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Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction

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DISTINGUISHING CERTIFICATION FROM ABSTENTION IN DIVERSITY CASES: POSTPONEMENT VERSUS ABDICATION OF THE DUTY TO EXERCISE JURISDICTION

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I. INTRODUCTION

When a federal court grants an abstention-based dismissal in a diversity case, the court abdicates its strict duty to exercise its jurisdiction where that jurisdiction has been properly invoked. Thus, a federal court may not dismiss a case on abstention grounds unless it concludes that "exceptional circumstances" require the dismissal. When a federal court grants an abstention-based stay in a diversity case, however, the court does not violate its jurisdictional duty. According to the Supreme Court, an abstention-based stay is merely a postponement of the exercise of jurisdiction. Although the Court has characterized an abstention-based stay as a delay rather than an abdication of the jurisdictional exercise, the Court surprisingly has not approved the liberal use of such stays. Instead, the Court has limited abstention-based stays, like abstention-based dismissals, to exceptional circumstances.

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In the certification context, unlike the abstention context, the Court has never addressed whether a federal court violates its duty to exercise its jurisdiction when it grants a certification-based stay in a diversity case. Several scholars have argued, however, that indeed certification in diversity cases constitutes an abdication of the jurisdictional duty.[1] Likewise, many of the federal circuit courts treat certification of unsettled questions of state law in diversity cases as an abdication of jurisdiction.[2] Accordingly, these circuits restrict certification, like abstention, to exceptional circumstances.[3]

This Article argues that a federal court does not abdicate its duty to exercise its jurisdiction when it certifies a question in a diversity case; instead, the court merely postpones the exercise of its jurisdiction. Thus, federal courts need not limit certification in diversity cases to exceptional circumstances. To substantiate this argument, Part II of this Article explains the pertinent abstention doctrines and the extension of abstention principles from suits for equitable relief to actions for damages. Part II also explains the development of the Supreme Court's distinction between abstention-based dismissals and abstention-based stays. Part III briefly describes certification, discusses the Supreme Court's certification case law, and establishes that the Court itself has distinguished certification from abstention. Part IV reviews the federal circuits' certification case law. This survey shows that several circuits, without explanation, equate certification with abstention and therefore require exceptional circumstances before they will certify.

Part V synthesizes Parts II, III and IV and demonstrates that certification is distinguishable from abstention. Specifically, Part V contends that, contrary to the Supreme Court's conclusion, abstention-based stays in diversity cases result in the relinquishment of jurisdiction because they entail a full round of litigation in a state court system and therefore require all or an essential part of the suit to be litigated in a state forum. Consequently,

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1. *See, e.g.*, Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 728-31 (1969) (arguing that certification constitutes "an abdication of the responsibility imposed by Congress to adjudicate cases when federal jurisdiction has been properly been invoked"); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1676, 1729-40 (2003) ("[C]ertification is inconsistent with the statutory diversity jurisdiction conferred upon the federal courts by Congress to the extent that it improperly allows state courts to hear cases that fall within the statutory grant."); Geri J. Yonover, *A Kinder, Gentler* Erie: *Reining in the Use of Certification*, 47 ARK. L. REV. 305, 312 (1994) (arguing that certification results in "frustration of the constitutional grant of diversity and supplemental jurisdiction to the federal courts").

2. *See infra* Part IV.A.

3. *See infra* Part IV.A.

abstention-based stays are the functional equivalent of abstention-based dismissals. In contrast, certification-based stays in diversity cases actually result in postponement of the exercise of jurisdiction because certification is simply a device that assists courts in the adjudicatory process. Certification allows a federal court, in effect, to research a question of state law and does not require fact-finding or application of law to facts. Thus, because certification does not involve the abdication of duty, it is distinguishable from abstention. Federal courts therefore should not employ abstention principles to restrict the use of certification.

Part VI briefly addresses several secondary factors that federal courts sitting in diversity consider in deciding whether to certify. Part VI concludes that at least some of these factors are highly relevant to the certification decision, and so it is these aspects of certification—not the exceptional circumstances requirement of abstention—to which the courts should turn their focus.

II. ABSTENTION

When Congress enacted the jurisdictional statutes,[4] it conferred upon the federal courts a "strict duty" to adjudicate controversies where their jurisdiction is properly invoked.[5] This "duty" derives from the "undisputed constitutional principle that Congress, and not the Judiciary, defines the

4. *See, e.g.*, 28 U.S.C. § 1331 (2000) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); § 1332(a)(1) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between – (1) citizens of different States . . . ."); § 1441(a) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

5. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996); *see also* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (stating that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them"); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959) (referring to the "duty of a District Court to adjudicate a controversy properly before it"); Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943) ("The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts."); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

scope of federal jurisdiction within the constitutionally permissible bounds."[6] Nevertheless, the federal courts' obligation to decide cases is not "absolute."[7] The Supreme Court has long held that federal courts have the power to abstain.[8] When a federal court abstains, it either: (1) declines to exercise its jurisdiction altogether by remanding a removed case to state court or dismissing the case outright,[9] or (2) "postpones" the exercise of its jurisdiction by staying the federal proceedings and remitting the parties to a state trial court to start a new lawsuit in order to resolve an unsettled question of state law.[10] Given the courts' rigorous duty, however, the power to abstain is limited to "exceptional circumstances where the order to the parties to

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6. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989) (citing Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922)).

