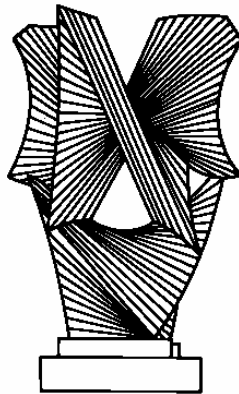


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## THE UNEASY CASE FOR TRANSJURISDICTIONAL ADJUDICATION

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## THE UNEASY CASE FOR TRANSJURISDICTIONAL ADJUDICATION

Jonathan Remy Nash<sup>†</sup>

*Federal courts often decide cases that include matters of state law, while state courts often decide cases that raise matters of federal law. Most of these cases are decided within the court system in which they originate. Recent commentary advocates more transjurisdictional adjudication through the expanded use of existing procedural devices, and development of new devices. Some commentators endorse greater use of certification by federal courts, while others advocate greater use of transjurisdictional procedural devices to increase the availability of a federal forum to resolve federal legal issues. In this Article, I call for refinement of this approach and argue that commentators have overlooked several looming obstacles. First, the ability of state courts to resolve issues of state law and federal courts issues of federal law relies upon the erroneous assumption that issues of federal and state law are readily separable. Second, the use of transjurisdictional procedural devices that send back to state court state law issues that federal courts otherwise would decide run the risk of admitting state court bias, or the appearance of bias, against out-of-state litigants. Third, commentators underestimate the extent to which transjurisdictional adjudication relies upon cooperation between court systems. Identifying these obstacles leads to a fuller recognition of the costs and benefits of transjurisdictional adjudication, which in turn is useful as a metric against which to measure existing and proposed transjurisdictional procedural devices and as an aid in refining existing devices.*

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**I. INTRODUCTION**

Federal courts are often called upon to decide cases that include matters of state law, while state courts often are called upon to decide cases that raise matters of both federal and state law. The vast bulk of these cases are decided within the court system in which the cases originate, without the benefit of input from the other court system as to how to resolve the legal issues that arise under the other legal system. In these cases of “intersystemic adjudication,”<sup>1</sup> the court system that decides the case will try to resolve “foreign” legal questions in the way that the other court system would. The court system will consider cases issued by the other court system that have addressed the issue in question.

Recent commentary by academics and judges suggests that the best way to resolve these cases is to have the court system definitively resolve those issues that arise under that court system’s “native” law. These commentators advocate expanded use of existing transjurisdictional procedural devices, and development and use of new devices. For example, Professor Bradford Clark argues for greater use of certification by federal

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<sup>1</sup> Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-Erie World*, 46 WM. & MARY L. REV. 1399, 1400 (2005) (defining “intersystemic adjudication” as “the interpretation by a court operating within one political system of laws of another political system,” and describing the phenomenon as “pervasive”).

courts to allow state courts to resolve state law issues,<sup>2</sup> while Professor Barry Friedman advocates greater use of what I shall refer to as “transjurisdictional procedural devices”<sup>3</sup> and in particular for greater availability of a federal forum to resolve federal law issues.<sup>4</sup>

In this Article, I call for refinement of this approach. I argue that the commentators have overlooked several looming obstacles.

First, the ability of state courts to resolve issues of state law and federal courts issues of federal law presupposes that the issues of federal and state law are readily separable. This presupposition masks several difficulties. First, at least in cases that raise intertwining issues of federal and state law, the federal and state law issues must be disentangled. But how is this to be done? Who is to do it? What if the federal and state courts disagree as to the proper disaggregation of the case? And, once the case is decomposed, should the court that is called upon, purportedly, to respond to particular issues of law simply address those legal issues, or ought it to opine upon the proper ultimate resolution of the entire case?

Second, the desirability of having state courts resolve state law matters assumes, if implicitly, that state courts will get questions of state law “correct”—or at least that they will be more likely to get them “correct” than federal courts. In fact, however, as the constitutional inclusion and the continued congressional authorization of federal diversity jurisdiction suggest, it may well be that state courts’ susceptibility to bias against out-of-staters might render them less able than federal courts to resolve state law questions “correctly.”

Third, commentators underestimate the extent to which the successful use of transjurisdictional procedural devices relies upon cooperation between court systems, and overestimate the extent to which courts in different systems have incentives to, and in fact will, cooperate.

These obstacles are not simply important in the abstract. First, these obstacles have manifested themselves in practice. Second, the discussion of the obstacles leads to a

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<sup>2</sup> See *infra* text accompanying notes 32-40.

<sup>3</sup> I use the terminology “transjurisdictional procedural device” to refer to a procedural device that involves the judiciary of more than one judicial system. I choose the term so as clearly to distinguish Professor Schapiro’s use of “intersystemic adjudication,” which he means to refer to courts in a single judicial system interpreting the law of another judicial system. See *supra* note 1.

fuller recognition of the costs of transjurisdictional adjudication, and of the potential benefits of intersystemic adjudication. I identify three categories of costs and benefits that should be, but as a general matter have not been, fully incorporated into benefit-cost evaluations.

First, the obstacles themselves translate into costs in the implementation of transjurisdictional procedural devices. They may act to make particular applications of a device costly, and in the long run to sour courts on particular devices and to discourage their use.

Second, commentators often tend to extol the virtue of affording court systems the opportunity to resolve questions arising under the system's native law. While this is clearly a benefit offered by the use of transjurisdictional adjudication, commentators have sometimes tended to elevate this benefit to the exclusion of other benefits. In reality, our federal system also reflects other values, as I now discuss.

Third, so attracted have commentators been to the apparent benefits of transjurisdictional procedural devices that they have tended to downplay the benefits of intersystemic adjudication. But intersystemic adjudication offers numerous benefits, including dialogue among court systems, and the opportunity for multiple courts to try to interpret the law "correctly."

This fuller understanding of costs and benefits is useful as a metric against which to measure existing and proposed transjurisdictional procedural devices. It is also useful as an aid in refining existing devices. As an illustration, I describe how one might refine the current procedure by which federal courts certify questions of law to state high courts.

This Article proceeds as follows. In Part II, I provide an overview of court systems' authority to decide issues of law arising under their own "native" law. I also discuss how courts usually decide such issues without input from the other judicial system, but also discuss methods that allow for a court in the other system directly to resolve those questions native to that court system.

In Part III, I describe various commentators' proposals for new, and expanded use of existing, transjurisdictional procedural devices. In Part IV, I discuss obstacles to the

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<sup>4</sup> See *infra* text accompanying notes 44-52.

implementation of these proposals that the commentators have either overlooked or undervalued.

In Part V, I build upon the discussion in the previous Parts to suggest a fuller understanding of the costs and benefits of transjurisdictional procedural devices. I use that understanding to evaluate commentators' proposals, and then as a guide in refining existing certification procedure.

## II. RESOLVING ISSUES ARISING UNDER ANOTHER SYSTEM'S LAW

State courts are often called upon to decide matters of federal law,<sup>5</sup> and federal courts are often called upon to decide matters of state law.<sup>6</sup> Both state and federal courts also may be called upon to decide cases in which state law causes of action implicate issues of, or are intertwined with, federal law,<sup>7</sup> or federal law causes of action that implicate issues of state law.<sup>8</sup>

There are a few procedural devices that afford opportunities for transjurisdictional dialogue and adjudication. First, the Supreme Court has the power to review, by

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<sup>5</sup> See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990). For a discussion of early state court practices interpreting federal statutes, see Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1529-48 (2006).

While settings in which courts of one state endeavor to discern the law of a sister state raise questions analogous to those I address here, they lie beyond the scope of this Article.

<sup>6</sup> See generally Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Redish*, 19 GA. L. REV. 861, 898-99 (1985).

First, the federal diversity jurisdiction authorizes, see 28 U.S.C. § 1332(a), (d) (2006)—indeed, demands, see *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943)—that federal courts hear some cases in which issues of state law alone arise.

Second, federal courts often hear state law causes of action that are supplemental to causes of action that arise under federal law. See 28 U.S.C. § 1367(a) (2006).

Third, it is possible that federal and state law issues are intertwined: state law might incorporate or implicate federal law, see, e.g., *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 309 (2005), or federal law might incorporate or implicate state law, see, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001) (holding that "federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity," and that the common law rule incorporates state law); 18 U.S.C. § 13 (2006) (incorporating state criminal law into federal criminal law on federal enclaves located within the state).

<sup>7</sup> For example, states often interpret state constitutional provisions to incorporate the legal standards of their federal analogs. For discussion of the difficulties faced by federal courts when they are called upon to interpret such state constitutional provisions, see Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999).

<sup>8</sup> For example, the Court has held that the question of whether the Takings Clause applies to a property interest is not resolved by reference to the Takings Clause, but rather by reference to some independent source of law, such as state law. See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).

discretionary grant of certiorari, state courts' determination of federal law.<sup>9</sup> In a case in which some issues arise under state law and others under federal law, the Supreme Court will consider only those issues that arise under federal law (or, to the extent that the grant of certiorari is narrower, some subset thereof).<sup>10</sup>

In order for the Court to review the case, the losing party must petition for a writ of certiorari, and then the Court must accept that petition and determine the scope of review.<sup>11</sup> The state court has no discretion to request Supreme Court review,<sup>12</sup> nor to deny review if the Court chooses to review the case. Further, remedies are available to the Court to address a state court's failure to abide by the Court's mandate.<sup>13</sup>

Two transjurisdictional procedural devices offer federal courts the opportunity to obtain direct feedback from the state court system as to the resolution of state law issues: abstention and certification. Under abstention, the federal court abstains from proceeding forward with the case in federal court to allow a pending state court case that will resolve the state law issues in the federal court case, or to allow the parties to file such an action in state court. If the parties ask the federal court to retain jurisdiction over any remaining federal issues (and probably even if they object to the state court's attempt to resolve federal issues), the state court's jurisdiction will be limited to resolving the state law

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<sup>9</sup> See 28 U.S.C. § 1257(a) (2006).

<sup>10</sup> See, e.g., Schapiro, *supra* note 1, at 1408 ("In exercising its appellate authority over state courts, . . . the U.S. Supreme Court does not generally review questions of state law.").

In *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875), the Court indicated that Congress cannot constitutionally confer upon the Supreme Court the power to review state court resolutions of state law. The constitutional basis for this holding, however, is somewhat dubious. See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 920 (1986). For arguments in favor of broader Supreme Court authority to review state courts' determinations of state law, see Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law*, 103 COLUM. L. REV. 1919 (2003); John Harrison, *Federal Appellate Jurisdiction Over Questions of State Law in State Courts*, 7 GREEN BAG 2D 353 (2004).

<sup>11</sup> See 28 U.S.C. § 1257(a) (2006). For a discussion of the evolution over time of the Supreme Court's jurisdiction to review state court decisions from mandatory to discretionary, and of the change in the Court's appellate jurisdiction away from the restriction that it could only review denials of federal rights, see RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 466-68 (5th ed. 2003).

<sup>12</sup> Like any lower court, a state high court may attempt to "signal" the Supreme Court that the case is worthy of review. See Andrew F. Daughety & Jennifer F. Reinganum, *Speaking Up: A Model of Judicial Dissent and Discretionary Review* (unpublished manuscript, available on SSRN).

<sup>13</sup> See generally FALLON ET AL., *supra* note 11, at 481-83. On the topic of state court evasion of Supreme Court mandates, see, for example, Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954); Note, *Supreme Court Evasion of United States Supreme Court Mandates*, 56 YALE L.J. 574 (1947).

issues.<sup>14</sup> The most commonly used form of abstention, *Pullman* abstention,<sup>15</sup> is available only in cases where resolution of the state law questions might relieve the court of the need to confront unclear issues of federal constitutional law.<sup>16</sup> While there are other forms of abstention that can apply in pure diversity cases, these abstention devices are quite limited in scope.<sup>17</sup>

Certification is a procedural device that achieves the same result as abstention.<sup>18</sup> It is available in cases in which *Pullman* abstention can be invoked and—since, unlike *Pullman* abstention, certification is not unavailable in pure diversity cases—certification is available in more cases than *Pullman* abstention. Certification is also more streamlined than *Pullman* abstention.

Either or both parties to a pending federal court lawsuit may request that the federal court initiate certification proceedings, or the federal court may do so sua sponte.<sup>19</sup> If certification is to be used, then the federal court identifies the issues of state law that it wishes the state high court to resolve and certifies those questions to the state court.<sup>20</sup> The state high court has discretion to accept or reject the certification request.<sup>21</sup> In particular, state courts will tend to deny certification requests where the factual record is insufficiently developed; this is in order to minimize the possibility that the state

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<sup>14</sup> See *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 415-19 (1964) (discussing right of party to federal court case where court has abstained pending resolution of state court case to reserve issues of federal law for resolution in federal court).

<sup>15</sup> *Pullman* abstention is named for the case that first recognized the doctrine, *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

<sup>16</sup> See *Meredith v. Winter Haven*, 320 U.S. 228 (1943) (holding that *Pullman* abstention is unavailable in cases where no federal law issue is present). The applicability of *Pullman* abstention in cases where the resolution of state law issues would obviate the need to decide an unclear *subconstitutional* federal law issue. See Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1683 n.33 (2003) (discussing *Propper v. Clark*, 337 U.S. 472 (1949)).

<sup>17</sup> See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1517-24 (1997) (discussing *Erie*-based abstention, including *Burford* and *Thibodaux* abstention).

<sup>18</sup> In one way the result achieved under certification is even greater: Under certification it is guaranteed that the state high court will resolve the state law issue definitively (assuming that court agrees to answer the certified questions). By contrast, because state high courts generally retain the discretion to deny review of lower state court rulings, a state high court might never hear the case under abstention, with the lower state courts effectively providing resolution.

<sup>19</sup> See generally Nash, *supra* note 16, at 1690, 1692.

<sup>20</sup> See *id.* at 1692-93.

<sup>21</sup> See *id.* at 1693.

court's answers will prove, once the record is developed, to be mere advisory opinions.<sup>22</sup> The state court also is free to rephrase the certified questions if it believes another phrasing would be more appropriate.<sup>23</sup> Once the state court answers the certified questions, the federal court resolves the case with the benefit of those answers.<sup>24</sup>

Certiorari review, abstention, and certification thus provide opportunities for transjurisdictional adjudication.<sup>25</sup> These devices are limited, however, in terms of both scope and current use. Typically, then, state courts must resolve federal law issues without help from the federal judiciary,<sup>26</sup> and federal courts must resolve state law issues on their own.<sup>27</sup> Judicial and legislative action may change this, however. The Supreme

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<sup>22</sup> See *id.* at 1694 & n.82.

<sup>23</sup> See *id.* at 1694 n.80. The parties to the federal court case are generally allowed to file briefs with, and argue before, the state high court. See *id.* at 1694 & n.81.

<sup>24</sup> See *id.* at 1695-96.

