groups, including state agencies. 23 FCC Rcd at 6374 & nn. 27-28.
well-established judicial certification, different federal jurisdictions and, indeed, different judges, approach the procedure with varying degrees of enthusiasm or doubt.\textsuperscript{127} Perhaps federal agencies would be unwilling to certify such questions and, even if they did, state courts might be reluctant to find preemption. Empirical work to date has suggested, for instance, that federal courts are much more likely than state courts to find that a federal regulation preempts state law,\textsuperscript{128} although this is not to say that a federal agency would always support preemption.\textsuperscript{129} Despite these and other caveats,\textsuperscript{130} this area is one in which informed agency decisionmaking is particularly crucial and warrants experimentation.

C. The Role of the Certifying Federal Agency: Adjudication, Rulemaking or Informal Action

The examples above indicate something that sets federal agency certification apart from any type of court-to-court certification. The state-law issues may be resolved in any of the contexts in which the agency undertakes action: adjudication, rulemaking, or informal action.


\textsuperscript{129} FTC and Department of Justice Amicus Curiae Brief in Altria v. Good et al., Concerning the Effect of the Federal Cigarette Labeling and Advertising Act (FCLAA) on State Law Claims Against Cigarette Companies (U.S. Supreme Court (Case No. 07-562)) (June 2008) (P082105) (arguing that the FTC had not preempted state law about cigarette labeling).

\textsuperscript{130} Another limitation may be that, in some cases, courts actually pass the preemption decision to the federal agency, so it is unlikely that passing it back through a certification procedure makes sense. See, e.g., 23 FCC Rcd at 6373-74 (the case was referred to the Commission from proceedings in federal court on the basis of the primary jurisdiction doctrine); Petition for Declaratory Ruling on Issues Contained in Count I of White v. GTE, WT Docket No. 00-164, Memorandum Opinion and Order, 16 FCC Rcd 11558 (2001) (same); supra (discussing the primary jurisdiction doctrine); see also Wireless Consumers Alliance Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as Amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to Preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) for Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, WT Docket No. 99-263, Memorandum Opinion and Order, 15 FCC Rcd 17021, 17022 (FCC 2000) (considering whether the Communications Act of 1934 preempted state courts from awarding monetary damages against wireless providers, a question referred to the FCC by the California state court).
Potentially certifiable state-law issues arise in an agency adjudication in several of the examples above: the administrative law judge decisions of the NLRB, the CFTC in the context of its reparations program, and sometimes the SEC. Even within the context of adjudication, some types of adjudication are very much like a court’s. In the CFTC reparations program, the agency provides the decisionmaker (akin to a judge) to resolve a dispute between two private parties engaged in adversarial proceedings.\footnote{Verity Winship, Public Agencies and Investor Compensation: Examples from the SEC and CFTC, Admin. L. Rev. (2009) (comparing agency provision of a decisionmaker to agency’s role as counsel in the context of investor compensation).} Perhaps the more common case arises when the agency is both an adjudicator and a party.

As for the agency’s rulemaking activities, because federal administrative agencies lack the power to prescribe the content of state law through legislative rulemaking, perhaps the most pressing rulemaking area in which state input would promote “cooperative interbranch federalism” is when a federal agency determines the impact of a federal regulation on state law, often a preemption determination. The issue recurs. Regulations – or their preambles – often state whether the federal regulations are intended to preempt conflicting state law.\footnote{Frost, FDA Preemption, at 381, citing Fidelity Federal Savings and Loan Association, 458 U.S. at 158 (quoting the pre-amble to Federal Home Loan Bank board regulations, which said that “[f]ederal [savings and loan] associations shall not be bound by or subject to any conflicting State law which imposes different ... due-on-sale requirements”); Catherine M. Sharkey, Preemption by Preamble: Federal Agencies and the Federalization of Tort Law, 56 DePaul L. Rev. 227, 227-28 (2007).} Indeed, a 1996 Executive Order issued by President Clinton mandated that a federal regulation “specify in clear language the preemptive effect, if any, to be given to the law.”\footnote{Executive Order 13132.}

When the agency acts in its rulemaking capacity, an ability to certify unresolved state-law questions to the relevant state court may supplement existing cooperative mechanisms (in particular, the ability to seek state opinions through the notice-and-comment process). At the same time, certification in this instance is analogous to the situation where a legislature asks a court for its opinion on a legal matter pending before it. This language should sound familiar: rather than speaking of this process as “certification,” it is usually termed an “advisory opinion.” As detailed below, the issuance by courts of such opinions are generally impermissible both in the federal system and in the majority of states. Accordingly, certification from an agency when it is acting in its rulemaking (legislative) capacity may have the most difficulty in implementation. Because of these limitations, this article focuses on agency action through adjudication and informal action of various sorts.
Finally, much of agency activity falls into the category of “informal action,” a residual category that captures a wide variety of agency activities that are neither adjudication nor legislative rulemaking. The forms it might take are as various as the federal agencies themselves. Whereas judicial interpretation occurs in the context of a court’s resolution of an adversary proceeding, agencies may act through “legislative rules, interpretive rules, statements of policy, manual issuances, advisory opinions, letters, press releases, after dinner speeches, formal adjudications, informal adjudications, interpretive memoranda, guidelines, ‘rulings,’” and other forms. The SEC no-action letter process is an example of an informal action with many of the attributes of adjudication (opposing “parties,” a third-party adjudicator, etc.), but one might also point to statements of guidance such as IRS private letter rulings.

* * *

In sum, the variety of federal agency types, activity and statutory or regulatory schemes means that this area resists generalization. Nonetheless, the examples above suggest that federal administrative agencies are often in the position of determining state law (for example, the IRS) and that, even when these determinations are less frequent, they may involve important and unresolved state issues (for example, the SEC and the CA, Inc., shareholder proposal certification). Moreover, these potentially certifiable questions may arise in adjudication or informal action.

3. HOW CERTIFICATION PROMOTES COOPERATIVE INTERBRANCH FEDERALISM

Comity and federalism, or the “spirit of” comity and federalism, are often given as reasons for federal court certification to state courts, at least when the question involved impacts state policy. To the extent that this rationale describes a mechanism through which federal entities can show respect for state

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136 See, e.g., Kremen v. Cohen, 325 F.3d 1035, 1037-38 (9th Cir. 2003) (“The certification procedure is reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts. We request certification not because a difficult legal issue is presented but because of deference to the state court on significant state law matters…. We would not presume to certify a run-of-the mill case to your Court nor would we use the certification process to sidestep our diversity jurisdiction. In a case such as this one that raises a new and substantial issue of state law in an arena that will have broad application, the spirit of comity and federalism cause us to seek certification.”); Hakimoglu, 70 F.3d at 302 (Becker, J., dissenting) (asserting that, without certification, federal courts “are forced to make important state policy, in contravention of basic federalism principles”).
sovereignty, it extends to any federal certifying entity, whether judicial or administrative or something else, and lends support to the argument that states should adopt federal agency certification. This Part goes beyond this general concern with comity or federalism to ask what particular state powers should be preserved (or what specific interests a federal agency certification procedure would protect).