7. *Quackenbush*, 517 U.S. at 716.

8. *See, e.g.*, *Colo. River*, 424 U.S. at 814-17 (discussing the different categories of abstention and citing many cases in which the Supreme Court has approved of abstention). There is a longstanding debate in the abstention literature as to whether the Supreme Court has *validly* held that federal courts have the power to abstain. *Compare* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 114-15 (1984) (arguing that abstention violates separation of powers principles), *with* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 574, 588 (1985) (arguing that abstention "does not endanger, but rather protects, the principle of separation of powers" and "that the responsibility of the federal courts to adjudicate disputes does and should carry with it significant leeway for the exercise of reasoned discretion in matters relating to federal jurisdiction"). *See generally* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 2 (1990) ("[T]he boundaries of federal jurisdiction – and the authority to define that jurisdiction – evolve through a dialogic process of congressional enactment and judicial response."); Daniel J. Meltzer, Jurisdiction and Discretion *Revisited*, 79 NOTRE DAME L. REV. 1891 (2004) (discussing the themes set forth in David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985)). This Article does not purport to enter this particular debate. Instead, this Article assumes, based on Supreme Court precedent, that federal courts have the authority to abstain in certain circumstances.

9. *See, e.g.*, Burford v. Sun Oil Co., 319 U.S. 315 (1943) (affirming a district court's dismissal of a complaint on abstention grounds); *see also Meredith*, 320 U.S. at 235 (citing numerous examples of abstention-based dismissals).

10. *See, e.g.*, La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30-31 (1959) (affirming a district court's stay of proceedings on abstention grounds); *id.* at 27-28 (discussing abstention-based stays); *see also* Gerald M. Levin, Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 346 (1963) ("When a federal court abstains, the litigants bring a separate action, often for declaratory judgment, in the appropriate state court. . . . Since the ultimate purpose of abstention is to secure an authoritative determination of state law, the litigants must then proceed to the final appellate court through the required tiers of the state judiciary. . . ." (footnote omitted)).

repair to the state court would clearly serve an important countervailing interest."[11]

A. Abstention and Suits for Equitable Relief

The Court has "located the power to abstain in the historic discretion exercised by federal courts 'sitting in equity'" to decline to exercise their jurisdiction.[12] Thus, it is not surprising that the Court initially applied abstention principles to suits for equitable relief. In these cases, the Court balanced the federal duty to decide cases against the state interests involved. The Court approved of abstention only where it found that principles of federal-state comity dictated that all or part of the dispute should be resolved in a state court.

For example, in *Railroad Commission of Texas v. Pullman Co.*,[13] the Court ruled that the district court should have abstained in a federal constitutional case involving the interpretation of an ambiguous state statute.[14] In *Pullman*, the Texas Railroad Commission ordered that all sleeping cars on trains must be operated by Pullman conductors.[15] At that time, all of the conductors were white.[16] The Pullman Company and the affected railroads sued in federal court to enjoin the Commission's order.[17] The Pullman porters, who were all black, intervened in the suit as plaintiffs.[18]

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11. *Colo. River*, 424 U.S. at 813 (internal quotation marks omitted) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)); *see also Quackenbush*, 517 U.S. at 716 ("[F]ederal courts may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an important countervailing interest . . . ."); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959) ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.").

12. *Quackenbush*, 517 U.S. at 718; *see also id.* at 717 ("[I]t has long been established that a federal court has the authority to decline to exercise its jurisdiction when it 'is asked to employ its historic powers as a court of equity.' This tradition . . . explains the development of our abstention doctrines." (citation omitted)).

13. 312 U.S. 496 (1941).

14. *Id.* at 501.

15. *Id.* at 497-98.

16. *Id.* at 497.

17. *Id.* at 498.

18. *Id.* at 497-98.