<sup>25</sup> These devices are among the few situations in which direct federal-state transjurisdictional dialogue and interaction are possible. See, e.g., *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 903 (1st Cir. 1988) (en banc) (“The certification process is the only opportunity for direct dialogue between a federal and a state court.”). Cf. Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 205 (1995) (“Federal and state judges in charge of ‘All Brooklyn Navy Yard’ asbestos cases literally sat in the same room, jointly convening a ‘state and federal court’ and ruling together on issues.”). Although one might also include habeas cases in this mix, habeas cases are in the nature of collateral review rather than direct dialogue.

Removal of cases to federal court is more complicated. See 28 U.S.C. § 1441(a) (2006). Removal of federal question cases allows federal courts to resolve issues arising under federal law. The removal will generally apply to the entire case, however, so that state courts will lose the ability to resolve issues of state law to the extent the case raises such issues. *But cf. id.* § 1441(c) (allowing for removal of “the entire case” “[w]henever a separate and independent [federal question] claim or cause of action . . . is joined with one or more otherwise non-removable claims or causes of action,” but also empowering federal court to remand “all matters in which State law predominates”). Moreover, the removal of cases grounded in diversity is designed to deny state courts the power to resolve questions of state law. Other removal statutes also open the doors of federal jurisdiction to claims arising purely under state law. See, e.g., *id.* §§ 1441(d) (allowing for removal of “[a]ny civil action brought in a State court against a foreign state”), 1442(a) (allowing for removal of “[a] civil action or criminal prosecution commenced in a State court” against the United States, an agency thereof, and certain federal officers and officials).

<sup>26</sup> See, e.g., Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005); Bellia, *supra* note 5. State courts are bound by Supreme Court precedent on federal law, and also by any decisions on federal law by a higher-ranked state court whose decisions would ordinarily be binding upon the state court. The state court also might look to lower federal courts' interpretations of state law and interpretations of courts of other states, both of which might be persuasive. See *State v. Knowles*, 371 A.2d 624, 627-28 (Me. 1977) (“[E]ven though only a decision of the Supreme Court of the United States is the supreme law of the land on a federal constitutional issue, nevertheless ‘in the interest of developing harmonious federal-state relationships it is a wise policy that a state court of last resort accept, so far as reasonably possible, a decision’” of the federal court of appeals within the geographic circuit of which the state lies on a federal constitutional question. (quoting *State v. Lafferty*, 309 A.2d 647, 667 (Me. 1973) (Wernick, J., concurring))).

<sup>27</sup> See, e.g., Schapiro, *supra* note 1, at 1421 (“State courts cannot review a federal court’s interpretation of state law.”).

Court has suggested that federal courts make greater use of certification,<sup>28</sup> and recent legislation that will allow more cases that raise state law claims to be heard in federal courts<sup>29</sup> likely will increase the occasions on which federal courts will seek to certify questions of state law. Greater use of certification may also result from the Court's recent reaffirmance, in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,<sup>30</sup> that federal question jurisdiction extends beyond cases in which a claim formally arises under federal law and reaches state law claims that incorporate some aspect of federal law.<sup>31</sup> Many legal commentators would applaud such changes, as I explain in the next Part.

### III. PROPOSALS FOR EXPANDED USE OF TRANSJURISDICTIONAL PROCEDURAL DEVICES

Most state courts resolve federal law questions without the benefit of Supreme Court enlightenment and, analogously, federal courts resolve state law questions without the benefit of abstention or certification. Recent commentary has disparaged this approach. Whether by expanding the use of certification and parties' ability to reserve issues for review by a court in a particular system, or by fundamentally altering and intermixing the plumbing of the state and federal judicial systems, commentators advocate the increased use of and reliance upon, and the development of new, transjurisdictional procedural devices. In this Part, I briefly survey some of these suggestions. In the next Part, I suggest obstacles that these commentators have overlooked or underestimated.

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The Court's decision in *Erie Railroad v. Tompkins*, 304 U.S. 64, 78-79 (1938), mandates that federal courts decide state law issues in accordance with the laws of the state, as set out by the state legislature and judicial system.

<sup>28</sup> See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76-79 (1997); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1254 (2004) ("[T]he Supreme Court has indicated it expects wider use of certification procedures.").

<sup>29</sup> See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9-12 (Feb. 18, 2005) (amending the federal judicial code to allow jurisdiction in federal court over certain class actions based upon minimal diversity; codified at 28 U.S.C. § 1332(d)).

<sup>30</sup> 545 U.S. 308 (2005).

<sup>31</sup> For discussion, see, for example, Lonny S. Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law, and the "Reliance Principle"*, 81 TUL. L. REV. 283, 290-308 (2006); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 333-36 (2007).

Citing inherent problems in all possible approaches to federal courts' endeavors to fulfill their obligation under *Erie* to estimate state law,<sup>32</sup> Professor Bradford Clark advocates implementing a presumption in favor of having federal courts certify questions of state law to the appropriate state high courts.<sup>33</sup> He suggests two methods by which federal courts might attempt to divine state law and finds all of them wanting. Under the "static approach," the federal court should "adjudicate the rights and duties of the parties without regard to novel rules proposed by the parties, but not yet recognized authoritatively by an appropriate organ of the state."<sup>34</sup> Professor Clark finds the static approach problematic in that it "may lead federal courts to continue to apply existing rules of decision even after state courts are prepared to abandon them,"<sup>35</sup> and thus allow for the "perpetuat[uation of] outmoded principles of state law by simultaneously drawing cases into federal court and depriving state courts of opportunities to adopt novel rules of state law."<sup>36</sup> By contrast, under what Professor Clark refers to as the "predictive approach," the federal court "attempts to forecast the development of state law by asking what rule of decision the state's highest court is likely to adopt in the future."<sup>37</sup> According to Professor Clark, "a federal court's 'prediction' of state law frequently devolves into little more than a choice among competing policy considerations."<sup>38</sup> In light of these deficiencies with the static and predictive approaches, Professor Clark endorses expanded use of certification<sup>39</sup> through, in particular, the implementation of "a presumption favoring certification of unsettled questions of state law."<sup>40</sup>

Judge Guido Calabresi, too, calls for expanded use of certification, imploring federal judges to "certify, certify, certify."<sup>41</sup> "In other words," he explains, "I believe that whenever there is a question of state law that is even possibly in doubt, the federal courts

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<sup>32</sup> See Clark, *supra* note 17, at 1495-1517, 1535-44.

<sup>33</sup> See *id.* at 1556-63.

<sup>34</sup> *Id.* at 1537.

<sup>35</sup> *Id.* at 1541.

<sup>36</sup> *Id.* at 1541-42.

<sup>37</sup> *Id.* at 1497. Professor Clark elucidates that federal courts might rely on the predictive approach to predict novel state law causes of action, *see id.* at 1502-08, predict novel state law defenses, *see id.* at 1508-13, and predict that existing state law precedent will be overruled, *see id.* at 1514-16.

<sup>38</sup> *Id.* See generally *id.* at 1498-1501.

<sup>39</sup> See *id.* at 1543-44.

<sup>40</sup> *Id.* at 1556. See generally *id.* at 1556-63.

should send the question to the highest court of the state, and let the highest court of the state decide the issue as it wishes.”<sup>42</sup> But Judge Calabresi endorses certification in a form slightly different from its current appearance: He believes that, as a prerequisite to certification, the federal court should write an opinion resolving the relevant state law issue as it believes it should be resolved. The state high court then can treat the federal court opinion as it would an opinion of a lower state court on the issue: It can choose to grant the request for certification and address the question itself, or it can choose to deny the certification request and let the federal court opinion stand (with the state high court denial of certification presumably having whatever preclusive effect a discretionary denial of review ordinarily has under state law).<sup>43</sup>

In a similar vein, Professor Barry Friedman assails what he calls “either-or” thinking—that is, that a court (and the associated judicial system) must resolve the entirety of all cases before it.<sup>44</sup> He explains that to require federal courts to resolve state law issues devalues state court interest in resolving those issues, and vice versa.<sup>45</sup> Professor Friedman endorses increased use of certification.<sup>46</sup> In addition, he advocates expanded use of *England* reservation doctrine.<sup>47</sup> In particular, he describes an “anticipatory” *England* reservation doctrine, under which parties in a state action could reserve federal issues when a case *could* be brought in federal court, even if in fact there is no pending federal court case.<sup>48</sup> He explains that “[f]ederal jurisdiction should be available for federal claims.”<sup>49</sup> Thus, “[s]o long as the state party indicates at the outset

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<sup>41</sup> Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301 (2003).

<sup>42</sup> *Id.* (footnote omitted). Judge Alex Kozinski, by contrast, recommends restricting the use of certification to a far narrower setting. He argues: “[T]hat a case raises difficult legal questions is not enough. . . . Certification is justified only when the state supreme court has provided no authoritative guidance, other courts are in serious disarray and the question cries out for a definitive ruling.” *Kremen v. Cohen*, 325 F.3d 1035, 1044 (9th Cir. 2003) (citation omitted) (Kozinski, J., dissenting).

<sup>43</sup> *See* Calabresi, *supra* note 41, at 1301-02.

<sup>44</sup> *See* Friedman, *supra* note 28, at 1216.

<sup>45</sup> *See id.* at 1216-26.

<sup>46</sup> *See generally id.* at 1255-56. Professor Friedman explains that “[c]ertification creates some additional delay and expense, but not a great deal, especially considering the benefits of obtaining an authoritative ruling.” *Id.* He appears not to go so far as Professor Clark’s presumption in favor of certification. *See id.* at 1276 (“[M]ost diversity cases do not require certification; their disposition rests on state law that is sufficiently settled.”).

<sup>47</sup> *See id.* at 1269-74.

<sup>48</sup> *Id.* at 1271.

<sup>49</sup> *Id.* at 1269.

that it intends to obtain litigation of federal questions in federal court, that reservation should be enough.”<sup>50</sup> While recognizing that the increased use of transjurisdictional procedural devices will impose some costs on the judicial system and litigants,<sup>51</sup> Professor Friedman concludes that the benefits outweigh those costs.<sup>52</sup>

Judge Jon Newman has gone a step farther. Among a series of procedural reforms designed to address what he identifies as an overburdened federal judiciary<sup>53</sup> is the suggestion that, as a matter of discretion, state law issues that arise in federal trial courts could be appealed to state intermediate—and then high—courts, and that federal law issues that arise in state trial courts could be appealed to federal courts of appeals and then the United States Supreme Court.<sup>54</sup> Judge Newman would vest discretion to administer the system in federal appellate judges; that is, federal circuit judges would decide both whether to allow appeals from state trial courts to federal courts of appeals, and also would have an effective ‘right of refusal’ as to appeals from federal trial courts.<sup>55</sup> He also explains that such “[a] discretionary system of reciprocal routing of appeals need not be limited to entire cases, but should permit review of single issues as well.”<sup>56</sup> Thus, for example, “[d]iscretionary access to federal appellate courts might well be limited to the federal issues in the state court litigation.”<sup>57</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> Professor Friedman assesses the costs by considering the number of cases implicated, *see id.* at 1276-77, the need for more judges to get up to speed on cases and issues, *see id.* at 1277, litigation redundancy, *see id.* at 1277-78, and litigant preference, *see id.* at 1278-79. Below I identify costs that commentators, including Professor Friedman, seem to have overlooked or at least undervalued. *See infra* Part V.A.

<sup>52</sup> *See id.* at 1279.

<sup>53</sup> *See* Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 761-67 (1989) (lamenting the increase in federal court caseload, and arguing that the increase has deleterious effects on the quality of federal judges, the quality of federal judges’ performance, and on the functioning of federal courts).

<sup>54</sup> *See id.* at 774-76.

<sup>55</sup> Judge Newman explicates:

Administering a system of reciprocal routing of appeals should be a task for federal appellate judges. For federal law claims, they should have the discretion to permit federal court appeals from cases relegated to state courts. As with the decision to grant access to the federal trial court, the appellate access decision would be accomplished without factfinding and would be nonreviewable. For state law claims, if it is not acceptable to route all diversity appeals to state courts, then federal appellate judges would at least have discretion to deny an opportunity for federal court appeal in selected diversity cases and leave them for review within the pertinent state appellate system.

*Id.* at 775.

<sup>56</sup> *Id.*; *see id.* at 775-76.

<sup>57</sup> *Id.* at 775.

Taken as a group, these commentators endorse increased availability of federal judicial fora to resolve questions of federal law, and of state judicial fora to resolve questions of state law. The trend in commentary—by both legal academics and judges—is to “resolve” the problem of having one judicial system guess at the proper resolution of a question of law arising under the law native to the other judicial system by increasing reliance upon, and developing new, transjurisdictional devices. In the next Part, I highlight problems that these commentators have either underestimated or overlooked entirely.

#### **IV. OBSTACLES TO EXPANDED USE OF TRANSJURISDICTIONAL PROCEDURAL DEVICES**

In the previous Part, I described a trend among commentators that supports both the increased use of existing transjurisdictional procedural devices, and an expansion of the pantheon of available transjurisdictional devices. The commentators, however, either overlook or underestimate the problems associated with the design and use of these devices will encounter. In this Part, I elucidate these problems.

First, transjurisdictional procedural devices raise important, yet underappreciated, problems with respect to decomposition of cases into constituent issues. Second, state courts may not manipulate state law when at least one of the parties hails from out-of-state. Third, commentators overlook the importance of whether the effectiveness of transjurisdictional devices is—and should be—based upon voluntary cooperation and comity, as opposed to disparities in power. I address each of these problems in turn.

##### ***A. Decomposition of Cases***

Commentators who advocate the introduction of new transjurisdictional devices and the expanded use of new and existing transjurisdictional devices tend to assume that the decomposition of cases into constituent state and federal issues is readily achievable. Indeed, most commentators simply gloss over this step. In reality, however, in the hardly

atypical case in which issues of state and federal law intertwine,<sup>58</sup> the step is substantial, complicated, and potentially controversial.<sup>59</sup> Consider the several questions that the decomposition of cases implicitly raises.

The first question is who is to perform the decomposition (or at least to decide upon the proper decomposition). The federal court? The state court? The court that originally enjoys jurisdiction? The court whose help is sought?<sup>60</sup>

The question also arises (and is obviously influenced by the answer to the first question) as to how the case is to be decomposed. The decomposition of cases into constituent issues can be complicated and raise challenges even in cases that arise under the law of a single sovereign.<sup>61</sup> The complications and challenges are even greater in the context of cases that raise questions of state and federal law that intertwine.<sup>62</sup>

Third, once the case is decomposed, and constituent issues are sent by one court system to another, should the court system to which constituent issues are sent simply resolve those issues—i.e., respond to the particular questions of law that are raised—or should it speak to what it believes would be the proper resolution of the underlying case (or both)? And, along similar lines, once the court that sent the constituent issues to the

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<sup>58</sup> E.g., Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1084 (1974) (noting that “the two legal systems are often intertwined in a particular case”).

