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

Verity Winship

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Verity Winship, Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies, 63 *Vanderbilt Law Review* 179 (2019)

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

Verity Winship

63 Vand. L. Rev. 181 (2010)

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. Certification allows 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 from an agency, its effect depends on the availability of judicial review and the type of agency activity—in particular, whether the agency is engaged in formal adjudication or informal action. Federal agency certification has the potential to speed resolution of state-law questions when a federal agency acts through reviewable adjudication. The need for certification is particularly acute, however, when judicial review is unavailable and little recourse may otherwise be had for interpretations of state law that the state may ultimately reject.

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

*Verity Winship**

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* Visiting Assistant Professor, Cardozo School of Law. I appreciate the helpful comments on earlier drafts from Ben Depoorter, Charlton Copeland, Maggie Lemos, Dan Markel, Peter Markowitz, Lesley Wexler, Tommy Crocker, Dave Fagundes, Michael Herz, Jessie Hill, Chad Oldfather, Carlton Smith, Stewart Sterk, Stephen Vladeck, Howard Wasserman, and all the participants in the Cardozo Junior Faculty Workshop. I am also grateful to Edward Zelinsky, Dan Ravicher, and Max Minzner for conversations about the project. Errors and omissions remain my own.

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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.¹ Certification by federal courts (what this Article terms “judicial certification”) has been touted as “sav[ing] time, energy and resources and help[ing] build a cooperative judicial federalism.”² 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 two axes: 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 as certification by federal courts to state courts. General notions of

1. Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 DUKE L.J. 69, 71 n.13 (2008) (noting that North Carolina is the only state not to have adopted a certification procedure); see also Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 159 n.13 (2003) (citing state laws enabling certification procedures).

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

comity and federalism are often invoked 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 benefits to state courts: namely, allowing 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 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 is expert in the laws of the state in which it sits, while a federal agency is expert in a national statutory and regulatory scheme—usually in a specialized or technical area. Thus, a state court is more institutionally suited to deciding unresolved state-law issues that impact state policy than a federal agency.

Whether federal agency certification makes sense depends on the type of action the agency undertakes and the availability of judicial review. Federal agency certification has the potential to speed resolution of difficult or important state questions when a federal agency's action is subject to judicial review. In addition, the need for certification is particularly acute when no judicial review of agency action is available and little recourse may otherwise be had for interpretations of state law that the state may ultimately reject. This need reflects a central problem in administrative law regarding how to subject informal agency action to an appropriate level of review. 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 I 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: some states' inclusion of non-Article III courts as permissible certifying courts and Delaware's recent expansion of potential certifying entities to the Securities and Exchange Commission ("SEC").

Part II examines the practical need for a federal agency certification process. This Part identifies instances in which federal

agencies determine state law or in which 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 of the legislative and regulatory schemes they administer makes generalizing difficult, this Part draws on examples from such agencies as the SEC, the Internal Revenue Service, the Commodity Futures Trading Commission, and the National Labor Relations Board to suggest that some agencies frequently make state-law determinations. Even when interpretations are infrequent, agencies may face state-law questions that are important but unresolved, 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 III. Federal agency certification enhances states' control of the primary conduct of those subject to state law and avoids 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 III 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 different aspects of federal agency activity: formal adjudication and informal action. It examines the benefits of federal agency certification for each activity, concluding that the mechanism is particularly needed in the absence of judicial review.

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

I. 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.³ It is one of several mechanisms that mediate among different jurisdictions and branches of government, each of which could legitimately make decisions in that area.⁴ 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.

The most well-established certification mechanism allows federal courts to certify unresolved questions of state law to the highest state court.⁵ The federal court has the subject matter jurisdiction to decide an issue of state law, but it instead seeks an opinion from a state court. Although federal courts are typically the certifying entities, some states allow their courts to certify questions to courts in other states and to hear such state-certified questions. For instance, a Wisconsin court might certify a question of Minnesota law to the Minnesota state court.⁶

Both of these examples are interjurisdictional, but certification may also be intra-jurisdictional. Within the federal court system, for instance, the Courts of Appeals may certify questions to the United

3. Cf. Allan D. Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 629–30 (1951) (“[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.”).

4. Other mechanisms include abstention, the doctrine of primary jurisdiction, and advisory opinions. See *infra* Part I.A and Part IV.A (discussing abstention and advisory opinions). The doctrine of primary jurisdiction 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. See, e.g., *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673–74 (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. W. Pac. R.R. Co.*, 352 U.S. 59, 63–65 (1956))).

5. JONA GOLDSCHMIDT, *CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE* 1 (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. J. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 684–85 (1995). Accordingly, although this article uses the term “judicial certification” narrowly to refer to certification from federal and sometimes other states’ courts to state courts, one can imagine a more expansive definition that includes certification from state to federal court or, indeed, from any court to any other court.

6. See WIS. STAT. § 821.08 (2009) (empowering Wisconsin courts to certify questions to other states’ courts); MINN. STAT. § 480.065(3) (2009) (permitting the Minnesota Supreme Court to answer certified questions from other state appellate courts); see also *In re Certified Question from Fourteenth Dist. Court of Appeals of Tex.*, 740 N.W.2d 206 (Mich. 2007) (answering a question certified by a Texas state court about the duty of a property owner).

States Supreme Court.⁷ Several states have similar procedures for intra-jurisdictional certification.⁸

The agency certification this Article proposes is both interjurisdictional and, unlike the familiar judicial certification procedure, interbranch. Until recently, the only instance of interbranch certification was some states' inclusion of non-Article III courts in their certification procedures.⁹ While non-Article III courts and agencies are closely related when the agency engages in adjudication, non-Article III courts do not engage in rulemaking or informal action. Accordingly, certification from non-Article III courts is a more limited expansion of traditional judicial certification than agency certification would be. The only existing example of the type of agency certification proposed here is Delaware's recent experiment with allowing certification from the SEC. To understand how agency certification expands on the existing framework, this Part examines first the mechanism of judicial certification and then the limited experiments in interbranch and agency certification.

A. Widespread Judicial Certification

The Supreme Court and others have lauded certification by federal courts to state courts as a pragmatic mechanism that promotes the speedy resolution of controversies and, in the Court's words, "cooperative judicial federalism."¹⁰ Such certification grew out of the 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.¹¹ In a series of cases beginning in the 1970s, the Supreme Court has encouraged its use.¹² The Court's

7. 28 U.S.C. § 1254(2) (2006); James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 1-2 (1949).

8. CERTIFICATION OF QUESTIONS OF LAW ACT Prefatory Note, 12 U.L.A. 46 n.1 (1995) ("[A] great number of states have provided for certified questions within their court systems."); Vestal, *supra* note 3, at 632.

9. Advisory opinions are also "interbranch." For a discussion about the relationship between certification and advisory opinions, see *infra* Part IV.A.

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

11. 304 U.S. 64, 80 (1938).

12. 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 (1960). See generally GOLDSCHMIDT, *supra* note 5, at 4-5 (tracing the introduction of certification). In 1974, in *Lehman Bros. v. Schein*, the Court again endorsed certification

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.¹³

Certification developed in part as a response to abstention. Abstention doctrine and procedures identify instances in which the federal courts, despite having jurisdiction, should refrain from deciding an unsettled issue of state law. Abstention was appropriate to avoid reaching a federal constitutional issue unnecessarily, to avoid interfering with a state administrative scheme, to allow states to resolve state-law questions, or to avoid duplicative litigation.¹⁴ Certification offered a more efficient alternative to abstention or another mechanism when abstention was a close call.¹⁵

The form and particular language of state authorization vary, but one common characteristic is that the procedure is voluntary on both sides. That is, federal courts and other states' courts are not obliged to certify state-law questions, no matter how unresolved or

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 . . ." 416 U.S. at 391. 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 (1976). For more recent Supreme Court encouragement of certification, see *City of Houston v. Hill*, 482 U.S. 451, 470–71 (1987).

13. Eisenberg, *supra* note 1, at 71, 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).

14. *Burford v. Sun Oil Co.*, 319 U.S. 315, 332–33 & n.29 (1943); *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). See generally 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, *FEDERAL PRACTICE AND PROCEDURE* § 4241 (3d ed. 2008) (discussing the development and evolution of abstention as a judicial doctrine).

15. 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 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 445, 448 (describing the survey responses of thirty-one state court judges and eighteen federal judges experienced with certification). 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, tbls.2 & 3.

intertwined with state policy.¹⁶ Moreover, even if a court certifies a question, the receiving state court is not obliged to answer it; in many instances, state courts have declined to do so.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,¹⁸ the power of cities,¹⁹ the standing rules for claims of tortious interference with a corpse,²⁰ whether an Internet domain name is “property” subject to the tort of conversion,²¹ and the scope of a state’s long-arm statute.²²

The language of state authorization often is based on the 1967 or 1995 version of Uniform Certification of Questions of Law Act (“Uniform Act”). The Uniform Act proposed the following language for defining the powers of the answering court:

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

16. See, e.g., 2D CIR. R. § 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)).

17. See, e.g., *Yesil v. Reno*, 705 N.E.2d 655, 655 (N.Y. 1998) (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). See generally GOLDSCHMIDT, *supra* note 5, at 35–39 (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).

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 eighteen).

19. See *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 457–58 (2d Cir. 2008) (certifying the question of the city’s power to assert a common law nuisance suit against cigarette manufacturers).

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”).

21. *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003).

22. *Internet Solutions Corp. v. Marshall*, 557 F.3d 1293, 1296–97 (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 such that the website owner would be subject to personal jurisdiction under Florida’s long-arm statute); *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 77 N.Y.2d 28, 31, 565 N.E.2d 488, 489 (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).

and there is no controlling appellate decision, constitutional provision, or statute of this State.²³

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

Florida's certification procedure provides an example.²⁹ 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."³⁰ The court rule that implements this certification procedure mirrors this language,³¹ allowing certification as broad as the constitution permits. 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"³²

23. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3, 12 U.L.A. 53 (1995).

24. GOLDSCHMIDT, *supra* note 5, at 18–19 & n.1 (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").

25. *Id.* at 18–19.

26. *See infra* Part IV.A.

27. A 1985 survey of state and federal judges found that state court judges "overwhelmingly agreed that only issues determinative of the case should be certified . . ." Corr & Robbins, *supra* note 15, at 455.

28. *See, e.g.,* 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 because the answer would not be determinative of the motion to bifurcate pending before the certifying federal court); Corr & Robbins, *supra* note 15, at 455 n.168 (citing cases).

29. For insight into New York's certification procedure, see Verity Winship, *Should New York Courts Hear Certified Questions from the Securities and Exchange Commission?*, 29 PACE L. REV. 575, 576 (2009) (describing New York's constitutional provision and related court rules).

30. FLA. CONST. art. V, § 3(b)(6).

31. FLA. R. APP. P. 9.150(a).

32. FLA. R. APP. P. 9.150(b).

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.³³ Federal courts have also incorporated some notion of the “importance” of the state-law issue into their rules or case law concerning when a state-law question should be certified. The U.S. 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.³⁴ Similarly, the U.S. 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.”³⁵

The practice of judicial certification has given rise to an extensive academic literature.³⁶ Proponents have suggested that certification of state-law issues promotes “judicial economy, comity, ease of application, [and] fairness to the litigants,” and importantly, “avoid[s] judicial guesswork.”³⁷ Critics have objected on pragmatic grounds that certification may simply be a costly interruption to

33. *W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp.*, 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.”).