The plaintiffs argued that the Commission's order violated a Texas statute and the United States Constitution.[19]

The Supreme Court found that under Texas law, it was unclear whether the state statute at issue authorized the Commission's order.[20] Instead of interpreting Texas law itself, the Court remanded the case to the district court with instructions to stay the federal proceedings and remit the parties to state court to obtain an authoritative interpretation of Texas law from the Texas courts.[21] The Court based its decision on "important considerations of policy in the administration of federal equity jurisdiction."[22] The Court reasoned that if the state courts found that the Commission violated state law by issuing its order, the litigation would end.[23] Thus, by sending the parties to state court, the federal court would have avoided adjudicating a "substantial constitutional issue" that "touch[ed] a sensitive area of social policy" or issuing an injunction against the order of a state agency.[24] On the other hand, if the state court found that the Commission's order violated state law, the parties could return to federal court for adjudication of the constitutional issues.[25] The district court would no longer be faced with issuing a "premature constitutional" ruling based on unclear state law, but instead could issue a decision that would not later be mooted by a state court's interpretation of the statute.[26]

According to the Court, abstention under the circumstances in *Pullman* demonstrated "'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary."[27] Thus, the court's use of its equitable discretion to stay the federal constitutional litigation and obtain clarification of state law "further[ed] the harmonious relation between state and federal authority."[28]

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19. *Id.* at 498.
20. *Id.* at 498-99.
21. *Id.* at 501-02.
22. *Id.* at 501.
23. *Id.* at 498, 501.
24. *Id.* at 498.
25. *Id.* at 501.
26. *Id.* at 499-500 ("The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.").
27. *Id.* at 501 (quoting Di Giovanni v. Camden Ins. Ass'n, 296 U.S. 64, 73 (1935)).
28. *Id.*

Similarly, in *Burford v. Sun Oil Co.*,[29] a case decided two years after *Pullman*, the Supreme Court upheld a district court's decision to abstain based on considerations of federal-state comity. In *Burford*, the Texas Railroad Commission issued a permit to G.E. Burford to drill four oil wells.[30] Sun Oil Company and The Magnolia Petroleum Company then sued the Railroad Commission, Burford and another oil company in federal district court, seeking cancellation of the permit or, in the alternative, an injunction to prevent operation of the wells.[31] The "principal issue" was whether the Commission's order was reasonable.[32] Texas had developed a "complex administrative system"[33] to address such claims, and thus had "demonstrated [an] interest in maintaining uniform review of the Commission's orders."[34] Nevertheless, "the federal courts had, in the years preceding *Burford*, become increasingly involved in reviewing the reasonableness of the Commission's orders."[35]

The district court held that the suit should be brought in a state forum and dismissed the case.[36] Ultimately, the Supreme Court concluded that the district court had properly declined to exercise its jurisdiction and affirmed the district court's dismissal of the complaint.[37] The Court identified a number of "unique" grounds that favored dismissal[38] and reasoned that dismissal "was appropriate because the availability of an alternative, federal forum threatened to frustrate the purpose of the complex administrative system that Texas had established" to adjudicate the type of claims at issue in

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29. 319 U.S. 315 (1943).

30. Sun Oil Co. v. Burford, 124 F.2d 467, 468 (5th Cir. 1941), *rev'd*, 319 U.S. 315 (1943).

31. *Id.*

32. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723 (1996) (citing *Burford*, 319 U.S. at 317).

33. *Id.* at 725 (citing *Burford*, 319 U.S. at 332).

34. *Id.* at 724.

35. *Id.*

36. *Sun Oil Co.*, 124 F.2d at 468.

37. *Burford*, 319 U.S. at 334.

38. In *Quackenbush*, a case decided fifty-three years after *Burford*, the Court explained that it "approved the District Court's dismissal of the complaint [in *Burford*] on a number of grounds that were unique to that case," including: (1) "the difficulty of the regulatory issues presented"; (2) "the demonstrated need for uniform regulation in the area"; and (3) "[m]ost importantly . . . the detrimental impact of ongoing federal court review of the Commission's orders, which . . . had already led to contradictory adjudications by the state and federal courts." *Quackenbush*, 517 U.S. at 725.

Burford.[39] Thus, as in *Pullman*, the Court found that "a sound respect for the independence of state action require[d] the federal equity court to stay its hand."[40]

In contrast to its decisions in *Pullman* and *Burford*, in *Meredith v. City of Winter Haven*,[41] the Supreme Court held that an appellate court improperly exercised its discretion to abstain. The plaintiffs in *Meredith* owned bonds that had been issued and were redeemable by the City of Winter Haven, Florida.[42] They brought suit in federal district court, seeking both declaratory and injunctive relief, to prevent the City from redeeming the bonds without paying interest.[43] The court's jurisdiction was based on diversity of citizenship, and the only issues in the case involved the proper interpretation of Florida law.[44]