<sup>59</sup> See Redish, *supra* note 6, at 899 (“[B]ecause of the long tradition of interactive federalism, state and federal law cannot always be so easily separated.”).

<sup>60</sup> Note that the answer to these questions well may implicate the concerns of comity, and of power disparity, that I discuss below. See *infra* Part IV.C.

<sup>61</sup> First, consider the degree to which attorneys attempt to “frame” the issues that a case presents to a court. Indeed, because the choice of issues allows for the manipulation of the result, efforts to decompose cases into issues can fall prey to strategy. See MAXWELL L. STEARNS, *CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING* 111-24 (2000); Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1045, 1047 (1996).

Second, on rare occasions, tallying judges’ votes on an issue-by-issue basis, as opposed to an outcome basis, may, paradoxically, yield different results. See generally Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75 (2003) (discussing cases of doctrinal paradox).

It is interesting to note that, much as the availability of interlocutory appeals functions as a natural issue decomposition device, see *id.* at 84-85, so too do cases that traverse the divide between the federal and state judicial systems offer an example of “natural” issue decomposition.

<sup>62</sup> The fact that issues of state and federal law must be separated and decided by different courts means that these issues must be decided sequentially. See Bruce Chapman, *Law, Incommensurability, and Conceptually Sequenced Argument*, 146 U. PA. L. REV. 1487 (1998) (describing the importance of the sequence of decisionmaking to legal argument); see also Bruce Chapman, *The Rational and the*

other court receives back the other court's opinion(s), ought it simply to use the resolutions of the constituent issues to resolve the entire case, or should it take into account the views of the other court (whether expressed implicitly or explicitly) as to the proper resolution of the entire case?

Decomposition poses difficulties across the range of transjurisdictional procedural devices.

*Certification.*— It might seem at first that certification presents an easy setting for state courts, in that the certifying federal court will state precisely the questions to be asked and the state court simply answers those legal questions. Such a view is grounded on fundamental misapprehensions about the workings of certification. In important ways, it is the case, and not just the certified questions, that goes to the state high court. That state high courts as a rule decline certification requests absent a sufficiently developed factual record shows that state courts answer—and, indeed, will only answer—certified questions in context.<sup>63</sup> And the parties to the actual case submit briefs to, and argue the case before, the state high court.<sup>64</sup> Thus, certification procedure in practice is far removed from consideration of abstract legal issues in a vacuum. In addition, the state courts remain free to rephrase the questions asked by the federal court,<sup>65</sup> leaving at least some power of decomposition in the hands of the state courts.

The difficulties of issue decomposition in certification cases come to a head where state courts are asked to deal with certified questions of state law that arise precisely because certain answers to the certified questions (but not others) will avoid federal constitutional issues. Consider the common setting in which a federal court is called upon to determine the federal constitutionality of a state statute. The federal court certifies to the state high court the question of how the state statute should be interpreted. Lurking (at least in the background) is the constitutionality of the statute. Indeed, the state

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*Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41 (1994) (emphasizing the importance of path dependence in legal reasoning).

<sup>63</sup> See *supra* text accompanying note 22.

<sup>64</sup> See *supra* note 23.

<sup>65</sup> See *supra* text accompanying note 23.

court will be fully aware that the issue of the proper interpretation of the state statute has arisen in the context of the constitutionality of the statute.

One possibility is for the state court to consider the likely constitutionality of the statute in determining the interpretation of the statute. While the state court generally will recognize explicitly that it lacks authority to resolve issues of federal law, the state court opinion may nonetheless make reference to federal law, and in substance reveal how the state court believes the state law questions should be resolved *in light of federal law*. Consider *Redgrave v. Boston Philharmonic Orchestra*,<sup>66</sup> where the issue arose in a federal case as to whether a particular application of a state statute would violate the First Amendment. The United States Court of Appeals for the First Circuit certified interpretive questions to the Massachusetts Supreme Judicial Court; the questions were broadly worded and did not mention or allude to the federal constitutional issues.<sup>67</sup> A fractured state court produced three opinions, none of which garnered a majority of votes. All three opinions answered the questions as phrased on their face, but then proceeded to note concerns, grounded in federal and/or state constitutional law, that the federal case (though not the certified questions standing alone) raised.<sup>68</sup> The federal court then divided over whether to accept the answers to the certified questions at face value, or whether to consider the state court judges' musings on the broader case, ultimately deciding that it would.<sup>69</sup>

Consider as well the response of the Maryland Court of Appeals to a certified question in *Telnikoff v. Matusevitch*.<sup>70</sup> At issue in *Telnikoff* was the enforceability under Maryland law of a British libel judgment. The United States Court of Appeals for the

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<sup>66</sup> 855 F.2d 888 (1st Cir. 1988) (en banc), *incorporating answers to certified questions provided by* 502 N.E.2d 1375 (Mass. 1987).

<sup>67</sup> *See id.* at 902.

<sup>68</sup> *See* 502 N.E.2d at 1377 (Hennessey, C.J., plurality opinion) (noting the serious constitutional questions raised by the setting in which certified questions were asked, and noting that the judges would nonetheless answer the certified questions "in accordance with their clear and unequivocal wording"); *id.* at 1380 (Wilkins, J., concurring) ("[S]ubstantial constitutional questions may be explicitly, and surely are impliedly, involved in the questions"); *id.* at 1382 (O'Connor, J., dissenting) ("The Chief Justice's opinion recognizes . . . that its answers to the certified questions may implicate serious constitutional questions . . .").

<sup>69</sup> *See* 855 F.2d at 903 ("Although all of the Justices' reflections on this issue technically may fall under the heading of dicta, they are so deliberate, so unanimously expressed, and involve such a basic proposition, that we feel constrained to listen carefully.").

<sup>70</sup> 702 A.2d 230 (Md. 1997).

District of Columbia Circuit asked the Maryland high court to resolve whether recognition of the foreign judgment would “be repugnant to the public policy of Maryland,” and therefore unenforceable under Maryland’s version of the Uniform Foreign-Money Judgments Recognition Act.<sup>71</sup> The Maryland Court of Appeals answered the certified question in the affirmative, noting that it was not resolving issues of either federal or state constitutional law, but rather interpreting the applicable judgment recognition statute.<sup>72</sup> But, the court added, “[w]hile we shall rest our decision in this case upon the non-constitutional ground of Maryland public policy, nonetheless, in ascertaining that public policy, it is appropriate to examine and rely upon the history, policies, and requirements of the First Amendment [to the federal Constitution] and [its Maryland constitutional analog].”<sup>73</sup> And, indeed, the court’s subsequent analysis includes numerous references to, and analysis of, general First Amendment law.<sup>74</sup>

A second possibility is for the state court to conclude that issues of federal law are beyond the proper scope of the federal court’s certification, as did the Supreme Court of Louisiana in *Aguillard v. Green*.<sup>75</sup> There, the federal courts were asked to rule upon the constitutionality of a state statute that required the teaching of creation science along with evolution, and the United States Court of Appeals for the Fifth Circuit called upon the Supreme Court of Louisiana to decide, as a preliminary matter, “whether the 1974 Louisiana Constitution by vesting the responsibility exclusively in [the state Board of Elementary and Secondary Education] prohibits the Legislature from prescribing courses of study in elementary and secondary public schools.”<sup>76</sup> Without so much as alluding to the federal constitutional issue ultimately driving the case, the Supreme Court of Louisiana answered the question in the affirmative and upheld the statute on state constitutional grounds. Dissenting, Chief Justice Dixon asserted that the two issues were inextricably linked,<sup>77</sup> while Justice Watson, also dissenting, explicitly cited cases from

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<sup>71</sup> *Id.* at 236.

<sup>72</sup> *Id.* at 239.

<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g., id.* at 244-47.

<sup>75</sup> 440 So. 2d 704 (La. 1983).

<sup>76</sup> *Id.* at 706.

<sup>77</sup> *See id.* at 711 (Dixon, C.J., dissenting) (“Perhaps because the litigants have not forcefully presented the issue, and have submitted to a division of the question, this court avoids the hard issue at the root of that

other jurisdictions that had stricken similar statutes as unconstitutional under the federal Constitution.<sup>78</sup>

A third possibility is for the state court to conclude that the certification improperly calls upon it to address matters of federal law. For example, in *In re Certified Question from the United States District Court, Eastern District of Michigan*,<sup>79</sup> the Supreme Court of Michigan was asked by a federal district court to interpret a state indecent exposure statute; as the certification request made clear, the federal court would determine the constitutionality of the statute under the First Amendment based upon the state court's response. The state court declined to answer the certified question. Reasoned the court:

[I]t is plain that the certified question procedure has not been employed to obtain an expression of this Court's opinion on a matter of Michigan law at all, or, even simply to obtain this Court's opinion [as to how the statute should be interpreted]. It has been employed instead to obtain a ruling from this Court on a question of First Amendment federal constitutional law with very explicit instructions from the federal court to this Court how that answer should be written to avoid federal court adjudication that the statute is unconstitutional.<sup>80</sup>

To the extent that certification is simply a streamlined form of abstention,<sup>81</sup> then perhaps the first option described above is best—that is, for the state court to consider the proper interpretation of the statute in light of any relevant federal constitutional provisions: The Court has explained that *Pullman* abstention procedure “does not mean

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one certified to us. It assumes that ‘creation-science’ is a ‘course of study.’”); *id.* (“From all that I have read in the past, ‘creation-science’ is a religious doctrine, not a course of study.”).

<sup>78</sup> See *id.* at 713 (Watson, J., dissenting).

<sup>79</sup> 359 N.W.2d 513 (Mich. 1984).

<sup>80</sup> *Id.* at 516. The court further explained:

The rhetorical questions, of course, are by what authority does this Court tell the federal court how the litigation before it challenging the constitutionality of our statute, should be decided and by what authority does this Court “save” the statute from the probability of federal court nullification by ruling on its constitutionality? There is no litigation before this Court challenging the constitutionality of the statute. Indeed, there is no lawsuit on the matter before this Court at all. There is a mere request for an advisory opinion not about “Michigan law” as is required by [the Michigan certification statute], but about the constitutionality of a Michigan statute under the First Amendment of the United States Constitution, a question of federal constitutional law, thinly veiled behind a purported request to advise the federal court [how the statute should be interpreted], accompanied by advice as to precisely how the question should be answered.

*Id.*

<sup>81</sup> See *supra* text accompanying note 18.

that a party must litigate his federal claims in the state courts, but only that he must inform those courts what his federal claims are, so that the state statute may be construed ‘in light of’ those claims.”<sup>82</sup> But, if that is so, how should the federal court “reassemble” a case after a state court has answered certified questions? In the *Redgrave* case, the First Circuit decided to consider the views of the Justices of the Massachusetts high court beyond simply the answers to the certified questions.<sup>83</sup> While this may be the correct path, it is interesting to note, from the perspective of difficulties that result from case decomposition, that the First Circuit had to resolve the case en banc, and that two of the five sitting judges vociferously dissented, arguing that the First Circuit should be bound by the simple votes of the Massachusetts high court judges as to whether to answer the certified questions “yes” or “no”.<sup>84</sup>

*Abstention.*—Abstention presents a complicated procedure for case decomposition. When a federal court abstains under *Pullman*, the state court has full authority to resolve state and federal issues unless a litigant clearly reserves the federal issues for federal court<sup>85</sup> and properly preserves those issues by not litigating them in the state forum.<sup>86</sup> If a litigant properly makes an *England* reservation, then the state court lacks the power to resolve federal issues. Indeed, if the state court nonetheless proceeds to resolve federal law issues over the litigant’s objection, that resolution is not binding upon return to the federal court. In short, then, the state court initially decomposes the case; if the federal court disagrees with that decomposition, however, and concludes that the state court overstepped its bounds, then the federal court’s “re-decomposition” controls.

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<sup>82</sup> *England*, 375 U.S. at 420; see Randall P. Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107, 1116 (1974) (noting that, under *Pullman* abstention, “the state court is not prohibited from considering the state law issue in light of the federal issue”).

<sup>83</sup> See 855 F.2d at 903 (“Although all of the Justices’ reflections on this issue technically may fall under the heading of dicta, they are so deliberate, so unanimously expressed, and involve such a basic proposition, that we feel constrained to listen carefully.”). The First Circuit proceeded to reason that, even though the Massachusetts high court had fractured into three camps, none of which constituted a majority, one could extrapolate that all the Justices would agree on ultimate outcome. See *id.* at 909-10. The First Circuit also indicated that, even if that extrapolation were not accurate, the concurrence combined with the dissent to form a majority on outcome. See *id.* at 909.

<sup>84</sup> See *id.* at 912 (Bownes, J., dissenting).

<sup>85</sup> See *supra* text accompanying note 14.

<sup>86</sup> See, e.g., *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323, 340-41 (2005) (*England* reservation ineffective where parties advanced federal constitutional arguments before state court).

Abstention presents the same legal decomposition challenges as does certification,<sup>87</sup> but, unlike certification, also raises two other concerns: factfinding and preclusion. Consider first the problem of decomposing factual issues. While certification generally envisions state courts responding to certified questions only in the light of a fully developed factual record, the procedure in no way calls upon or allows the state court to render factual findings. Abstention, in contrast, calls upon the state court not only to resolve the state law issues but also the factual questions underlying those issues. And, just as the state court is precluded (assuming a valid *England* reservation) from resolving issues of federal law, so too is it precluded from resolving the factual questions underlying *those* issues.<sup>88</sup> As I noted above, at the end of the day, the federal court may disagree with the state court's efforts to disaggregate the relevant legal and factual issues,

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<sup>87</sup> On one reading, *England* reservation simply allows for litigants to reserve for review in federal courts federal *claims*—that is, claims arising under federal law—while allowing for state court resolution of state law claims. See, e.g., *England*, 375 U.S. at 415 (“There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court’s determination of *those claims*.” (emphasis added)); *id.* at 417 (noting a litigant’s “right to litigate his *federal claims* fully in the federal courts” (emphasis added)). On this understanding then, cases are “naturally” decomposed, based simply on whether each claim arises under state or federal law. On the other hand, language elsewhere in *England* suggests that the federal reservation applies to federal law questions, not claims. See, e.g., *id.* at 415-16 (recognizing “the primacy of the federal judiciary in deciding questions of federal law”). Professor Field is similarly ambiguous, compare Field, *supra* note 58, at 1079 (*England* “held that a litigant remanded to state court under that doctrine cannot be compelled to submit his *federal claims* for state court disposition. . . .” (emphasis added)) with *id.* (“[A]bstention may not be used to deprive [a litigant invoking a reservation] of the benefits of an initial federal determination of the *federal issues*. . . .” (emphasis added)), as is Professor Friedman, compare, e.g., Friedman, *supra* note 28, at 1271 (“Federal jurisdiction should be available for federal *claims*.” (emphasis added)) with *id.* at 1269 (“So long as the state party indicates that it intends to obtain litigation of federal *questions* in federal court, that reservation should be enough.” (emphasis added)). I believe the *England* is better understood to apply to federal issues, not claims. Indeed, *England* itself involved a case where, when three would-be chiropractors sued for a declaration that a Louisiana statute that forbade them from practicing in Louisiana was violative of the federal Constitution, the federal court abstained pending state court determination of whether the statute applied to the plaintiffs (the resolution of which question might obviate the need to resolve the federal constitutional issue). *England* recognized the right of litigants to reserve for federal court review not entire claims, but rather questions of federal law that might be subsets of claims.