In particular, federal agency certification would promote state control over the primary conduct of those who, in the absence of certification, would be directly affected by a federal agency’s decision of state law and also those who shape their behavior in response to agency decisions, formal and informal, including those involving state law. Moreover, it would allocate decisionmaking according to institutional expertise, taking advantage of the highest state court’s knowledge and expertise in state law and its flexibility in considering state policies and legal regimes to reach its decision.

Finally, the advantages of a federal agency certification procedure vary depending on the context in which the certifiable question arises. In agency adjudication, the availability of a federal agency certification procedure would speed resolution of state-law issues and, where judicial review is unavailable as either a practical or a legal matter, would provide recourse to parties involved in agency adjudicatory proceedings. In the context of agency informal proceedings, the availability of certification would provide a safety valve important in the absence of judicial review.

A. Certification Preserves State Control Over Primary Conduct

That the state should have the opportunity to declare and to control the development of state law, particularly when important (or controversial) state policies are at issue, is often put forward as a compelling reason for judicial certification. Sometimes it is referred to as a concern with preserving state “control” of the content and development of its own law. “Control” in this context does not mean that the certifying court (or agency) has imposed particular content on the state. A decision of state law by the federal agency or the federal court does not bind the state – the highest state court is free to disregard the federal court’s prediction and come to a different conclusion.

Moreover, the meaning of “control” may differ in the judicial and federal agency contexts. A federal agency’s decision of state law may have less of a ripple effect than one by a federal court. The state control justification for judicial certification relies in part on the idea that the federal court’s decision, though not

binding on the state, may be influential\textsuperscript{138} or that the failure of federal courts to certify open state law questions promotes forum shopping that ultimately may impede the development of state law in that area.\textsuperscript{139} In contrast, the federal agency’s decisions will not always be binding or given \textit{res judicata} effect even within an agency because the decision occurs in an informal action. Furthermore, with the possible exception of regulatory preemption,\textsuperscript{140} decisions by the agency about state law will not influence federal courts – \textit{Chevron} deference is directed to the federal statute that the federal agency is charged with administering, not with its interpretation of state law.\textsuperscript{141}

So what does “control” mean in this context? In the case of a certifying federal agency or court, certification enhances the “control” of state courts by affording the state additional opportunities to address state-law questions.\textsuperscript{142} Moreover, agency decisions of state law will influence the primary behavior of both the individuals or entities directly subject to the agency’s decision and also, more generally, those who shape their conduct in response to agency interpretations. The concern arises primarily when the federal agency incorrectly predicts how the highest state court would resolve a question of state law. In other words, because neither a decision of state law by the federal court nor by the agency binds the state court, the federal judge’s or agency’s educated guess (or, in

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\textsuperscript{138} Note, \textit{New York’s Certification Procedure: Was It Worth the Wait?}, 63 St. John’s L. Rev. 539, 542-43 (1989) (The problem with federal predictions of state law is “exacerbated when other federal courts or foreign state courts, ruling on similar issues, use the possibly incorrect holding of the first federal court as authority in their rulings on the same law. This domino effect continues until broken by a final decision in the highest court of the state whose law is in question.”), cited in Kaye & Weissman, \textit{supra} note [], at n.32.
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\textsuperscript{139} Judge Calabresi developed this argument in a dissent to a case in which the Court of Appeals to the Second Circuit did not certify a state-law question. See \textit{McCarthy v. Olin Corp.}, 119 F.3d 148, 157-58 (2d Cir. 1997) (Calabresi, dissenting). If federal court follows lower state court opinions where there is no final word from the state’s highest court, and the federal court is reluctant to certify the question of state law, forum shopping is promoted. The party favored by the lower court decisions will choose the federal forum over the state forum. A side effect of this is that the state will not get the opportunity to develop the state law. \textit{Id.}
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\textsuperscript{140} Whether federal agencies’ decisions about regulatory preemption influence the decisions of federal courts may depend on the degree of deference that courts give to them. See Amanda Frost, \textit{Judicial Review of FDA Preemption Determinations}, 54 Food & Drug L.J. 367, 377 (1999).
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\textsuperscript{141} \textit{See, e.g., Fashion Valley Mall, LLC v. National Labor Relations Board}, 451 F.3d 241, 246 (D.C. Cir. 2006) (noting that the federal court was not required to defer to the agency’s state-law determination).
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\textsuperscript{142} Cf. Jonathan Remy Nash, \textit{Examining the Power of Federal Courts to Certify Questions of State Law}, 88 Cornell L. Rev. 1672, 1697 (2003) (suggesting that judicial certification “gives the state judiciary the opportunity to rule on important issues of state law in cases in which it might not otherwise have had the chance”).
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Court of Appeals Judge Sloviter’s words, the “Erie guess”\textsuperscript{143} may turn out to be “wrong” in the sense that a state court ultimately comes out another way. This problem is sometimes described as one of forecasting or prediction.\textsuperscript{144}

A concern with incorrect predictions, whether by federal agencies or federal courts, is that they “inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court” and “skew the decisions of persons and businesses who rely on them.”\textsuperscript{145} First, the parties directly involved – e.g., the CA, Inc., shareholder making the proposal and the corporation itself – will be influenced and their primary conduct shaped by the federal agency decision of state law. The litigants may be frustrated if they are subject to a decision that is later found to be an incorrect interpretation of state law – a “ticket for one ride only.”\textsuperscript{146} Second, the agency’s decision of state law may shape primary conduct beyond that of the individuals or entities directly involved to reach those who follow the various speeches of agency commissioners, amicus briefs, litigation positions, etc., which, although technically non-binding, are influential.\textsuperscript{147}


\textsuperscript{144} Interestingly, based on this idea that the number of educated guesses should be reduced, one commentator has argued that courts should certify questions to federal agencies given that the courts’ statutory interpretations will often be non-binding after the Supreme Court’s decision in \textit{National Cable & Telecommunications Association v. Brand X Internet Services}. See Kathryn A. Watts, \textit{Adapting to Administrative Law’s Erie Doctrine}, 101 NW. U. L. Rev. 997, 1001-02 (2007).

