

THE UNEASY CASE FOR TRANSJURISDICTIONAL ADJUDICATION

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INTRODUCTION

FEDERAL courts often are 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. In these cases of “intersystemic adjudication,”¹ the court system that decides the case will try to resolve “foreign” legal questions in the way that the other court system would by considering rulings from the other court system that have addressed the issue in question. Thus, under intersystemic adjudication, a court in one system undertakes to interpret issues arising under the laws of another system.

Recent commentary by academics and judges, however, suggests that the best way to resolve these cases is to have each court system definitively resolve those issues that arise under that court system’s “native” law. These commentators advocate expanded use of what I shall call “transjurisdictional adjudication”—that is, the use of procedural devices that allow a court in one system to answer questions of law arising under that system’s law in cases that are pending before courts in another system. Transjurisdictional adjudication and intersystemic adjudication constitute different approaches to “intersystemic judicial governance,” that is, judicial adjudication of issues arising under more than one system of laws.² In contrast to

¹ 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”).

² I draw the nomenclature from Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 *Emory L.J.* 1, 4–5 (2007) [hereinafter Ahdieh, *Intersystemic Governance*] (discussing “intersystemic governance” as embracing phenomena of “cross-jurisdictional regulatory engagement”); cf. Robert B. Ahdieh, *Dialectical Regulation*, 38 *Conn. L. Rev.* 863, 865–66 (2006) (discussing “intersystemic regulation,” under which different governmental authorities’ regulatory initiatives rely upon one another for effectiveness).

intersystemic adjudication, under transjurisdictional adjudication, a court in one system faced with a question arising under a second system's laws seeks an interpretation of that question from a court in the second system rather than conducting the interpretation itself.

Advocates of transjurisdictional adjudication urge greater reliance upon existing transjurisdictional procedural devices, as well as the development and use of new devices. For example, Professor Bradford Clark argues for greater use of certification by federal courts to allow state courts to resolve state law issues,³ while Professor Barry Friedman advocates greater use of what I shall refer to as "transjurisdictional procedural devices"⁴ and, in particular, for greater availability of a federal forum to resolve federal law issues.⁵

In this Article, I call for refinement of this approach. I argue that the commentators have overlooked several looming obstacles. Transjurisdictional adjudication is not the panacea that the commentators sometimes paint it to be.

First, any assertion that state courts should 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 to respond to particular issues of law simply address those legal issues, or should it opine upon the proper resolution of the entire case?

Second, the desirability of having state courts resolve state law matters is based, if implicitly, on a notion 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,

³ See *infra* text accompanying notes 33–41.

⁴ I use the terminology "transjurisdictional procedural devices" to refer to procedural devices that involve the judiciary of more than one judicial system. I choose the term so as to clearly distinguish Professor Schapiro's use of "intersystemic adjudication," by which he means to refer to courts in a single judicial system interpreting the law of another judicial system. See *supra* note 1.

⁵ See *infra* text accompanying notes 45–53.

as the constitutional inclusion and the continued congressional authorization of federal diversity jurisdiction suggest, it may well be that state courts' susceptibility to bias against out-of-state parties renders them less able than federal courts to resolve state law questions "correctly."

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; they have manifested themselves in practice. Furthermore, the discussion of these obstacles leads to a 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 cost-benefit 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 extol the virtue of affording court systems the opportunity to resolve questions arising under the system's native law. While native interpretation 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, founded upon a rejection of the unitary model, 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, as well as 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 exist-

ing 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 I, I will provide an overview of court systems' authority to decide issues of law that do not arise under their own "native" law. I will then discuss how courts usually decide such issues without input from the other judicial system, but I also introduce methods that allow for a court in the other system directly to resolve those questions native to its court system.

In Part II, I will describe various commentators' proposals for new, and expanded use of existing, transjurisdictional procedural devices. In Part III, I will discuss obstacles to the implementation of these proposals that the commentators have either overlooked or undervalued.

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

I. RESOLVING ISSUES ARISING UNDER ANOTHER SYSTEM'S LAW

State courts are often called upon to decide matters of federal law,⁶ and federal courts are often called upon to decide matters of state law.⁷ Both state and federal courts also may be called upon to

⁶ See *Yellow Freight Sys. 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.

⁷ See generally Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 *Ga. L. Rev.* 861, 898–99 (1985). First, federal diversity jurisdiction authorizes, see 28 U.S.C. § 1332(a), (d) (2000 & Supp. 2007)—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) (2000). 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, 308–09 (2005), or federal law might incorporate or implicate state law, see,

decide cases in which state law causes of action implicate issues of, or are intertwined with, federal law,⁸ or federal law causes of action that implicate issues of state law.⁹

When these situations arise, there are a few procedural devices that afford substantial opportunities for transjurisdictional dialogue and adjudication: certiorari review, abstention, and certification. By discretionary grant of certiorari, the Supreme Court has the power to review state courts' determinations of federal law.¹⁰ 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.¹¹ The state court has no discretion to request Supreme Court review,¹² 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.¹³ In a case in which some issues arise under state

e.g., *Semtek Int'l 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(a) (2000) (incorporating state criminal law into federal criminal law on federal enclaves located within the state).

⁸ 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).

⁹ For example, the Supreme 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).

¹⁰ See 28 U.S.C. § 1257(a) (2000).

¹¹ *Id.* 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. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 466–68 (5th ed. 2003).

¹² 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* (Vand. Univ. Law Sch. Law & Econ., Working Paper No. 02-14, 2002), available at http://ssrn.com/abstract_id=312019.

¹³ 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, *State Court Evasion of United States Supreme Court Mandates*, 56 Yale L.J. 574 (1947).

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).¹⁴ Thus, the federal judicial system adjudicates the issues of federal law, while determinations of state law are left as the state courts resolved them.

There are also two other transjurisdictional procedural devices, abstention and certification, which offer federal courts the opportunity to obtain direct feedback from the state court system as to the appropriate resolution of state law issues. Under abstention, the federal court abstains from proceeding with the case in federal court to allow a pending state court case to 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 seek an *England* reservation and 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 issues.¹⁵ The most commonly used form of abstention, *Pullman* abstention,¹⁶ 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

¹⁴ 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, 632–33 (1875), the Court implied that Congress cannot constitutionally confer upon the Supreme Court the power to review state court resolutions of state law. The Court refused to decide whether the Constitution compelled such a result. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 920–21 (1986) (noting that the Court was unclear as to whether its decision rested on statutory or constitutional grounds). 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 in Constitutional Cases*, 103 Colum. L. Rev. 1919 (2003); see also John Harrison, *Federal Appellate Jurisdiction Over Questions of State Law in State Courts*, 7 Green Bag 2d 353 (2004) (asserting the constitutionality of expanded federal jurisdiction over state law claims not entwined with federal law in the case of contested federal elections).

¹⁵ 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 in which court has abstained pending resolution of state court case to reserve issues of federal law for resolution in federal court).

¹⁶ *Pullman* abstention is named for the case that first recognized the doctrine, *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

law.¹⁷ While there are other forms of abstention that can apply in pure diversity cases, these abstention devices are quite limited in scope.¹⁸

Certification is a procedural device that achieves the same result as abstention.¹⁹ It is available in cases in which *Pullman* abstention can be invoked, as well as in pure diversity cases. Certification is also more streamlined than *Pullman* abstention, as the question of state law proceeds directly to the state's high court.

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*.²⁰ 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.²¹ The state high court has discretion to accept or reject the certification request.²² 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 court's answers will prove, once the record is developed, to be mere advisory opinions.²³ The state court also is free to rephrase the certified questions if it believes another phrasing would be more appropriate.²⁴ Once the state court answers the certified ques-

¹⁷ See *Meredith v. Winter Haven*, 320 U.S. 228, 234–35 (1943) (holding that *Pullman* abstention is unavailable in cases where no federal law issue is present). *Pullman* abstention is usually unavailable 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)).

¹⁸ 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).

¹⁹ 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.