<sup>88</sup> E.g., Field, *supra* note 58, at 1079. Compare, in this regard, the use of *Pullman* abstention with the use of *Burford* abstention, where the decision to abstain in favor of state court litigation (including state court factfinding) is based in part on the state court’s “superior factfinding abilities.” Bezanson, *supra* note 82, at 1123-24. Note as well that, when the Supreme Court reviews a state court’s resolution of federal law on certiorari, it generally accepts the state court system’s factfinding, even though that factfinding may influence the ultimate resolution of the federal issue. See Field, *supra* note 58, at 1084.

It may be that some (or all) of the factual questions that underlie the state law issues that the state court properly resolves also underlie the federal law issues. In such cases, the question arises whether issue preclusion may bind the federal court to the state court’s factual conclusions. For an argument that it does,

in which case the federal court's views will control—that is to say, the federal court will not be bound under *England* by the state court's findings. At the same time, however, as I shall discuss presently, preclusion doctrine may vest additional power in state court factfinding.

Turning to preclusion, the Supreme Court held in *San Remo Hotel, L.P. v. City & County of San Francisco* that the full faith and credit statute<sup>89</sup> requires federal courts to give preclusive effect to state court holdings, even where the plaintiff is forced to raise claims in state court in order to have her federal claims ripen, and even where the plaintiff proceeds in state court while the federal court abstains under *Pullman*<sup>90</sup> and where the plaintiff makes an *England* reservation.<sup>91</sup> As a result, issue preclusion generally binds an abstaining federal court to a state court's findings, that are necessary to the state court's holding, on issues of evidentiary fact, and issues of “ultimate fact”—that is, put broadly, law applied to fact.<sup>92</sup>

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see Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 272-76 (2006).

<sup>89</sup> See 28 U.S.C. § 1738 (2006).

<sup>90</sup> See 545 U.S. at 341-47. Under the Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, federal takings claims do not ripen until a state fails “to provide adequate compensation for the taking.” 473 U.S. 172, 195 (1985). After the district court relied on *Williamson County* to hold the plaintiffs' taking claim untimely, the plaintiffs in *San Remo* asked the Ninth Circuit to abstain under *Pullman* while the plaintiffs pursued an inverse condemnation action in the California state courts and thus ripened their federal claim. 545 U.S. at 330-31. After losing on the merits in state court, the district court and subsequently the Ninth Circuit dismissed the plaintiffs' federal takings claim, this time relying upon the issue preclusive effect of the state court's ruling. *Id.* at 332-35. The Supreme Court affirmed.

<sup>91</sup> While noting that the plaintiffs had raised arguments inconsistent with their invocation of *England*, the Court observed that its holding on the lack of an exception to the full faith and credit statute did not turn on *England*. See *id.* at 341-42.

<sup>92</sup> See Sterk, *supra* note 88, at 273-74 & 121.

Though issue preclusion also applies generally to pure matters of law, *see id.*, that will presumably not be of moment in the abstention setting where an *England* reservation is properly invoked: Any pure legal questions resolved should be matters of state law, which by definition the federal court will not be confronting. See *id.* at 273-74 (explaining why “according issue-preclusive effect to a state court determination of law . . . will not generally prevent a landowner from mounting a federal takings challenge in federal court”). If, on the other hand, the state court improperly addresses a matter of federal law, the *San Remo* Court did hold that the *England* reservation (assuming it is properly preserved) will deny preclusive effect to the state court's determination. See *id.* at 280.

Though it is less likely, claim preclusion could also present a problem. Under claim preclusion, a federal court may be barred from hearing a claim—even a federal claim—if the plaintiff has first proceeded in state court and could have brought in that forum the federal claim along with a closely related state claim, but chose not to do so. See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 83-84 (1984). Absent an exception for *England* reservations, it would seem that exercises of *Pullman* abstention might often give rise to assertions of claim preclusion—for example, in cases where claims are raised under analogous

*Supreme Court Certiorari Review of State Court Cases.*—Difficulties in decomposition also may arise under Supreme Court certiorari review of state court decisions. One might think that manifestation of those difficulties would be rare, insofar as the Supreme Court both decides upon the proper decomposition of the case and then has the freedom not just to resolve the federal issues but to decide the case itself. Consider, however, two areas of possible problem.

First, how should the Supreme Court decide whether independent issues of federal law abound in a state court decision? In theory, “where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [Supreme Court] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.”<sup>93</sup> However, since its 1983 decision in *Michigan v. Long*,<sup>94</sup> the Court has applied a presumption that there is no independent and adequate state law ground “when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.”<sup>95</sup>

This had the effect of expanding the Court’s jurisdiction to review state court cases, but also of increasing the likelihood that state courts on remand would adhere to their earlier decision on the ground that it was, contrary to the Court’s presumption, based

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federal and state constitutional provisions. *E.g.*, *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1104-05 (9th Cir. 1998) (abstaining from plaintiffs’ facial federal takings claim pending state court litigation).

Does *England* reservation provide an exception to application of claim preclusion? As Professor Sterk notes, while “[t]he Supreme Court’s opinion in *San Remo* did not expressly determine whether the hotel’s effort to litigate its federal takings claim in federal court was foreclosed by the doctrine of claim preclusion or by the doctrine of issue preclusion,” Sterk, *supra* 88, at 272, “[n]othing in the Court’s analytical framework distinguishes issue preclusion from claim preclusion,” and “Section 1738 applies equally to claim preclusion and issue preclusion,” *id.* at 280. Nonetheless, Professor Sterk concedes that, for an *England* reservation to be effective, it must trump: “When a federal court properly invokes the abstention doctrine, a state court judgment rendered after an *England* reservation will have neither issue preclusive effect nor claim preclusive effect in a subsequent federal adjudication of federal claims.” *Id.* at 280.

At the same time, Professor Sterk argues that, when “no ground for abstention exists, *England* reservations are not authorized and can operate to trump neither state issue preclusion doctrine nor state claim preclusion doctrine.” *Id.* This point, if true, has ramifications for Professor Friedman’s proposal to allow for anticipatory *England* reservations, *see supra* text accompanying note 14, as I discuss below, *see infra* notes 185-192 and accompanying text.

<sup>93</sup> *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

<sup>94</sup> 463 U.S. 1032 (1983).

<sup>95</sup> *Id.* at 1042.

on an independent and adequate state law ground.<sup>96</sup> In this sense, the *Michigan v. Long* presumption is a decomposition device, but one that state courts may, and often do, rebut.

Consider, moreover, the lengths to which state courts may go to preserve their decisions as grounded on an independent state law basis. In *Racing Association of Central Iowa v. Fitzgerald*,<sup>97</sup> the Iowa Supreme Court held that a state tax on gambling receipts from racetracks at nearly twice the rate imposed on receipts from riverboat gambling violated the Equal Protection Clause of the United States and an analogous provision of the Iowa Constitutions. The court noted that the “same analysis” applied to determining the applicability of both provisions.<sup>98</sup> The United States Supreme Court, by writ of certiorari, reversed the state court’s federal constitutional holding and remanded the case for further proceedings.<sup>99</sup> On remand, the Iowa Supreme Court adhered to its original decision on state law grounds.<sup>100</sup> The state court expressly declined to hold that the Iowa Constitution required a different analytical framework from federal law to evaluate equal protection claims,<sup>101</sup> holding instead that the rational basis test, which was the governing standard under federal law, applied as well under Iowa law but demanded a different outcome.<sup>102</sup>

The upshot in defying Supreme Court authority to decompose cases is simply to decline to fulfill the Court’s mandate on remand. Though rare, this did happen in the case of *Johnson v. Radio Station WOW, Inc.*<sup>103</sup> There, the Court reversed the Supreme Court of Nebraska’s mandate in a state law fraud case that the parties do “all things necessary” to achieve return of a radio station license,<sup>104</sup> reasoning that license ownership lay within

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<sup>96</sup> See Richard W. Westling, Note, *Advisory Opinions and the “Constitutionally Required” Adequate and Independent State Grounds Doctrine*, 63 TUL. L. REV. 379, 389 n.47 (1988) (calculating that 26.7% of Supreme Court decisions reviewing state court rulings proved to be advisory opinions in the four-and-one-half years following *Long*, compared to 14.3% in the five-and-one-half years preceding *Long*).

<sup>97</sup> 648 N.W.2d 555, 562 (Iowa 2002), *rev’d*, 539 U.S. 103 (2003), *on remand to* 675 N.W.2d 1 (Iowa 2004), *cert. denied*, 541 U.S. 1086 (2004).

<sup>98</sup> *Id.* at 558 (internal quotation marks omitted).

<sup>99</sup> 539 U.S. 103 (2003).

<sup>100</sup> 675 N.W.2d 1 (Iowa 2004), *cert. denied*, 541 U.S. 1086 (2004).

<sup>101</sup> See *id.* at 5-6.

<sup>102</sup> See *id.* at 6-16.

<sup>103</sup> 13 N.W.2d 556 (Neb.), *reh’g denied*, 14 N.W. 666 (1944), *rev’d*, 326 U.S. 120 (1945), *on remand to* 19 N.W.2d 853 (1945).

<sup>104</sup> *Id.* at 564.

the sole purview of the Federal Communications Commission (“FCC”).<sup>105</sup> In formulating the appropriate relief, the Court recognized the state court’s power to adjudicate fraud, but also was concerned that a state court order that resulted in the separation of the FCC radio license from the underlying physical property might “result . . . in the termination of a broadcasting station,” which in turn might “deprive[] the public of those advantages which presumably led the Commission to grant a license” in the first place.<sup>106</sup> The Court sought to vindicate these competing interests in fashioning relief: “We think that State power is amply respected if it is qualified merely to the extent of requiring it to withhold execution of that portion of its decree requiring retransfer of the physical properties until steps are ordered to be taken, with all deliberate speed, to enable the Commission to deal with new applications in connection with the station.”<sup>107</sup> The Court remanded the case “for further proceedings not inconsistent with this opinion.”<sup>108</sup>

On remand, the Supreme Court of Nebraska opined that the United States Supreme Court had overstepped its bounds by deciding a matter of state law.<sup>109</sup> The

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<sup>105</sup> 326 U.S. at 130.

*Johnson* involved the lease of radio station and the transfer of the station’s license by the fraternal society that owned the station to a corporate entity. A member of the society sued the fraternal society and the corporation in Nebraska state court on his own behalf and on behalf of all members of the society, raising allegations of fraud, and asking the court to set aside the transfer of the lease and the assignment of the license. 13 N.W.2d at 557. While the suit was pending, the FCC exercised its supervisory authority over the station license and approved of the assignment. 326 U.S. at 121.

While the trial court found no fraud and dismissed the suit, the state supreme court reversed and “ordered that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside.” 13 N.W.2d at 564. On motion for rehearing, the defendants argued that the state court improperly exercised jurisdiction properly belonging to the FCC. The supreme court denied that motion as untimely, but did clarify its opinion as follows: “The effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status, the question of the federal license being a question solely for the Federal Communications Commission. Our former opinion should be so construed.” 14 N.W.2d at 669.

The United States Supreme Court granted defendants’ petition for certiorari “[b]ecause of the importance of the contention that the State court’s decision had invaded the domain of the Federal Communications Commission.” 326 U.S. at 123. The Court declined to address the defendants’ primary argument—that the state court exercised jurisdiction that was vested solely in the FCC—on the ground that the state court’s ruling that the argument was raised belatedly constituted an independent and adequate state law ground. 326 U.S. at 123. However, reasoning that ownership of the license lay within the sole purview of the FCC, the Supreme Court explained that the state supreme court “went outside its bounds when it ordered the parties ‘to do all things necessary’ to secure a return of the license.” *Id.* at 130 (quoting *Johnson*, 13 N.W.2d at 564).

<sup>106</sup> *Id.* at 131-32.

<sup>107</sup> 326 U.S. at 132. The Court added: “Of course, the question of fraud adjudicated by the State court will no longer be open insofar as it bears upon the reliability as licensee of any of the parties.” *Id.*

<sup>108</sup> *Id.* at 133.

<sup>109</sup> 19 N.W.2d 853.

Nebraska court recognized the Supreme Court’s authority to decide whether the Nebraska court had encroached upon the FCC’s authority, but it identified that as the “only possible basis for the attaching of federal jurisdiction.”<sup>110</sup> It understood the Supreme Court’s decision to go farther “The mandate of the Supreme Court of the United States directing this court to withhold its mandate of the state court encroaches upon the plenary powers of this court and tends to undermine the autonomy and destroy the independence of the state courts in a field in which they are admittedly supreme.”<sup>111</sup> The Nebraska court proceeded to characterize the “contention” advanced by the Supreme Court—“that state power is amply respected, even if it is qualified to the extent of requiring the withholding of execution” of a portion of the Court’s decree—as “specious.”<sup>112</sup> The court concluded: “The mandate of this court will . . . issue on order by this court without reference to the advisory directions contained in the mandate of the Supreme Court of the United States.”<sup>113</sup>

Last, consider that state courts may so wish to preserve their holding that they may seek to evade the reviewing power of the Supreme Court. On this basis, the Supreme Court has developed the doctrine that it may review state court decisions purportedly grounded in state law where the issue of state law is antecedent to a question of federal law,<sup>114</sup> or where the Supreme Court suspects the state court of having devised its determination of state law so as to evade or cheat federal law or federal judicial review.<sup>115</sup>

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A final point of difficulty raised by case decomposition relates to the difficulties courts tend to have in resolving less than entire cases. The natural tendency of courts is to

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<sup>110</sup> *Id.* at 854.

<sup>111</sup> *Id.* The Nebraska court evidently believed that its opinion on rehearing adequately preserved the FCC’s authority over the license.

<sup>112</sup> *Id.* at 854-55.

<sup>113</sup> *Id.* at 855.

After the Supreme Court of Nebraska adhered to its earlier decision, the parties agreed to a new lease. The case was not pursued again to the United States Supreme Court. Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, *supra* note 13, at 1253 n.15.

One presumes that, had the case again been reviewed by the Supreme Court, the Court would have been free to enforce its original mandate. See *supra* note 13 and accompanying text.