\textsuperscript{145} Sloviter, supra note [143], at 1681. Other concerns with incorrect predictions focus on the impact on the federal entity or the legal system more generally: Former New York Chief Justice Judith Kaye suggested that incorrect predictions embarrass judges. See Kaye & Weissman, supra note [145], at 378. Moreover, as the Supreme Court has pointed out, “[t]he reign of law is hardly promoted if an unnecessary ruling of a federal court is … supplanted by a controlling decision of a state court.” \textit{R.R. Comm’n of Tex. v. Pullman Co.}, 312 U.S. 496, 500 (1941).

\textsuperscript{146} See, e.g., John R. Brown, \textit{Certification – Federalism in Action}, 7 Cumb. L. Rev. 455, 456 (1977) (noting frustration of litigants when the rule of law announced by the federal court turns out to be “a ticket for one ride only”); \textit{W.S. Ranch Co. v. Kaiser Steel Corp.}, 388 F.2d 257, 264 (10th Cir. 1967) (Brown, J., concurring and dissenting) (advocating certification because federal courts do litigants injustice by making decision that state court later overrules); but see Selya, supra note [144], at 690 (pointing out that in many instances no relief is available to parties where – in hindsight – their case was wrongly decided: “[S]uch a litigant is no more greatly disadvantaged than a litigant who loses in a lower state court and is thereafter denied discretionary review, only to have the state’s high court decide the issue favorably in some other case at a later date. By like token, such a litigant is no worse off than a litigant who loses on a federal-law issue in a federal court, only to have the court admit the error of its ways in subsequent litigation.”).

\textsuperscript{147} For example, although technically non-binding, SEC no-action letters provide a relatively well-developed source of interpretations of the securities laws. See Donna Nagy, \textit{Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework}, 83 Cornell L. Rev. 91 (1998); Lemke, supra note [145], at 1091 (“Because no-action letters
Furthermore, there is reason to think that federal agencies make incorrect predictions because federal courts have often incorrectly predicted the stance of the highest state court\(^\text{148}\) and there is no reason to believe that federal agencies would be better at predicting state law than federal courts. In fact, federal agencies may very well be worse at predicting state law given their focus on the specialized area that they administer and possibly an approach to interpretation that differs from courts’.

Finally, rather than predict state law (and risk an incorrect guess) agencies may simply decline to decide unresolved issues of state law. So, for instance, the SEC has indicated that it would not issue a no-action letter concerning a shareholder proposal in the proxy context (the context of the CA, Inc., decision) in the absence of resolved state law.\(^\text{149}\) Rather than reduce the need for a federal agency certification procedure, however, this agency “abstention” raises problems akin to that of abstention in the judicial process. It, in effect, prefers one “party” (the proponent),\(^\text{150}\) and forces further (time-consuming) procedures if any relief is to be had.

\(^{148}\) See, e.g., Kaye & Weissman, supra note [], 378 n.28 (2000) (citing cases in which federal courts incorrectly predicted state law); John B. Corr & Ira P. Robbins, Interjurisdictional Certification and Choice of Law, 41 Vand. L. Rev. 411, 415 n.11 (1988) (same); Sloviter, supra note [], at 1679-80 (listing instances in which the state court did not come out the way the United States Court of Appeals for the Third Circuit predicted).

\(^{149}\) See Bank of America Corp., SEC No-Action Letter, 2009 SEC No-Act. LEXIS 57, *5-*7 (Feb. 11, 2009) (“The Division has repeatedly refused to issue no action relief based on unsettled issues of state law.”), citing PLM Intern'l, Inc., SEC No-Action Letter, 1997 WL 219918 (Apr. 28 1997) (“The staff notes in particular that whether the proposal is an appropriate matter for shareholder action appears to be an unsettled point of Delaware law. Accordingly, the Division is unable to conclude that rule 14a-8(c)(1) may be relied upon as a basis for excluding that proposal from the Company's proxy materials”); see also Exxon Corp. (Feb. 28 1992) (concluding that the SEC Division of Corporation Finance “cannot conclude that state law prohibiting the bylaw when no judicial decision squarely supports that result”).

B. Certification Allocates Decisionmaking According to Institutional Expertise

The argument that state courts are institutionally apt for deciding state law boils down to the idea that state courts, through repeated application of state law, have become particularly expert.\textsuperscript{151} The Delaware Supreme Court is only an extreme example of this – it is specialized not only in Delaware state law but, even more specifically, in Delaware \textit{corporate} law. The state court’s expertise in state law does not vary depending on whether a federal court or agency (or non-Article III court) is raising the state-law question. In other words, a state that accepts this rationale for judicial certification should also accept it in the federal agency context. Moreover, the particular state-law questions that come up in the agency context are within this area of specialization. The examples above of agencies’ determinations of state law show that at least some of the state-law issues that have arisen or may arise in agency matters are ones that could arise in state-court adjudication – whether funds were fraudulently transferred, whether a sale took place under state law, etc.

State court expertise is not considered in a vacuum, however. Certification is worth the trouble (delay, expense) only if the states are more expert than the certifying entity. In the context of judicial certification, a federal court may not have developed expertise in a particular body of state law in the way a state court has, but its function as a (mostly) generalist court has prepared it for the task of analyzing precedents and applying them to the facts before it. After all, one premise of diversity jurisdiction is that the federal court is perfectly capable of determining state law in the role of an additional state court.\textsuperscript{152}

The institutional expertise reason for \textit{interbranch} certification is more compelling than in federal court-state court certification because the federal agency’s \textit{raison d’etre} is often to be the expert administrator of a specialized subject area defined by federal statute and regulations. \textit{Chevron} deference to agency statutory interpretations is appropriate, according to the Supreme Court, both because of the agency’s expertise in a “technical and complex” federal regulatory scheme\textsuperscript{153} and because of the agency’s expertise in administering its

\textsuperscript{151} Cochran, \textit{supra} note \textsuperscript{[\textsuperscript{159 \& n.14.}}.

\textsuperscript{152} \textit{Cf.} Jonathan Remy Nash, \textit{The Uneasy Case for Transjurisdictional Adjudication}, 94 Va. L. Rev. 1869, 1872 (2008) (arguing that, “as the constitutional inclusion and the continued congressional authorization of federal diversity jurisdiction suggest, it may well be that state courts’ susceptibility to bias against out-of-staters might render them less able than federal courts to resolve state law questions ‘correctly’”).