34. *O'Mara v. Town of Wappinger*, 485 F.3d 693, 698 (2d Cir. 2007) (“In deciding whether to certify, we consider: (1) the absence of authoritative state court decisions; (2) the importance of the issue to the state; and (3) the capacity of certification to resolve the litigation.” (citing *Morris v. Schroder Capital Mgmt. Int'l*, 445 F.3d 525, 531 (2d Cir. 2006))); see also *Fid. & Guar. Ins. Underwriters, Inc. v. Jasam Realty Corp.*, 540 F.3d 133, 144 (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.” (quoting *Colavito v. N.Y. Organ Donor Network, Inc.*, 438 F.3d 214, 229 (2d Cir. 2006) (emphasis added))).

35. *Rennert v. Great Dane P'ship*, 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))).

36. See, e.g., *GOLDSCHMIDT*, *supra* note 5, at 119–37 (providing an annotated bibliography of select literature).

37. *Ira P. Robbins, The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127, 134 (1992) (citing *Corr & Robbins, supra* note 15, at 411).

federal court litigation.³⁸ They have also objected on policy grounds that certification is inconsistent with the goals of federal diversity jurisdiction³⁹ or that federal courts' discretion to certify makes the procedure "a handout" from federal courts, which "apes federalism, but does not advance it."⁴⁰ 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.⁴¹ In contrast, certification from federal agencies is a new area of experimentation that scholars and other commentators have largely ignored.⁴²

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

38. See Selya, *supra* note 5, at 687–88 (claiming that certification causes "congestion in the courts, unnecessary duplication of effort, inordinate delay, and added expense" (citing *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 46 (1st Cir. 1988))); 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").

39. See Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1675 (2003) ("[A]t the very least certification is in tension with the fundamental purpose of federal diversity jurisdiction.")

40. Selya, *supra* note 5, at 683 ("[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.")

41. See Eisenberg, *supra* note 1, at 71–72 (noting that North Carolina is the only state not to have adopted a certification procedure).

42. But see 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"); J.W. Verret, *Federal vs. State Law: The SEC's New Ability to Certify Questions to the Delaware Supreme Court*, CORP. GOVERNANCE ADVISOR, Mar./Apr. 2008, 12 & n.1, available at <http://ssrn.com/abstract=1156527> (discussing Delaware's new certification procedure that allows the SEC to certify questions of law directly to the Delaware Supreme Court); Daniel Ross Kahan, *The Administrative State(s): Delaware's New Administrative Certification Procedure*, J. BUS. & SEC. L. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1431611 (arguing that Delaware's certification procedure is beneficial because it promotes state control over corporate governance); Joseph Antignani, Note, *Delaware to the Rescue: A Proper Exercise of Deference by the SEC and the Future Implications of CA, Inc. v. AFSCME*, 3 BROOK. J. CORP. FIN. & COM. L. 431 (2009) (defending the SEC's use of the certification ability).

jurisdiction as well as certification's role as a practical alternative to abstention. Nonetheless, states have experimented in extending certification practices to some non-Article III courts and, recently, a federal agency.

1. 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, some provide that other, non-Article III courts may certify questions.⁴³ The authorizing statutes list specific non-Article III courts or refer to "a court of the United States," which has sometimes been interpreted to include bankruptcy courts, military courts, and courts of claims.⁴⁴ Indeed, the 1995 revision of the Uniform Act proposed the language "a court of the United States" with the express purpose of allowing certification from any United States court, "including bankruptcy courts."⁴⁵ Because these courts are incorporated into the list of permissible certifying agencies, the mechanism works like the more common judicial certification. For instance, participation in certification from non-Article III courts is voluntary on both sides.

States' treatment of bankruptcy courts provides a sense of whether state legislatures have been willing to allow certification from non-Article III courts. As of 2003, four state statutes specifically listed U.S. bankruptcy courts as permissible certifying entities,⁴⁶ while

43. See, e.g., ARIZ. REV. STAT. ANN. § 12-1861 (2008) (allowing certification from tribal courts); MO. REV. STAT. § 477.004(1) (2009) (allowing certification from bankruptcy courts); WYO. STAT. ANN. § 1-13-105 & 1-13-106 (allowing certification from "a federal court," which includes the U.S. Supreme Court, courts of appeals and district courts, as well as "any other court created by act of congress").

44. E.g., MINN. STAT. § 480.065(3) (allowing certification from "a court of the United States"). See generally GOLDSCHMIDT, *supra* note 5, at 17 (listing states that allow certification from non-Article III courts such as the U.S. Bankruptcy Court).

45. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3, 12 U.L.A. 53 cmt. (1995). The language "a court of the United States" replaced the 1967 version of the Uniform Act that listed particular federal courts. *Id.* The comments indicate that "[t]his [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." *Id.*

46. ALASKA R. APP. P. 407(a) (including "a United States bankruptcy court or United States bankruptcy appellate panel"); MO. REV. STAT. § 477.004 (2009) (including "a United States Bankruptcy Court"); OR. REV. STAT. § 28.200 (2007) (including "a panel of the Bankruptcy Appellate Panel Service"); TENN. SUP. CT. R. 23, § 1 (including "a United States Bankruptcy Court in Tennessee"). See generally Sharron B. Lane, *To Certify or Not to Certify: When Can a Bankruptcy Court Certify Questions of State Law?*, NORTON BANKR. L. ADVISER, Jan. 2004, at 6

sixteen other state courts had interpreted the language of their statutory grant to include bankruptcy courts.⁴⁷ Several other states use language like “any federal court” or “a court of the United States,” but have not yet determined whether this language includes bankruptcy courts.⁴⁸ The fact that approximately twenty states permit certified questions from bankruptcy courts does not, however, indicate the extent to which the procedure is used, and empirical studies have not focused on this particular type of certification.

Nonetheless, the potential value of this procedure is suggested by the fact that bankruptcy courts, the Tax Court, and the federal Court of Claims are often called upon to decide issues of state law.⁴⁹ For instance, the Tax Court is often in the position of determining whether someone is liable for a tax deficit as a “transferee” under state law.⁵⁰ Similarly, the rights enforced in bankruptcy are rights created by state law,⁵¹ so bankruptcy courts look to state law to determine whether property is an asset of a debtor,⁵² the scope of a

app. A (listing the state certification statutes or rules and identifying language and case law relating to the bankruptcy courts). Despite statutory authorization, for certification, including certification from bankruptcy courts, the Missouri Supreme Court has held that the Missouri Constitution does not give it jurisdiction over these questions. See *Zeman v. V.F. Factory Outlet, Inc.*, 911 F.2d 107, 108–09 (8th Cir. 1990) (discussing the Missouri Supreme Court’s order declining to answer the certified question from the U.S. Court of Appeals for the Eighth Circuit).

47. See *Lane*, *supra* note 46, at app. A (listing case law allowing certification from bankruptcy courts or panels in Alabama, Arizona, Maine, Massachusetts, Minnesota, Montana, Nevada, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Utah, Washington, West Virginia, and Wyoming).

48. See *id.* (listing statutory language providing for certification from federal courts).

49. See *id.* at 7 (citing cases before the bankruptcy court in which the court had to decide an unresolved issue of state law); *N. Pipeline Constr. 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”).

50. I.R.C. § 6901(a) (2006) (transferee liability applies if a basis exists under applicable state law); see, e.g., *Johnson v. Comm’r of Internal Revenue*, 118 T.C. 74, 79–84 (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).

51. *In re Kaiser*, 791 F.2d 73, 74 (7th Cir. 1986) (citing *Butner v. United States*, 440 U.S. 48 (1979)).

52. *Kallen v. Ash, Anos, Freedman & Logan (In re Brass Kettle Rest., Inc.)*, 790 F.2d 574, 575 (7th Cir. 1986) (citing *Weng v. Farb (In re K & L Ltd.)*, 741 F.2d 1023, 1030 n.7 (7th Cir. 1984)); see also *In re Gladstone Glen*, 628 F.2d 1015, 1018 (7th Cir. 1980) (relying on state law to determine whether the debtor is the “legal owner” of an asset).

state-law homestead exemption,⁵³ or the validity of a deed acknowledgment.⁵⁴

Moreover, at least some of these state-law questions are “certifiable,” as the numerous examples of certification from non-Article III courts demonstrate. For instance, in Oklahoma, which permits certification from “a court of the United States,”⁵⁵ a bankruptcy court certified two state-law questions to the state court, including whether Oklahoma’s motor vehicle lien perfection statute could be interpreted using UCC case law regarding substantial compliance and the perfection of a security interest.⁵⁶ 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.”⁵⁷

Empirical studies are needed to gauge whether certification from bankruptcy courts and other non-Article III courts has been successfully implemented. Nonetheless, many of the arguments for certification developed here likewise apply to non-Article III courts

53. See *In re Arnold*, 73 P.3d 861, 862 (Okla. 2003) (answering a U.S. Bankruptcy Court’s certified question on this issue).

54. See *In re Akins*, 87 S.W.3d 488, 490 (Tenn. 2002) (answering a U.S. Bankruptcy Court’s certified question on this issue). See generally Lane, *supra* note 46, at 7 (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).

55. 20 OKLA. STAT. tit. 20, § 1602 (2002).

56. *Woodson v. Ford Motor Credit Co. (In re Cook)*, 637 P.2d 588, 589 (Okla. 1981).

57. *In re Key*, 930 P.2d 824, 824 (Okla. 1996) (answering question certified to it by the U.S. Bankruptcy Court for the Northern District of Oklahoma); see also *JP Morgan Chase Bank N.A. v. Cougar Crest Lodge, L.L.C. (In re Weddle)*, No. 05-21089-TLM, 2006 Bankr. LEXIS 3468 (Bankr. D. Idaho Dec. 12, 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 Lane, *supra* note 46 (arguing that bankruptcy courts should be able to certify questions of state law).

Federal courts have also considered, though ultimately rejected, litigants’ requests for such certification of state-law issues on appeals from bankruptcy and tax proceedings. See *Holliman v. Midpoint Dev., L.L.C. (In re Midpoint Dev., L.L.C.)*, 466 F.3d 1201, 1207 (10th Cir. 2006) (rejecting motion of debtor to certify question of when an Oklahoma LLC ceases to exist under state law to the Oklahoma Supreme Court); *Pine v. Hartman Paving, Inc. (In re Hartman Paving, Inc.)*, 745 F.2d 307, 309 n.2 (4th Cir. 1984) (refusing to certify a state-law question in a bankruptcy appeal because the state law was settled); *Boyter v. Comm’r of Internal Revenue Serv.*, 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); *First Nat’l Bank of Atlanta 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); *Collier v. United States (In re Charco, Inc.)*, No. 1:03-2323, 2004 U.S. Dist. LEXIS 23160, at *6–7 (S.D.W. Va. Oct. 25, 2004) (refusing in a bankruptcy appeal to certify an issue of status of judgment lien because West Virginia law was settled on the issue).

because of the similarities to agencies that are acting in their adjudicative roles.⁵⁸ Furthermore, the argument by the drafters of the Uniform Act that certification should be expanded to non-Article III courts⁵⁹ has equal force when applied to administrative agencies engaged in adjudication.⁶⁰

2. 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, U.S. District Courts, other states' courts of last resort, and other Delaware courts.⁶¹ 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,⁶² 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."⁶³ The court rule lists instances in which acceptance of a certified question may be appropriate—when the question is one of first impression or "unsettled," or when

58. Kenneth Karst, *Federal Jurisdiction Haiku*, 32 STAN. L. REV. 229, 230 (1979) (provocatively declaring, "Legislative courts / Are but agencies in drag"); 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.").