²⁰ See Nash, *supra* note 17, at 1690–92.

²¹ See *id.* at 1692–93.

²² See *id.* at 1693.

²³ See *id.* at 1694 & n.82.

²⁴ 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.

tions, the federal court resolves the case with the benefit of those answers.²⁵

Certiorari review, abstention, and certification thus each provide opportunities for transjurisdictional adjudication.²⁶ 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,²⁷ and federal courts must resolve state

²⁵ See *id.* at 1695–96.

²⁶ 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*, 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.”) One also might add federal court habeas review of state criminal convictions under 28 U.S.C. § 2254 to this mix. Habeas cases, however, are in the nature of collateral review, meaning that the federal court entry occurs only after the state court has rendered a final judgment. Thus, although they entail some measure of direct dialogue, that dialogue is decidedly one-sided.

Removal of cases to federal court is more complicated. See 28 U.S.C. § 1441(a) (2000). 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 that the case raises such issues. But cf. *id.* § 1441(c) (allowing for removal of “the entire case” “[w]hen 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).

²⁷ See, e.g., Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 *U. Pa. L. Rev.* 825, 832–51 (2005); see also Bellia, *supra* note 6. 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 interests 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 its federal circuit court on a

law issues on their own.²⁸ Judicial and legislative action may change this arrangement, however. The Supreme Court has suggested that federal courts make greater use of certification,²⁹ and the frequency of certification is likely to increase following recent legislation that will allow more cases raising state law claims to be heard in federal courts.³⁰ Greater use of certification may also result from the Court's recent reaffirmance, in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*,³¹ that federal question jurisdiction extends beyond cases in which a claim formally arises under federal law and reaches state law claims that involve a substantial federal issue.³² Many legal commentators would applaud such changes, as I explain in the next Part.

II. 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 reservation, or by fundamentally altering and intermixing the plumbing of the

federal constitutional question] . . .” (quoting *State v. Lafferty*, 309 A.2d 647, 667 (Me. 1973) (Wernick, J., concurring)).

²⁸ See, e.g., Schapiro, *supra* note 1, at 1421 (“State courts cannot review a federal court’s interpretation of state law.”). The Court’s decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938), does, however, mandate 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.

²⁹ 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.”).

³⁰ See, e.g., *Class Action Fairness Act of 2005*, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9–12 (codified at 28 U.S.C. § 1332(d) (2000 & Supp. 2007)) (amending the federal judicial code to allow jurisdiction in federal court over certain class actions based upon minimal diversity).

³¹ 545 U.S. 308, 312–15 (2005).

³² For discussion of the *Grable* standard, see, for example, Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on “Arising Under” Jurisdiction*, 82 *Ind. L.J.* 309, 333–36 (2007); 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).

state and federal judicial systems, commentators advocate increased reliance upon, and 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.

Because Professor Bradford Clark finds inherent problems in all possible approaches to federal courts' fulfilling their obligations under *Erie*,³³ he advocates implementing a presumption in favor of federal courts certifying state law questions to the appropriate state high courts.³⁴ He suggests two methods by which federal courts might attempt to divine state law, and he finds both 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."³⁵ 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,"³⁶ and thus it might 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."³⁷ 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."³⁸ According to Professor Clark, "a federal court's 'prediction' of state law frequently devolves into little more than a choice among competing policy considerations," which encroaches on state autonomy to make such choices.³⁹ In light of these deficiencies with the static and predictive approaches,

³³ See Clark, *supra* note 18, at 1495–1517, 1535–44.

³⁴ See *id.* at 1556–63.

³⁵ *Id.* at 1537.

³⁶ *Id.* at 1541.

³⁷ *Id.* at 1541–42.

³⁸ *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, to predict novel state law defenses, see *id.* at 1508–13, and to predict that existing state law precedent will be overruled, see *id.* at 1514–17.

³⁹ *Id.* at 1499. See generally *id.* at 1498–1501.

Professor Clark endorses expanded use of certification⁴⁰ through, in particular, the implementation of “a presumption favoring certification of unsettled questions of state law.”⁴¹

Judge Guido Calabresi, too, calls for expanded use of certification, imploring federal judges to “certify, certify, certify.”⁴² “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 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.”⁴³ 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 could treat the federal court opinion as it would an opinion of a lower state court on the issue: it could choose to grant the request for certification and address the question itself, or it could choose to deny the certification request and let the federal court opinion stand.⁴⁴ Presumably, the state high court denial of certification would have whatever preclusive effect a discretionary denial of review ordinarily would have under state law.

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.⁴⁵ He explains that to require federal courts to resolve state law issues devalues state court interest in resolving those issues, and vice versa.⁴⁶ For this reason, Professor Friedman endorses increased use of cer-

⁴⁰ See *id.* at 1543–44.

⁴¹ *Id.* at 1556. See generally *id.* at 1556–63.

⁴² Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 *N.Y.U. L. Rev.* 1293, 1301 (2003) (footnote omitted).

⁴³ *Id.* Judge Alex Kozinski, by contrast, recommends restricting the use of certification to a far narrower setting: “[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).

⁴⁴ See Calabresi, *supra* note 42, at 1301–02.

⁴⁵ See Friedman, *supra* note 29, at 1216.

⁴⁶ See *id.* at 1216–26.

tification.⁴⁷ In addition, he advocates expanded use of the *England* reservation doctrine.⁴⁸ 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.⁴⁹ He explains that “[f]ederal jurisdiction should be available for federal claims.”⁵⁰ Thus, “[s]o long as the state party indicates at the outset that it intends to obtain litigation of federal questions in federal court, that reservation should be enough.”⁵¹ While Professor Friedman recognizes that the increased use of transjurisdictional procedural devices will impose some costs on the judicial system and litigants,⁵² he concludes that the benefits outweigh those costs.⁵³

Judge Jon Newman has gone a step further. Among a series of procedural reforms designed to address what he identifies as an overburdened federal judiciary⁵⁴ 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, similarly, that federal law issues that arise in state trial courts could

⁴⁷ See generally *id.* at 1254–56. 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.* at 1255–56 (footnotes omitted). 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.”).

⁴⁸ See *id.* at 1264–74; see also Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 *Wm. & Mary L. Rev.* 605, 616–18 & nn. 35–36 (1981) (discussing the notion of “affirmative federal intervention” in state court proceedings).

⁴⁹ Friedman, *supra* note 29, at 1269–71.

⁵⁰ *Id.* at 1271.

⁵¹ *Id.* at 1269.

⁵² 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 to have undervalued. See *infra* Section IV.A.

⁵³ See Friedman, *supra* note 29, at 1279.

⁵⁴ 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, on the quality of federal judges’ performance, and on the functioning of federal courts).

be appealed to federal courts of appeals and then to the United States Supreme Court.⁵⁵ Judge Newman would vest discretion to administer the system in federal appellate judges; that is, federal circuit judges would decide 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.⁵⁶ Judge Newman 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.”⁵⁷ Thus, for example, “[d]iscretionary access to federal appellate courts might well be limited to the federal issues in the state court litigation.”⁵⁸ In this way, federal issues could be channeled to federal appellate courts and state issues to state appellate courts.

Taken as a group, these commentators endorse increased availability of federal judicial fora to resolve questions of federal law and increased availability 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.

⁵⁵ See *id.* at 774–76.

⁵⁶ Judge Newman explains:

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.

⁵⁷ *Id.*; see *id.* at 775–76.

⁵⁸ *Id.* at 775.

III. 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 the development of new transjurisdictional devices. The commentators, however, either overlook or underestimate the problems associated with the design and use of these devices. 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, these devices may encounter problems of bias, particularly in that state courts may approach state law differently—or may appear to approach state law differently—when at least one of the parties hails from out-of-state. Third, commentators tend to overlook 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,⁵⁹ the step is substantial, complicated, and potentially controversial.⁶⁰ Consider the several questions that the decomposition of cases implicitly raises.