\textsuperscript{153} 467 U. S. 865, citing \textit{Aluminum Co. of America v. Central Lincoln Peoples’ Util. Dist.}, ante at 467 U. S. 390.
The same is true about specialized courts such as bankruptcy and tax courts. Another way to understand the expertise of the state court versus the federal agency is to think of the federal agency as expert in a national scheme whereas one would not expect federal agency expertise in more than 50 different bodies of state law. Further, federal agencies’ approach to interpretation may differ fundamentally from federal courts’, making it less able to act in the shoes of a state court interpreting state law.

The highest state court is also “better” at deciding unresolved issues of state law because it has more room for judgment, with sensitivity to important state policies or legal framework. In contrast, the federal agency or court is in the position of parsing and predicting state law. Where the highest state court has clearly spoken, the federal entity simply follows that precedent, acting as another state court would. When the state law is unsettled or when only lower court opinions are available, federal courts or agencies are put into the position of predicting the content of the state law. As Judge Friendly observed in the context of judicial certification, “[o]ur 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.” In sum, the job of prediction is quite different from the job of a state court that must address an open question: whereas the federal court (or agency) must parse the state decisions, the state court may appropriately reason in terms of policy and common sense.

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154 467 U. S. 865.
155 See, e.g., Jeffrey M. Hirsch, Taking State Property Rights Out of Federal Labor Law, 46 B.C. L. Rev 891, 909 (2006) (noting that the expertise of the National Labor Relations Board “is solely in federal labor law and does not include the vagaries of over fifty different property regimes” and concluding that its decisions that depend on state property law take longer to resolve than its other unfair labor practice decisions).
158 Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960), quoted in Kaye & Weissman, supra note [], at 378.
159 Kaye & Weissman, supra note [], at 377 (“Whereas the highest court of the state can ‘quite acceptably ride along a crest of common sense, avoiding the extensive citation of authority,’ a federal court often must exhaustively dissect each piece of evidence thought to case light on what the highest state court would ultimately decide.”), quoting Henry J. Friendly, Federal Jurisdiction: A General View, at 142 (1973); Drury Development Corp. v. Foundation Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (S.C. 2008) (“In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best
C. Certification Speeds Review of State-Law Determinations in
Agency Adjudication

This section and the one that follows consider a complication raised by the fact that, unlike federal courts (whether Article III or not), agencies do not act only through adjudication, but also through informal action and rulemaking. This section considers the role of certification in agency adjudication and in the adjudicatory work of non-Article III courts. The main question that arises in the context of such adjudication is whether expanded certification is worth its costs given the availability of judicial review. Judicial review potentially reduces the need for a separate agency certification process because the reviewing court may use the well-established judicial certification mechanism to certify an unresolved or important state-law issue to the relevant state court. This section suggests that, even when judicial review is available, federal agency certification procedure may offer benefits of speedy resolution in certain cases. Rather than making agency certification unnecessary, the availability of judicial review (both as a formal matter and practically) should be part of the certifying agency’s and the answering court’s consideration of which questions to certify or to answer.

As a descriptive matter, one can point to examples of certification of state-law issues by reviewing courts after an initial determination by federal agencies or non-Article III courts. On appeal from the National Labor Relations Board, federal courts have certified questions of state law to the California state court. Federal courts have also certified state-law questions on appeals from bankruptcy proceedings and actions challenging IRS determinations and have considered, though ultimately rejected, litigants’ requests for such certification of state-law issues on appeals from bankruptcy and tax proceedings.

comport with the law and public policies of the state as well as the Court’s sense of law, justice, and right.”).


161 In re Krause, 546 F.3d 1070, 1071 (9th Cir. 2008) (certifying a question to the Nevada Supreme Court on bankruptcy appeal).

162 Imel v. United States, 375 F., Supp. 1102, 1116 (D. Co. 1974) (certifying a state-law issue underlying federal tax determination); Estate of Madsen v. Commissioner, 659 F.2d 897, 899 (9th Cir. 1981) (certifying to the state high court the question of whether a life insurance policy naming the deceased spouse as the insured and the surviving spouse as beneficiary and owner was separate property of the surviving spouse although the premiums were paid out of community funds).

163 Collier v. United States (In re Charco, Inc.), 2004 U.S. Dist. LEXIS 23160, *6-*7 (S.D.W.Va. 2004) (refusing in a bankruptcy appeal to certify an issue of status of judgment lien because West Virginia law was settled on the issue); In re Midpoint Development, LLC, 466 F.3d 1201, 1207 (10th
Even in such circumstances, what the proposal to expand certification procedures to federal agencies would enable is more timely resolution of unresolved state-law issues and resolution of them even when judicial review is unavailable as a formal or practical matter. Just as certification was welcomed as a sensible alternative to abstention that “saved time, energy and resources,” federal agency certification may be a practical and speedier alternative to waiting for judicial review (if any) and access to judicial certification. A similar criticism – that the inability of lower courts to certify questions to state courts slows and/or multiplies litigation—has been made in the context of certification procedures that allow only the court of appeals and not the district courts to certify such questions. The effect is not just delay, but also potentially unnecessary proceedings in the reviewing court and blocking of any settlement efforts.

When an agency is acting in its adjudicative role, it is very similar to a non-Article III court. As one commentator provocatively put it: “Legislative courts are but agencies in drag.” Moreover, courts such as the Bankruptcy Courts, Tax Court or federal Court of Claims are often called upon to decide issues of state law. For instance, the rights enforced in bankruptcy are rights

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164 First Nat'l Bank v. United States, 634 F.2d 212, 214 (5th Cir. 1981) (refusing to certify a question about a will because the issue was settled in state law); Boyter v. Commissioner of Internal Revenue Service, 668 F.2d 1382, 1385-86 (4th Cir. 1981) (refusing to certify a question in an appeal for the Tax Court because the state-law issue was not necessarily dispositive of the case before the federal court).


166 Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 Va. L. Rev. 1671, 1686 (1992) (“In those jurisdictions where certification is available to the federal appellate courts but not to the federal district courts, litigants are forced to go through the entire trial process and initiate an appeal before they can request a state determination. As a result, an entire trial may be rendered meaningless, efforts to settle may be frustrated, and the docket of the federal appeals court may be enlarged unnecessarily.”).