59. See *supra* notes 44–45 and accompanying text.

60. 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 certification to the Maryland Court of Appeals," but "[u]nfortunately," the Maryland certification procedure did not allow certification from the Court of Claims. *Estate of German v. United States*, 7 Cl. Ct. 641, 645–46 (1985), cited in Caron, *supra* note 42, 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." *Id.*

61. DEL. CONST. art. IV, § 11(8); DEL. SUP. CT. R. 41.

62. See, e.g., ALA. R. APP. P. 18 (allowing for certification when issues of state law are "determinative"); COLO. APP. R. 21.1 (same); FLA. R. APP. P. 9.150 (same); MISS. R. APP. P. 20 (same).

63. DEL. CONST. art. IV, § 11(8).

conflicting lower-court opinions exist—but does not limit the Delaware Supreme Court to this list.⁶⁴

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.⁶⁵ 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."⁶⁶

Although the SEC could have ignored Delaware's innovation, it instead chose to use the procedure. The agency certified a question in June 2008,⁶⁷ and the Delaware Supreme Court answered it soon after.⁶⁸ At issue was whether a company—CA, Inc.—could exclude a particular shareholder proposal from its proxy materials.⁶⁹ Under Rule 14(a) of the Exchange Act, the SEC is tasked with regulating proxy solicitations.⁷⁰ The SEC's proxy rules list the permissible bases for excluding shareholder proposals, two of which explicitly involve state law.⁷¹ 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"⁷² or "[i]f the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject."⁷³ A third basis for exclusion sometimes involves an evaluation of state law: proposals may also be omitted "[i]f the company would lack the power or

64. DEL. SUP. CT. R. 41(b) ("Without limiting the Court's discretion to hear proceedings on certification, the following illustrate reasons for accepting certification: (i) *Original question of law*. The question of law is of first instance in this State; (ii) *Conflicting decisions*. The decisions of the trial courts are conflicting upon the question of law; (iii) *Unsettled question*. The question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court.").

65. Act of May 3, 2007, 76 Del. Laws, ch. 37, § 1 (2007); Verret, *supra* note 42, at 12 & n.1.

66. 76 Del. Laws 2007, ch. 37, § 1.

67. SEC, Certification of Questions of Law Arising from Rule 14a-8 Proposal by Shareholder of CA, Inc. (June 27, 2008), available at <http://www.sec.gov/rules/other/2008/ca14a8cert.pdf> [hereinafter SEC Certification of Questions of Law].

68. CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 228 (Del. 2008).

69. *Id.* at 231; SEC Certification of Questions of Law, *supra* note 67.

70. 15 U.S.C. § 78n(a) (2006).

71. 17 C.F.R. § 240.14a-8 (2009).

72. *Id.* § 240.14a-8(i)(1).

73. *Id.* § 240.14a-8(i)(2).

authority to implement the proposal.”⁷⁴ If a company wants to exclude a shareholder’s proposal, it may request a “no-action letter” from the SEC staff.⁷⁵ These SEC no-action letters indicate whether the agency would take enforcement action against the company for omitting the proposal.⁷⁶

CA, Inc., sought to exclude a shareholder proposal mandating reimbursement of dissident shareholders’ proxy solicitation expenses.⁷⁷ 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.⁷⁸ 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. That 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.⁷⁹

Although this Article suggests that federal agency certification should be adopted more widely, the SEC example can be understood narrowly as part of ongoing dialogues between Delaware and other states, and between Delaware and the federal government about control over corporate law. It fits into the longstanding academic debate over whether states compete over corporate charters and the effects of such competition,⁸⁰ as well as more recent arguments that Delaware is instead competing with the federal government—including with the SEC—for control over the content and

74. *Id.* § 240.14a-8(i)(6).

75. *Id.* § 240.14a-8; Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 938–39 (1998).

76. Nagy, *supra* note 75, at 936–37, 938–39.

77. SEC Certification of Questions of Law, *supra* note 67.

78. *Id.*

79. *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 237, 240 (Del. 2008).

80. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 663–66 (1974) (arguing that Delaware had led a “race for the bottom” in corporate law by providing law attractive to managers); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 254–58, 289–90 (1977) (arguing that state competition for corporate charters leads to legal rules that provide value to shareholders).

administration of U.S. corporate law.⁸¹ 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.⁸² The introduction of SEC certification might also be 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.⁸³ In sum, there are good reasons for Delaware to be the early adopter and to limit its certification to the SEC,⁸⁴ although, as seen below, this analysis does not answer the question of whether broader adoption makes sense.

II. WHEN FEDERAL AGENCIES DETERMINE 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 state courts. Given these costs, certification only makes sense if the type of unresolved state-law questions we would want to be certified arise in the agency context. This question is peculiar to the agency context because agencies are designed to administer federal

81. See, e.g., Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 592 (2003) (arguing that Delaware’s real competition comes from the federal government, not other states).

82. Delaware predominates incorporation in the United States: as of the beginning of 2000, 58 percent of corporations were incorporated in Delaware. Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 389, 391 tbl.2 (2003) (analyzing the distribution by state of publicly traded firms headquartered and incorporated in the United States). No other state rivals this percentage; the remaining incorporations are spread among states, often reflecting the corporation’s home state. *Id.* at 392–93 tbl.3, 394. 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. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971) (outlining the rule that the law of the state of incorporation governs internal aspects of the corporation).

83. Steven J. Cleveland, *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. See, e.g., Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1062, 1075–81 (2000) (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.

84. 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 such as corporate governance to a federal agency based on federal standards. Instead, this article is concerned with when a federal agency is tasked with determining and applying *state* law.

law and, unlike federal courts, lack diversity jurisdiction or *Erie*-driven choice-of-law rules.⁸⁵

However, 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. In the *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 Internal Revenue Service (“IRS”), state law creates the underlying rights and duties, and federal law determines the federal tax consequences of these rights and duties.⁸⁶

While it is difficult to generalize about the myriad federal agencies, this section draws on examples from the Commodity Futures Trading Commission, the SEC, the IRS, and the National Labor Relations Board to suggest that—although agencies may be thought of as concerned primarily with the 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.⁸⁷ Moreover, these examples illustrate a certification problem unique to the agency context. Rather than being restricted to unresolved state-law questions that arise during formal adjudication, agencies may also face such questions in the context of 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

85. Approximately 33 percent of the typical federal court’s docket is based on diversity jurisdiction. See 13E CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3601 n.77 (3d ed. 2009) (“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 ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, 44, tbl. C-10 (2007))).

86. *Morgan v. Comm’r of Internal Revenue*, 309 U.S. 78, 80 (1940).

87. *Compare* *N. Pipeline Constr. 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 suggesting that administrative agencies “adjudicate only rights of Congress’ own creation”), *with* *Morgan*, 309 U.S. at 96–97 (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”).

agency with jurisdiction over futures trading.⁸⁸ Like the IRS and SEC, state-law issues are embedded in the federal scheme the agency administers, and the agency may address such issues in formal 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*.⁸⁹

The CFTC is home to a dispute resolution mechanism called the Reparations Program.⁹⁰ The agency provides a forum and a decisionmaker for resolving disputes between private parties, in particular "futures customers and commodity futures trading professionals."⁹¹ Although triggered by claims of a violation of a federal statute or regulations—the Commodity Exchange Act (the "CEA") or CFTC Rules⁹²—the statute and rules also allow the CFTC to hear counterclaims, including state-law counterclaims.⁹³

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.⁹⁴ At issue was a reparations complaint by Schor against a commodity futures broker for alleged

88. 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.

7 U.S.C. § 2(a)(1)(A) (2006) (amended 2008).

89. 478 U.S. 833 (1986).

90. See 7 U.S.C. § 18 (2006) (creating a means to bring claims for damages based on violations of the Commodity Exchange Act or CFTC Rules and authorizing the CFTC to control the process); Rules Relating to Reparations, 17 C.F.R. § 12 (2008) (describing the Reparations Program). See generally Verity Winship, *Public Agencies and Investor Compensation: Examples from the SEC and CFTC*, 61 ADMIN. L. REV. 137, 147–50 (2009) (detailing the history and operation of the CFTC's reparations program).

91. U.S. Commodity Futures Trading Comm'n, Reparations Program, <http://www.cftc.gov/customerprotection/redressandreparations/reparationsprogram/index.htm> (last visited Nov. 10, 2008).

92. See 17 C.F.R. § 12.13 (describing the criteria for filing a reparations complaint with the CFTC).

93. *Id.* § 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.").

94. 478 U.S. 833, 835–36 (1986).

violations of the CEA.⁹⁵ 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."⁹⁶ At the time, the CFTC regulations allowed the agency to adjudicate all counterclaims "aris[ing] out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint."⁹⁷ In other words, the CFTC had the rough equivalent of supplemental jurisdiction over state-law counterclaims.⁹⁸

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."⁹⁹ 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.¹⁰⁰

CFTC v. Schor indicates that federal agencies 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,"¹⁰¹ which comports with the understanding of federal agencies as primarily concerned with administering federal law. However, the permissible reach of state-

95. *Id.* at 837–38.

96. *Id.* at 838.

97. 41 Fed. Reg. 3995 (Jan. 27, 1976); *see also* 17 C.F.R. §12.19 (2009) (stating that a counterclaim may include "[a]ny 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").

98. *Cf.* 28 U.S.C. § 1367 (2006) (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).

99. 478 U.S. at 857.

100. *Cf.* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 609 (2007) ("Because the adjudicatory powers of federal administrative agencies must be tethered to the 'execution' of federal law, Congress cannot give such agencies the more general adjudicatory authority that is often vested in true courts. To take an extreme example, it plainly would violate the Constitution for Congress to establish a federal administrative tribunal with conclusive authority to adjudicate run-of-the-mill diversity cases. Indeed, the unconstitutionality of any such measure is sufficiently clear that Congress has never tried to do so—despite longstanding concerns about the burdens that diversity cases impose on the Article III courts.").

101. 478 U.S. at 856.

law decisions by federal agencies is fairly broad and pragmatically drawn.¹⁰²

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 types 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.¹⁰³ The issues may be settled in state law, unlikely to recur, or may not implicate important state policies.¹⁰⁴ In the context of certification from federal courts to state courts, some certifiable questions concern issues such as abortion, while others concern contract interpretation or the scope of personal jurisdiction.¹⁰⁵ 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.