The district court found that the plaintiffs had failed to state a cause of action under Florida law and dismissed the complaint.[45] The court of appeals concluded that the applicable Florida constitutional and statutory law was uncertain and therefore ordered that the case be dismissed without prejudice so that the plaintiffs could proceed in state court.[46] The Supreme Court framed the question before it as whether the appellate court "rightly declined to exercise its jurisdiction" because the case turned on unclear Florida law.[47] The Court concluded that the dismissal was improper, reversed the judgment of the appellate court, and remanded the case.[48]

The *Meredith* Court opined that, given the federal courts' strict duty to exercise their jurisdiction, they cannot decline to do so "merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state."[49] Thus, the *Meredith* Court held

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39. *Id.* at 725 (citing *Burford*, 319 U.S. at 332). In *Burford*, the plaintiffs invoked federal jurisdiction on both diversity and federal question grounds. 319 U.S. at 317. In addition to their state law claim, the plaintiffs asserted that the Commission's order violated the U.S. Constitution. *Id.* Thus, the dismissal in *Burford* "had the effect of avoiding a federal constitutional issue." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 815 n.21 (1976). Nevertheless, the presence of the federal question in *Burford*, "was not an additional ground for abstention." *Id.*

40. *Burford*, 319 U.S. at 334.

41. 320 U.S. 228 (1943).

42. *Id.* at 229-30.

43. *Id.*

44. *Id.* at 229.

45. *Id.* at 230.

46. *Id.* at 230-31.

47. *Id.* at 229.

48. *Id.* at 238.

49. *Id.* at 234-35.

that unlike the prior cases in which it had approved abstention, there were no exceptional circumstances present in the case at bar that justified an abstention-based dismissal.[50] In contrast to *Pullman* and *Burford*, *Meredith* did not involve a federal constitutional question that could be mooted by remitting the parties to state court[51] or "interference with [state] agencies or with the state courts."[52] It simply involved uncertain Florida law regarding the extent of the City's liability on the bonds.

Moreover, the *Meredith* Court emphasized that the purpose of the diversity statute is to give litigants "an opportunity . . . to assert their rights in the federal rather than in the state courts."[53] The Court explained that to deny the plaintiffs this option absent exceptional circumstances "would thwart the purpose of the jurisdictional act,"[54] further delay the litigation,[55] and penalize the plaintiffs without justification for invoking diversity jurisdiction.[56] Finally, the Court recognized that while only Florida's highest court could "settle" the state law questions involved, the federal courts could at least "adjudicate the rights of the parties" before them.[57]

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50. *Id.* at 236.

51. *Id.* (citing R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941)).

52. *Id.* at 237.

53. *Id.* at 234.

54. *Id.* at 235; *see also id.* at 237 ("We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess.").

55. *Id.* at 237.

56. *Id.* ("To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize [plaintiffs] for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."); *see also* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 196-97 (1959) ("To order [the plaintiffs] out of the federal court [absent exceptional circumstances] would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties . . . . It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them 'that promptness of decision which in all judicial actions is one of the elements of justice.'" (quoting Forsyth v. City of Hammond, 166 U.S. 506, 513 (1897)).

57. *Meredith*, 320 U.S. at 238.

B. Abstention and Actions for Damages

Although the Court first applied abstention principles to suits for equitable relief, the court has not limited abstention to such suits.[58] Instead, the Court has permitted federal courts to abstain from exercising their jurisdiction whenever they have discretion to grant or deny relief.[59] Abstention principles consequently apply not only in suits for injunctive relief, but also in declaratory judgment actions.[60] Moreover, the Court has further extended abstention principles to common law actions for damages.[61]

In *Louisiana Power & Light Co. v. City of Thibodaux*,[62] for example, the City of Thibodaux, Louisiana, filed a petition in Louisiana state court "asserting a taking of the [Power and Light Company's] land, buildings, and equipment."[63] The defendant removed the case to federal district court on the basis of diversity of citizenship[64] and sought compensation for the taking.[65] A Louisiana statute appeared to permit the taking, but the statute had never been interpreted by Louisiana courts.[66] At the same time, the Attorney General had issued an opinion in another "strikingly similar" case stating that such acquisitions were prohibited.[67] Given the uncertainty in Louisiana law, the district judge stayed the proceedings until the Louisiana Supreme Court had "been afforded an opportunity to interpret" the statute at issue.[68] The Fifth Circuit reversed, but the Supreme Court concluded that the district court had properly exercised its discretion to stay the action "pending the

58. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 718 (1996).

59. *Id.*

60. *Id.*

61. *Id.* at 719. This Article uses the phrases "damages action," "action for damages," and "actions at law" (as well as other variations of these phrases) interchangeably to refer to actions seeking monetary relief as opposed to equitable relief. *See* Lewis Yelin, Burford *Abstention in Actions for Damages*, 99 COLUM. L. REV. 1871, 1873 n.10 (1999) ("One common way of distinguishing equitable actions from actions at law is that, in the former, the court has discretion to adapt its relief to the circumstance of the case, while in the latter, the relief afforded is normally money damages."). Although this "distinction is too simple . . . [it will] suffice for present purposes." *Id.* ("This distinction is too simple . . . since relief in a common-law action seeking issuance of a prerogative writ (such as mandamus or prohibition) is discretionary.").