<sup>114</sup> See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

decide cases based upon final outcomes, not constituent issues.<sup>116</sup> At some level, decomposition conflicts with this natural tendency.<sup>117</sup> And the examples I have identified bear this out. The courts in *Johnson* focused on outcome at every level.<sup>118</sup> The Iowa Supreme Court and United States Supreme Court wrestled over the outcome of the case in *Fitzgerald*.<sup>119</sup> By relying upon the state law issue, the Iowa Supreme Court was able to reaffirm its earlier outcome and reject the United States Supreme Court's outcome. And *Redgrave* elucidates the tendency toward deciding outcomes in the context of certification.<sup>120</sup>

### **B. Problems of Bias**

The ordinary story is that the Constitution authorizes, and Congress has conferred, federal court diversity jurisdiction on the grounds (or at least substantially on the grounds) that state courts are biased against out-of-state residents—or are perceived to be so, even if in fact they are not.<sup>121</sup> In this sense, as expressed through Congress' decision

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<sup>115</sup> See generally Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80 (2002).

<sup>116</sup> See STEARNS, *supra* note 61, at 111-24 (arguing that judges' general preference for outcome-based voting is the result of natural evolution in decisionmaking).

<sup>117</sup> See *England*, 375 U.S. at 421 n.12 (“It has been suggested that state courts may ‘take no more pleasure than do federal courts in deciding cases piecemeal \* \* \*’ and ‘probably prefer to determine their questions of law with complete records of cases in which they can enter final judgments before them.’” (quoting *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 227 (1960) (Black, J., dissenting))).

<sup>118</sup> First, the Nebraska state court announced a preliminary outcome in the case. After the Supreme Court identified a federal issue on which it had authority to rule, the Court proceeded to modify the outcome in the case to incorporate its ruling on the federal law issue. On remand, the Nebraska Supreme Court rejected the Supreme Court's issue distinction and reinstated the outcome it previously had announced. While issue decomposition provided a substantial ground for dispute between the courts, it was ultimately through the outcome in the case that the Supreme Court sought to assert its authority, and it was the outcome of the case that the Nebraska Supreme Court sought to protect. See *supra* notes 103-113 and accompanying text.

<sup>119</sup> See *supra* notes 97-102 and accompanying text.

<sup>120</sup> See *supra* notes 66-69 and accompanying text.

<sup>121</sup> Though the justifications for the constitutional and congressional grants of diversity jurisdiction are myriad and subject to debate, still it remains the case that avoiding bias and the appearance of bias are, at the least, two of the principal justifications. See Nash, *supra* note 16, at 1729 n.223, and the authorities cited therein. See also *id.* at 1730 n.224 (arguing that the affirmative choice to retain diversity jurisdiction in the face of arguments to repeal it reflects at least some belief that the risk of bias and perceived bias remains somewhat vibrant). While some argue that the diversity jurisdiction proved to be invaluable for the economic and commercial development of the country, see, e.g., Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOKLYN L. REV. 197, 206-10 (1982); William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 604 (1922), that point ultimately may rest on the perception of bias, see Taft, *supra*, at 604 (“The material question is not so much whether the justice administered [in state courts with respect to litigants from other

to instantiate the federal courts' diversity jurisdiction, federal courts are in certain circumstances seen to be better fora for state court claims than are state courts.<sup>122</sup>

To the extent that state courts are biased against out-of-state residents, state and federal courts do not, and *should not* decide state law claims identically: While *Erie* directs that federal courts decide state law questions as would the relevant state high court, that directive implicitly includes an exception for bias against litigants that state courts themselves might exhibit. The implicit justification is that state courts may manipulate state law—that is, apply state law to achieve a different outcome—when at least one of the parties hails from out-of-state.

On the other hand, to the extent that state courts are in reality (either broadly or in particular cases) *not* biased against out-of-state residents but run the risk of being perceived to be so, the fact that federal and state courts *will* decide state law issues in the same way (as *Erie* otherwise directs) will serve to dispel the incorrect perceptions of bias, and to bolster and indeed to legitimate state court decisions on matters of state law in other cases.

To the extent that they allow for resolution in state court, in whole or in part, of state law claims that are otherwise to be heard in federal court—especially those in federal court by virtue of the diversity jurisdiction—transjurisdictional procedural devices frustrate the attainment of these goals. In other words, while one might dispute either the suggestion that state courts are often biased, the suggestion that they are often perceived to be biased, or both, the fact that the federal courts' diversity jurisdiction

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regions of the country] is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where their capital is needed for the promotion of enterprises and industrial and commercial progress.”).

<sup>122</sup> Cf. Schapiro, *supra* note 1, at 1421-22 (arguing that perhaps federal courts are better suited to decide state constitutional law issues, based in part upon the argument that a “federal court’s familiarity with constitutional adjudication might compensate for its potential unfamiliarity with some aspects of state law”); Marsh, *supra* note 121, at 212 (“[C]ontinued heavy use of diversity jurisdiction has been cited as evidence of its continuing need to overcome the perceived shortcomings of the state courts.” (footnote omitted)). The converse is generally not seen to be true; that is, there is no sustained argument that state courts provide a better forum for federal law claims across a wide swath of cases. Indeed, commentators generally argue that federal courts provide at least as good, if not a better, forum for the vindication of federal civil rights claims. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). Still, there are some who argue that state courts in particular contexts and at particular times may offer a friendlier forum. See William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMM. 599 (1999); Bezanson, *supra* note 82, at 1123 (“In virtually every *Burford* abstention case the Supreme Court has . . . emphasized the reliability of the state court adjudicatory process in the resolution of the issues presented.”).

remains “on the books” suggests that decisions to send state law claims that otherwise would be wholly resolved in federal court back, in whole or in part, to state court should not be taken lightly. Thus, the Supreme Court has stated that “the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.”<sup>123</sup> Rather, “[i]n the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.”<sup>124</sup> And, indeed, other than recognizing the propriety of certification and very limited applications of abstention doctrine,<sup>125</sup> the Supreme Court has generally adhered to this view. The introduction of certain new transjurisdictional procedural devices, and expansion and increased use of existing ones, are inconsistent with this view.

One might argue that certification—unlike procedural devices such as abstention that allow for state court systems to address cases in their entirety—adequately protects against state court bias in three ways. First, certification involves only judges of the state’s highest court, and those judges are less likely to exhibit bias (or to be perceived to exhibit bias) than are lower state court judges. Second, any use of a jury takes place in federal court with a jury drawn from a federal jury pool. This, too, reduces the likelihood of bias, of the perception of bias. And, third, all factfinding takes place in the federal court; state courts on certification decide only abstract questions of state law, leaving the opportunities for bias quite small.

None of these arguments (whether alone, or taken together) establishes that bias, or the perception of bias, will be eliminated under certification procedure. First, it is simply not the case that a state’s high court judges are less likely to be biased, or to be perceived to be biased. To the contrary, the fact that high court judges are not bound by

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<sup>123</sup> *Meredith v. Winter Haven*, 320 U.S. at 234.

<sup>124</sup> *Id.*

<sup>125</sup> See *supra* note 28 and the accompanying text.

precedent affords them *greater* leeway to engage in bias.<sup>126</sup> And the fact that many members of state courts of last resort are elected raises the specter of bias or at least of its appearance.<sup>127</sup>

Second, while jury determinations will be made in federal court, the possibility of bias extends beyond juries to state tribunals.<sup>128</sup> Indeed, the fact that federal juries, like state juries, are drawn from the residents of the state in which the federal court is located (albeit from a wider swath of the state) has led defenders of federal diversity jurisdiction to argue that the source of bias is not so much the jury itself but rather the power the trial judge exercises in controlling and instructing the jury.<sup>129</sup>

Third, the notion that state high courts answer certified questions in a vacuum is incorrect. Indeed, the cognate point—that all factfinding takes place in federal court—itself undermines the notion that the state court responds to abstract legal questions. Rather, the fact that state high courts as a rule decline certification requests absent a sufficiently developed factual record shows that state courts answer—and, indeed, will only answer—certified questions in context. This leaves the state court the freedom to distinguish the certified answers in subsequent opinions. At the same time, however, the setting of certification gives the state high court the cover to claim that it is simply answering abstract legal questions, making the potential for bias (or the appearance of bias) especially invidious.<sup>130</sup> As Professors Ann Woolhandler and Michael Collins explain, “the risk of bias against a nonresident in the interpretation of untested state law may be even greater than in cases of routine law application to disputed facts.”<sup>131</sup>

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<sup>126</sup> See Nash, *supra* note 16, at 1743. Indeed, the large sums of money expended, and attention focused, on races for seats on state high courts is evidence of the great discretion that state high court judges enjoy. *See id.*

<sup>127</sup> *See id.* at 1742-43.

While serving as a West Virginia Supreme Court Justice, Richard Neely wrote:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

RICHARD NEELY, *THE PRODUCT LIABILITY MESS* 4 (1988).

<sup>128</sup> Congress presumably could decide, but has not decided, to extend diversity jurisdiction solely to cases that involve jury trials.

<sup>129</sup> See Nash, *supra* note 16, at 1741, and the authorities cited therein.

<sup>130</sup> *See id.* at 1743-45.

<sup>131</sup> Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 677 (1999).

This risk, moreover, is not merely theoretical; it has in fact come to pass. As I detail elsewhere, in a pair of cases, the Supreme Court of Texas initially answered certified questions in what appeared to be a broad statement of law, only two years later to issue an opinion that relegated the certified answers to the facts there presented.<sup>132</sup> Without ascribing intentional bias to the judges of the Texas court (and recalling that the mere appearance of bias is problematic), the fact remains that the net result of the two opinions was to treat an in-state litigant more favorably than a similarly-situated out-of-state litigant.

Professor Friedman has suggested that the real question is whether the state court's holdings are general statements of law, broadly applicable without regard to citizenship.<sup>133</sup> I do not disagree with this general point. Indeed, I suggest below that such a metric might be used to determine whether the federal court should be bound by a state court's response to a certified question.

### ***C. Disparity in Judicial System Power***

The successful use of transjurisdictional procedural devices rests upon one of two bases (or a combination thereof): comity between the two judicial systems implicated by the use of the device, and/or the power of one of the two judicial systems to employ the device. Insofar as they tend to understand transjurisdictional devices to further comity among judicial systems, commentators tend to assume (if implicitly) that the

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<sup>132</sup> See Nash, *supra* note 16, at 1745-47 (discussing *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), and *Rose v. Doctors Hospital*, 801 S.W.2d 841 (Tex. 1990)).

<sup>133</sup> Professor Friedman argues that, “[e]ven in the case [that I] discuss[], the subsequent ruling was itself general, and the body of law now contains the general principles from those two cases, principles that will apply without regard to the citizenship of parties.” Friedman, *supra* note 28, at 1239 n.72. The problem, however, is that the first opinion—that is, the response to the certified questions—what to all appearances purported to be a general statement of law turned out *not* to be. One well might have said—erroneously, as it turned out—that the first decision by the Texas court was “general” such that the “body of law . . . contains the general principles” from that case. This begs the question: What exactly constitutes “general principles” in this context? More importantly, the ultimate question is whether state courts treat responses to certified questions differently from their other opinions.

Professor Friedman also questions the importance of the example I offer, arguing that I “give[] no idea how pervasive the phenomenon is, and there is room to be skeptical.” *Id.* It is true that I make no assertion, and offer no evidence, as to how pervasive the phenomenon is, but neither does Professor Friedman offer evidence of how constrained it is. Ultimately, while the question indeed is an empirical one, in my view it is not clear on whose shoulders the burden of proof should fall. The point in any event remains that the Texas cases demonstrate that the phenomenon is not purely theoretical. However frequently it may occur now, moreover, increased use of certification would make its occurrence more likely. See *infra* page 41.

transjurisdictional devices they endorse rest upon and further comity. And, indeed, comity is the stronger base on which to design a transjurisdictional device. The problem, however, is that the existing commentary fails adequately to analyze the degree to which existing or proposed devices in fact rest upon comity, as opposed to disparities in power.

As a general matter, the federal court system enjoys a considerable power advantage over the various state judicial systems. First, federal law is expressly binding upon all state courts by virtue of the Supremacy Clause.<sup>134</sup> Second, the federal courts are part of the federal government and, as such, sit atop their state court counterparts much as the federal government sits atop state governments. Third, all state courts are directly inferior to a part of the federal court system: the United States Supreme Court. By contrast, the federal courts only need to apply state law by virtue of the Court's decision in *Erie*,<sup>135</sup> and then only when Congress has seen fit to extend jurisdiction over questions of state law. And, further, one can see congressional action to authorize (or require) federal courts to hear state law claims as a further example of federal court power over state courts, insofar as state courts have no say in the matter and in effect are required to share jurisdiction with the federal courts, and indeed effectively to lose the right to adjudicate cases that otherwise would fall under their purview.<sup>136</sup> Fourth, federal courts may stay actions in state court under appropriate circumstances,<sup>137</sup> but state courts may not as a general matter stay actions in federal court.<sup>138</sup> Fifth, federal courts trying to

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<sup>134</sup> See U.S. CONST., art. VI, cl. 2.

<sup>135</sup> See *supra* note 27; see also Clark, *supra* note 17, at 1477 & n.92 (questioning whether the result in *Erie* is constitutionally required); W. David Sarratt, Note, *Judicial Takings and the Course Pursued*, 90 VA. L. REV. 1487, 1513 n.105 (2004), and the authorities cited therein (same).

<sup>136</sup> Courts of a state also share jurisdiction in this sense with courts of another system, and also generally do not have a final say in the interpretation of state law, when matters arising under the law of that state are litigated in the courts of another state. In both cases, the state courts are not divested of jurisdiction, but also do not enjoy exclusive jurisdiction.

<sup>137</sup> The Anti-Injunction Act states that a federal court “may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect and effectuate its judgments.” 28 U.S.C. § 2283 (2006). While it thus limits the circumstances under which federal courts may issue injunctions against state courts, see, e.g., *Atlantic Coastline R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970) (describing the Act as “an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions”), still the Act confirms at the same time the power of federal courts to issue such injunctions.

<sup>138</sup> See, e.g., *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964) (“While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here.” (footnotes

discern state law undertake an endeavor quite distinct from that undertaken by state courts asked to rule upon issues of federal law. *Erie* calls for federal courts to decide matters of state law as would the relevant state high court. While the leeway that this affords federal courts is open to debate,<sup>139</sup> nonetheless it is clear that, at some level, the federal court must endeavor to act as it believes the state court would. In effect, if the *Erie* mandate is followed, the federal court can be said to act as the faithful agent of the state court.<sup>140</sup> By contrast, the role of a state court faced with questions of federal law is different. While the state court should endeavor to decide the federal law issues “correctly” and while in some sense this may involve anticipating how the United States Supreme Court would decide the issues, it hardly seems accurate to describe the state court as acting the Supreme Court’s faithful agent.<sup>141</sup>

Despite the evident power disparity, advocates of expanded transjurisdictional procedural devices rely upon cooperation between court systems to effectuate their goals. In other words, the commentators rely, if implicitly, upon Professor Edward Corwin’s pronouncement that the era of dual federalism—in which the federal government and state governments coexist but the relation between them “is one of tension rather than

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omitted)). *See id.* at 412-14 (invalidating state court order enjoining parties from prosecuting parallel suit in federal court, and vacating state court judgment of contempt for violation of order). *But see* *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 465-68 (1939) (upholding a state court order enjoining litigants from pursuing relief in federal court on the ground that the state court had the power to protect its ability, to the exclusion of the federal court, to adjudicate the *in rem* case before it).