102. *Id.* at 857–58; see also *AAA & Bros. Int'l Fin. Corp. v. Pioneer Futures, Inc.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,925 (CFTC Dec. 30, 1996) (finding that the CFTC had jurisdiction over a state-law counterclaim for payment under an indemnification agreement between parties to reparations proceedings); *Simpson v. Office of Thrift Supervision*, 29 F.3d 1418 (9th Cir. 1994) (holding that the Office of Thrift Supervision's determination of breach of state-law fiduciary duty, which showed the reckless disregard required under federal law, did not violate *Schor*).

103. See *supra* Part I.A.

104. See *id.*

105. See *id.*; see also Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 *FORDHAM L. REV.* 373, 401 (2000) (noting that contract law is a large category of certified questions in New York).

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.¹⁰⁶ One indicator of the frequency of this occurrence 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 SEC administrative law judge had the occasion to apply state law about piercing the corporate veil.¹⁰⁷ 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 *CA, Inc.*¹⁰⁸ 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.¹⁰⁹

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 percent).¹¹⁰ This percentage gives a rough estimate of the frequency of state-law issues, although not all state-law questions are unresolved or otherwise appropriate for certification, and the percentage may change as the subject matter of shareholder proposals varies from year to year.¹¹¹ Another indicator that at least some of these state-law issues are “certifiable” is that courts have certified questions that also arise in the no-action context. For instance, a federal court of appeals certified

106. SEC Certification of Questions of Law, *supra* note 67.

107. Application of Ochanpugh, Exchange Act Release No. 54,363, 88 SEC Docket 2510 (Aug. 25, 2006).

108. *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 237, 240 (Del. 2008).

109. John W. White, Dir., 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”).

110. This data comes from a review of the no-action letters posted on the SEC website for this period. See SEC, Staff No Action, Interpretive and Exemptive Letters, <http://www.sec.gov/intersp/noaction.shtml> (last visited Nov. 11, 2009).

111. One year may be dominated by proposals for a shareholder vote on executive pay, for instance, while proposals to declassify boards of directors predominate during the next. See, e.g., RiskMetrics Group, 2008 Post-Season Report Summary, available at http://www.riskmetrics.com/docs/2008postseason_review_summary (surveying proxy trends).

to Oklahoma's highest court a question about a particular proposed bylaw that the SEC has also considered in no-action proceedings.¹¹²

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. For example, some securities are exempt from federal registration when they are exempt under the laws of a particular state.¹¹³ Likewise, common trust funds can avoid classification as investment companies if certain conditions are met, including that their fees and expenses are "not in contravention of fiduciary principles established under applicable federal or state law."¹¹⁴ State contract law may determine whether a sale of securities has taken place.¹¹⁵ Finally, collection of penalties imposed in SEC matters may also depend on state law.¹¹⁶

Although the number or frequency of state-law issues may be limited, the SEC example seems to be the type of matter in which one would want certification: an unresolved, high-stakes corporate law question. *CA, Inc.*, concerned the relative power of shareholders and directors, a balance at the heart of U.S. corporate law.¹¹⁷ Moreover, states have traditionally been the source of the law governing a

112. *Int'l Bhd. of Teamsters Gen. Fund v. Fleming Cos., Inc.*, 1999 WL 166041, at *1 (10th Cir. 1999) (certifying questions to the Oklahoma Supreme Court relating to a proposed by-law that would require a shareholder rights plan to be subject to a shareholder vote); *Int'l Bhd. of Teamsters Gen. Fund v. Fleming Cos., Inc.*, No. 90,185, 1999 WL 35227 (Okla. Jan. 26, 1999) (answering the certified questions); 1998 SEC No-Act. LEXIS 503 (noting that a question arising in the SEC no-action process was the same as the one that had been certified to the Oklahoma court).

113. 17 C.F.R. § 230.1001 (2008); Exemption for Certain California Limited Issues, Securities Act Release No. 7285, 61 SEC Docket 2049 (May 1, 1996); 1 THOMAS LEE HAZEN, *LAW OF SECURITIES REGULATION* § 4.16[1] (6th ed. 2009). 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. 17 C.F.R. § 230.504(b)(1) (2008); Revision of Rule 504 of Regulation D, Securities Act Release No. 7644, 69 SEC Docket 364 (Feb. 25, 1999); MARC I. STEINBERG, *UNDERSTANDING SECURITIES LAW* § 3.09[1] (4th ed. 2007); 1 HAZEN, *supra*, at § 4.20[1]; *see also* STEINBERG, *supra*, at § 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).

114. Investment Company Act, 15 U.S.C. § 80a-3(c)(3) (2006) (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.").

115. 2 HAZEN, *supra* note 113, at § 5.1[7].

116. *See, e.g.*, SEC. & EXCH. COMM'N, REPORT PURSUANT TO SECTION 308(C) OF THE SARBANES OXLEY ACT OF 2002, at 35-36, *available at* <http://www.sec.gov/news/studies/sox308creport.pdf> (noting that state law determines when assets are protected under homestead acts and collection techniques or procedures).

117. *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 230-31 (Del. 2008).

corporation's internal affairs. 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."¹¹⁸ While Delaware's experiment in agency certification may seem *sui generis* because of its special combination of subject matter and state, it may nonetheless 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 by the role of state law in their federal statutory and regulatory schemes and the history of agency determinations of state-law issues.

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.¹¹⁹ "Legitimacy" is defined by the law of the child's or father's residence or domicile, which includes state law.¹²⁰ Similarly, the Board of Veterans' Appeals is often in the

118. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977) (quoting *Cort v. Ash*, 422 U.S. 66, 84 (1975)); see also Leo E. Strine, Jr., *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").

119. See, e.g., *In re Joseph Cabilte Anderson*, File A035 198 461, 2009 WL 263034 (B.I.A. Jan. 21, 2009) (denying a motion to cancel removal because petitioner was not a U.S. citizen based on the requirements of blood relationship and legitimacy); *Matter of Wong*, No. A-12644189, 1963 BIA LEXIS 27, at *4 (B.I.A. May 8, 1963) (applying California law to determine legitimacy of child).

120. 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.").

position of determining whether someone is a “surviving spouse” entitled to benefits.¹²¹ This determination depends in part on state rules about marriage and, in particular, common law marriage.¹²²

In addition, some agencies are continually involved in determining state law. The IRS 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 what interests or rights, so created, shall be taxed.”¹²³ For example, the IRS looks to the underlying state law to determine the interests of taxpayers in property,¹²⁴ partnerships, and LLC liabilities.¹²⁵ It also looks to the state to resolve when “theft” that qualifies for a deduction has occurred.¹²⁶

Another indication that federal agencies are faced with certifiable questions is the existence of state-law questions that arise in administrative proceedings and are ultimately certified by a reviewing court. The point here is not whether 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.

121. See, e.g., 38 U.S.C. § 103(c) (2006) (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) (2008) (defining “marriage” in the same way that 38 U.S.C. § 103(c) defines it).

122. See, e.g., Docket No. 06-17 912, 2007 BVA LEXIS 25776, at *10–11 (B.V.A. Oct. 12, 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 and thus entitled to pension benefits); Docket No. 02-00 859, 2005 BVA LEXIS 110301, at *7 (B.V.A. Nov. 21, 2005) (considering whether woman was a surviving spouse based on a common law marriage).

123. Caron, *supra* note 42, at 782 (quoting *Morgan v. Comm’r*, 309 U.S. 78, 80 (1940)). Professor Caron points out that, while this aspect of allocation between state and federal law is long-established, a conflict continues over who 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.*

124. See, e.g., *Ordlock v. Comm’r*, 126 T.C. 47, 56 (2006), *aff’d*, 533 F.3d 1136 (2008).

125. See, e.g., *United States ex rel. Perler v. Papandon*, 331 F.3d 52, 55–56 (2d Cir. 2003) (noting that state law determines a partner’s liability for partnership obligations, including federal tax liabilities); Rev. Rul. 2004-41, 2004-1 C.B. 845.

126. Rev. Rul. 72-112, 1972-1 C.B. 60 (“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.”). See generally 1988 IRS NSAR 8562 (June 15, 1988) (noting that “numerous areas of tax law are affected by state law (*i.e.*, alimony, divorce, partnership law, insurance, and estate tax)” but declining to certify an issue to Montana state court).

A good example is provided in 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.¹²⁷ State law determines the private property rights, putting the federal administrative agency in the position of determining the content of state law.¹²⁸ 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.¹²⁹ 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 that urged boycotts of mall shops.¹³⁰ An administrative law judge found for the union, and the Board affirmed.¹³¹ 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.¹³² Requiring the union to adhere to this

127. *Glendale Assocs.*, 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 California state law); *Bristol Farms, Inc.*, 311 N.L.R.B. 437, 438 (N.L.R.B. 1993) (“[W]hen 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.”). See generally Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV 891, 905–08 (2006) (criticizing the NLRB’s reliance on state private property rights in its right-to-access inquiries).

128. *Bristol Farms*, 311 N.L.R.B. 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.”).

129. *Fashion Valley Mall, LLC v. NLRB*, 451 F.3d 241, 246–47 (D.C. Cir. 2006) (noting that the union alleged violation of § 8(a)(1) of the National Labor Relations Act, 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” (quoting 29 U.S.C. §§ 157–158 (2006))).

130. 451 F.3d at 242–43.

131. *Id.* at 243.

132. *Equitable Life Assur. Soc’y of the U.S.*, 343 N.L.R.B. 438, 439 (N.L.R.B. 2004) (“[We 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,

unlawful rule amounted to a federal labor law violation.¹³³ The issue reached the U.S. Court of Appeals when the shopping mall petitioned for review, and the Board sought enforcement of its order.¹³⁴ The Court of Appeals then certified to the California Supreme Court the question of whether California law permitted the shopping mall to enforce an anti-boycotting rule.¹³⁵ The California Supreme Court, in its response, held that the shopping mall could not enforce such a rule.¹³⁶

Similarly, in *Walmart Foods v. NLRB*, the NLRB had to resolve two state-law issues. The first issue was whether California law permitted a grocery store to prevent members of the public from engaging in expressive activity on an adjacent parking lot and walkway. The second issue was whether, if they could prevent such activity, state law made an exception for the distribution of literature by union leaders.¹³⁷ When the grocery store appealed and the NLRB sued for enforcement, the U.S. Court of Appeals certified the question to the California Supreme Court,¹³⁸ although that court ultimately declined to answer.¹³⁹

3. The Special Case of Preemption

Finally, federal agencies may be tasked with interpreting state law when deciding the scope of preemption of state law by federal administrative regimes. Preemption of state law may occur either by

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. *Id.* at 449.

133. *Id.*

134. *Fashion Valley Mall*, 451 F.3d at 242.

135. *Id.* at 246.

136. *Fashion Valley Mall, LLC v. NLRB*, 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.").

137. 333 F.3d 223, 227–28 (D.C. Cir. 2003). An administrative law judge had found for the union based on the determination that California state law did not allow the grocery store to exclude union representatives. *Walmart Foods*, 2000 NLRB LEXIS 701, at *14, *28–30 (N.L.R.B. Sept. 25, 2000), *aff'd* 337 N.L.R.B. 289, 289 (N.L.R.B. 2001).