62. 360 U.S. 25 (1959).

63. *Id.* at 25.

64. *Id.*

65. *See id.* at 43 (Brennan, J., dissenting); *see also Quackenbush*, 517 U.S. at 720.

66. *Thibodaux*, 360 U.S. at 30.

67. *Id.*

68. *Id.* at 26.

institution of a declaratory judgment action and subsequent decision by the Supreme Court of Louisiana."[69] Thus, the Court reversed the Fifth Circuit and reinstated the district court's stay order.[70]

The Court first recognized that the case before it was an action "at law" seeking damages and that its prior abstention cases were suits in equity.[71] The Court stated, however, that its prior abstention cases "did not apply a technical rule of equity procedure."[72] Instead, they were based on considerations of federal-state comity.[73] Thus, the Court explained, it previously had approved abstention where it was necessary to avoid "serious disruption by federal courts of state government or needless friction between state and federal authorities."[74] The Court concluded that even though the case at bar was a damages action, abstention was appropriate.[75] It reasoned that because the case involved eminent domain, a subject that is "intimately involved with [a state's] sovereign prerogative,"[76] abstention was warranted to maintain "harmonious federal-state relations in a matter close to the political interests of a State."[77] Thus, the Court applied abstention principles to an action for damages and reinstated the district court's stay order.[78]

In upholding the district court's order, the Court emphasized that the lower court "had only *stayed* the federal case pending adjudication of the dispute in state court," rather than dismissing the suit as the *Burford* Court

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69. *Id.* at 30.

70. *Id.*

71. *Id.* at 35 (Brennan, J., dissenting).

72. *Id.* at 28 (majority opinion).

73. *Id.* at 34 (Brennan, J., dissenting).

74. *Id.* at 28 (majority opinion).

75. *Id.* at 30.

76. *Id.* at 28.

77. *Id.* at 29. As one commentator has explained, "The Supreme Court's focus on comity as the most essential component in the balance of federal/state interests for federal abstention purposes has allowed [the] Court to expand the equitable doctrine of abstention to cover actions seeking damages as well as those seeking equitable relief." Stephanie Dest, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 278 (1989).

78. *Thibodaux*, 360 U.S. at 30. In upholding the district court's stay order, the Supreme Court also recognized that the Louisiana state courts were "the only tribunal[s] empowered to speak definitively" on the meaning of the eminent domain statute at issue. *Id.* at 29. The district court could only "make a dubious and tentative forecast" as to the proper interpretation of the statute. *Id.* Thus, if the federal courts interpreted and applied the statute in the case at bar, then it "would be the only case in which the Louisiana statute [was] construed as [the federal courts] would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana different from [the federal courts']." *Id.* at 30.

had done.[79] The Court explained that the district court would continue to participate in the litigation because once the state court interpreted the statute, the case would be returned to the district court.[80] If the state courts upheld the taking, then the district court would "award compensation."[81] Furthermore, if the parties did not file and obtain a declaratory judgment in a timely fashion, then "the District Court, having retained complete control of the litigation, [would] doubtless assert it to decide . . . the question of the meaning of the state statute."[82]

By stressing that the district court had merely stayed the proceedings, the *Thibodaux* Court recognized the distinction between an abstention-based stay and an abstention-based remand or dismissal.[83] Traditionally, courts lacked discretionary power to decline to exercise their jurisdiction in actions "at law" except in very limited circumstances and therefore typically could not dismiss common law damages actions.[84] Thus, by analogy, an abstention-based remand to state court in *Thibodaux* would have been improper because the defendant sought compensation for the taking.[85] According to the Court, however, the stay in *Thibodaux* was acceptable because a stay, unlike a dismissal, does "not constitute abnegation" by a federal court of its duty to decide the case before it.[86] Instead, a stay merely *postpones* the court's exercise of its duty to adjudicate the controversy until a later time.[87] Thus, while an abstention-based remand in *Thibodaux* would have represented an inappropriate abdication of duty, the district court's abstention-based stay

79. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 721 (1996) (citing *Thibodaux*, 360 U.S. at 29).

80. *Thibodaux*, 360 U.S. at 29.