<sup>139</sup> *See* Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges’ Interpretations of State Law*, 77 S. CAL. L. REV. 975, 997-98 (2004) (identifying factors that federal courts sometimes consider in *Erie* analyses).

<sup>140</sup> Charging the federal court to act as the state court’s ‘faithful agent’ does not render it, in Judge Frank’s words, the “ventriloquist’s dummy” to the state court. *See Richardson v. Comm’r*, 126 F.2d 562, 567 (2d Cir. 1942) (“[W]e are not here compelled by [*Erie*] to play the role of ventriloquist’s dummy to the courts of some particular state; as we understand it, ‘federal law,’ not ‘local law,’ is applicable.”) (Frank, J.); John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 13 (1963) (noting that the continuation of federal diversity jurisdiction is subject to the “ventriloquist’s dummy criticism,” and noting that the criticism “may have merit”); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 655 (1995) (“[N]o judge ought to be anyone’s ‘ventriloquist’s dummy,’ and any doctrine that does not recognize this merits serious reexamination.” (quoting *Richardson*, 126 F.2d at 567)).

<sup>141</sup> In addition to the points in the text, consider the argument that Supreme Court has deliberately carved out from the jurisdiction of the federal courts, and thus left to the exclusive jurisdiction of the state courts, matters that traditionally fall within the realm of the feminine. *See, e.g.*, Judith Resnik, “*Naturally* without Gender: Women, Jurisdiction, and the Federal Courts”, 66 N.Y.U. L. REV. 1682, 1699 (1991) (noting “the deliberate construction of jurisdictional rules and doctrine to exclude “domestic relations” from federal court authority”); *id.* at 1739-50.

collaboration”<sup>142</sup>—(if ever there was such an era) has passed.<sup>143</sup> One ought not to presume, however, that the retreat of dual federalism leaves unabashed cooperative federalism in its stead. To whatever extent there ever was an era of cooperative federalism,<sup>144</sup> it is “interactive federalism,” not cooperative federalism, that most aptly describes the relationship today between the federal judiciary and state court systems.<sup>145</sup> Just as the age of pure dual federalism may never have existed, so too is it an overstatement to describe today’s atmosphere as one of pure cooperative federalism.<sup>146</sup> Thus does interactive federalism “implicitly recognize the continued relevance of at least some form of dualism.”<sup>147</sup>

Commentators have generally failed to acknowledge the mismatch between the suggestion to rely more heavily on transjurisdictional procedural devices on the one hand, and the reality of dual federalism on the other. In reality, all transjurisdictional procedural devices operate based upon voluntary cooperation, power disparity, or some combination thereof. The combinations vary, however. Certification relies more heavily on voluntary cooperation, while abstention and certiorari review rely more heavily on power disparity—and thus are more likely to create friction between the court systems.<sup>148</sup>

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<sup>142</sup> Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950).

<sup>143</sup> See *id.* at 4-23.

<sup>144</sup> Compare Schapiro, *supra* note 1, at 1404 (“Some have declared the end of the era of cooperative federalism. Others have merely called for its demise.” (footnotes omitted)); John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 920 (1995) (referring to “the New Deal era of cooperative federalism (circa 1933-1968)”), with Redish, *supra* note 6, at 864 (expressing skepticism as to whether cooperative federalism ever held sway).

<sup>145</sup> See Redish, *supra* note 6, at 874-88; MARTIN REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 29 (1995); Schapiro, *supra* note 1, at 1404; Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 250-51 (2005).

<sup>146</sup> As the Supreme Court explained in *Atlantic Coastline R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970):

While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system was bound to lead to conflicts and frictions.

<sup>147</sup> Redish, *supra* note 6, at 882. Cf. Schapiro, *supra* note 1, at 1404 (“The new phase of federalism . . . though, will place more emphasis than cooperative federalism on competition and even confrontation among the states and between the states and the national government.”).

<sup>148</sup> Cf. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813 (1998) (arguing that cooperation between governments is more effective than coercion).

All three procedures vest substantial power in the federal courts. Only certification, however, vests any real power in the state courts. Under certification, one of the parties may request that the federal court initiate certification proceedings, or the federal court may do so sua sponte;<sup>149</sup> either way, the federal court has ultimate discretion whether to use certification.<sup>150</sup> However, it is also true that the state court then has discretion as to whether to accept the request for certification.<sup>151</sup> Further, with respect to decomposition of the case into constituent issues, while the federal court initially states the questions to be answered, the state court has the freedom to decline to answer some or all of the questions, or to redraft the questions as it sees fit.<sup>152</sup> It thus seems that certification does a good job of relying upon, and encouraging, comity between the federal court system and the state judiciaries.

As compared to certification, Supreme Court review of state court rulings by writ of certiorari relies far more heavily upon disparity in power. Under previous procedural regimes, the Supreme Court was obligated to review at least some state court decisions.<sup>153</sup> By contrast, under the current system of direct Supreme Court review of state court decisions on matters of federal law, it is the system whose questions of law are at issue that enjoys full discretion.<sup>154</sup> It is the parties who petition for its use, and the Supreme Court that decides whether to invoke it; the state court has no voice in the use of the device. Thus, direct Supreme Court review empowers one system to correct another system, while certification empowers one system to ask another system to help it resolve questions of law (and the other system remains free to decline that request for help).

Power over case decomposition is also less well balanced under certiorari review than under certification. While the federal court decides (perhaps with the input of the parties) what issues it would like the state high court to determine under both devices,<sup>155</sup> under direct Supreme Court review, it is the Court itself that ultimately decides the scope

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<sup>149</sup> See *supra* text accompanying note 19.

<sup>150</sup> See Nash, *supra* note 16, at 1692.

<sup>151</sup> See *supra* text accompanying note 21.

<sup>152</sup> See *supra* text accompanying note 23.

<sup>153</sup> See *supra* note 11.

<sup>154</sup> See *supra* text accompanying notes 11-12.

<sup>155</sup> See *supra* text accompanying notes 9 and 20.

of the review that it will undertake.<sup>156</sup> The Court in theory must restrict its review to matters of federal law, but that in practice may prove difficult. This may further complicate relations with the state court whose decision is under Supreme Court review, since, as in *Johnson*, the state court may resent what it perceives to be an impingement on its authority to decide matters of state law. Further, the Court's presumption under *Michigan v. Long*<sup>157</sup> can be seen to have two deleterious effects on federal-state court relations. First, the presumption results in more state high court decisions being reviewed. Second, the presumption makes it likely that at least some of the time the Court will erroneously treat state court decisions as relying on federal law when in fact they rest upon independent and adequate state law grounds.<sup>158</sup> Indeed, the ambivalent relationship between the state and federal judiciaries is evident in the examples I discussed above; the *Johnson* and *Fitzgerald* cases highlight the potential for conflict between the Supreme Court and state courts whose decisions are reviewed.<sup>159</sup>

Certification also compares favorably to abstention on this metric. Unlike certification where the state court is free to decline involvement, a state court is expected to act once a federal court has abstained. Moreover, under *England* reservation doctrine, the federal court is free to disregard what the state court thought was the proper decomposition of the case into state and federal issues once the case returns to federal court.<sup>160</sup>

In the end, then, two devices—abstention and review by the Supreme Court of state law judgments by writ of certiorari—seem more inclined to emphasize the friction between the systems. By contrast, certification of questions of state law is better designed to foster, and benefit from, cooperation between the systems.

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<sup>156</sup> See *supra* text accompanying note 9-10.

<sup>157</sup> See *supra* text accompanying notes 94-95.

<sup>158</sup> See *supra* note 96 and accompanying text.

<sup>159</sup> See *supra* text accompanying notes 97-113.

*Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 381-82 (1816) (opinion of Johnson, J.) (suggesting that perhaps the better practice, and one that better preserves the dignity and independence of the state courts, is simply for the Supreme Court to enter judgment rather than to remand a case to the state court with instructions that the state court must follow).

<sup>160</sup> See *Bezanson*, *supra* note 82, at 1117, 1126 (noting that “friction between the state and federal systems . . . may be exacerbated . . . under *Pullman* abstention); see also *id.* at 1134 (“If . . . avoidance of friction between federal and state systems is the paramount justification for abstention, one might well conclude that only *Burford*-type abstention would be wholly justified.”).

## V. REASSESSING THE BENEFITS AND COSTS OF TRANSJURISDICTIONAL ADJUDICATION

In this Part, I describe, and apply, a fuller benefit-cost analysis for transjurisdictional adjudication. First, I identify costs, based upon the obstacles I identified in the previous Part, that commentators have either overlooked or underestimated. Second, I discuss one benefit of transjurisdictional adjudication—affording a court system the opportunity to resolve definitive matters arising under that system’s native law—that commentators have tended to overvalue or overemphasize. Third, I identify the opportunity costs of transjurisdictional adjudication—that is, the benefits of intersystemic adjudication that are foregone by virtue of reliance on transjurisdictional adjudication. Finally, I use the fuller consideration of benefits and costs that results to suggest refinements to current certification procedure, and also to design a new transjurisdictional procedural device.

### A. *Identifying Overlooked and Underestimated Costs and Benefits*

The obstacles that I identified in the previous Part give rise to costs commentators often have undervalued or overlooked. First, decomposing cases into constituent issues generates costs. There are costs to the courts involved—possibly exacerbating, and exacerbated by, power disparities between the relevant court systems—in terms of deciding who determines the proper decomposition and what the proper decomposition is. There also may be costs, both monetary and temporal, to litigants with respect to the decomposition process. For example, in the *Fitzgerald* case, certiorari review and remand added almost two years to the time necessary to resolve the case definitively,<sup>161</sup> with no

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<sup>161</sup> The Iowa Supreme Court handed down its original decision on August 6, 2002. The Supreme Court granted certiorari on January 17, 2003, and handed down its opinion on June 9 of that year. The Iowa Supreme Court issued its opinion on remand on February 3, 2004, and the Supreme Court denied a second petition for certiorari on June 7, 2004. Certainty may be not only elusive, but also time-consuming.

Perhaps concerns of comity underlay the Supreme Court’s decision to hear the case a second time in the wake of the Iowa Supreme Court’s decision on remand. The petitioner sought review based upon the question:

Did the Iowa Supreme Court violate the United States Supreme Court mandate for “further proceedings not inconsistent with this opinion” when on remand that Court declined to formulate a different standard for examining claims under the state Equal Protection Clause, and accepted federal equal protection principles, but reapplied the federal principles to reject as erroneous

change in the final outcome. Finally, the presumption of *Michigan v. Long* may mean that the Court may decide a case only to have the state court on remand disagree with the presumption that the case originally was not decided on independent and adequate state law grounds, and stand by its original decision. This will generate both legitimacy and error costs.

Second, consider bias, and the perception of bias, and the costs it exacts on invocations of transjurisdictional procedural devices. To the extent that use of an existing or a new transjurisdictional procedural device sends state law issues that otherwise would be decided in federal court back to state court, state courts regain their ability (or at least their perceived ability) to discriminate against out-of-state litigants. If state courts in fact engage in bias, this will generate error costs and legitimacy costs. Even if a state court does not in fact decide cases in a biased way but *is nonetheless perceived to do so*, then the use of such devices will still give rise to legitimacy costs even if they do not give rise to error costs.

Consider now the extent to which costs will be imposed by devices that rely upon disparity in judicial system power, rather than comity, to achieve effectiveness. First, the absence of cooperation and emphasis on power disparity may make one court system—likely the state court system—less likely to participate fully and voluntarily, which serves only to undermine the success of the device itself. Second, to the extent that the participation of one court system is less than willing, litigants may face increased costs even if the use of the procedural device is ultimately “successful.” Third, tensions and disagreements between court systems may bleed over to other interactions between court systems. Thus, while the fact that courts from the different systems may deal with one another repeatedly may on the one hand serve to rein in uncooperative actions,<sup>162</sup> it is also possible that the tensions that one transjurisdictional device generates may interfere

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those specific rational bases expressly found by the United States Supreme Court to sustain a state tax statute?

Brief of Petitioner i (filed Apr. 6, 2004) (available at 2004 WL 831355). The Court may have thought it better not to raise the specter (by accepting review) that the Iowa court had shifted its position in order to preserve its original holding. This may reflect some degree of comity; indeed, as I have discussed above, it is not surprising to see federal court willingness to accommodate the state court (as opposed to the reverse) given the structure of certiorari review, *see supra* text accompanying notes 152-159.

<sup>162</sup> *See, e.g.*, DOUGLAS G. BAIRD, ROBERT H. GERTNER, & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 159-87 (1994) (discussing the relevance in game theory of repeated play).

with the use of other transjurisdictional devices and with other interactions between courts, and conceivably even between other branches of government. Fourth, there is a possible cost in terms of the public conception of the judiciary: It is conceivable that the public might lose confidence in judicial systems, both as a result of uncooperative interactions that the public observes between judicial systems, and also as a result of displeasure over one judicial system—likely the federal system—exerting power over another court system in an unseemly way.

Even while it is true that transjurisdictional adjudication may create friction between judicial systems (as well as error costs), it is also true that the absence of transjurisdictional adjudication—that is, intersystemic adjudication—may itself foment friction. Whether the frictions alleviated by transjurisdictional adjudication exceed those introduced by it is an empirical question. My point is simply that it is a mistake to point to transjurisdictional adjudication simply as a means of reducing friction, without acknowledging that it may introduce frictions of its own.

### ***B. An Overvalued and Overemphasized Benefit of Transjurisdictional Adjudication***

Commentators often tend to extol the virtue of affording court systems the opportunity to resolve questions arising under the system's native law. While this is clearly a benefit offered by the use of transjurisdictional adjudication, commentators have sometimes tended to elevate this benefit to the exclusion of other benefits. In reality, our federal system also reflects other values, as I now discuss. Other benefits often motivate the generation and use of transjurisdictional procedural devices, sometimes even substantially. That, in turn, draws in question the degree to which commentators have emphasized the benefits of enabling a court system to resolve questions of native law.

To begin, it is important to note that it is possible to ameliorate, or even to eliminate, some of these problems I discussed in Part IV—and the accompanying costs I discussed in Part V.A—by having a unitary judicial system with a single final arbiter of all legal questions.<sup>163</sup> But there are benefits that come from having distinct judicial

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<sup>163</sup> Professor Robert Schapiro explains:

In Australia and Canada, . . . a federal high court serves as the ultimate interpreter of both national and subnational law. Commentators credit the existence of a single final interpreter with

systems. The maintenance of separate state and federal court systems satisfies both social<sup>164</sup> and political<sup>165</sup> concerns.