⁵⁹ See Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1084 (1974) (“[T]he two legal systems are often intertwined in a particular case . . .”).

⁶⁰ See Redish, *supra* note 7, at 899 (“[B]ecause of the long tradition of interactive federalism, state and federal law cannot always be so easily separated.”). The question of how to decompose a case into constituent issues in a logical, coherent way is a particular example of the need to find the proper scale at which law and legal questions should be framed. For general discussions, see Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 Yale L.J. 1311, 1332–75 (2002) (discussing the importance of the choice of relevant “legal unit” in constitutional

The first question is who is to perform the decomposition (or at least who is to decide how the case is to be decomposed). The federal court? The state court? The court that originally enjoys jurisdiction? The court whose help is sought?⁶¹

The second question (which is obviously influenced by the answer to the first question) is 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.⁶² The complications and challenges are even greater in the context of cases that raise interconnected questions of state and federal law.⁶³

adjudication); Lee Anne Fennell, *Slices and Lumps* (Univ. of Chicago John M. Olin Program in Law & Econ., Working Paper No. 395, 2008), available at <http://ssrn.com/abstract=1106421> (discussing the legal importance of aggregation and division of entitlements).

⁶¹Note that the answer to these questions may well implicate concerns of comity and power disparity, which I discuss below. See *infra* Section III.C.

⁶²First, 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) (discussing how the Supreme Court’s transition from issue voting to outcome voting has tempered issue manipulation by litigants); Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 *Vand. L. Rev.* 1045, 1046 n.2 (1996) (noting that standing doctrine limits litigant issue manipulation).

Second, on rare occasions, a doctrinal paradox arises in which 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).

The conundrum of the doctrinal paradox is mitigated in settings where decomposition of a case into constituent issues occurs naturally. For example, the availability of interlocutory appeals functions as a natural issue decomposition device. See *id.* at 84–85. Similarly, cases that traverse the divide between the federal and state judicial systems offer examples of “natural” issue decomposition.

⁶³The fact that issues of state and federal law must be separated and decided by different courts means that these issues must be decided sequentially, which could affect outcome. 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 Reasonable: Social Choice Theory and Adjudication*, 61 *U. Chi. L. Rev.* 41 (1994) (emphasizing the importance of path dependence—that is, the order in which courts are confronted with and decide legal issues—in legal reasoning).

The third question is, once the case is decomposed, and once constituent issues are sent by one court system to another, should the court system to which constituent issues are sent simply resolve those issues—that is, 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 seeking the other's opinion receives a response, should it simply 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. In the following Sections, I elucidate those problems that arise in the context of certification, abstention, and Supreme Court certiorari review of state law judgments.

1. Certification

It might seem at first that certification presents an easy proposition for state courts, in that the certifying federal court will state precisely the questions to be asked and the state court will simply answer 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. 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.⁶⁴ And the parties to the actual case submit briefs to, and argue the case before, the state high court.⁶⁵ 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,⁶⁶ 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 when state courts are asked to deal with certified

⁶⁴ See *supra* text accompanying note 23.

⁶⁵ See *supra* note 24.

⁶⁶ See *supra* text accompanying note 24.

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 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. There are three possible approaches that the state court can take.

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 Symphony Orchestra*,⁶⁷ 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 Supreme Judicial Court of Massachusetts; the questions were broadly worded and did not mention or allude to the federal constitutional issues.⁶⁸ 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.⁶⁹ The federal court then divided over whether to ac-

⁶⁷ 855 F.2d 888 (1st Cir. 1988) (en banc) (incorporating answers to certified questions provided by *Redgrave v. Boston Symphony Orchestra*, 502 N.E.2d 1375 (Mass. 1987)).

⁶⁸ See *id.* at 902.

⁶⁹ 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

cept 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 consider the judges' overall impressions.⁷⁰

Consider as well the response of the Maryland Court of Appeals to a certified question in *Telnikoff v. Matusevitch*.⁷¹ At issue in *Telnikoff* was the enforceability under Maryland law of a British libel judgment.⁷² The United States Court of Appeals for the 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.⁷³ The Maryland Court of Appeals answered the certified question in the affirmative,⁷⁴ noting that it was not resolving issues of either federal or state constitutional law, but rather interpreting the applicable judgment recognition statute.⁷⁵ 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]."⁷⁶ And, indeed, the court's subsequent analysis includes numerous references to, and analysis of, general First Amendment law.⁷⁷

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.*

Justice's opinion recognizes that its answers to the certified questions may implicate serious constitutional questions" (citation omitted)).

⁷⁰ 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.").

⁷¹ 702 A.2d 230 (Md. 1997).

⁷² Id. at 232.

⁷³ Id. at 236.

⁷⁴ Id. at 251.

⁷⁵ Id. at 239.

⁷⁶ Id.

⁷⁷ See, e.g., id. at 244–47.

Treen.⁷⁸ 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,⁷⁹ 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.”⁸⁰ 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,⁸¹ while Justice Watson, also dissenting, explicitly cited cases from other jurisdictions that had stricken similar statutes as unconstitutional under the federal Constitution.⁸²

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*,⁸³ 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.⁸⁴ The state court declined to answer the certified question, reasoning:

[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

⁷⁸ 440 So. 2d 704, 707 & n.6 (La. 1983).

⁷⁹ *Id.* at 706 & n.4.

⁸⁰ *Id.* at 706.

⁸¹ 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 one certified to us. It assumes that ‘creation-science’ is a ‘course of study.’ . . . From all that I have read in the past, ‘creation-science’ is a religious doctrine, not a course of study.”).

⁸² See *id.* at 713 (Watson, J., dissenting).

⁸³ 359 N.W.2d 513 (Mich. 1984).

⁸⁴ *Id.*

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.⁸⁵

To the extent that certification is simply a streamlined form of abstention,⁸⁶ 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 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.”⁸⁷ But, if that is so, then 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.⁸⁸ While this may be

⁸⁵ 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 upon 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.

⁸⁶ See supra note 19 and accompanying text.

⁸⁷ *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 420 (1964); 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”).

⁸⁸ See *Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888, 903 (1st Cir. 1988) (“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

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 (rather than their opinions in dicta) as to whether to answer the certified questions “yes” or “no.”⁸⁹ In short, it is quite difficult to determine the extent to which state courts have freedom to decompose cases into constituent state issues and the extent to which federal courts should defer to state courts in that regard.

2. Abstention

Abstention also 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 court⁹⁰ and properly preserves those issues by not litigating them in the state forum.⁹¹ If a litigant properly makes an *England* reservation, then the state court lacks the power to resolve federal issues.⁹² In-

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 the 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 the outcome. See *id.* at 909.

⁸⁹ See *id.* at 912 (Bownes, J., concurring in part and dissenting in part).

⁹⁰ See *supra* text accompanying note 15.

⁹¹ See, e.g., *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 340–41 (2005) (finding *England* reservation ineffective where parties advanced federal constitutional arguments before state court).

⁹² On one reading, an *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 another reading, 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” (emphasis

deed, 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 "recomposition" controls.

Abstention presents the same legal decomposition challenges as does certification, 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 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 federal issues.⁹³ As I noted above, at the end of the day, the federal court

added)). Professor Field is similarly ambiguous, compare Field, *supra* note 59, 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 29, at 1271 ("Federal jurisdiction should be available for federal *claims*." (emphasis added)), with *id.* at 1269 ("So long as the state party indicates at the outset that it intends to obtain litigation of federal *questions* in federal court, that reservation should be enough." (emphasis added)).

I believe that *England* is better understood to apply to federal issues, not claims. In *England*, when three would-be chiropractors sued for a declaration that a Louisiana statute, which forbade them from practicing in Louisiana, violated 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). Thus, *England* recognized the right of litigants to reserve for federal court review not only entire claims, but rather questions of federal law that might be subsets of claims.