167 Id.

168 Karst, Federal Jurisdiction Haiku, 32 Stan. L. Rev. 229, 230 (1979); Martin H. Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197, 199-200 (“Although [federal administrative] agencies do not function as ‘courts,’ they nevertheless are ‘non-article III’ bodies in much the same sense as are the less common legislative courts; the personnel of both do not have the salary and tenure protections of article III. Nonetheless, agencies arguably adjudicate ‘cases’ that ‘arise under’ the laws of the United States, and these cases constitute one of the central categories of the article III judicial power.”).

169 Sharron B. Lane, To Certify or Not to Certify: When Can a Bankruptcy Court Certify Questions of State Law? 2004 No. 1 Norton Bankr. L. Adviser 3 (citing cases before the bankruptcy court in
created by state law\textsuperscript{170} so, for instance, bankruptcy courts look to state law to
determine whether property is an asset of a debtor,\textsuperscript{171} the scope of a state-law
homestead exemption,\textsuperscript{172} or the validity of a deed acknowledgment.\textsuperscript{173} Similarly,
the Tax Court is often in the position of determining whether someone is liable for
a tax deficit as a “transferee” (sometimes involving questions of fraudulent
conveyance) under state law.\textsuperscript{174}

Because of the similarity to adjudicating agencies and the likelihood that
certifiable issues arise in the context of non-Article III courts, many of the
arguments for certification developed here likewise apply to non-Article III
courts.\textsuperscript{175} Furthermore, the experiments with certification from bankruptcy courts
and other non-Article III courts described above, as well as the argument by the
drafters of the uniform law on certification that certification should be so
expanded\textsuperscript{176} have equal force when applied to administrative agencies engaged in
adjudication.

In fact, one Court of Claims judge lamented the lack of a certification
procedure in a case concerning creditor rights to trust assets under Maryland law:
“The most satisfactory resolution of this question of state law would have been by

\textsuperscript{170} Matter of Kaiser, 791 F.2d 73, 74 (7th Cir. 1986) (citing Butner v. United States, 440 U.S. 48).
\textsuperscript{171} In re Brass Kettle Restaurant, Inc., 790 F.2d 574, 575 (7th Cir. 1986); see also In re K & L Limited,
741 F.2d 1023, 1030 n.7 (7th Cir. 1984); Matter of Gladstone Glen, 628 F.2d 1015, 1018
(7th Cir. 1980).
\textsuperscript{172} In re Arnold, 73 P.3d 861 (Okla. 2003).
\textsuperscript{173} In re Akins, 87 S.W.3d 488 (Tenn. 2002); see generally Sharron B. Lane, To Certify or Not to
L. Adviser 3 (stating that “[s]tate law issues that arise in bankruptcy cases often recur and have
significance beyond the parties before the court” and that “[n]ot infrequently, however, state law is in
doubt, with no determination from the state's highest court” and citing illustrative cases).
\textsuperscript{174} 26 U.S.C. § 6091(a) (transferee liability applies if a basis exists under applicable state law); see,
e.g., Johnson v. Commissioner of Internal Revenue, 118 T.C. No. 4, 118 T.C. 74 (2002) (applying
Texas law to decide that a taxpayer was not liable as a transferee for the federal income tax liabilities
of a corporation he wholly owned because the transfer was not in avoidance of creditors under Texas
law).
\textsuperscript{175} Although whether the Tax Court is an Article I or Article II court is debated, see Freytag v.
Commissioner of Internal Revenue, 501 U.S. 868, 111 S.Ct. 2631 (1991), for the purposes of this
article’s comparison between judicial and federal agency certification, this distinction does not
matter. The point is only that the Tax Court hears resolution of questions that arise under a complex
administrative scheme and that this court is not captured by the prevalent list of permissible
certifying entities.
\textsuperscript{176} See supra Part 1B2.
certification to the Maryland Court of Appeals” but, “[u]nfortunately,” the Maryland certification procedure did not allow certification from the Court of Claims.\footnote{Estate of German v. United States, 7 Cl. Ct. 641, 645-46; 85-1 U.S. Tax Cas. (CCH) P13,610; 55 A.F.T.R.2d (RIA) 1577; 1985 U.S. Cl. Ct. LEXIS 1020645-46 (1985), cited in Caron, supra note \[\], at 852 n.320.} The judge concluded that “it is the duty of this court to approximate the law of the state from decisions of its highest court as best it can.”\footnote{Id.}

In sum, judicial review and the eventual availability of judicial certification may at times provide another route to state-court determination of unresolved state-law questions, but by no means does it always, given variations in the function and frequency of judicial review of the particular agency’s adjudications. Although, as urged below, state-law questions that arise during agency informal action should be given precedence, interbranch certification for agency adjudication may be appropriate where it leads to faster and more streamlined resolution.

D. Certification Provides Recourse in Otherwise Unreviewable Informal Action

One difference between certification from federal (or other states’) courts and administrative agencies is that the federal court asks a question that arises while it is adjudicating a case. This is not always so for federal agencies since so much agency action is informal. The SEC’s certified question to the Delaware court is such an example where the SEC was not acting in its adjudicative role. Its no-action letters—no matter how influential in practice\footnote{Lemke, supra note \[\], at 1091.}—merely announce that the SEC staff does not plan to take enforcement action based on the activity described in the request for the letter. They do not prevent the parties from seeking other relief or even from excluding the provisions from the proxy materials and taking their chances as to enforcement action. In fact, the SEC has even reserved the right to take enforcement action even if it has issued a no-action letter announcing that it would not do so.\footnote{Marc I. Steinberg, Understanding Securities Law § 2.04[B] (4th Ed.); New York City Employees’ Retirement System v. SEC, 45 F.3d 7 (2d Cir. 1995); In re Morgan Stanley & Co., Securities Exchange Act Release No. 28990 (1991); R. Haft, Analysis of Key No-Action Letters (2006); Thomas P. Lemke, The SEC No-Action Letter Process, 42 Bus. Law. 1019 (1987).} There are practical reasons for it not to exercise this power, but it reserves this right.

Certification introduces a way of getting a check on informal action (particularly where guidelines within the agency dictate when and how to seek certification) where the action would be otherwise unreviewable. At the same time it preserves discretion and flexibility in the agency, which is the point of
allowing informal action and one reason that so much of an agency’s work depends on informal action. Federal agency certification also gives the agency a mechanism for seeking expert resolution of an issue that is simply unresolved or controversial and particularly linked to state policy decisions.

4. IMPLEMENTATION

This Part considers how a federal agency certification procedure may be implemented. It describes the main difficulties with implementation: the concern that a court answering a certified question is in the position of issuing an advisory opinion; the concern that agencies may be engaged in inappropriate subdelegation if they pass one of their responsibilities along to the state courts; and the difficulty of separating the state and federal law issues. Finally, this Part details the certification procedure this article proposes in light of these concerns and examines how this expansion would alter the existing legal landscape.