The Constitution's Full Faith and Credit Statute and the full faith and credit statute further evidence the Founders' and Congress's rejection of a unitary model. And the Supreme Court's agreement is evident from its decision in *San Remo*, which confirms the limited availability of exceptions to the full faith and credit statute.<sup>166</sup>

That said, the existing system has generated transjurisdictional procedural devices that often have the effect of enabling a court system to resolve questions that arise under the system's own set of laws. But the fact that a device may often have this effect does not mean that it was designed primarily to achieve that result. Consider for example that, while *Pullman* abstention does give state courts the opportunity to resolve contested matters of state law,<sup>167</sup> its genesis is a desire to allow federal courts to avoid unnecessary decision of difficult constitutional questions<sup>168</sup>; indeed, *Pullman* abstention is not permitted solely to allow state court resolution of matters of state law.<sup>169</sup> In endorsing *Pullman* abstention in cases where definitive state court resolution of a state law issue may obviate the need for a federal court to address a novel or contest federal

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creating a greater sense of the unity of the law. Statutory law differs among the states and territories, but the federal high court serves as a unifying force. The absence of parallel court systems decreases the possibility of interpretive divergence between state and federal tribunals, and the single high court structure diminishes the variations in the law among the various states.

Schapiro, *supra* note 1, at 1409-10 (footnotes omitted).

<sup>164</sup> See, e.g., Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the "Martian Chronicles"*, 78 VA. L. REV. 1769, 1771-73 (1992) ("One of the greatest values of our federal system is the benefit to be gained from an open interchange of ideas among sovereigns. . ."); cf. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003) (discussing different models for, and the possible benefits of, transnational judicial dialogue). See generally *infra* note 177 and accompanying text.

<sup>165</sup> See, e.g., Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 901-02 (1990) (discussing the Madison-Wilson political compromise, under which the Constitution authorized, but did not mandate, the creation of lower federal courts).

<sup>166</sup> See Sterk, *supra* note 88, at 278 (describing language used by the Court in *England* that "focused on a plaintiff's right to litigate federal claims in a federal forum" as "quaint in light of the Court's subsequent jurisprudence").

<sup>167</sup> See Bezanson, *supra* note 82, at 1114.

<sup>168</sup> See *id.* at 1112-13.

<sup>169</sup> *Meredith v. Winter Haven*, 320 U.S. 228 (1943) (federal court cannot abstain solely on the ground that state law issue is novel or confusing). I have argued elsewhere that it is inconsistent with the federal diversity jurisdictional grant to use certification in cases in so-called "pure diversity cases" in which no issue of federal law lurks, i.e., in cases in which *Pullman* abstention remains unavailable under *Meredith*. See Nash, *supra* note 16, at 1738. I have also argued that proposals to expand the use of certification, as

constitutional issue but not in cases where no issue of federal law lurks, the Supreme Court implicitly valued the benefit of avoiding “unnecessary” resolution of constitutional issues over the benefit of having, at all costs, state courts resolve state law issues that otherwise would be resolved in federal court.<sup>170</sup>

While commentators who evaluate transjurisdictional adjudication have tended to focus on the benefit of empowering court systems to resolve native questions of law, the reality is that neither the existing multiple judicial system model, nor the existence of many transjurisdictional devices, vindicates valuing of this empowerment as an unmitigated benefit. In this sense, then, many commentators have overstated or overemphasized this benefit.<sup>171</sup>

Of course, the choice to have, nor not to have, a unitary court system is a normative one, and one can make a normative argument in favor of a unitary system even if one does not now exist. That said, it seems to me inconsistent to accept on the one hand the existing multiple judicial system model, while on the other hand to extol devices that would have the effect of moving the existing system closer to a unitary model, without acknowledging other goals that might underlie the design and use of those devices.

### ***C. Overlooked and Underestimated Benefits of Intersystemic Adjudication***

I turn now to some opportunity costs of transjurisdictional adjudication—benefits, that is, of *not* using transjurisdictional procedural devices. In the absence of such procedural devices, intersystemic adjudication will be the rule; state law questions will be resolved in federal court and federal law questions in state court.<sup>172</sup> This means that multiple courts may opine on the same legal issue. This may generate several benefits. Consider first the value of having more than one court speak to a particular legal issue. The Condorcet Jury Theorem suggests that increasing the number of decisionmakers will

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well as Judge Newman’s proposal to have appeals of state law issues from federal trial courts proceed in state appellate courts, are similarly problematic. *See id.* at 1739-40.

<sup>170</sup> *Cf.* Schapiro, *supra* note 1, at 1414-16 (noting the difficulty in harmonizing three principles: “(1) courts should avoid federal constitutional rulings when possible . . . ; (2) state courts should be the primary interpreters of state law . . . ; and (3) no barriers should impair the availability of a federal forum for federal claims” (footnote omitted)).

<sup>171</sup> *See, e.g.,* Friedman, *supra* note 28, at 1279 (emphasizing “the enormous benefits” of transjurisdictional adjudication).

<sup>172</sup> *See supra* note 1 and accompanying text.

increase the likelihood of reaching the “correct” outcome: Assuming that each decisionmaker has a better than even chance of choosing the correct outcome, the Jury Theorem predicts that the choice of the majority of decisionmakers will likely be the correct outcome, and also that this likelihood increases as the number of decisionmakers increases.<sup>173</sup> Here, one would treat each court as a separate decisionmaker.<sup>174</sup> In this sense, allowing multiple courts from multiple systems to speak on legal issues should increase our ability to identify correct resolutions of those issues.<sup>175</sup>

Even if one rejects or questions the formal applicability of the Jury Theorem to the context of appellate court consideration of legal questions,<sup>176</sup> benefits remain from having multiple courts address the same issue. First, consider the benefits that flow from increased dialogue between state and federal courts. A multiplicity of opinions, and potentially also of approaches, might help to open debate as to the proper way to resolve an issue.<sup>177</sup> It also would reduce the problematic situation of an initial court decision that turns out to be ill-advised yet binding on all other courts.<sup>178</sup>

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<sup>173</sup> The Condorcet Jury Theorem provides that, if it is the case that each voter has better than a 50% chance of voting for the correct outcome, then “the probability that a majority vote will select the correct alternative approaches 1 as the number of voters gets large.” Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 328 (2002). In the context of appellate court review, the theorem suggests that, the greater the number of judges that sit on an appellate panel, the greater the likelihood that the panel will reach the correct result. *See, e.g.*, Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1632-33 (2000).

<sup>174</sup> One could also treat that each judge as a distinct decisionmaker. In that case, increasing the number of courts will also increase the number of relevant decisionmakers, especially if (as tends to be the case for appellate courts across judicial systems) the courts consist of more than one judge. *Cf.* Jacob E. Gersen & Adrian Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676, 711-12 (2007) (arguing that, in the context of Supreme Court review of administrative action, “the votes of agency decision-makers are also useful inputs for Jury Theorem purposes”).

<sup>175</sup> *See* Eric A. Posner & Cass. R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006) (arguing that the Condorcet Jury Theorem offers limited support for the practice of considering the law of other nations in determining domestic law); *id.* at 142 (using an example where a state court might consider how the majority of other state courts to have considered a question have ruled).

<sup>176</sup> *See, e.g.*, Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore*, 3 THEORETICAL INQUIRIES IN L. 125, 144-46 (2002) (arguing that the theorem is of limited applicability to the appellate court setting because appellate panels bear little resemblance to juries).

<sup>177</sup> *See* David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 324-27 (1977) (discussing “the ‘migration of ideas’ between the state and federal systems” in light of federal diversity jurisdiction) (quoting Diversity Jurisdiction, Hearings on S. 1876 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 92d CONG., 1st Sess. 162, 256 (1971) (testimony of John Frank)). As Professor Schapiro explains in the context of interpreting state constitutional provisions: “The federal court interpretation may be helpful . . . in contributing to the discussion of the best way to realize the underlying constitutional value. Federal judges can contribute to a plurality of legal meaning, which provides a rich background for the investigation of fundamental rights.” Schapiro, *supra* note 1, at 1417; *see id.* at 1417-20.

Next, just as having multijudge panels fosters collegiality among judges,<sup>179</sup> so too may having courts from different systems opine on the same legal issues foster collegiality among the various judges, courts, and judicial systems. Such collegiality should encourage judges to consider themselves in a community of judges that reaches beyond judicial system boundaries.<sup>180</sup> Somewhat ironically, it also should help to facilitate the use of transjurisdictional procedural devices in the instances in which they are used.<sup>181</sup>

Finally, to the extent that some have argued that federal courts are of greater quality than their state counterparts,<sup>182</sup> intersystemic adjudication offers a benefit to state court systems. First, state courts may become of better quality by virtue of resolving

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Even if federal issues were largely decided by federal courts and state issues by state courts, there still could be valuable dialogue between the federal and state courts. For example, insofar as many state constitutional provisions mirror their federal counterparts, federal and state courts could debate and discuss, through judicial opinions, the proper interpretation of similarly worded language. Missing from that dialogue, however, would be debate and discussion as to the proper interpretation of *exactly the same provisions*—that is, the dialogue would be by analogy only. At some level, then, it seems that, insofar as the choice not to empower a single court to be ultimate arbiter of all legal questions reflects a desire for dialogue among court systems, it is not unreasonable to see the choice as reflecting a desire to attain *maximum* dialogue by allowing courts of different systems to rule on *exactly the same issues*.

The possible benefits of dialogue are exemplified by the Illinois Supreme Court's recent decision to adopt the Seventh Circuit's understanding of Illinois conflict of laws rules as endorsing the old presumptive rule that the law to be applied in a tort action is the law of the jurisdiction where the tort occurred. *See Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 903-04 (Ill. 2007) (citing *Spinuzzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844-45 (7th Cir. 1999)).

Of course, sometimes opportunities for dialogue fall flat. Consider *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982), where the Second Circuit was faced with a novel issue of Tennessee law. Rather than certifying the question to the Tennessee Supreme Court (or even to the New York Court of Appeals) or trying its own hand at interpreting Tennessee law, the Second Circuit thought it appropriate to defer to an opinion of the Sixth Circuit (within the geographic reach of which falls Tennessee) that was on point. *See id.* at 283. Not only, then, was the Second Circuit a disinterested bystander, it was truly an *uninterested* bystander. (I am grateful to Henry Monaghan for this point.)

<sup>178</sup> *See* Schapiro, *supra* note 1, at 1422 (“The existence of parallel, non-intersecting lines of authority means that a blockage or error in one will not affect the other.”); *cf.* John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 363 (1999) (“[T]he development of appellate hierarchy with collegial courts at the appellate level can be understood as a strategy to ensure that no single judge can, by her actions alone, inflict too much damage on the judiciary as a whole, by making aberrant or overly courageous judgments.”).

<sup>179</sup> *See generally* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2002).

<sup>180</sup> *See* Adeno Addis & Jonathan Remy Nash, *On Judicial Deliberation* (work-in-progress).

<sup>181</sup> *See supra* p. 27 (explaining how the successful use of transjurisdictional devices depends upon good relations between the two relevant judicial systems).

<sup>182</sup> *See supra* note 122.

matters of federal law.<sup>183</sup> Further, this should result in an elevation in the stature of state courts, both in their own eyes and in the eyes of others.<sup>184</sup>

To be sure, there are costs that counterbalance each of these benefits.<sup>185</sup> The greater the numbers of decisions handed down by non-native court systems, the greater the likelihood for error costs. There may also be accompanying legitimacy costs. The point, however, is not that the benefits necessarily will always outweigh the costs, but only that the benefits (and costs) should be evaluated and weighted in each setting before a decision is made.

#### ***D. Evaluation and Design of Transjurisdictional Procedural Devices***

In this Section, I use the fuller identification of the costs and benefits of transjurisdictional adjudication in two ways. First, I use costs and benefits as a yardstick to evaluate commentators' proposals for expanded use of transjurisdictional procedural devices. Second, I use costs and benefits to suggest refinements of the existing certification procedure and design of a new form of certification.

*Evaluating commentators' proposals.*—Proposals to expand the use of transjurisdictional devices will to some degree increase costs associated with decomposition to the extent that they will require decomposition of more cases into constituent federal and state issues. Decomposition, moreover, may be likely to increase friction between the court systems, thus leading to additional costs. Proposals to expand the use of abstention are especially problematic in that they also require decomposing factual issues.

Consider in this regard Professor Friedman's proposal to allow litigants to make anticipatory *England* reservations whenever federal claims could be brought in a federal

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<sup>183</sup> Cf. Bezanson, *supra* note 82, at 1126 (noting that, under *Burford* abstention, “[t]he quality . . . of the state judiciary is enhanced, due . . . to the greater responsibility in the resulting adjudication of federal matters”).

<sup>184</sup> Cf. *id.* at 1117 (noting that invocations of abstention other than under *Pullman* “increase the responsibility of state courts in adjudicating federal questions and thus promote greater respect for the state judiciary”); *see also id.* at 1126.

<sup>185</sup> Professor Schapiro identifies the inevitable tradeoffs of three pairs of principles that results from increased reliance on intersystemic adjudication—and, concomitantly, decreased reliance on transjurisdictional procedural devices: plurality versus uniformity, dialogue versus finality, and redundancy versus hierarchical accountability. *See* Schapiro, *supra* note 1, at 1417-23.

court, even if no federal case then is pending.<sup>186</sup> The proposal could give rise to substantial decomposition and legitimacy problems, stress the relationship between the federal and state judiciaries, and inhibit dialogue between the judiciaries. As initial matter, a litigant would be invoking *England* before a federal court had agreed to abstain (let alone had a case pending, or had a formal request to abstain made).<sup>187</sup> In order for the litigant, or the litigant with the state court's approval, to bind the federal court to respect the reservation, the litigant, or the litigant and state court, would have to have the power unilaterally to create an exception to the full faith and credit statute.<sup>188</sup> The Court's opinion in *San Remo* makes clear that a federal court must give full preclusive effect to the decision of a state court, even where the federal court has abstained pending the state court's decision.<sup>189</sup> *San Remo* strongly suggests that any attempt to vest such power with litigants, or state courts, would be inconsistent with the full faith and credit statute.<sup>190</sup> It also might raise legitimacy concerns.

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<sup>186</sup> See *supra* text accompanying notes 47-50.

<sup>187</sup> Professor Friedman asserts that "[i]t is impossible to see what is achieved by requiring the filing of a federal lawsuit when that lawsuit may never prove necessary depending upon how the state court proceedings are resolved, particularly when abstention by the federal court is entirely predictable." Friedman, *supra* note 28, at 1269. One thing that is gained is the ability of the federal court to exercise its discretion to abstain or not. Professor Friedman's point is more convincing to the extent that, as he puts it, "abstention by the federal court is entirely predictable." *Id.* Note, however, that the notion that the exercise of abstention would become so predictable as to be in effect an exception to the congressional grant of jurisdiction may raise questions arise as to the propriety of abstention without discretion. Cf. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing that grants of federal jurisdiction implicitly vest the federal courts with principled discretion to decline to exercise that jurisdiction). Even if there are such cases, moreover, the universe of cases for which that is true is a small one. See Friedman, *supra* note 28, at 1269 n.184.