⁹³ E.g., Field, *supra* note 59, 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 87, at 1123–24. Note as well that, when the Supreme Court reviews a state court's resolution of federal law on

may disagree with the state court's efforts to disaggregate the relevant legal and factual issues, in which case the federal court's views will control—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 statute⁹⁴ requires federal courts to give preclusive effect to state court holdings, even when the plaintiff is forced to raise claims in state court in order to have her federal claims ripen, and even when the federal court abstains under *Pullman*,⁹⁵ while the plaintiff, having made an *England* reservation, proceeds in state court.⁹⁶ As a result, issue preclusion generally binds an abstaining federal court to those state court findings that are necessary to the state court's holding, including rulings on issues of evidentiary fact

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 59, at 1084.

It may be that some (or all) of the factual questions underlying 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, see Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 *Wm. & Mary L. Rev.* 251, 272–76 (2006).

⁹⁴ 28 U.S.C. § 1738 (2000).

⁹⁵ 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. *Id.* at 335.

⁹⁶ 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 would have been the same even if *England* had been properly invoked. See *id.* at 341–42.

and issues of “ultimate fact”—that is, put broadly, law applied to fact.⁹⁷

3. *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

⁹⁷ See Sterk, *supra* note 93, at 273–74 & n.123. Though issue preclusion also applies generally to pure matters of law, see *id.* at 273, that fact will presumably be immaterial 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 (“[A]ccording 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 the federal claim in that forum, 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, 83–85 (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 federal and state constitutional provisions. E.g., *San Remo Hotel, L.P. 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* note 93, 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 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 49, as I discuss below, see *infra* notes 199–207 and accompanying text.

case and then has the freedom not just to resolve the federal issues but to decide the case itself. Consider, however, two areas of potential concern.

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.”⁹⁸ However, since its 1983 decision in *Michigan v. Long*,⁹⁹ 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.”¹⁰⁰

Not only did this have 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 on an independent and adequate state law ground.¹⁰¹ 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 Ass’n of Central Iowa v. Fitzgerald*,¹⁰² the Iowa Supreme Court held that a state tax on gambling receipts from race-tracks at nearly twice the rate imposed on receipts from riverboat gambling violated the Equal Protection Clause of the United States Constitution and an analogous provision of the Iowa Constitu-

⁹⁸ *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

⁹⁹ 463 U.S. 1032 (1983).

¹⁰⁰ *Id.* at 1042.

¹⁰¹ 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*).

¹⁰² 648 N.W.2d 555 (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).

tion.¹⁰³ The court noted that the “same analysis” applied to determining the applicability of both provisions.¹⁰⁴ The United States Supreme Court, by writ of certiorari, reversed the state court’s federal constitutional holding and remanded the case for further proceedings.¹⁰⁵ On remand, the Iowa Supreme Court adhered to its original decision on state law grounds.¹⁰⁶ The state court expressly declined to hold that the Iowa Constitution required a different analytical framework from federal law to evaluate equal protection claims,¹⁰⁷ holding instead that the rational basis test, which was the governing standard under federal law, applied under Iowa law as well but demanded a different outcome.¹⁰⁸

The greatest step a state court can take 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*.¹⁰⁹ 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,¹¹⁰ reasoning that license ownership lay within the sole purview of the Federal Communications Commission (“FCC”).¹¹¹ In formulating the appropriate relief, the Court

¹⁰³ Id. at 562.

¹⁰⁴ Id. at 558.

¹⁰⁵ *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103, 110 (2003).

¹⁰⁶ 675 N.W.2d 1, 16 (Iowa 2004).

¹⁰⁷ See id. at 5–6.

¹⁰⁸ See id. at 6–7.

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

¹¹⁰ Id. at 564.

¹¹¹ 326 U.S. at 130. *Johnson* involved the lease of a 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 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 state supreme court denied that motion as untimely, but did clarify its opinion as follows:

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.¹¹² 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.¹¹³

The Court then remanded the case "for further proceedings not inconsistent with this opinion."¹¹⁴

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.¹¹⁵ The 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

"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 untimely constituted an independent and adequate state law ground. 326 U.S. at 128–29. 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 13 N.W.2d at 564).

¹¹² 326 U.S. at 131–32.

¹¹³ *Id.* 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.*

¹¹⁴ *Id.* at 133.

¹¹⁵ 19 N.W.2d 853, 854 (Neb. 1945).

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“only possible basis for the attaching of federal jurisdiction.”¹¹⁶ It understood the Supreme Court’s decision to go further:

The mandate of the Supreme Court of the United States directing this court to withhold its mandate . . . of the state courts 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.¹¹⁷

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.”¹¹⁸ 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.”¹¹⁹

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,¹²⁰ 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.¹²¹

* * *

¹¹⁶ *Id.*

¹¹⁷ *Id.* The Nebraska court evidently believed that its opinion on rehearing adequately preserved the FCC’s authority over the license.

¹¹⁸ *Id.* at 854–55.

¹¹⁹ *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.

¹²⁰ See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 358–59 (1816).

¹²¹ See generally Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 *Mich. L. Rev.* 80 (2002).

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 decide cases based upon final outcomes, not constituent issues.¹²² At some level, decomposition conflicts with this natural tendency.¹²³ The examples I have identified bear this out. The courts in *Johnson* focused on the outcome at every level, with the Nebraska Supreme Court ultimately enforcing the outcome as it was originally conceived.¹²⁴ Similarly, the Iowa Supreme Court and United States Supreme Court wrestled over the outcome of the case in *Fitzgerald*.¹²⁵ By relying upon the state law issue, the Iowa Supreme Court was able to reaffirm its earlier outcome and reject the outcome of the United States Supreme Court. Meanwhile, *Redgrave* elucidates judges' tendency toward deciding outcomes in the context of certification, with the state court judges each offering their opinions on the federal constitutional issue driving the case.¹²⁶

Decomposition of a case into constituent state and federal issues thus poses a substantial challenge to the court that has to undertake the decomposition in the first instance. It also puts the court from the other system in the difficult position of either having to

¹²² See Stearns, *supra* note 62, at 111–24 (arguing that judges' general preference for outcome-based voting is the result of natural evolution in decisionmaking).

¹²³ See *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 421 n.12 (1964) (“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*, 363 U.S. 207, 227 (1960) (Black, J., dissenting))).

¹²⁴ First, the Nebraska Supreme 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 Nebraska court's order 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, ultimately it was through the outcome of 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 preserve. See *supra* notes 109–19 and accompanying text.

¹²⁵ See *supra* notes 102–08 and accompanying text.

¹²⁶ See *supra* notes 67–70 and accompanying text.

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accept the first court's decomposition or to question it and thus increase friction between the two systems.¹²⁷

Transjurisdictional adjudication raises issues beyond decomposition of cases. In the next Section, I address problems of bias, which one might expect to arise in one court system but not in the other.

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.¹²⁸ In this sense, as expressed through Congress' decision to instantiate the federal courts' diversity jurisdiction, federal courts are in certain circumstances seen to be better fora for state law claims than are state courts.¹²⁹

¹²⁷ Though a detailed discussion lies beyond the scope of this Article, the decomposition of cases poses analogous problems in the context in which one state court certifies to a sister state court questions of law arising under the second state's laws.

Decomposition also may pose similar problems in the arena of conflict of laws. Some conflict of laws regimes call for courts to apply different rules to different types of claims, with claims that arise under similar "policy bundles" be treated similarly. See Caleb Nelson, *The Persistence of General Law*, 106 *Colum. L. Rev.* 503, 541–43 (2006). These approaches thus require decomposition of cases into constituent issues, with many of the same attendant obstacles and challenges. I am grateful to Michael Collins for this point.

¹²⁸ Though the justifications for the constitutional and congressional grants of diversity jurisdiction are myriad and subject to debate, avoiding bias and the appearance of bias are, at the very least, two of the principal justifications. See Nash, *supra* note 17, at 1729 & n.223 (noting that the affirmative choice to retain diversity jurisdiction in the face of arguments to repeal it reflects at least some belief that its purpose remains valid). 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 *Brook. L. Rev.* 197, 205–10 (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 *id.* ("The material question is not so much whether the justice administered [in state courts with respect to litigants from other 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 that capital is needed for the promotion of enterprises and industrial and commercial progress.").