138. *Walmart Foods*, 333 F.3d at 227–28.

139. *Walmart Foods v. NLRB*, 354 F.3d 870, 871 (D.C. Cir. 2004); Hirsch, *supra* note 127, at 914.

the statute that an agency administers or by regulatory preemption—the “preemption of state law by regulations promulgated by federal agencies.”¹⁴⁰ Regulatory preemption in particular raises complex issues, including whether an agency’s determination that preemption is appropriate merits *Chevron* deference. Although an analysis of preemption’s complications is largely beyond the scope of this Article, a few aspects of preemption, and especially regulatory preemption, suggest that federal agency certification may be a good mechanism to promote the cooperative resolution of such issues.

Questions of preemption can be either general or specific. That is, an agency or a court might have to decide whether the federal statute or regulations preempt conflicting state law in general or whether they preempt a specific state law.¹⁴¹ This second category 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],” “infringe[s],” or “hamper[s]” federal law.¹⁴² 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.¹⁴³

While state courts and, ultimately, the U.S. Supreme Court are in the position of determining issues of preemption,¹⁴⁴ questions of preemption do arise in the agency context in both formal adjudicatory and informal settings. 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

140. Amanda Frost, *Judicial Review of FDA Preemption Determinations*, 54 FOOD & DRUG L.J. 367, 377–78 (1999); see also Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POLY 1013, 1021 (2007) (describing “federal preemption of state tort liability” as “a dominant issue for the 21st century”).

141. 21 C.F.R. § 808.1 (2008) (describing the pre-emptive effect of federal regulation of medical devices); see also Frost, *supra* note 140, at 367.

142. *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31–33 (1996).

143. See, e.g., 12 C.F.R. § 213.9 (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. § 226.28 (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).

144. See, e.g., *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 551 (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).

trustees.¹⁴⁵ Similarly, 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.¹⁴⁶

Thus, one situation in which agency certification of a state-law issue would promote cooperative interbranch federalism is when a federal agency must decide whether the statute it administers or its regulations preempt state law.¹⁴⁷ Certainly the state has a stake in answering the question; moreover, the issue is recurrent. Regulations—or their preambles—often expressly state whether the federal regulations are intended to preempt conflicting state law.¹⁴⁸ Indeed, a 1996 Executive Order issued by President Clinton mandated that a federal regulation “specif[y] in clear language the preemptive effect, if any, to be given to the law.”¹⁴⁹

Given that agency certification would be voluntary on both sides, how certifying federal agencies and answering state courts would use the procedure is uncertain, particularly when the agency is the author of the preemptive federal law, as is the case in regulatory preemption. Perhaps federal agencies would be unwilling to certify such preemption questions and, even if they did, state courts might be reluctant to find preemption. Empirical work to date has suggested that federal courts are much more likely than state courts to find that a federal regulation preempts state law,¹⁵⁰ although this is not to say

145. O.C.C., Interpretive Letter No. 1016, 2005 WL 475400 (Jan. 14, 2005); *see also* 12 C.F.R. § 34.4 (2009) (noting that “[e]xcept where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank’s ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks”).

146. *Thorpe v. GTE Corp.*, 23 F.C.C.R. 6371, 6374, 6387 (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).

147. Certification would supplement requests for comments, even outside formal notice and comment requirements, which may further some of the same goals. In *Thorpe v. GTE Corporation*, for example, the FCC requested and considered comments from various groups, including state agencies. *Id.* at 6374 & nn.27–28.

148. Frost, *supra* note 140, at 381 (citing *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 158 (1982) (quoting the pre-ambble 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”)); Sharkey, *supra* note 140, at 227–28.

149. Exec. Order No. 12,988, 61 Fed. Reg. 4,729 (Feb. 5, 1996).

150. Sharkey, *supra* note 140, at 1017 & n.8.

that federal agencies always support preemption.¹⁵¹ Despite these and other caveats,¹⁵² informed agency decisionmaking about preemption is particularly crucial and, as such, warrants experimentation.

* * *

In sum, because of the variety of federal agency types, activities, and statutory or regulatory schemes, this area resists generalization. Nonetheless, the examples above suggest that federal administrative agencies are often in the position of determining state law and that, even when these determinations are less frequent, they may involve important and unresolved state issues. As such, a practical reason exists for expanding the practice of certification to federal agencies. The next Part considers the benefits of such an expansion.

III. HOW CERTIFICATION PROMOTES COOPERATIVE INTERBRANCH FEDERALISM

Many of the widely accepted rationales for judicial certification support agency certification as well. For instance, both mechanisms exhibit respect for state sovereignty and thus further general values of federalism and comity. Also, certification takes advantage of state courts' expertise in state law regardless of whether a court or an agency certifies the question.

Other rationales are unique to agency certification. Unlike generalist courts, for instance, federal agencies are expert in particular subject areas and federal statutes. *Chevron* deference to agency statutory interpretations is appropriate, according to the Supreme Court, because of both the agency's expertise in a "technical and complex" federal regulatory scheme¹⁵³ and its expertise in administering its statute, particularly relative to the judiciary's lack of

151. Brief of Former Comm'rs of the FTC as Amici Curiae in Support of Respondents at 3, *Altria v. Good et al.*, 129 S.Ct. 538 (2008) (No. 07-562) (arguing that the FTC had *not* preempted state law about cigarette labeling).

152. 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., *Thorpe*, 23 F.C.C.R. 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*, 16 F.C.C.R. 11,558, 11,559 (2001) (same); *supra* Part II.A (discussing the primary jurisdiction doctrine); see also *Wireless Consumers Alliance*, 15 F.C.C.R. 17,021, 17,022 (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).

153. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (citing *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984)).

expertise.¹⁵⁴ The flip side of this specialization is that agencies are not expected to be expert beyond the limits of the statute or subject area they administer. Nor are they generalists. Accordingly, they may be less able than federal courts to predict how a state court would decide an issue. Moreover, allocation from specialized administrative agencies to state courts may be more pressing than when the alternatives are a generalist federal court or a state court.

Furthermore, the need for agency certification may be great precisely because of another difference between agencies and courts: agencies do not act solely through formal adjudication. Particularly when agency actions are informal, the mechanism would provide an important safety valve where judicial review is unavailable as either a practical or a legal matter.

A. Certification Preserves State Control over Primary Conduct

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.¹⁵⁵ To the extent that this rationale describes a mechanism through which federal entities can show respect for state sovereignty, it applies to any federal certifying entity—whether judicial, administrative, or something else—and supports the argument that states should adopt federal agency certification. This section goes beyond this general concern with comity and federalism to ask what specific state interests a federal agency certification procedure would protect.

That the state should have the opportunity to declare and to control the development of state law, particularly when important state policies are at issue, is often put forward as a compelling reason

154. *Id.*

155. *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 v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting) (asserting that, without certification, federal courts “are forced to make important state policy, in contravention of basic federalism principles”).

for judicial certification.¹⁵⁶ 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, however, that the certifying court or agency would otherwise impose particular content on the state. A decision of state law by a federal agency or federal court does not bind the state—the highest state court is free to disregard the federal entity’s prediction and come to a different conclusion.¹⁵⁷

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.¹⁵⁸ Moreover, agency decisions of state law will influence the primary behavior of both the individuals and entities directly subject to the agency’s decision as well as, more generally, those who shape their conduct in response to agency interpretations. The concern with control arises primarily when the federal entity incorrectly predicts how the highest state court would resolve a question of state law. In other words, because decisions of state law by federal courts or agencies do not bind the state court, the federal judge’s or agency’s educated guess (or, in Court of Appeals Judge Sloviter’s words, the “Erie guess”¹⁵⁹) 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.¹⁶⁰

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

156. See, e.g., Corr & Robbins, *supra* note 15, at 416–17 (arguing that certification promotes state autonomy by allowing federal courts to avoid their duty to resolve questions of state law in narrow circumstances).

157. Cf. Nash, *supra* note 39, at 1098 (observing that only the highest state court can make a “definitive” ruling of state law under *Erie*).

158. Cf. *id.* at 1697 (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”).

159. Sloviter, *supra* note 38, at 1679.

160. 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 *National Cable & Telecommunications Association v. Brand X Internet Services*. See Kathryn A. Watts, *Adapting to Administrative Law’s Erie Doctrine*, 101 NW. U. L. REV. 997, 1001–02 (2007) (pointing out the difficulty federal courts may experience when faced with “applying ambiguous state law which they [cannot] authoritatively construe” and arguing that similar problems arise where federal courts must rule on matters within the agency expertise before the agency has expressed its views on the matter).

court” and “skew the decisions of persons and businesses who rely on them.”¹⁶¹ First, the federal agency decision of state law will influence and shape the primary conduct of the parties directly involved, such as the CA, Inc., shareholder making the proposal and the corporation itself. 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.”¹⁶² Second, the agency’s decision of state law may shape primary conduct beyond that of the individuals or entities directly involved, reaching those who follow statements of commissioners, amicus briefs, litigation positions, and other agency actions which, although non-binding, are influential.¹⁶³

Furthermore, there is reason to think that federal agencies make incorrect predictions. Federal courts have often incorrectly

161. Sloviter, *supra* note 38, 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. Kaye & Weissman, *supra* note 105, 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.” *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941). A related concern that does not apply to the agency context is 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. *See McCarthy v. Olin Corp.*, 119 F.3d 148, 157–58 (2d Cir. 1997) (Calabresi, J., dissenting) (developing this argument).

162. *See, e.g., John R. Brown, Certification—Federalism in Action*, 7 CUMB. L. REV. 455, 456 (1977) (noting the frustration of litigants when the rule of law announced by the federal court turns out to be “a ticket for one ride only”); *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 5, 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.”).

163. For example, although technically non-binding, SEC no-action letters provide a relatively well-developed source of interpretations of the securities laws. *See Thomas P. Lemke, The SEC No-Action Letter Process*, 42 BUS. LAW. 1019, 1019–20 (1987) (“Because no-action letters represent the views of those who administer the federal securities laws on a daily basis, they have assumed a significant degree of importance to practitioners, especially in light of the relative dearth of case law or formal Commission interpretations on many aspects of these laws. Indeed, on a significant number of the more complex aspects of the federal securities laws, no-action letters are the sole body of precedent. As a result, experienced practitioners recognize staff no-action letters as an essential resource for advising clients as to the proper interpretation of the law.”); Nagy, *supra* note 75, at 924 (discussing the widespread reliance on no-action letters by courts, practitioners, and their clients).

predicted the stance of the highest state court,¹⁶⁴ 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. They focus on the specialized area they administer, whereas federal courts are expected to be generalists. Moreover, some commentators have suggested that agencies interpret statutes in a fundamentally different way than courts, with more sensitivity to executive directives and the policy context.¹⁶⁵ If the agency uses different interpretive tools than the state court, it may be less able to predict its decision than a federal court, which uses the same approach.