A. Advisory Opinions Objection

This section evaluates the concern that answers to certified questions amount to impermissible advisory opinions. It suggests that the strength of this objection to federal agency certification depends on the type of activity in which the agency is engaged when it certifies the question, in particular how closely the action resembles adjudication. Drawing on arguments made in the context of judicial certification, it concludes that, at least outside of the rulemaking context, the concern can be overcome.

Advisory opinions are given by courts in response to “questions of law that neither arise from actual litigation nor involve private rights,” usually to another branch of government.\(^\text{181}\) In the federal system, Article III’s “case or controversy” requirement has been read to prohibit advisory opinions\(^\text{182}\) and most states also prohibit their courts from issuing advisory opinions. They are disfavored because of three main concerns: that questions giving rise to advisory opinions are too abstract; that advisory opinions are not the product of an adversarial process, which is one cause for the lack of concreteness; and that giving opinions on proposed legislation is not a judicial function and interferes with the proper function of the legislature, triggering separation of powers concerns.\(^\text{183}\) As the Supreme Court put it in Flast v. Cohen, “the rule against

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\(^{181}\) See also Comment, The State Advisory Opinion in Perspective, 44 Fordham L. Rev. 81, 81 (1976) (describing an advisory opinion as an “answer given by the justices of a state’s highest court acting in their individual capacities, at the request of a coordinate branch of government, to a legal question regarding a matter pending before the requesting authority”).


\(^{183}\) 392 U.S. at 96–97; see also George Neff Stevens, Advisory Opinions – Present Status and an Evaluation, 34 Wash. L. Rev. & St. B. J. 1, 8 (1959) (listing reasons that states have rejected the
advisory opinions recognizes that such suits often ‘are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.’”

The states that do allow advisory opinions do so in limited contexts and to a limited set of entities or people, not including federal agencies or even state agencies. For instance, Rhode Island’s constitution requires “[t]he judges of the supreme court [to] give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly.” Delaware permits advisory opinions by statute, and this statute has been found not to violate the separation of powers. Nonetheless, the categories of advisory opinions are limited, primarily to constitutional questions, and the category of those who can receive advisory opinions is limited to the governor and governing assembly. Moreover, the statutory allowance for advisory opinions has been read narrowly as outside the normal activities of the judiciary. Delaware courts and judges have, however, been unusually willing to provide advice to various constituencies through dictum, speeches, articles and other writings.

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advisory opinion process); Felix Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1005-07 (1923).

184 Flast v. Cohen, 88 S.Ct. at 1950–1951, 392 U.S. at 96–97, quoting United States v. Fruehauf, 365 U.S. 146, 157 (1961); see also Stevens, supra note [ ], at 8 (explaining that state courts that have rejected an advisory opinion process have done so in part because there were “no parties before the court and therefore nothing to adjudicate”).


188 10 Del. C. § 141 (2008) (“§ 141. Advisory opinions of Justices upon request of Governor and General Assembly (a) The Justices of the Supreme Court, whenever the Governor of this State or a majority of the members elected to each House may by resolution require it for public information, or to enable them to discharge their duties, may give them their opinions in writing touching the proper construction of any provision in the Constitution of this State, or of the United States, or the constitutionality of any law or legislation passed by the General Assembly, or the constitutionality of any proposed constitutional amendment which shall have been first agreed to by two-thirds of all members elected to each House.”).

189 Id.; see, e.g., In re Opinion of the Justices, 8 Terry 117, 47 Del. 117, 88 A.2d 128 (De. S.Ct. 1952) (issuing an advisory opinion on whether a particular section of the Delaware code was constitutional and thus the Delaware Attorney General could investigate a charge of vote buying in an election).

190 Opinion of the Justices, 413 A.2d 1245 (Del. 1980).

191 Steven J. Cleveland, Process Innovation in the Production of Corporate Law, 41 U.C. Davis L. Rev. 1829, 1846-59 (2008); see also id. at 1859-61 (suggesting that the separation of powers
One possible approach to instituting federal agency certification is to concede that answers to certified questions may be advisory opinions and to modify or eliminate the state ban on advisory opinions. In fact Florida did exactly that when confronted with the argument that judicial certification resulted in advisory opinions, announcing that the state constitution permitted advisory opinions. The assertion of state control over primary conduct or the introduction of a level of input into informal proceedings determining state law might be reason for a state to do so.

In the absence of such modification of the state’s advisory opinion practices, the advisory opinion concern is least troubling in the context of agency adjudication (or adjudication by non-Article III courts); it has largely been put to rest for the same reasons it is no longer a live issue in the judicial certification context. The question of whether answers to certified questions are impermissible advisory opinions is not a new one; it arose as states developed processes to accept certified questions from courts. Indeed, some commentators have suggested that this objection to court certification was the most serious one raised in early years. In New York, for instance, the highest court’s first reaction to proposed legislation permitting certification was that these involved impermissible advisory opinions, which was an “historically inappropriate and unacceptable” role for the court. Nonetheless, the argument that answers to certified questions from courts are impermissible advisory opinions has not prevailed. Most courts have rejected the advisory opinion concern, although for varied reasons.

The certifying court – as is an adjudicating agency or legislative court – is considering “a genuine live controversy between the parties” that is “based upon an existing factual situation which will be determined by our response to questions.” Moreover, the requirement that the state-law issue be “dispositive” concerns usually raised by such advice are less troubling in the Delaware context because Delaware’s part-time legislature has delegated governance of corporate law to the specialized courts in a way analogous to congressional delegation to federal agencies).