¹²⁹ Cf. Marsh, *supra* note 128, 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."); Schapiro, *supra* note 1, at 1422 ("[T]he federal court's

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 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 legitimize, state court decisions on matters of state law in other cases.

Transjurisdictional procedural devices frustrate the attainment of these goals to the extent that they allow for resolution in state court, in whole or in part, of state law claims that would otherwise be heard in federal court under diversity jurisdiction. In other words, while one might dispute the suggestion that state courts are often biased or perceived to be biased, the fact that the federal courts' diversity jurisdiction 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

familiarity with constitutional adjudication might compensate for its potential unfamiliarity with some aspects of state law."). 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 Bezanson, *supra* note 87, 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."); William B. Rubenstein, *The Myth of Superiority*, 16 *Const. Comment.* 599, 599 (1999) ("Put simply, gay litigants seeking to establish and vindicate civil rights have generally fared better in state courts than they have in federal courts.").

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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.”¹³⁰ 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.¹³¹

And, indeed, other than recognizing the propriety of certification and very limited applications of abstention doctrine,¹³² the Supreme Court has generally adhered to this view that federal courts have the duty to decide diversity cases. The introduction of certain new transjurisdictional procedural devices, and the expansion and increased use of existing ones, are inconsistent with this duty.

Unlike procedural devices, such as abstention, that allow for state court systems to address cases in their entirety, one might argue that certification 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, or 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 minimal opportunities for bias.

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 precedent affords them *greater* leeway to engage

¹³⁰ Meredith v. Winter Haven, 320 U.S. 228, 234 (1943).

¹³¹ Id.

¹³² See supra notes 15–18, 29 and accompanying text.

in biased decisionmaking.¹³³ 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.¹³⁴

Second, while jury determinations will be made in federal court, the possibility of bias extends beyond juries to state tribunals.¹³⁵ 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 the efficacy with which the trial judge controls—or fails to control—the jury.¹³⁶

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. State courts demonstrate their unwillingness to answer abstract legal questions by only accepting certification request supported by a sufficiently developed factual record. 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.¹³⁷ As Professors Ann Woolhandler and Michael Collins explain, “the risk of bias against a nonresident in the interpretation of untested state law may be

¹³³ See Nash, *supra* note 17, at 1743 (“[J]udges on the state’s highest court enjoy more discretion and are more likely to be called upon to make policy decisions than are judges on lower state courts.”). 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.*

¹³⁴ 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).

¹³⁵ Congress presumably could decide, but has not decided, to limit diversity jurisdiction solely to cases that involve jury trials.

¹³⁶ See Nash, *supra* note 17, at 1741.

¹³⁷ See *id.* at 1743–45.

even greater than in cases of routine law application to disputed facts.”¹³⁸

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.¹³⁹ 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.¹⁴⁰ 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. If the state court with some regularity overrules or disregards ear-

¹³⁸ Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 Cal. L. Rev. 613, 677 (1999).

¹³⁹ See Nash, *supra* note 17, 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)).

¹⁴⁰ Professor Friedman argues that, “[e]ven in the case[s] [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 29, at 1240 n.72. The problem, however, is that the first opinion—that is, the response to the certified questions—which to all appearances purported to be a general statement of law, turned out *not* to be. One well might have said that the first decision by the Texas court was “general” such that the “body of law . . . contains the general principles” from that case, but the state court chose to limit those “general principles” to specific facts. This begs the question: What exactly constitutes “general principles” in this context? The question of ultimate interest 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.

lier answers to certified questions in subsequent rulings, then certifying federal courts should have greater latitude not to follow answers to certified questions—much as, per state court practice, courts of the state are not so obligated.¹⁴¹

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 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 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 to adequately analyze the degree to which existing or proposed devices in fact rest upon disparities in power as opposed to comity.

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.¹⁴² Second, 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*,¹⁴³ and then only when Congress has seen fit to extend jurisdiction over questions of state law. In fact, 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. Indeed, state courts effectively lose the right to adjudicate cases that otherwise would fall under their

¹⁴¹ See *infra* text accompanying notes 231–232.

¹⁴² See U.S. Const., art. VI, cl. 2.

¹⁴³ See *supra* note 28; see also Clark, *supra* note 18, 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) (same).

purview.¹⁴⁴ Third, federal courts may stay actions in state court under appropriate circumstances,¹⁴⁵ but state courts may not as a general matter stay actions in federal court.¹⁴⁶ Fourth, federal courts trying to 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,¹⁴⁷ 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.¹⁴⁸ By contrast, the role of a state court faced with

¹⁴⁴ Courts of a state also share jurisdiction in this way with courts of another system—they 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 they also do not enjoy exclusive jurisdiction.

¹⁴⁵ 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 or effectuate its judgments.” 28 U.S.C. § 2283 (2000). While it thus limits the circumstances under which federal courts may issue injunctions against state courts, see, e.g., *Atlantic Coast Line R.R. Co. v. Bhd. 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”), the Act still confirms the power of federal courts to issue such injunctions.

¹⁴⁶ 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 omitted)); see also *id.* at 412–14 (invalidating state court order enjoining parties from prosecuting a parallel suit in federal court and vacating the 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 quasi *in rem* case before it).

¹⁴⁷ 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* analysis).

¹⁴⁸ Nevertheless, 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.”

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 as the Supreme Court’s faithful agent.¹⁴⁹

Despite this evident power disparity, advocates of expanded transjurisdictional procedural devices rely upon cooperation between court systems to effectuate their goals. These commentators rely, if implicitly, upon Professor Edward Corwin’s pronouncement that the era of dual federalism, in which the coexistence between the federal and state governments “is one of tension rather than collaboration,”¹⁵⁰ has passed—if there ever was such an era.¹⁵¹ One ought not to presume, however, that the retreat of dual federalism leaves unabashed cooperative federalism in its stead. Just as the age of pure dual federalism may never have existed, so too the existence of an era of pure cooperative federalism has been questioned.¹⁵² Indeed, it would be an overstatement to describe today’s atmosphere as one of pure cooperative federalism,¹⁵³ and the rela-

(citation omitted)); 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)); 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 that the criticism “may have merit”).

¹⁴⁹ In addition to the points in the text, consider whether federal court dominance over state courts is in some ways gendered—it has been argued that the 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”); see also *id.* at 1739–50.

¹⁵⁰ Edward S. Corwin, The Passing of Dual Federalism, 36 Va. L. Rev. 1, 4 (1950).

¹⁵¹ See *id.* at 4–23.

¹⁵² Compare Redish, *supra* note 7, at 864 (expressing skepticism as to whether dual federalism ever held sway), with 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)”; 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)).

¹⁵³ As the Supreme Court explained in *Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers*:

tionship today between the federal judiciary and state court systems is more aptly described as “interactive federalism.”¹⁵⁴ Interactive federalism “implicitly recognize[s] the continued relevance of at least some form of dualism.”¹⁵⁵

Commentators have generally failed to acknowledge the disconnect 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 precise 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.¹⁵⁶

Although all three procedures vest substantial power in the federal courts, only certification 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*;¹⁵⁷ either way, the federal court has ultimate discretion whether to use certification.¹⁵⁸ However, it is also true that the state court then has discretion as to whether to accept the

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.

398 U.S. 281, 286 (1970).

¹⁵⁴ See Martin H. Redish, *The Constitution as Political Structure* 29 (1995); Redish, *supra* note 7, at 874–88; see also Schapiro, *supra* note 1, at 1404; Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 *Iowa L. Rev.* 243, 250–51 (2005).

¹⁵⁵ Redish, *supra* note 7, 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.”).

¹⁵⁶ 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, 893–906 (1998) (arguing that cooperation between governments is more effective than coercion).

¹⁵⁷ See *supra* text accompanying note 20.