Finally, rather than predict state law, agencies may simply decline to decide unresolved issues of state law. So, for instance, the SEC has indicated that it will refrain from issuing a no-action letter concerning a shareholder proposal in the proxy context in the absence of resolved state law.¹⁶⁶ Rather than reduce the need for a federal agency certification procedure, however, the SEC's abstention raises problems akin to that of abstention in the judicial process. In effect, it

164. See, e.g., Corr & Robbins, *supra* note 15, at 415 n.11 (1988) (citing cases in which federal courts incorrectly predicted state law); Kaye & Weissman, *supra* note 105, 378 n.28 (citing commentators who have discussed federal courts' incorrect predictions of state law); Sloviter, *supra* note 38, 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 had predicted).

165. See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 535 (2005) (comparing agency interpretations “based on text, legislative history, statutory history, past agency practice, the balance of competing congressional purposes, and industry or scientific understandings” with “judicial approaches based on pure textual analysis, plain meaning or the invocation of grammatical rules”); Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 104–05 (2009) (arguing that agencies are in a better position to interpret statutes in light of their purpose than are courts).

166. See SEC Certification of Questions of Law, *supra* note 67 (“The Division, faced with two conflicting opinions on Delaware law from Delaware law firms, does not resolve disputed questions of Delaware law. If there is no way to obtain any such resolution, the Division intends to inform CA that it has not satisfied its burden of demonstrating that it may exclude the AFSCME Proposal under Rule 14a-8(i)(1) or Rule 14a-8(i)(2).”); Bank of America Corp., SEC No-Action Letter, 2009 SEC No-Act. LEXIS 57, at *5–7 (Feb. 11, 2009) (“The Division has repeatedly refused to issue no action relief based on unsettled issues of state law.” (citing PLM Int’l, Inc., SEC No-Action Letter, 1997 WL 219918, at *1 (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., SEC No-Action Letter, 1992 WL 43435, at 10 (Feb. 28, 1992) (concluding that the SEC Division of Corporation Finance cannot conclude that state law prohibits the bylaw when no judicial decision squarely supports that result).

prefers one “party,” the shareholder proposal’s proponent,¹⁶⁷ and forces further procedures if any relief is to be had.

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.¹⁶⁸ 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 *corporate* law. The state court’s expertise in state law does not vary depending on whether a federal court or agency is raising the state-law question. Thus, 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 above examples 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.¹⁶⁹

The highest state court is also “better” at deciding unresolved issues of state law because it has more room for judgment and for being sensitive to important state policies or legal frameworks.¹⁷⁰ 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.¹⁷¹ When the state law is unsettled or when only lower court opinions are available, federal courts or agencies are put

167. See Robert B. Thompson, *Defining the Shareholder’s Role, Defining a Role for State Law; Folk at 40*, 33 DEL. J. CORP. L. 771, 783 (2008) (“‘If the staff receives dueling opinions of counsel on state law,’ as to whether a particular proposal is a proper subject of action for shareholders, which is a likely occurrence, the SEC ‘ha[s] traditionally deferred to the proponent’” (quoting John W. White, Dir., 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>).

168. Cochran, *supra* note 1, at 159, 160 n.14.

169. See *supra* Part II.

170. See, e.g., *Drury Dev. Corp. v. Found. Ins. Co.*, 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 comport with the law and public policies of the state as well as the Court’s sense of law, justice, and right.”).

171. *Guar. Trust Co. v. York*, 326 U.S. 99, 108 (1945) (observing that a federal court must act as “another court of the State”).

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.”¹⁷² In sum, the job of prediction is quite different from the job of a state court that must address an open question: the federal court or agency must parse the state decisions, while the state court may appropriately reason in terms of policy and common sense.¹⁷³

State court expertise is not considered in a vacuum, however. Certification is worth the trouble 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 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.¹⁷⁴

The institutional expertise justification for *interbranch* certification is more compelling than that for federal court / state court certification because the federal agency’s *raison d’être* is to be the expert administrator of a specialized subject area and a particular federal statute and regulations. An agency’s expertise in a single area cuts against its effectiveness in interpreting state law. It is not expected to be expert outside of its specialized area. Moreover, a federal agency is expert in a national scheme and does not have a similar depth of expertise in fifty different bodies of state law.¹⁷⁵ Nor is it expected to be a generalist, applying broad principles of law that cross subject areas. Further, if a federal agency takes into account

172. Kaye & Weissman, *supra* note 105, at 378 (quoting *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960)).

173. *Id.* 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 cast light on what the highest state court would ultimately decide.” (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 142 (1973))).

174. *Cf.* Nash, *supra* note 39, at 1872 (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-state parties renders them less able than federal courts to resolve state law questions ‘correctly’ ”).

175. *See, e.g.*, Hirsch, *supra* note 127, at 909 (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).

policy and executive branch directives in a way that makes its process of interpretation differ fundamentally from that of a court,¹⁷⁶ it may be even less capable of acting in the shoes of a state court interpreting state law.

C. Certification Speeds Review of State-Law Determinations and Provides Recourse in Otherwise Unreviewable Agency Actions

Unlike federal courts, agencies act not only through formal adjudication, but also through rulemaking and through informal action—a residual category that captures the wide variety of agency activities that are neither formal adjudication nor formal rulemaking.¹⁷⁷ Whereas courts resolve adversary proceedings, 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.¹⁷⁸ The rationale for and appropriateness of federal agency certification depends on the context in which the state-law issue arises and also on the availability of judicial review. As many commentators have noted, divisions between adjudication and rulemaking and between formal and informal proceedings are far from clear in fact or in law,¹⁷⁹ but this lack of clarity does not preclude some general observations about why federal agency certification might be desirable in the various contexts and how such certification might work.

Certification’s role in agency adjudication, defined broadly as the “determination of individual rights or duties,”¹⁸⁰ depends on the availability of judicial review. When judicial review—and with it, potential judicial certification from the reviewing court—is available, agency certification speeds the resolution of the state-law issue. When

176. Cf. Mashaw, *supra* note 165, at 524–25 (noting the difficulty in identifying how agencies interpret statutes).

177. See, e.g., William J. Lockhart, *The Origin and Use of ‘Guidelines for the Study of Informal Action in Federal Agencies’*, 24 ADMIN. L. REV. 167, 174 (1972) (defining informal agency action as executive branch action “other than formal adjudication or rulemaking”).

178. Mashaw, *supra* note 165, at 525.

179. See, e.g., Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park’s Requirement of Judicial Review “On the Record”*, 10 ADMIN. L.J. AM. U. 179, 180–81 (noting that “ambiguities . . . blur even [the] most basic distinctions” of “the law governing federal administrative procedure”); cf. Antonin Scalia, Speech at Duke University School of Law, *Judicial Deference to Administrative Interpretations of Law*, in 1989 DUKELJ. 511, 511 (“Administrative law is not for sissies.”).

180. CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE 45 (2d ed. 1997).

judicial review is unavailable as either a practical or legal matter, agency certification may provide a check on agency decisionmaking.

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. On appeal from the National Labor Relations Board, for example, federal courts have certified questions of state law to the highest California state court.¹⁸¹ Such judicial review is widely available: the Administrative Procedure Act provides for judicial review of agency action in most, but not all cases.¹⁸²

Even when judicial review is available as a legal matter, however, federal agency certification may be the only practical way for the issue of state law to reach an expert court. Judicial review is rare, in part because it depends on an issue's reaching the highest levels inside an agency. In the SEC no-action context, for instance, the availability of judicial review depends on whether the Commission agrees to review the SEC staff's decision.¹⁸³ If it does, then judicial review is available, but Commission review is infrequent and of limited value, as a practical matter, because of time and expense.¹⁸⁴ Similarly, in CFTC reparations proceedings, judicial review is available only of orders of the Commission.¹⁸⁵

181. *Fashion Valley Mall, LLC v. NLRB*, 451 F.3d 241, 242–43 (D.C. Cir. 2006) (certifying question to California Supreme Court on appeal—and seeking enforcement—from NLRB); *Walmart Foods v. NLRB*, 333 F.3d 223, 223–24 (D.C. Cir. 2003) (same).

Federal courts have also certified state-law questions on appeals from bankruptcy proceedings and actions challenging IRS determinations. See *In re Krause*, 546 F.3d 1070, 1071 (9th Cir. 2008) (certifying a question to the Nevada Supreme Court on bankruptcy appeal); *Imel v. United States*, 375 F. Supp. 1102, 1116 (D. Colo. 1974) (certifying a state-law issue underlying federal tax determination); *Estate of Madsen v. Comm'r*, 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”).

182. 5 U.S.C. § 702 (stating general rule that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof”). *But see id.* § 701(a) (listing exceptions to the general rule).

183. Lemke, *supra* note 163, at 1039–40.

184. *Id.* at 1040. A shareholder proponent might alternatively seek an injunction in federal district court. See, e.g., *Lovenheim v. Iroquois Brands, Ltd.*, 618 F. Supp. 554, 562 (D.D.C. 1985) (shareholder successfully sought preliminary injunction in federal court).

185. 7 U.S.C.A. § 18(e) (“Review. Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located . . .”).

Federal agency certification still has a role when judicial review is available legally and practically: it enables more timely resolution of unresolved state-law issues. Just as certification was welcomed as a sensible alternative to abstention that "saved time, energy and resources,"¹⁸⁶ federal agency certification may be a practical and speedier alternative to waiting for judicial review and access to judicial certification.¹⁸⁷ This process includes more than just delay; it may result in potentially unnecessary proceedings in the reviewing court and block any settlement efforts.¹⁸⁸ Rather than making agency certification unnecessary altogether, the availability of judicial review should inform the decisions of the certifying agency and the answering court to certify or to answer.

In the absence of judicial review, certification introduces a check on agency action. The scope of this category of unreviewable agency actions is debated and has shifted over time. Whatever its contours, courts have found certain agency action to be unreviewable, either because the relevant statute is explicit about the lack of judicial review or because the action has been "committed to agency discretion by law."¹⁸⁹ Until 1988, for instance, actions by what was then the Veterans Administration (including benefit determinations turning on state-law marital status) were insulated from judicial review by statute.¹⁹⁰ In the category of actions "committed to agency discretion,"

186. See, e.g., *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) ("[I]n the long run [certification] save[s] time, energy, and resources . . ."); Lawrence L. Piersol, *Certifying Questions to State Supreme Courts as a Remedy to the Abstention Doctrine*, 9 S.D. L. REV. 158, 167-68 (1964) (discussing delay, expense, and lack of guidance as three distinct problems of abstention).

187. 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 courts of appeals and not the district courts to certify such questions. See Sloviter, *supra* note 38, at 1686 ("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.").

188. *Id.*

189. Administrative Procedure Act § 701(a) (exempting agency action from judicial review "to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law"); see also Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990) (discussing the scope of the "committed to agency discretion" category).

190. See 38 U.S.C. § 211(a) (1982) ("[T]he decision of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."); Barton F. Stichman, *The Veterans' Judicial*

the Supreme Court found that an agency's refusal to initiate proceedings was presumptively unreviewable.¹⁹¹ In these circumstances, federal agency certification allows review of a particular state-law issue, even if full-fledged judicial review is unavailable. At the same time, the fact that agency certification is narrower in scope than judicial review preserves discretion and flexibility in the agency—the reasons why informal action is permitted and why so much agency work depends on it.¹⁹² 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.