81. *Id.*

82. *Id.*

83. *See Quackenbush*, 517 U.S. at 721. Indeed, the *Thibodaux* Court distinguished *Meredith* on the ground that *Meredith* involved an abstention-based dismissal, while *Thibodaux* involved an abstention-based stay. The *Thibodaux* Court characterized the issue in *Meredith* as "whether jurisdiction must be surrendered to the state court" due to uncertain state law, while the issue in *Thibodaux* was whether the district judge should be prohibited from instituting a stay order to seek an interpretation of unclear state law from the Louisiana courts. 360 U.S. at 28 n.2. The Court concluded that a district court properly exercises its discretionary power when it stays proceedings in order to clarify state law, but not when it dismisses a case for the same reason. *Id.* at 28 & n.2, 29.

84. *Quackenbush*, 517 U.S. at 721.

85. *See id.*

86. *Thibodaux*, 360 U.S. at 29.

87. *Quackenbush*, 517 U.S. at 719 (citing *Thibodaux*, 360 U.S. at 29).

order was a "wise and productive discharge" of its duty to exercise jurisdiction.[88]

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88. *Id.* at 721 (citing *Thibodaux*, 360 U.S. at 29); *see also* Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959). In 1968, the Court decided *Kaiser Steel*, a case very similar to *Thibodaux*. In *Kaiser*, the plaintiff filed suit in federal court under diversity jurisdiction claiming illegal trespass by the defendant and seeking damages. *Kaiser Steel Corp.*, 391 U.S. at 593. The defendant conceded that it had trespassed, but claimed that a state statute permitted the trespass for the purpose of using water rights the state had granted to it. *Id.* Because state law was unclear and the same issues were pending before the state courts in a declaratory judgment action, the defendant requested a stay until the state courts clarified the law. *Id.* at 593-94. Both the federal district court and the court of appeals denied the defendant's motion to stay. *Id.* at 594.

The Supreme Court reversed in a brief per curiam opinion. *Id.* at 593-94. The Court reasoned that:

> The state law issue [was] . . . of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, [was] a truly novel one. The question [would] eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action [was] actually pending there, in all likelihood that resolution [would] be forthcoming soon. Sound judicial administration require[d] that the parties in this case be given the benefit of the same rule of law which [would] apply to all other businesses and landowners concerned with the use of this vital state resource.

Id. at 594. Thus, the Court remanded the case "with directions that the action be stayed." *Id.* The Court concluded its opinion by stating, "Federal jurisdiction will be retained in the District Court in order to insure a just disposition of this litigation should anything prevent a prompt state court determination." *Id.*

Like *Thibodaux*, *Kaiser* was an action for damages. Thus, the abstention-based stay ordered by the Court in *Kaiser*, like the stay in *Thibodaux*, was proper because it would merely postpone the district court's exercise of its jurisdiction. By staying the proceedings, the district court would not improperly abdicate its duty to decide as it would if it dismissed the case and remitted the parties to state court.

County of Allegheny v. Frank Mashuda Co., unlike *Thibodaux* and *Kaiser*, involved an abstention-based *dismissal* by a district court in a diversity action for damages. In *County of Allegheny*, the Allegheny County Board of Commissioners appropriated the plaintiffs' property under the applicable state eminent domain statutes and then leased the property to a company for "its private business use." *Id.* at 187. The plaintiffs brought suit in federal court under diversity jurisdiction alleging that settled state law prohibited the taking of private property for private, rather than public, use. *Id.* at 187-88. They sought ouster of the County and the company from the property, as well as damages. Although the plaintiff sought damages, the district court in *County of Allegheny*, in contrast to the district court in *Thibodaux*, dismissed the action "on the ground that it should not interfere with the administration of the affairs of a political subdivision acting under color of State law in a condemnation proceeding." *Id.* at 188 (internal quotation marks omitted). The Third Circuit reversed, and the Supreme Court affirmed.

Thus, while the Court upheld an abstention-based *stay* in *Thibodaux*, an eminent domain case where damages were sought, it would not approve an abstention-based *dismissal* in

Thirty-seven years later in *Quackenbush v. Allstate Insurance Co.*, the Supreme Court directly confronted the question of whether federal courts can exercise their discretion to remand or dismiss actions for damages, as opposed to those for discretionary relief, on abstention grounds.[89] In *Quackenbush*, the California insurance commissioner sued Allstate Insurance Company in state court "seeking contract and tort damages for Allstate's alleged breach of certain reinsurance agreements, as well as a general declaration of Allstate's obligations under those agreements."[90] Invoking diversity jurisdiction, Allstate removed the case and filed a motion to compel arbitration under the Federal Arbitration Act.[91] The commissioner then moved for remand, arguing that the district court should abstain under *Burford* because its resolution of the case might interfere with California's regulation of the insurance industry.[92] Specifically, the commissioner indicated that there was "a hotly disputed question of state law" involved in the case, and that this question was already pending before the state courts.[93]