¹⁵⁸ See Nash, *supra* note 17, at 1692.

request for certification.¹⁵⁹ Further, 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.¹⁶⁰ 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.¹⁶¹ By contrast, under the current system in which the Supreme Court may review state court decisions on matters of federal law, it is the federal system, whose questions of law are at issue, that enjoys full discretion.¹⁶² It is the parties who petition for certiorari, and the Supreme Court that decides whether to invoke it. The state court itself has no voice in the use of the device. Thus, while certification empowers one system to ask another system to help it resolve questions of law (with the other system free to decline that request), direct Supreme Court review empowers one system to correct the other, creating a disparity in power.

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 certification,¹⁶³ under direct Supreme Court review, it is the Court itself that ultimately decides the scope of the review that it will undertake.¹⁶⁴ The Court in theory must restrict its review to matters of federal law, but that may prove difficult in practice. Attempts to restrict review to matters of federal law may further complicate relations with the state court whose decision is under Supreme Court review, since, as in *Johnson v. Radio Station WOW, Inc.*, the state court may resent what it perceives to be an impingement on its authority to decide matters of state law.

¹⁵⁹ See supra text accompanying note 22.

¹⁶⁰ See supra text accompanying note 24.

¹⁶¹ See Fallon et al., supra note 11.

¹⁶² See supra text accompanying notes 11–12.

¹⁶³ See supra text accompanying note 21.

¹⁶⁴ See supra text accompanying notes 10–14.

Further, the Court's presumption under *Michigan v. Long*¹⁶⁵ 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, it 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.¹⁶⁶ Indeed, the ambivalent relationship between the state and federal judiciaries is evident in the examples I discussed above; both the *Johnson* case and *Racing Ass'n of Central Iowa v. Fitzgerald* highlight the potential for conflict between the Supreme Court and state courts whose decisions are reviewed.¹⁶⁷

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.¹⁶⁸

In the end, then, two devices—abstention and certiorari review by the Supreme Court—seem more inclined to emphasize the friction between the systems. By contrast, certification is better designed to foster, and benefit from, cooperation between the systems. Indeed, devices that foster intersystemic cooperation will encourage courts from both systems that utilize those devices to

¹⁶⁵ See supra text accompanying notes 99–100.

¹⁶⁶ See supra note 101 and accompanying text.

¹⁶⁷ See supra text accompanying notes 102–19; 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).

¹⁶⁸ See *Bezanson*, supra note 87, at 1117 (“While the state court may also adjudicate the federal issues if it pleases, the full federal system stands ready to review the state judgment on these matters if a mistake is made.”); see also *id.* at 1126 (“[F]riction between the state and federal systems . . . may be exacerbated . . . under *Pullman* abstention . . .”); *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.”).

invest the time and resources to reach fair and just results as much as possible.¹⁶⁹

IV. REASSESSING THE BENEFITS AND COSTS OF TRANSJURISDICTIONAL ADJUDICATION

In this Part, I describe, and apply, a fuller cost-benefit analysis for transjurisdictional adjudication. First, I identify costs, based upon the obstacles I identified in the previous Part, which commentators have either overlooked or underestimated. Second, I discuss one benefit of transjurisdictional adjudication—allowing a court system to resolve questions of its 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 this fuller consideration of costs and benefits to suggest refinements to current certification procedure.

A. Identifying Overlooked and Underestimated Costs of Transjurisdictional Adjudication

The obstacles that I identified in the previous Part give rise to costs commentators often have undervalued or overlooked.¹⁷⁰ 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 that proper decomposition is. There also may be costs, both monetary and temporal, to litigants with respect to the decomposition process. For example, in *Racing Ass'n of Central Iowa v. Fitz-*

¹⁶⁹ One should not underestimate the importance of the psychological frame through which a procedural device is seen. Cf. Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 *Notre Dame L. Rev.* 313, 355-69 (2007) (arguing that framing effects help to explain the choice of regulatory devices); Ahdieh, *Intersystemic Governance*, *supra* note 2, at 6, 16-17 (noting role in psychology of societal actors in determining form and success of intersystemic governance).

¹⁷⁰ But cf. Bator, *supra* note 48, at 621 (“[S]tate courts [will] continue to participate . . . in the enterprise of defining and enforcing federal constitutional principles . . . because the institutional costs of the techniques available to put in place the opposite system will inevitably be assessed as too high.” (emphasis in original)); *id.* at 624.

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gerald, certiorari review and remand added almost two years to the time necessary to resolve the case definitively,¹⁷¹ with no change in the final outcome. Further, the presumption of *Michigan v. Long* may mean that the Court decides a case only to have the state court on remand stand by its original decision, disagreeing with the presumption that the case originally was not decided on independent and adequate state law grounds. This will generate both legitimacy and error costs. When the Supreme Court uses the *Michigan* presumption to decide a case only to have the state court reinstate its earlier decision on state law grounds, there is an air of illegitimacy to the Supreme Court's having decided an issue unnecessarily. In such an instance, it is clear that the Court's presumptive conclusion was erroneous—an independent and adequate state law ground did exist. This mistake by the Court generates error costs, including the resources of both the Court and litigants.

Second, consider the costs that actual and perceived bias exact 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

¹⁷¹ Certainty may be not only elusive, but also time-consuming. The Iowa Supreme Court handed down its original decision in the *Fitzgerald* case on June 12, 2002; that court denied a request for rehearing on August 6. 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.

Perhaps concerns of comity underlay the Supreme Court's decision not 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 those specific rational bases expressly found by the United States Supreme Court to sustain a state tax statute?

Petition for a Writ of Certiorari at i, *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 541 U.S. 1086 (2004) (No. 03-1419). 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, it is not surprising to see federal court willingness to accommodate the state court given the structure of certiorari review, see *supra* text accompanying notes 161–167.

litigants. If state courts in fact engage in bias, this will generate both 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.

Finally, consider the extent to which costs may 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—usually the state court system—less likely to participate fully and voluntarily, which would serve 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 may bleed over to other, unrelated interactions between the court systems. On the one hand, that courts from the different systems may deal with one another repeatedly may rein in uncooperative actions;¹⁷² on the other hand, it is also possible that the tensions that one transjurisdictional device generates may interfere with the use of other transjurisdictional devices, as well as with other, unrelated interactions between the courts—conceivably even between other branches of government. Last, 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 sim-

¹⁷² See, e.g., Douglas G. Baird et. al., *Game Theory and the Law* 159–87 (1994) (discussing the relevance in game theory of repeated play).

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ply 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*

In addition to downplaying these frictions, 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 that often motivate the generation and use of transjurisdictional procedural devices, sometimes even substantially. That, in turn, draws into 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 the problems I discussed in Part III—and the accompanying costs in Section IV.A—by having a unitary judicial system with a single final arbiter of all legal questions.¹⁷³ But there are benefits that come from having distinct judicial systems. The maintenance of separate state and federal court systems satisfies both social¹⁷⁴ and political¹⁷⁵ concerns. The Constitution's

¹⁷³ 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 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).

¹⁷⁴ The interchange of ideas makes it more likely both that the public may become involved in the debate and that the courts will ultimately reach a fair and just conclusion. 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, 1772–73 (1992) ("One of the greatest values of our federal system is the benefit to be gained from an open interchange of ideas among sovereigns. . . ." (footnote omitted)); cf. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 Yale J. Int'l L. 409 (2003) (discussing different models for, and the

Full Faith and Credit Clause and the full faith and credit statute provide further evidence of the Founders' and Congress's rejection of a unitary model. The Supreme Court's agreement is evident from its decision in *San Remo Hotel, L.P. v. City & County of San Francisco*, which confirms the limited availability of exceptions to the full faith and credit statute.¹⁷⁶

That said, the existing system has generated transjurisdictional procedural devices that often enable 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,¹⁷⁷ its genesis came from a desire to allow federal courts to avoid unnecessary decisions regarding difficult constitutional questions.¹⁷⁸ Indeed, *Pullman* abstention is not permitted solely to allow state court resolution of matters of state law.¹⁷⁹ In endorsing *Pullman* abstention in cases where resolution of a state law issue may obviate the need for a federal court to address a novel or contested federal constitutional issue but not in cases where no issue of federal law issue lurks, the Supreme Court implicitly valued the benefit of avoiding "unneces-

possible benefits of, transnational judicial dialogue). See generally *infra* note 192 and accompanying text.