Although the proposed certification procedure focuses on formal and informal agency adjudication, agencies also act through rulemaking. Rulemaking defines the outer limits of agency certification. Specific state-law issues are unlikely to arise in this context because federal administrative agencies lack the power to prescribe the content of state law through rulemaking. Even when agencies make determinations that affect or interact with state law (such as when a federal agency determines the preemptive force of a federal statute or regulation on state law¹⁹³), certification would be analogous to the situation where a legislature asks a court for its opinion on a legal matter pending before it. This situation should sound familiar: rather than speaking of this process as “certification,” it is usually termed an “advisory opinion.” As detailed below, the issuance of such opinions by courts is 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 capacity is outside the scope of the proposed agency certification, which focuses instead on agency adjudication of varying degrees of formality.

In sum, federal agency certification has two functions when the agency undertakes adjudication, whether formal or informal. Where judicial review is available, 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

Review Act of 1988: Congress Introduces Courts and Attorneys to Veterans' Benefits Proceedings, 41 ADMIN. L. REV. 365, 366 (1989).

191. *Heckler v. Chaney*, 470 U.S. 821 (1985).

192. See Ronald J. Krotoszynski, Jr., *Taming the Tail that Wags the Dog: Ex Post and Ex Ante Constraints on Informal Adjudication*, 56 ADMIN. L. REV. 1057, 1058, n.7 (2004) (estimating that more than 90 percent of agency activity is informal).

193. See *supra* Part II.B.3.

does it always do so, given variations in the function and frequency of judicial review of the particular agency's adjudications. Accordingly, federal agency certification may be appropriate where it leads to faster and more streamlined resolution. Where judicial review is unavailable, certification introduces a check on agency action by involving the courts in at least one stage of the proceedings.

IV. IMPLEMENTATION

This Part considers how a federal agency certification procedure may be implemented. It describes the main difficulties with implementation: (1) the concern that a court answering a certified question is in the position of issuing an advisory opinion, (2) the fear that agencies may be engaged in inappropriate subdelegation by passing one of their responsibilities along to state courts, and (3) the difficulty of separating 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

Critics of interbranch certification may argue that answering certified questions amounts to issuing advisory opinions. Advisory opinions are given by courts in response to "questions of law that neither arise from actual litigation nor involve private rights,"¹⁹⁴ usually to another branch of government.¹⁹⁵ In the federal system, Article III's "case or controversy" requirement has been read to prohibit advisory opinions¹⁹⁶ and the majority of states also prohibit their courts from issuing advisory opinions.¹⁹⁷ They are disfavored because questions giving rise to advisory opinions may be too abstract; advisory opinions are not the product of an adversarial process, which

194. Gerald M. Levin, Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 356 (1963).

195. See also Charles M. Carberry, 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").

196. *Flast v. Cohen*, 392 U.S. 83, 96–97 (1968).

197. Jonathan D. Persky, Note, *"Ghosts That Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155, 1181 (2005) (listing ten states that allow their courts to issue advisory opinions).

may cause a lack of concreteness; and opinions on proposed legislation may trigger separation of powers concerns if giving such opinions is not a judicial function and interferes with the legislature.¹⁹⁸ As the Supreme Court put it in *Flast v. Cohen*, “the rule against 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.’ ”¹⁹⁹

The states that 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.”²⁰⁰ Delaware permits advisory opinions by statute,²⁰¹ and this statute has been found not to violate the separation of powers.²⁰² Nonetheless, the categories of advisory opinions are limited primarily to constitutional questions,²⁰³ and the category of those who can receive advisory opinions is limited to the governor and governing assembly.²⁰⁴ Moreover, the statutory allowance for advisory opinions has been read

198. *Id.*; see also Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1005–07 (1924) (describing the constitutional and statutory problems with the advisory opinion process); 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 opinion process).

199. *Flast*, 392 U.S. at 96–97 (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)); see also Stevens, *supra* note 198, 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”).

200. R.I. CONST. art. X, § 3 (internal quotations omitted); see also Persky, *supra* note 197, at 1160–61 (describing Rhode Island’s use of advisory opinions).

201. DEL. CODE ANN. tit. 10, § 141 (2008).

202. *In re Opinions of Justices*, 88 A.2d 128, 139 (Del. 1952).

203. DEL. CODE ANN. tit. 10, § 141 (“§ 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.”).

204. *Id.*; see, e.g., *Opinions of the Justices*, 88 A.2d 128 (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).

narrowly as outside the normal activities of the judiciary.²⁰⁵ Delaware courts and judges have, however, been unusually willing to provide advice to various constituencies through dictum, speeches, articles, and other writings.²⁰⁶

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.²⁰⁷ The assertion of state control over primary conduct or the introduction of a level of input into informal proceedings determining state law might be compelling reasons 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 formal agency adjudication 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.²⁰⁸ Nonetheless, most courts have rejected the advisory opinion concern, although for varied reasons.²⁰⁹

The certifying court—like an adjudicating agency—considers “a genuine live controversy between the parties” that is “based upon an existing factual situation which will be determined by [the court's] response to questions.”²¹⁰ Moreover, the requirement that the state-

205. Opinion of the Justices, 413 A.2d 1245, 1251 (Del. 1980).

206. 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 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).

207. Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 739–43 (Fla. 1961).

208. *Corr & Robbins*, *supra* note 15, 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.”).

209. 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); *Corr & Robbins*, *supra* note 15, at 419–22 (describing the various responses of state courts to the argument that answers to certified questions were advisory opinions); *Kaye & Weissman*, *supra* note 105, at 394 & n.125.

210. *Richards*, 223 A.2d at 832; see also *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 151 (Kan. 1980) (reasoning that the certification procedure did not generate advisory opinions

law issue be “dispositive” 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.²¹¹ Finally, the state court’s decision is binding on the federal court (or at least treated as such because of *Erie*²¹²) 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.²¹³

Agency reliance on informal action poses more of a problem for certification procedures because, as the context for certification departs from formal litigation, the answers to certified questions are more easily characterized as advisory opinions. For agencies, a certifiable question often arises not in litigation or formal adjudication, but rather during informal proceedings, making it difficult to argue 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.²¹⁴ These interested parties may present the argument in front of the answering court; as in the case when judicial certification was challenged, the fact that “[p]arties are before the court and are provided with the opportunity for presentation of briefs and oral argument customary upon appeal” helped ensure that the

because the 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”); *Wolner v. Mahaska Indus., Inc.*, 325 N.W.2d 39, 40 (Minn. 1982) (rejecting argument that answers to certified questions are advisory opinions); *Corr & Robbins*, *supra* note 15, at 421 (quoting the *Spencer* court’s reasoning).

211. *Kaye & Weissman*, *supra* note 105, at 378.

212. 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.* at 393.

213. *Corr & Robbins*, *supra* note 15, at 455 (surveying state and federal judges in 1985 and finding that the tight connection to the federal case minimized concern that answers to certified questions were advisory opinions); *Levin*, *supra* note 194, at 357 (“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.”).

214. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (listing aspects of adjudication that need to be present in an administrative proceeding for the administrative decision to have preclusive effect).

question was concrete and subject to an adversarial process.²¹⁵ Furthermore, as with judicial certification, *stare decisis* and preclusion rules will apply, binding the state court and the parties in front of it once the state court has answered a certified question.²¹⁶ 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, but as long as the answering state court is considering a defined question with advocates on either side, the existence of formal federal litigation is not dispositive.

The no-action process that gave rise to the SEC's certified question to the Delaware court is a good example of informal agency action that has many of the attributes of adjudication.²¹⁷ The no-action letters—no matter how influential in practice—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 either from seeking other relief or from excluding the provisions from the proxy materials and taking their chances as to enforcement action.²¹⁸ In fact, the SEC has reserved the right to take enforcement action even if it has issued a no-action letter announcing that it would not do so.²¹⁹ However, the SEC no-action letter at issue in *CA, Inc.*, featured opposing “parties” (the shareholder proponent and the company) and a third-party adjudicator.²²⁰ Not only did the two sides make competing submissions before the SEC, but they also contested the issue in the state court proceeding after the question

215. *Richards*, 223 A.2d at 832.

216. *Levin*, *supra* note 194, at 357.

217. *See supra* Part I.B.2.

218. *See New York City Employees' Ret. Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995) (ruling that a “no action letter” is an interpretive rule and does not carry the force of law); Administrative Proceedings Instituted Morgan Stanley & Co, Inc., Exchange Act Release No. 28,990, 1991 SEC LEXIS 409, *3 (Mar. 20, 1991) (noting that no-action letters “are not rulings of the Commission or its staff on questions of law or fact”); MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW § 2.04[B] (4th ed. 2007); *Lemke*, *supra* note 163, at 1019 nn.1, 3 (noting that, according to the Commission, no-action letters “only purport to represent the views of the officials who give them” or “set forth staff positions only” that “are not rulings of the Commission or its staff on questions of law or fact”).

219. ROBERT J. HAFT & MICHELLE H. HUDSON, ANALYSIS OF KEY SEC NO-ACTION LETTERS § 6.2 (2006) (recognizing that SEC no-action letters are merely informal views and that future enforcement action is not precluded). There are practical reasons for the agency not to exercise this power, but it reserves this right.

220. *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 230 (Del. 2008).

was certified.²²¹ Moreover, *CA, Inc.*, resulted in a state court decision with the usual force of law.²²²

Finally, states may consider 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 individual judges²²³—although the authority and usefulness of such advisory opinions certainly come from the judges' official position.²²⁴ Where the reasons for allowing certification are compelling, some states may be willing to accept this pragmatic solution.

B. Agency Authority to Certify

The flip side of the objection to the power of the *state* to accept certified questions from federal agencies is the concern with the power of the *agency* to certify. In other words, is certification of state-law questions to state courts an appropriate subdelegation by federal agencies?²²⁵

Courts have invalidated subdelegation by federal administrative agencies to outside parties, including state entities, because of a concern that “lines of accountability may blur, undermining an important democratic check on government decision-making”²²⁶ or that “these parties will not share the agency’s ‘national vision and perspective’ . . . and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme.”²²⁷

However, federal agency certification differs from the type of subdelegation that has been successfully challenged. After the state court has decided the issue of state law, the matter returns to the

221. *Id.*

222. *Id.* at 240.

223. Opinion of the Justices, 413 A.2d 1245, 1248 (Del. 1980) (“We have emphasized that opinions given by the Justices ‘administratively’ under the [state advisory opinion] Statute are non-adjudicative expressions of personal points of view . . .”).

224. *Id.* (“Such opinions are different and useful, and, properly understood, they are authoritative for one reason: the persons giving them are the members of the highest Court of this State and, in effect, are what one would expect the Justices to say if the issue had been presented to them in litigation.”).

225. *Cf.* C. Steven Bradford, *The SEC’s New Regulation CE Exemption: Federal-State Coordination Run Rampant*, 52 U. MIAMI L. REV. 429, 437–39 (1998) (suggesting that incorporating a state-law exception into SEC rules is arguably unconstitutional). Section 4A of the Exchange Act permits some delegation, but not to state courts.