In contrast to the district court in *Thibodaux*, the district court in *Quackenbush* remanded the case to state court on *Burford* abstention grounds even though it was an action for damages.[94] The district court primarily was concerned that the state and federal courts might rule differently on the disputed issue of state law and thereby produce inconsistent decisions.[95] The Ninth Circuit reversed,[96] and the Supreme Court affirmed.[97] The Court concluded that abstention-based remands or dismissals of damages actions are an improper use of the federal courts' discretionary power; however, federal courts may apply abstention principles to stay damages

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County of Allegheny, also an eminent domain case where damages were sought. *Quackenbush*, 517 U.S. at 720 (distinguishing "between abstention-based remand orders or dismissals and abstention-based decisions merely to stay adjudication of a federal suit"). Furthermore, while *Thibodaux* and *Kaiser* are distinguishable because they involved stays while *County of Allegheny* involved a dismissal, they also differ from *County of Allegheny* in that they involved unclear issues of state law while the state law in *County of Allegheny* was settled. *Id.* at 720-21; *see also Thibodaux*, 360 U.S. at 31 (Stewart, J., concurring) ("[S]ince the controlling state law is clear and only factual issues need be resolved, there is no occasion in the interest of justice to refrain from prompt adjudication.").

89. *Quackenbush*, 517 U.S. 706.
90. *Id.* at 709.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 710.
95. *Id.* at 709-10.
96. *Id.* at 710.
97. *Id.* at 711.

proceedings.[98] Because the case at bar was an action for damages, "the District Court's remand order was an unwarranted application of the *Burford* doctrine."[99]

In reaching its decision, the Court recognized that it had long held that federal courts may dismiss cases where equitable relief is sought and exceptional circumstances are present.[100] The Court also acknowledged that over time it had expanded the power of federal courts to decline to exercise their jurisdiction to all cases in which discretionary relief is sought and exceptional circumstances are present.[101] The Court pointed out, however, that in prior abstention cases where damages were sought, it had only permitted the federal court "to enter a stay order that *postpones* adjudication of the dispute, not to dismiss the federal case altogether."[102] Quoting *Thibodaux*, the Court again explained that "an order merely staying the action 'does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition.'"[103]

Thus, the *Quackenbush* Court confirmed that in actions "at law," federal courts do not have the power to remand or dismiss on abstention grounds.[104] If they do so in actions for damages, they improperly abdicate their duty to exercise their jurisdiction.[105] Federal courts do, however, have the power to "apply[] abstention principles in damages actions to enter a stay" and send the parties to state court for resolution of a state law issue.[106] A stay in an action at law, in contrast to a remand or dismissal, does not constitute the "abnegation of judicial duty"; a stay is merely a postponement of adjudication.[107]

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98. *Id.* at 721.

99. *Id.* at 731.

100. *Id.* at 716.

101. *Id.* at 718.

102. *Id.* at 719 (citing La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28-30 (1959)).

103. *Id.* at 721 (quoting *Thibodaux*, 360 U.S. at 29).

104. *Id.*

105. *See id.*

106. *Id.* at 730.

107. *Id.* at 721. The *Quackenbush* Court stated at the end of its opinion that because it was deciding only the question of whether the district court's dismissal was appropriate, it was "unnecessary to determine whether a more limited abstention-based stay order would have been warranted on the facts of [the] case." *Id.* at 731. Nevertheless, the Court speculated that "*Burford* might support a federal court's decision to postpone adjudication of a damages action pending the resolution by the state courts of a disputed question of state law." *Id.* at 730-31. The Court reasoned that it might have been appropriate for the district court to enter a

C. Abstention Today

Federal courts abstain only in exceptional circumstances.[108] They do so "out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism."[109] The Court has recognized that under its abstention case law, various types of abstention exist.[110] While the Court has warned that the abstention doctrines "'are not rigid pigeonholes into which federal courts must try to fit cases,'"[111] there are nevertheless separate categories of abstention today. Three of these categories—*Pullman* abstention, *Thibodaux* abstention, and *Burford* abstention—are pertinent to this Article, and they are summarized below.[112]

First, federal courts abstain under *Pullman* "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law."[113] When a

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stay in the case at bar given the disputed issue of state law involved "and in the interest of avoiding inconsistent adjudications on that point." *Id.* at 731.

108. *Id.* at 716.

109. *Id.* at 723.

110. *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813-17 (1976) ("[Supreme Court] decisions have confined the circumstances appropriate for abstention to three general categories.").

111. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989) (quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n.9 (1987)).