192 Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 739-43 (Fla. 1961).
193 Corr & Robbins, supra note [], at 419 (“Probably the most damaging argument against the use of certification is the claim that certified questions seek advisory opinions from the state courts.”).
194 Kaye & Weissman, supra note [], at 388, citing Letter from Joseph W. Bellacosa, Chief Clerk, New York Court of Appeals, to John J. Halloran, Legislative Assistant to Assemblyman Edward Griffith (Mar. 2, 1982).
195 See, e.g., In re Richards, 223 A.2d 827 (Me. 1966) (rejecting the argument that answers to certified questions were advisory opinions when considering the power of Maine’s highest court to consider certified questions); Kaye & Weissman, supra note [], at 394 & n.125; Corr & Robbins, supra note [], at 419-22 (describing the various responses of state courts to the argument that answers to certified questions were advisory opinions).
196 223 A.2d 827 (Me. 1966); Spencer v. Aetna Life & Casualty Ins. Co., 227 Kan. 914, 611 P.2d 149 (1980) (reasoning that the certification procedure did not generate advisory opinions because the
or “determinative” ensures that the opinion issued by the state court is tightly linked to the case or controversy before the certifying court or adjudicating body. Finally, the state court’s decision is binding on the federal court (or at least treated as such because of *Erie*198) and is likely to be treated as binding on the adjudicating agency. For many courts considering judicial certification procedures, these reasons were enough to overcome the advisory opinion objection.199

Agency reliance on informal action poses more of a problem for certification procedures because, as the context for certification departs from formal litigation in court, these answers to certified questions become more easily characterized as advisory opinions. In particular, the fact that for agencies a certifiable question often arises not in litigation or adjudication but rather during informal proceedings presents a problem for the rationale that the certifying entity is deciding a case or controversy to which the answering court is providing a determinative or dispositive element.

Nonetheless, interbranch certification in agency informal action may rely on other characteristics of the certification process to avoid being characterized as advisory opinions, particularly when the informal action includes characteristics of adjudication such as the presence of adverse parties with an interest in the dispute. For instance, the SEC no-action letter at issue in *CA, Inc.*, pitted a shareholder against a corporation. Not only did they make competing submissions before the SEC, but they also contested the issue in the state court proceeding after the question was certified. In this type of action, as is the case in judicial certification, stare decisis and preclusion rules will both apply, binding the state court and the parties in front of it once the state court has answered a certified question.200 The *CA, Inc.*, example above resulted in a state court decision with the usual force of question “arises from an actual case and controversy and although presented as a question of law, it neither violates the case or controversy requirement nor the separation of powers doctrine on advisory opinions.”), quoted in Corr & Robbins, *supra* note [], at 421; see also *Wolner v. Mahaska Indus., Inc.*, 325 N.W.2d 39 (Minn. 1983) (rejecting argument that answers to certified questions were advisory opinions).


198 As to whether the decision was binding on the federal courts, the court relied on *Erie* to make the answer to the certified question “conclusive and determinative in the federal courts” with respect to Maine’s state law. *Id.*

199 Corr & Robbins, *supra* note [], at 455 (surveying state and federal judges in 1985 and finding that this fact minimized concern with the advisory opinion problem); Gerald M. Levin, Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. Pa. L. Rev. 344, 345 (1963) (“Most significantly, that answer will determine the rights of federal court parties, will have res judicata and stare decisis effect, and will authoritatively settle state law on the question.”).

200 *Id.*
Furthermore, interested parties may present the argument in front of the answering court: “[p]arties are before the court and are provided with the opportunity for presentation of briefs and oral argument customary upon appeal.” In sum, the strength of the argument that an answer to a certified question amounts to an advisory opinion may depend on the particular characteristics of the agency’s informal action.

There may also be a pragmatic response to the concern that advisory opinions issued by the state court would offend the separation of powers. In some states, including Delaware, advisory opinions are not issued by the court, but rather by the individual judges. Whereas the authority and usefulness of the opinion certainly come from the judges’ official position, where the reasons for allowing certification are compelling, some states may be willing to accept such a pragmatic solution.

B. Agency Authority to Certify

The flip side of the above concern with the power of the state to accept certified questions from federal agencies when they undertake informal action is the concern with the power of the agency to certify. In other words, is certification of state-law questions to state courts an inappropriate subdelegation by federal agencies?

The answer is likely that the agencies can get advice (note the advisory opinion problem) from whomever they like as long as the federal actor gets the last word. The tension is that to avoid issuing advisory opinions, the federal actor should treat state court opinions as binding and to avoid inappropriate subdelegation, the federal actor should get the last word.

The pragmatic solution is that the opinions of the state court answering a certified question are likely treated as binding whether they are formally so or not. This solution is the one reached in the case of certification from federal courts. Whereas the Fifth Circuit suggested early in the use of the mechanism that answers are “merely advisory and entitled, like dicta, to be given persuasive but
not binding effect as a precedent,” courts have since abandoned that notion.205 One sees a similar accommodation when it comes to advisory opinions. Advisory opinions, where permitted, are not formally binding, but are “almost invariably accepted by those who requested the opinion and are cited quite frequently in later cases both at home and in other jurisdictions as authority.”206

C. Mixed Federal- and State-Law Questions

The state-law and the federal-law questions may be easily separable and identifiable. The CFTC’s reparations proceeding, for example, considered a state-law counterclaim for debt.207 This counterclaim was integral to the federal scheme in the sense that the scheme includes a dispute resolution apparatus intended to resolve all parts of the dispute in one agency-provided forum,208 but not in the sense that the state-law standard was embedded in federal statutes or regulations. The CA, Inc., question of law that the SEC certified to the Delaware court was similarly separable: Was a proposal mandating reimbursement of dissident shareholders’ proxy solicitation expenses a proper subject for action by shareholders under Delaware law and would its adoption cause the company to violate Delaware law?209

But this easy separability will not always be the case. For instance, in the immigration context, one ground for exclusion or deportation for a criminal offense depends on a federal requirement of “moral turpitude,” which in turn depends on “whether the proscribed act, as defined by the law of the State in which it was committed, includes elements which necessarily demonstrate the baseness, vileness and depravity of the perpetrator.”210

This problem is not unique to agency certification: discrete state-law issues may arise in federal court in diversity actions or based on supplemental jurisdiction. Nonetheless, determination of state and federal law may also be intertwined.211 The solution found in certification from federal courts or agencies lies both in the standard – that the state-law be “dispositive” or “determinative” – and in the voluntariness of the procedure. Both suggest that certification will not or should not be evoked when the questions are inseparable.

208 478 U.S. at 855-56.
D. Proposed Certification Procedure

This section details the proposed interbranch certification procedure and examines how it would modify current practice. The proposed procedure would take the existing state frameworks and expand the permissible certifying entities to include federal agencies.

The first option would be for a state to amend its laws enabling certification simply by adding “federal agency” to the list of entities from which the highest state court may accept certified questions. Absent other changes to the enabling language, such an amendment would likely limit certification to questions that arise in adjudication and adjudication-like informal action, at least in states that require that the answer to the certified question be “dispositive” or “determinative.” On the one hand, such an amendment has the benefit of being a natural outgrowth of certification from non-Article III courts and avoiding some of the difficult concerns about advisory opinions. On the other hand, the extent to which such an amendment would reach agency informal action is unclear.