¹⁷⁵ 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).

¹⁷⁶ See Sterk, *supra* note 93, 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").

¹⁷⁷ See Bezanson, *supra* note 87, at 1114.

¹⁷⁸ See *id.* at 1111–14; see also *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941).

¹⁷⁹ *Meredith v. Winter Haven*, 320 U.S. 228, 234–35 (1943) (holding that a 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 so-called "pure diversity cases" in which no issue of federal law lurks, that is, in cases in which *Pullman* abstention remains unavailable under *Meredith*. See Nash, *supra* note 17, at 1737–38. I have also argued that proposals to expand the use of certification, as 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.

sary” resolution of constitutional issues over the benefit of having state rather than federal courts resolve state law issues.¹⁸⁰

Also supporting the view that increased transjurisdictional adjudication is not always objectively and inherently valuable is the trend in congressional action limiting the availability of Supreme Court review. For many years, Supreme Court authority to review state high court decisions extended only to state court decisions that denied federal rights.¹⁸¹ Moreover, such review was as of right.¹⁸² Over the years, Congress not only extended the Supreme Court’s authority to review state court decisions that upheld federal rights,¹⁸³ but it also increased the Supreme Court’s discretion to choose the cases that it reviews.¹⁸⁴ Ultimately, in 1988, Congress “eliminate[d] appeals as of right and . . . ma[de] all state court judgments reviewable only by writ of certiorari.”¹⁸⁵ In doing so, Congress restricted the right of state court litigants to utilize transjurisdictional adjudication.

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 this empowerment as an unmitigated benefit. In this sense, then, many commentators have overstated or overemphasized this benefit.¹⁸⁶

¹⁸⁰ 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)).

¹⁸¹ See Fallon et al., *supra* note 11, at 466–67.

¹⁸² See *id.*

¹⁸³ See *id.* at 467.

¹⁸⁴ See *id.* at 467–68.

¹⁸⁵ *Id.* at 468 (footnote omitted).

¹⁸⁶ For example, Professor Friedman argues that the virtual elimination of appeals as of right from state courts to the Supreme Court further depletes opportunities for federal court review of questions of federal law raised in state court. See, e.g., Friedman, *supra* note 29, at 1279 (emphasizing “the enormous benefits” of transjurisdictional adjudication). He adds that, as a consequence, “at present no one plausibly can argue that Supreme Court review standing alone is enough” to vindicate “federal interests.” *Id.* at 1219. If that were truly the case, however, why would Congress have amended the law to eviscerate appeals as of right? Should we presume, as Professor Friedman does, that Congress (with the input of the Court) acted outside the federal

Of course, the choice to have, or 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, which would be the rule without such devices. State law questions would then be resolved in federal court and federal law questions in state court,¹⁸⁷ meaning that multiple courts might 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 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.¹⁸⁸ Here, one would treat each court as a separate decision-

interest in so doing? Rather, it seems more appropriate to assume that Congress determined the benefit of having the Supreme Court rule on questions of federal law as of right was not worth the associated costs.

¹⁸⁷ See *supra* note 1 and accompanying text.

¹⁸⁸ The Condorcet Jury Theorem provides that, if it is the case that each voter has better than a fifty percent 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).

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maker.¹⁸⁹ 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.¹⁹⁰

Even if one rejects or questions the formal applicability of the Jury Theorem to the context of appellate court consideration of legal questions,¹⁹¹ 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.¹⁹² It also would re-

¹⁸⁹ One could also treat 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 decisionmakers are also useful inputs for Jury Theorem purposes”).

¹⁹⁰ See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 *Stan. L. Rev.* 131, 178–79 (2006) (arguing that the Condorcet Jury Theorem, if certain prerequisites are met, 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 have ruled on a particular question).

¹⁹¹ See, e.g., Maxwell L. Stearns, *The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore*, 3 *Theoretical Inquiries L.* 125, 144–46 (2002) (arguing that the theorem is of limited applicability to the appellate court setting because cases considered by appellate panels are multidimensional, asymmetric and deal with policy concerns more than a technical legal “right or wrong”).

¹⁹² 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 S. Comm. on the Judiciary*, 92d Cong., 1st Sess. 256 (1971) (statement 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.

Nevertheless, 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, insofar as choosing not to have an ultimate arbiter of all legal ques-

duce the problematic situation of an initial court decision that turns out to be ill-advised yet binding on all other courts.¹⁹³

Next, just as having multijudge panels may foster collegiality among judges,¹⁹⁴ so too having courts from different systems opine on the same legal issues may 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. Somewhat ironically, by improving cooperation between the state and federal systems, this collegiality also should help to facilitate the use of transjurisdictional procedural devices in the instances in which they are used.

Finally, to the extent that some have argued that federal courts are of greater quality than their state counterparts,¹⁹⁵ intersystemic adjudication offers a benefit to state court systems. First, state

tions reflects a desire for dialogue among court systems, it is not unreasonable to see that 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. See *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 903–04 (Ill. 2007) (citing *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842, 844–45 (7th Cir. 1999) (interpreting Illinois law presumption that the law to be applied in a tort action is the law of the jurisdiction where the tort occurred)).

Of course, sometimes opportunities for dialogue fall flat. Consider *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), 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.

¹⁹³ 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 levels 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.”).

¹⁹⁴ See generally Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L. Rev. 1639, 1640–41 (2003) (“[C]ollegiality mitigates judges’ ideological preferences and enables [them] to find common ground and reach better decisions.”).

¹⁹⁵ See *supra* note 129.

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courts may become better quality by virtue of resolving matters of federal law.¹⁹⁶ Further, this should result in an elevation in the stature of state courts, both in their own eyes and in the eyes of others.¹⁹⁷

To be sure, there are costs that counterbalance each of these benefits.¹⁹⁸ An increased number of decisions handed down by non-native court systems increases the likelihood for error costs insofar as those courts may ultimately be proven to have wrongly decided the issues. There may also be accompanying legitimacy costs: a court system may lose respect, at least on the margin, from the public, lawyers, and other judges in the system, to the extent that its courts routinely decide legal issues in ways that prove to be incorrect. 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 weighed in each setting before a decision is made.

D. Evaluation and Design of Transjurisdictional Procedural Devices

In this Section, I use the more full 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 existing certification procedure.

¹⁹⁶ Cf. Bezanson, *supra* note 87, at 1126 (noting that, under *Burford* abstention, “[t]he quality . . . of the state judiciary is enhanced, due in large part to the greater responsibility in the resulting adjudication of federal matters”).

¹⁹⁷ 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”); *id.* at 1126.

¹⁹⁸ Professor Schapiro identifies the inevitable tradeoffs of three pairs of principles that result 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.

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1. 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, 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 a federal claim could be brought in a federal court, even if no federal case is then pending.¹⁹⁹ 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 an 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).²⁰⁰ 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.²⁰¹ The Court's opinion in *San Remo* makes clear that

¹⁹⁹ See *supra* text accompanying notes 48–51.

²⁰⁰ 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 29, 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 as to the propriety of abstention without discretion. Cf. David L. Shapiro, *Jurisdiction and Discretion*, 60 *N.Y.U. L. Rev.* 543, 543–45 (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, e.g., Friedman, *supra* note 29, at 1269 n.184.