<sup>188</sup> The proposed expansion of *England* would require a parallel expansion of the implicit exception that *England* imposes on the full faith and credit statute. The Supreme Court in *San Remo* makes suggests that, but for a valid *England* reservation, the rules of res judicata require that preclusive effect be given to state court judgments. Professor Stewart Sterk has argued that the Supreme Court's *San Remo* decision interprets the full faith and credit statute to require federal courts to accord claim preclusive and issue preclusive effect to state court judgments. If that is true, then, at least under current law, a subsequent federal lawsuit would be barred to the extent that the plaintiff was seen to be splitting her claims between the state and federal lawsuits, or to be relitigating identical issues. Professor Friedman argued to the contrary (albeit before *San Remo*) that, "[i]f the Supreme Court can limit the impact of preclusion in the *England* situation itself, there is no reason why it cannot do so when an *England* reservation is made in these other circumstances and federal litigation (if still necessary) follows immediately on the heels of state litigation." Friedman, *supra* note 28, at 1270-71. While Professor Friedman may be correct as a normative matter, it seems fair to say as a descriptive matter that the Court's opinion in *San Remo* may indicate that the Court, at least as currently composed, is unlikely to take that step.

<sup>189</sup> See *supra* notes 89-92 and accompanying text.

<sup>190</sup> See *supra* note 92.

If (as seems likely) the power to validate an invocation of *England* must remain with the federal court, then the state court would be faced with a quandary. If it is reasonably confident that the federal court will grant abstention<sup>191</sup> and recognize the *England* reservation once a federal lawsuit is subsequently filed, then the state court might try to restrict itself to resolving only state law matters and the facts attendant thereto. If it is wrong and the federal court denies abstention, then the decomposition will have been for naught and the state court presumably would have to continue to resolve the remaining federal issues and factual matters. Even if it is right and the federal court winds up abstaining, there is some chance that preclusion will render the reservation, and therefore the decomposition, moot,<sup>192</sup> and also some chance that the federal court will disagree with the state court's decomposition and retry certain legal and/or factual matters. All this uncertainty might generate legitimacy concerns and also friction between judicial systems.<sup>193</sup>

Consider next various proposals to employ certification more frequently. I have noted above that, of all the existing transjurisdictional procedural devices, certification seems to work best in terms of generating relatively little friction between the state and federal court systems. That said, there is a risk that increased reliance upon certification will at some point inordinately tax state court systems. At some point, excessive reliance upon transjurisdictional procedural devices by one court system at the expense of the other might engender resentment and discourage voluntary cooperation. Either the state courts will to their own frustration endeavor to continue to satisfy federal court certification requests, or the state courts may begin to deny certification requests more frequently which may frustrate the federal courts. There is some evidence that this may be happening even under the current system.<sup>194</sup> Moreover, recent statutory enactments—

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<sup>191</sup> Professor Friedman observes that there are cases in which “abstention by the federal court is entirely predictable.” Friedman, *supra* note 28, at 1269. Even if there are cases in which abstention is indeed “entirely” predictable, the set of such cases is not large. *See supra* note 187.

<sup>192</sup> *See supra* notes 89-92 and accompanying text (explaining *San Remo*'s holding that preclusion applies even where a valid *England* reservation is made).

<sup>193</sup> The proposal also would decrease dialogue between the state and federal judiciaries to the extent that state court would less frequently decide matters of federal law.

<sup>194</sup> Indeed, there is some evidence that even now the volume of certification requests is considerably beyond what state courts can, or at least choose to, handle. While Professor Friedman (who appears not to endorse Professor Clark's presumption in favor of certification, *see supra* note 75) asserts that “most diversity cases do not require certification” since “their disposition rests on state law that is sufficiently

such as the Class Action Fairness Act of 2005<sup>195</sup>—and court cases—such as the Supreme Court’s decision in *Grable & Sons*<sup>196</sup>—will lead to more state law claims being heard in federal court, and hence an enlargement of the universe of cases in which certification might be used, and therefore presumably an increase in actual certification requests, even under the current standard for invocation of certification. Lowering the threshold would generate even more frequent use of the device. Thus, for example, Professor Clark’s suggested presumption in favor of certification<sup>197</sup> either raises concerns about the state courts’ willingness, and capacity, to respond to much larger number of such requests, or raises concerns about the federal courts’ ability somehow to compel state courts to respond to certification requests, even in the face of unwillingness or perhaps even limited capacity to accommodate a much larger number of such requests.<sup>198</sup>

Increased use of certification would also reduce dialogue between the state and federal judiciaries insofar as the federal courts would be less likely to opine on matters of state law. Moreover, increased reliance on certification would combine with the increase in opportunity, resulting from the Court’s decision in *Grable*, to employ certification in cases in which federal and state law intertwine, to present more problems of case decomposition. Finally, increased reliance on certification would increase the possibility of bias, and of the perception of bias.

Judge Newman’s suggestion to funnel appeals of federal issues to federal courts of appeals and state issues to state appellate courts<sup>199</sup> is more sensitive to the problem of friction between the judicial systems: Judge Newman’s suggestion would, roughly at least, offset the increase in state court appellate workload by taking away from state court appellate dockets appeals involving federal issues. His approach, in other words,

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settled,” Friedman, *supra* note 28, at 1276, a limited empirical study presented by Judge Alex Kozinski in a dissenting opinion suggests that the California Supreme Court “has rejected one-third of the cases [that the Ninth Circuit has] certified to it since the [state certification] rule went into effect.” *Kremen v. Cohen*, 325 F.3d 1035, 1051 (9th Cir. 2003) (Kozinski, J., dissenting); *see id.* at 1054 app. (displaying a table summarizing dispositions of Ninth Circuit certification requests to the California Supreme Court).

<sup>195</sup> *See supra* note 29 and accompanying text.

<sup>196</sup> *See supra* notes 30-31 and accompanying text.

<sup>197</sup> *See supra* text accompanying notes 32-40.

<sup>198</sup> Here I mean to refer to the capacity of the federal courts to force state courts to respond to certified questions either by truly compelling them (a power which is in doubt), *see Nash, supra* note 16, at 1690-91 n.74, or by strong suggestion or other methods of attempted coercion grounded in power disparity.

<sup>199</sup> *See supra* text accompanying notes 53-57.

endeavors to balance workload and responsibility between judicial systems, which seems likely to foster cooperation and comity. The proposal does less well with respect to preserving dialogue between the state and federal judiciaries, and avoiding the difficulties of case decomposition. While Judge Newman's suggestion would preserve some dialogue—between federal trial courts and state appellate courts, and between state trial courts and federal appellate courts—it would eliminate federal appellate courts from dialogue over state law and state appellate courts and supreme courts from dialogue over federal law.<sup>200</sup> Judge Newman's proposal would also require the decomposition of large numbers of cases, and as a result generate sizable costs.

Judge Calabresi's suggestion for a modified certification procedure is also sensitive to the role of state courts: Even though Judge Calabresi's proposal would lead to increased use of certification, because he calls as a prerequisite for federal courts to draft an opinion tackling the state law questions to be certified, the state high courts may feel freer to reject certification requests unless the federal court opinion in fact gets the answers wrong. In this sense, Judge Calabresi's proposal positions federal courts as subordinate to the state high court.<sup>201</sup> By requiring federal courts to offer a suggested interpretation of

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<sup>200</sup> It might be argued that vibrant and effective dialogue between judicial systems does not require the participation of every court at every level. Even now, for example, the Supreme Court does not hear appeals of state law resolutions by state courts unless the determination is antecedent to a question of federal law, or is suspected of having been devised so as to evade or cheat federal law or federal judicial review. *See supra* text accompanying notes 114-115. It also will almost always decline to review federal court determinations of state law as a matter of efficient allocation of judicial resources. *See Leavitt v. Jane L.*, 518 U.S. 137 (1996) (Supreme Court granted certiorari “solely to review what purports to be an application of state law” because “the alternative is allowing blatant federal-court nullification of state law”); *see generally* Nash, *supra* note 139, at 990-91. Thus, the Supreme Court generally does not participate in dialogue on matters of state law.

That said, while the presence of one additional participant in a dialogue may be of negligible benefit, *cf.* Saul Levmore, *Simply Efficient Markets and the Role of Regulation: Lessons from the Iowa Electronic Markets and the Hollywood Stock Exchange*, 28 J. CORP. L. 589, 597 n.30 (2003) (noting the “declining marginal gains in accuracy from increased numbers of voters under the Condorcet Jury Theorem”), the benefit of the inclusion of entire tiers of courts would seem to be potentially great. More importantly, experience indicates that state courts often adopt reasoning advanced by federal appellate courts and vice versa. *See, e.g., supra* note 177.

<sup>201</sup> Judge Calabresi explains:

[T]he intermediate federal courts should be no more than the ‘Appellate Division for Diversity Cases.’ We should think of ourselves as an intermediate state court whose function it is to decide provisionally, and let the highest court of the state ultimately determine state law. . . . What federal judges should do, if state law is uncertain, is write an opinion which says what we think that law ought to be. We should write an opinion of the same sort that the state’s appellate division would write. And then we should certify, so that the New York Court of Appeals is able to decide (1) not to take the case, if it thinks that we are right, or if it is not ready to take the issue

state law that the state court could consider in deciding whether to grant the certification request, the proposal would also tend to preserve dialogue between the state and federal judiciaries as compared to proposals to expand the use of certification in its current form. Just as the Supreme Court's discretion to grant certiorari review is often used with an eye to fostering dialogue among lower state and federal courts on federal law issues,<sup>202</sup> so too would Judge Calabresi's modified certification procedure tend to foster such a dialogue with respect to state law issues.

*Refinement and design.*—The full consideration of costs and benefits can also be an aid in refining existing transjurisdictional procedural devices. For example, despite certification's good ability to harness the federal and state courts' cooperative spirit, some changes to that device might be considered. First, as I have noted above, while *Pullman* abstention does give state courts the opportunity to resolve contested matters of state law,<sup>203</sup> its genesis is a desire to allow federal courts to avoid unnecessary decision of difficult constitutional questions<sup>204</sup>; indeed, *Pullman* abstention is not permitted solely to allow state court resolution of matters of state law.<sup>205</sup> Theoretically, the use of certification, as a streamlined form of abstention, should to some degree incorporate this point. Even if the lower costs of certification give that procedure a lower invocation threshold, and even if that lower threshold allows its use even where there is no federal issue in a case, one would think that the presence of a complex federal question whose

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up, or if it just doesn't want to bother to take it at that time; or (2) to take it, if it likes, in exactly the same way it does cases brought up (on certiorari, essentially) from the appellate division.

If federal judges did that, if we had that structural view of our role, then we would not be insulted when the New York Court of Appeals declines certification. Now, when the New York Court of Appeals declines certification, some federal judges walk around saying, "What did they do to us? After all, we are the Second Circuit, they should listen to us!" My view is exactly the opposite. We have indicated how we would decide something, or simply explicated our doubts on the issue. If the state's highest court doesn't want to take it, great! That gives us authority to impose our view of state law, provisionally, until the highest court of the state decides to resolve the question.

Calabresi, *supra* note 41, at 1301-02. (One might query, as Professor Bradford Clark has to me, whether such federal court opinions run the risk of being seen as merely advisory.)

<sup>202</sup> See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984) (extolling the virtue of having the Supreme Court decline to address a legal issue while it "percolate[s]" in the lower courts).

<sup>203</sup> See Bezanson, *supra* note 82, at 1114.

<sup>204</sup> See *id.* at 1112-13.

decision might be avoided by resolution of a matter of state law would weigh in favor of the use of certification, while certification would be less likely absent such an issue.<sup>206</sup>

A second suggested refinement to current certification procedure arises from the possibility that the use of certification may empower state courts to render biased decisions, or at least that its use may give rise to such a perception. One answer to this problem would be to make explicit that the federal court need not follow the state court's responses to certified questions in every case. Specifically, the federal court could make clear that it need not follow a state court's response when there is adequate evidence that the court has responded in a biased way.

One might argue that *Erie* requires the federal court simply to apply the state court's ruling, but it must be that bias is an exception. The very premise of diversity jurisdiction suggests that federal courts should not decide cases *exactly* as the state court would if doing so would entail being biased against or in favor of parties on a geographical basis.<sup>207</sup>

In the end, it is unlikely that many state courts will be sufficiently explicit as to reliance upon bias.<sup>208</sup> Thus, it would also make sense to have federal courts announce they will be disinclined against certifying questions to state courts where there is evidence that prior responses to certified questions may have been motivated by bias. In making such determinations, federal courts could look to see how frequently, and how and why, state courts have seen fit to overrule or limit earlier responses to certified questions that purported to be general statements of law. Such an approach would offer

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<sup>205</sup> *Meredith v. Winter Haven*, 320 U.S. 228 (1943) (federal court cannot abstain solely on the ground that state law issue is novel or confusing).

<sup>206</sup> See *supra* note 169 and accompanying text.

<sup>207</sup> The Court's ability to review purportedly state law decisions where the state law decision is couched in a way so as to insulate it against federal review, see *supra* text accompanying notes 114-115, also supports the validity of this notion.

An extension of Professor Schapiro's argument that "courts may make mistakes in their interpretation of the law," Schapiro, *supra* note 1, at 1413, provides further theoretical underpinning. One can argue that a state court of last resort may err in interpreting state law: Specifically, a ruling in which bias affects a state court's resolution of a legal issue is a case in which the court errs in interpreting the law, and, analogously, a case in which bias is *perceived* to have affected the resolution (even if in fact it did not) is a case in which it is *perceived* that the state court erred in interpreting the law. Perhaps federal courts should have some freedom to consider such possibilities.

<sup>208</sup> While Justice Neely was explicit about his goal of favoring in-state plaintiffs against out-of-state companies while still on the bench, see *supra* note 127, one would not expect many court opinions to exhibit similar candor.

dual benefits: It would decrease the likelihood of certification where bias is, or is perceived to be, a real possibility, and it would also create a prospective incentive for states not to rely on bias in answering certified questions.

## **VI. CONCLUSION**

In this Article, I have highlighted the difficulties inherent in having cases traverse the divide between judicial systems. While many commentators advocate increased reliance on transjurisdictional procedural devices, the commentators overlook or undervalue the costs that these devices may introduce. Reliance upon disparities in power, bias, and the challenge of decomposing cases into constituent issues are potentially problematic for the introduction of new devices as well as expanded use of existing ones as, indeed, experience with existing transjurisdictional procedural devices confirms. A fuller appreciation of these costs, and of the potential benefits of intersystemic adjudication, makes it easier to evaluate proposals to expand the use of transjurisdictional procedural devices and, indeed, to design new devices and to refine existing ones.

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