If the state wants its highest court to be able to decide state-law questions that arise in a broader range of agency activities, it could add a new provision. Using the Uniform Certification of Questions of Law formulation212 as a baseline, the proposed provision would add language like the following to the existing grant of answering power:

The [Supreme Court] of this State may answer a question of law certified to it by a federal agency if there is no controlling appellate decision, constitutional provision or statute of this State and it appears to the [Supreme Court] of this State that there are important and urgent reasons for an immediate determination of such questions by it.

The reason to add this as an additional provision is that, when an agency acts in one of its non-adjudicative roles, the requirement that there be a “pending litigation” before the certifying agency or that the resolution of the state-law question be “determinative” or “dispositive” of that litigation – both requirements suggested by the Uniform Act and widely adopted by states – are not a good fit. This requirement might reasonably be preserved in the case of judicial certification (including certification from non-Article III courts), agency adjudication, or informal action with such aspects of adjudication as opposing parties involved in an adversarial proceeding. However, neither rulemaking nor

212 Uniform Certification of Questions of Law (Act) (Rule) 95 § 3 (1995) (“The [Supreme Court] of this State may answer a question of law certified to it by a court of the United States ....”).
Cooperative Interbranch Federalism

Some agency informal action involves a clear litigation or case or controversy, so other ways of identifying certifiable questions are necessary.

A sorting mechanism is needed for identifying the types of questions that should be certified. One approach is the current arrangement, where only one state (and a very special one at that) has allowed only one federal agency to certify questions to its courts. In a way, this filter is effective. The question is one of corporate law, the area of law the SEC is most likely to have to resolve. The answer is both unresolved and one particularly consigned to state law. The identification of one certifying agency and one answering court ensures that these are the questions that get certified.

However, certification could be extended to all federal agencies by other, non-Delaware states because the state-law certification standards already act as a sorting mechanism. The implementation of expanded certification could rely on existing state-law certification standards to filter the types of questions that should be certified consistent with the goals of federal-state cooperation and different branches’ institutional expertise. They often provide that an issue must be unresolved and not controlled by state-law precedent (usually of the highest state court).

Like judicial certification, the proposed mechanism is voluntary on both sides (the federal agency has the discretion to certify a question and the state court may decline to answer). The voluntariness of the procedure answers the concern that the availability of the process overburdens state-court dockets. The ability of the state court to reject a question certified to it enables the state court to make the judgment call about the importance of the question and the practical impact on its docket.

Finally, the guidance for the answering court proposed above should be accompanied by guidance within the federal agency as to the form in which the question is posed and which questions should be certified. In the Delaware/SEC example, SEC staff has indicated that “[w]e’re very excited to have this tool [certification to the Delaware court] at our disposal, and look forward to using it further, as appropriate, in coming years,” but have not indicated when the

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213 Uniform Certification of Questions of Law (Act) (Rule) 95 § 3 (1995) (proposing a certification standard that requires that there be “no controlling appellate decision, constitutional provision, or statute of this State.”).

214 Cf. Unif. Certification of Questions of Law (Act) (Rule) 95 § 3 (1995) (expanding the certifying entities to include any court of the United States and reasoning that the discretion of the answering court mitigates any concern that this expansion would overburden them: “Ultimately, the receiving court retains the power to accept or reject a certified question so that it can control its docket even though the number of courts from whom it may receive a certified question has been expanded”).
procedure is appropriately invoked and by whom.\textsuperscript{215} The starting point may be the guidance for the certifying entities provided in the present system of judicial certification. So, for instance, the United States Court of Appeals for the Second Circuit has developed court rules that detail when a question might be certified: the court may certify “an unsettled and significant question of state law that will control the outcome of a case pending before this Court.”\textsuperscript{216} Agencies might also include a standard aimed at the importance of the state-law issue, as judicially created requirements do.\textsuperscript{217}

The agency must also determine whom at the agency has the power to certify a question. Although the structure and policies of the agencies would influence the final rule, it might reflect the differences between adjudication (which might allow administrative law judges to certify dispositive or determinative state-law questions for which no precedent exists) and rulemaking (which might be much more limited, given some of the advisory opinion concerns addressed above). The most difficult question, given the variety of actors and forms, may be in identifying the appropriate actor who should make the decision to certify when a federal agency undertakes informal action.

Finally, guidance for the agency is particularly important as the agency wears multiple hats – decisionmaker and party – in some adjudication and informal proceedings. Similarly, if certification were to be used in the context of decisions about regulatory preemption, a concern may be that the agency may not be motivated to certify any question, favoring preemption by its own rules or at least agency-determination of preemption. In those circumstances, the need for internal guidance or even guidance from outside (perhaps an executive order like that ordering the agencies to include a statement on the preemptive effect in their regulations) is even more pressing.

**CONCLUSION**

Certification from federal agencies to state courts serves many of the traditional functions of judicial certification. It benefits the state court by


\textsuperscript{216} Second Circuit Rule 0.27. Similarly, the Uniform Certification of Questions of Law Act proposes that a state court have the power to certify if “pending litigation involves a question to be decided under the law of the other jurisdiction,” the answer “may be determinative of an issue in the pending litigation,” and when “an answer is not provided by a controlling appellate decision, constitutional provision, or statute of the other jurisdiction.” Unif. Certification of Questions of Law (Act) (Rule) 95 § 2 (1995).

\textsuperscript{217} See supra.
providing additional opportunities to decide state law, particularly in sensitive policy areas, and also preserves state control over certain primary conduct. The procedure allocates decisionmaking according to institutional expertise, allocating decisionmaking between federal agencies, which are expert in the federal regime they administer, and state courts, which are expert in their own state’s laws. In doing so, it avoids putting the federal agency in the position of forecasting how a state court would resolve an issue, a prediction that may turn out to be wrong.

Beyond that, federal agency certification’s benefits depend on the context (adjudication, rulemaking, or informal activity) in which the certifiable question arises. It may speed resolution of difficult or important state questions when the agency acts as an adjudicator and may add another tool for informed rulemaking. Moreover, the federal agency certification that this article proposes addresses a problem central to the activity of federal agencies: how do we subject informal action to an appropriate level of review, one that neither hamstring the agency, preventing creative use of limited resources, nor allows the agency unfettered discretion. This type of interbranch certification provides another outlet for providing guidance and legitimacy for informal agency actions and decisions. For all of these reasons, states should consider following and expanding on Delaware’s lead to institute federal agency certification, a flexible mechanism with the potential to promote cooperative interbranch federalism.