²⁰¹ 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* suggests that, but for a valid *England* reservation, the rules of *res judicata* require that preclusive effect be given to state court judgments. Profes-

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a federal court must give full preclusive effect to the decision of a state court, even when the federal court has abstained pending the state court's decision.²⁰² *San Remo* strongly suggests that any attempt to vest litigants, or state courts, with the power to create an exception to this standard preclusive effect would be inconsistent with the full faith and credit statute.²⁰³ Professor Friedman's proposal also might raise legitimacy concerns: a court system's legitimacy rests in some part on the notion that preclusive effect is not generally subject to the court's discretion.²⁰⁴ Moreover, it seems inconsistent with standard understandings of preclusion and precedential effect to allow a state court to create a limited exception to a federal rule regarding full faith and credit. In this sense, such an attempt might also jeopardize the legitimacy of the standard practice of having federal courts afford state court decisions full faith and credit.

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 abstention²⁰⁵ 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

sor 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. See Sterk, *supra* note 93, at 272–77. 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 29, 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.

²⁰² See *supra* notes 94–97 and accompanying text.

²⁰³ See *supra* note 97.

²⁰⁴ But see Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements* 40–41 (Univ. of Chicago Pub. Law & Legal Theory Working Paper No. 227, 2008), available at <http://ssrn.com/abstract=1217876>.

²⁰⁵ See *supra* note 200.

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,²⁰⁶ 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 as well as friction between judicial systems.²⁰⁷

Moreover, even without all of the potential precedential, constitutional, and statutory problems, the benefits of allowing federal courts greater opportunity to resolve federal law issues in state court cases may not be worth the resulting potential for strife. Professor Friedman's proposal would largely displace the state courts in contributing to the development of, and even the dialogue over, issues of federal law. Professor Bator has emphasized the relationship between continuing to involve state courts in these activities and the willingness of state courts both to take this role seriously and to uphold federal rights.²⁰⁸ By taking affirmative steps to minimize state courts' role in litigating federal issues, one runs the risk that they will react negatively to requests to adjudicate federal issues in the remaining state cases in which such issues arise.²⁰⁹ Thus, to the extent that entirely extinguishing the state court role in federal litigation is impossible, one should instead foster acceptance of state courts in that role.²¹⁰

That is not to say that state courts should be, or are, given free rein to decide issues of federal law as they wish. Collateral federal court review of state court criminal convictions under the writ of habeas corpus provides an important limit on state court free-

²⁰⁶ See supra notes 94–97 and accompanying text (explaining *San Remo*'s holding that preclusion applies even where a valid *England* reservation is made).

²⁰⁷ The proposal also would decrease dialogue between the state and federal judiciaries to the extent that state courts would less frequently decide matters of federal law.

²⁰⁸ See Bator, supra note 48, at 623–29.

²⁰⁹ See id.

²¹⁰ See id; cf. Bezanson, supra note 87, 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.”).

dom.²¹¹ Note, however, that such review is available only in the criminal context, and then only to challenge alleged state court failures to vindicate certain federal constitutional rights. Note further that federal court freedom to vacate a state court ruling is limited by requirements—such as the procedural default rule²¹² and exhaustion requirements²¹³—that presume the federal court must otherwise respect the finality of state court proceedings and state court procedures. That federal court intervention in state court proceedings is thus limited reflects some understanding on the part of Congress and policymakers that broader divestiture of state court prerogatives might not be desirable. Indeed, beyond the scope of habeas, the Supreme Court and Congress have, to the contrary, seen fit to limit the ability of federal courts to interfere with state court proceedings. Consider the Court's decision in *Younger v. Harris*,²¹⁴ which bars federal courts from enjoining ongoing state criminal proceedings,²¹⁵ or the Anti-Injunction Act that dates from 1793 and bars federal courts from “grant[ing] 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 or effectuate its judgments.”²¹⁶

As Professors Randy Hertz and James Liebman observe, federal habeas review acts as a “surrogate” for direct Supreme Court review of state court criminal proceedings.²¹⁷ The important liberty interests at issue in criminal proceedings and the limited resources of the Supreme Court to conduct direct review combine to make such surrogacy appropriate, in spite of the attendant costs. Professor Friedman's proposed expansion of this surrogacy would be extravagantly large. So, too, would the attendant costs be much larger, and the marginal benefits likely smaller.

²¹¹ See 28 U.S.C. § 2254 (2000 & Supp. 2007).

²¹² See generally 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.2 (5th ed. 2005 & Supp. 2007).

²¹³ See generally *id.* ch. 23.

²¹⁴ 401 U.S. 37 (1971).

²¹⁵ See *id.* at 43–54; see also *id.* at 43 (“Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.”).

²¹⁶ 28 U.S.C. § 2283 (2000).

²¹⁷ See 1 Hertz & Liebman, *supra* note 212, § 2.4.

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.²¹⁸ Moreover, recent statutory enactments—such as the Class Action Fairness Act of 2005²¹⁹—and court cases—such as the Supreme Court’s decision in *Grable & Sons*²²⁰—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 certification²²¹ either raises concerns about the state courts’ willingness, and capacity, to respond to a 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

²¹⁸ Indeed, there is some evidence that, even now, states are receiving considerably more certification requests than they can, or would prefer to, handle. While Professor Friedman asserts that “most diversity cases do not require certification” since “their disposition rests on state law that is sufficiently settled,” Friedman, *supra* note 29, 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).

²¹⁹ See *supra* note 30 and accompanying text.

²²⁰ See *supra* notes 31–32 and accompanying text.

²²¹ See *supra* text accompanying notes 33–41.

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face of unwillingness or perhaps even limited capacity to accommodate a much larger number of such requests.²²²

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, presenting 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 courts²²³ 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 those appeals involving federal issues. His approach, in other words, endeavors to balance workload and responsibility between judicial systems, which seems likely to foster cooperation and comity. The proposal performs less favorably with respect to preserving dialogue between the state and federal judiciaries, and with respect to 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.²²⁴ Judge Newman's proposal would also

²²² 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 17, at 1690–91 n.74, by strong suggestion, or by other methods of attempted coercion grounded in power disparity.

²²³ See *supra* text accompanying notes 54–58.

²²⁴ 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 120–121. The Court 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, 144–45 (1996) (explaining the

require the decomposition of large numbers of cases and therefore would generate sizable costs.

Judge Calabresi's suggestion for a modified certification procedure²²⁵ 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 for federal courts first 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.²²⁶ By requiring federal courts to offer a suggested

Supreme Court normally does not grant certiorari "solely to review what purports to be an application of state law," but the Court will do so when "the alternative is allowing blatant federal-court nullification of state law"; see generally Nash, *supra* note 147, at 990–91 (discussing *Leavitt* and its implications). 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 192.

²²⁵ See *supra* notes 42–44 and accompanying text.

²²⁶ 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 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.

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interpretation of 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,²²⁷ so too would Judge Calabresi's modified certification procedure tend to foster such a dialogue with respect to state law issues. Still, the approach is not devoid of possible drawbacks: when federal courts use certification selectively, they identify issues of state law that are of greater importance. This practice itself may be beneficial and provide useful dialogue between the federal and state court systems.

2. *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,²²⁸ it was created in the interest of allowing federal courts to avoid the unnecessary decision of difficult constitutional questions.²²⁹ Indeed, *Pullman* abstention is not permitted solely to allow state court resolution of matters of state law.²³⁰ 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

Calabresi, *supra* note 42, 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.

²²⁷ 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 until it has “fully percolated” in the lower courts).

²²⁸ See Bezanson, *supra* note 87, at 1114.

²²⁹ See *id.* at 1111–14; see also R.R. Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941).

²³⁰ See *supra* note 179 and accompanying text.

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 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.

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 respond 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.²³¹

In the end, it is unlikely that many state courts will be explicit as to their reliance upon bias.²³² Thus, it would also make sense to have federal courts announce that they will be inclined against certifying questions to state courts where there is evidence that prior

²³¹ 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 120–121, 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, although the freedom would have to be considerably constrained lest federal courts be given too much discretion simply to ignore state court decisions with which they disagreed.

²³² 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 134, one would not expect many court opinions to exhibit similar candor.

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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 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.

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 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.