226. U.S. Telecom Ass’n v. FCC, 359 F.3d 554, 565–66 (D.C. Cir. 2004).

227. *Id.* (quoting Nat’l Park & Conservation Ass’n v. Stanton, 54 F. Supp. 2d 7, 20 (D.D.C. 1999)).

agency for final disposition, so such a certification process does not assign all functions in a particular area to an outside entity. Moreover, courts have held that agencies may subdelegate the definition of a term in a federal regulation to a state agency as long as the state's determinations are consistent with the statute.²²⁸ The delegation here involves state-law determinations rather than elements of federal law, which should make it more likely that allocation to the state is permissible.

If agency certification is nonetheless considered inappropriate subdelegation, practical resolutions are available. Agencies can get advice from any source, as long as the federal actor makes the final decision.²²⁹ The problem is that to avoid issuing advisory opinions, the federal actor should treat state court opinions as binding; however, to avoid inappropriate subdelegation, the federal actor should get the last word. The pragmatic solution is that an opinion of a state court answering a certified question is likely treated as binding whether it is formally binding 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 certification mechanism that answers are "merely advisory and entitled, like dicta, to be given persuasive but not binding effect as a precedent,"²³⁰ courts have since abandoned that notion.²³¹ One sees a similar accommodation regarding 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."²³² Alternatively, a state might have its judges opine in their individual capacity.

C. Mixed Federal- and State-Law Questions

A final obstacle to implementation is the concern that the federal and state questions that arise in agency proceedings may be

228. *Vierra v. Rubin*, 915 F.2d 1372, 1376 (9th Cir. 1990).

229. *See, e.g., U.S. Telecom Ass'n*, 359 F.3d at 565-66 ("[A] federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself. . . . An agency may not, however, merely 'rubber-stamp' decisions made by others under the guise of seeking their 'advice' . . . nor will vague or inadequate assertions of final reviewing authority save an unlawful subdelegation.")

230. *Sun Ins. Ltd. v. Clay*, 319 F.2d 505, 509 (5th Cir. 1963).

231. *See, e.g., Engel v. CBS, Inc.*, 182 F.3d 124 (2d Cir. 1999) (giving significant weight to answers to certified questions). *See generally* WRIGHT, MILLER, COOPER & AMAR, *supra* note 14, § 4248 n.69 (discussing court decisions that treated certification decisions as binding).

232. *Stevens, supra* note 198, at 7.

inextricable. Although this obstacle is surmountable, the concern arises with particular force in the agency context because agencies lack diversity jurisdiction and because *Schor* permits consideration of state-law issues only when they are related to federal claims.

That said, the state-law and the federal-law questions before an agency may be easily separable and identifiable. For example, CFTC reparations proceedings may consider a state-law counterclaim for a debt.²³³ The counterclaim is integral to the federal scheme in that the scheme includes a dispute resolution apparatus intended to resolve all parts of the dispute in one agency-provided forum;²³⁴ however, the state-law standard is not intertwined with federal statutes or regulations. The *CA, Inc.*, questions of law that the SEC certified to the Delaware court were 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?²³⁵

Such easy separability will not always be the case. In the immigration context, for instance, 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."²³⁶

This problem is not unique to agency certification: discrete state-law issues may arise in federal court in diversity actions or in those based on supplemental jurisdiction. Nonetheless, determination of state and federal law may sometimes be intertwined.²³⁷ The solution found in certification from federal courts or agencies lies both in the standard—that the state-law issue be "dispositive" or "determinative"—and in the voluntariness of certification. Both suggest that certification will not or should not be invoked when the state and federal questions are inseparable.

233. *CFTC v. Schor*, 478 U.S. 833, 838 (1986); see also *Pal v. Reifler Trading Corp.*, C.F.T.C. No. 95-R151, Comm. Fut. L. Rep. (CCH) ¶ 27,237, 1998 WL 39420 (Feb. 2, 1998) (deciding whether respondents were contractually entitled to attorneys fees and costs for their successful reparations counterclaim to recover a debt).

234. 478 U.S. at 855–56.

235. SEC Certification of Questions of Law, *supra* note 67.

236. *Tutrone v. Shaughnessy*, 160 F. Supp. 433, 435–36 (S.D.N.Y. 1958).

237. *Cf. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312–14 (2005) (basing federal question jurisdiction on a state-law quiet title claim in which the validity of the title turned on whether the IRS gave proper notice under federal law).

D. Proposed Certification Procedure

This section details the proposed agency certification procedure and examines how it would modify current practice. Existing certification procedures are enabled through state legal rules defining the jurisdiction of the highest state court. The source of these rules may be the state constitution, jurisdictional statutes, court rules, case law, or some combination of these. The proposed mechanism would expand the permissible certifying entities to include federal agencies by modifying these existing state frameworks. Such amendments by states should be accompanied by rules at the federal level defining which questions of state law can be certified and by whom.

To enable agency certification, a state should add “federal agency” to the list of entities from which the highest state court may accept certified questions. Although a necessary first step, such an amendment generally would not be enough to permit certification of questions that arise in a broad range of agency activity. States must also decide whether to modify the requirement that the resolution of the state-law question be “determinative” or “dispositive” of “pending litigation”—requirements suggested by the Uniform Act and widely adopted by states.

If these requirements are left in place, certification may be limited to questions that arise in formal agency adjudication, or informal action with aspects of litigation (e.g., opposing parties involved in an adversarial proceeding). 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 a 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 Act formulation²³⁸ as a baseline and drawing on the flexible Delaware standard, the proposed provision could 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

238. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3, 12 U.L.A. 53 (1995) (“The [Supreme Court] of this State may answer a question of law certified to it by a court of the United States . . .”).

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.

Other than the above amendments, extending certification to all federal agencies, as this Article proposes, could rely on existing state-law certification standards to ensure that the types of questions that are certified are consistent with the goals of federal-state cooperation and each branch's institutional expertise. Questions of state law could be certified when they are open questions; in other words, when no controlling precedent exists in state law.²³⁹ The issue should be important to state policy or state legal schemes. Finally, existing rules providing, for instance, that information developed at the federal level be sent to the state court, that the certified question be precisely defined, or that the two sides be given the opportunity to be heard before the state court would apply to certification from federal agencies, just as they apply to other forms of certification.²⁴⁰

Furthermore, like judicial certification, the proposed mechanism is voluntary on both sides. The state court may reject a question certified to it, allowing the state court to evaluate whether the question is sufficiently important to state policy or legal schemes to be worth the devotion of judicial resources and time.²⁴¹ With some limits discussed below, agency certification would also be voluntary for the agency, allowing the agency to evaluate whether certification would allow for timely resolution of the issue, whether a state-law issue is sufficiently separable, and other considerations relevant to the effective use of the mechanism.

Although this Article focuses primarily on whether states should expand the jurisdiction of their highest courts to hear questions from federal agencies, guidance is also needed for the agencies that would have the power to certify questions. Because of the variety of federal agencies, such guidance would likely take the form of guidelines internal to each agency, designed with sensitivity to the structure and purpose of the particular agency. Agencies should be

239. *Id.* § 3 (proposing a certification standard that requires that there be “no controlling appellate decision, constitutional provision, or statute of this State”).

240. FLA. R. APP. P. 9.150(b) (requiring “a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise, and the questions of law to be answered” as well as establishing a procedure for the federal record to be sent to the state court).

241. *Id.* at cmt. (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.”).

instructed as to which questions should be certified, the form in which the question is posed, and which actor within the agency should advance it.

The starting point for such agency guidance may be the present system of judicial certification.²⁴² For instance, the U.S. Court of Appeals for the Second Circuit has developed court rules that detail when a question might be certified and mirror the requirements in most answering state courts. The court may certify “an unsettled and significant question of state law that will control the outcome of a case pending before this Court.”²⁴³ Agencies might also include a standard aimed at the importance of the state-law issue, just as judicially created requirements do. These rules might also indicate which officials may certify a question. Whereas it may be relatively straightforward to designate the administrative law judge in the adjudicative context, it may be more difficult, given the variety of actors and forms, to identify the appropriate actor when a federal agency undertakes informal action.

Finally, *ex ante* guidance for the agency is particularly important because the agency wears multiple hats—both decisionmaker and party—in some formal and informal adjudications. Whereas some agency adjudication is very much like judicial adjudication, in that the agency provides a decisionmaker that resolves disputes between two private parties engaged in adversarial proceedings,²⁴⁴ in other settings the agency may be an interested “party.” In the administrative law judge decisions of the NLRB or SEC, the adjudication is trial-like in that it involves a dispute between opposing parties and results in a reviewable record and decision, but it differs from federal court in that the agency is both the adjudicator

242. The Delaware/SEC example does not provide a model. SEC staff has indicated that “[w]e’re very excited to have this tool [of certification to the Delaware court] at our disposal, and look forward to using it further, as appropriate, in coming years.” John W. White, Dir., 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 32 (Aug. 11, 2008), available at <http://www.sec.gov/news/speech/2008/spch081108jww.htm>. The SEC has not, however, indicated when and by whom the procedure is appropriately invoked.

243. 2D CIR. R. § 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 § 2, 12 U.L.A. 51 (1995).

244. Winship, *supra* note 90, at 138 (comparing the CFTC’s provision of a decisionmaker to agency’s role as counsel in the context of investor compensation).

and a party. When an agency determines eligibility for benefits, the two interested parties are the agency and the person potentially eligible for benefits. In such situations, the agency may have a vested interest in the outcome that—in the absence of internal, *ex ante* guidance—would influence which questions it chooses to certify. Similarly, if certification were to be used in the context of decisions about regulatory preemption, 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 or outside guidance²⁴⁵ is even more pressing.

CONCLUSION

Certification from federal agencies to state courts operates along two axes: federal-to-state and branch-to-branch. Although the fact that the federal actor is an agency shapes some aspects of the federal-state interaction, considerations of federalism and comity generally underlie any certification between the federal and state systems, whether from a court or an agency. Implementing such a mechanism signals respect for state sovereignty, particularly when questions affect policies or legal schemes important to the state. It does so by providing additional opportunities to decide state law and also preserving state control over certain primary conduct.

The fact that this mechanism is interbranch as well as interjurisdictional intensifies the reasons and need for such a procedure. Two characteristics of federal agencies make agency certification particularly useful. The procedure assigns decisionmaking according to institutional expertise: it allocates decisions between federal agencies, which are expert in the federal regimes they administer (but not beyond) and state courts, which are expert in their own states' laws. In this respect, agency certification is more pressing than the well-established certification between courts. For courts, the premise of diversity jurisdiction is that the federal court has the capacity to act as an additional state court. In contrast, federal agencies are neither expert outside of their specialized area, nor are they generalists. Certification by federal *agencies* accordingly enables sensible institutional allocation of open and important state-law issues.

245. For example, guidance might consist of an executive order like the one ordering agencies to include a statement on the preemptive effect in their regulations. *See supra* note 148 and accompanying text.

Furthermore, federal agency certification 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 by preventing creative use of limited resources nor allows the agency unfettered discretion? Interbranch certification constitutes another way to provide guidance and legitimacy to agencies when they act informally; it is also a safety valve where review of an important state-law issue by a court is not otherwise practically or legally available.

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.