112. The other two main categories of abstention are *Younger* abstention and *Colorado River* abstention. When federal courts engage in *Younger* abstention, they refrain "from hearing cases that would interfere with a pending state criminal proceeding . . . or with certain types of state civil proceedings." *Quackenbush*, 517 U.S. at 716; s*ee also* Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971). When federal courts engage in *Colorado River* abstention, they "refrain from hearing cases . . . which are duplicative of a pending state proceeding." *Quackenbush*, 517 U.S. at 717; *see also Colo. River*, 424 U.S. 800; Pennsylvania v. Williams, 294 U.S. 176 (1935). The Court has also approved of abstention in "cases whose resolution by a federal court might unnecessarily interfere with a state system for the collection of taxes." *Quackenbush*, 517 U.S. at 717 (citing Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943)).

113. *Colo. River*, 424 U.S. at 814 (internal quotation marks omitted) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959)). As Judge Friendly explained:

> One type of case almost universally recognized as appropriate for abstention is that of a state statute, not yet construed by the state courts, which is susceptible of one construction that would render it free from federal constitutional objection and another that would not. A federal court should not place itself in the position of holding the statute unconstitutional by giving it the latter construction, only to find that the highest court of the state will render the decision futile and unnecessary by

federal court abstains in these circumstances, it stays the proceedings in federal court even though the plaintiff typically seeks equitable relief and the court therefore has the discretionary power to dismiss. The court does so in order to preserve the federal constitutional issue for decision in a federal forum.[114]

Pullman abstention is inappropriate, however, when state law is clear.[115] In addition, it is improper when the statute at issue is not "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question."[116] Even if the state courts have never interpreted the statute, a federal court should not abstain under *Pullman* "[i]f the statute is not obviously susceptible of a limiting construction."[117]

Second, federal courts abstain under *Thibodaux* when a case "rais[es] issues 'intimately involved with the States' sovereign prerogative,' the proper adjudication of which might be impaired by unsettled questions of state law."[118] At least in diversity cases, however, abstention-based remands

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> adopting the former. Such a decision not only is a waste of judicial resources but provokes a needless collision between state and federal power.

HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 93 (1973) (footnote omitted).

114. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 101 n.17 (1980) ("Where a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. Abstention may serve only to postpone rather than to abdicate, jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary, or to obviate the risk of a federal court's erroneous construction of state law." (citations omitted)); England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 415 (1964) (compelling a litigant who properly asserts federal constitutional claims in a federal district court to have those claims decided by a state court "would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts" and with the duty of federal courts to exercise their jurisdiction when it is properly invoked); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941) (stating that the district court should not abstain unless the constitutional claim could be fully protected while the state law issue was resolved in state court).

115. City of Houston v. Hill, 482 U.S. 451, 469 (1987).

116. *Id.* at 468 (internal quotation marks omitted) (quoting Harman v. Forssenius, 380 U.S. 528, 534-35 (1965)).

117. *Id.*

118. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996) (citing La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959)); *see also Colo. River*, 424 U.S. at 814 (citing *Thibodaux* and *Kaiser* for the proposition that "[a]bstention is . . . appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.").

or dismissals based solely on unclear state law are not permitted under *Thibodaux*.[119]

Finally, federal courts abstain under *Burford* when "the State's interests in maintaining uniformity in the treatment of an essentially local problem . . . and retaining local control over difficult questions of state law bearing on policy problems of substantial public import" outweigh "the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court."[120] While there is no "formulaic test for determining when dismissal under *Burford* is appropriate,"[121] the exercise of discretion must, as with the other abstention doctrines, "reflect 'principles of federalism and comity.'"[122]

When a federal court decides that a case falls into one of the abstention categories and abstention is appropriate, the court must also decide whether to grant an abstention-based dismissal or remand or an abstention-based stay. To make this decision, the court must consider the type of relief sought in the case. As the *Quackenbush* Court explained:

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119. *See Colo. River*, 424 U.S. at 816 ("[T]he mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." (citing Meredith v. City of Winter Haven, 320 U.S. 228 (1943)).

120. *Quackenbush*, 517 U.S. at 728 (citations and internal quotation marks omitted). *Burford* abstention is sometimes placed in the same category as *Thibodaux* abstention. *See Colo. River*, 424 U.S. at 814-15 (discussing *Burford* abstention in the same category as *Thibodaux* abstention). *But see* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359-60 (1989) ("While we acknowledge that the various types of abstention are not rigid pigeonholes into which the federal courts must try to fit cases . . . the policy considerations supporting *Burford* . . . are sufficiently distinct to justify independent analyses.") (citations and internal quotation marks omitted)).

121. *Quackenbush*, 517 U.S. at 727.

122. *Id.* at 728 (quoting Growe v. Emison, 507 U.S. 25, 32 (1993)). In dicta, the *Quackenbush* Court concluded that *Burford* abstention was inappropriate on the facts of that case. *Id.* at 731. The Court reasoned that the federal interests were strong, while the state interests were comparatively weak. Specifically, "Allstate's motion to compel arbitration under the Federal Arbitration Act implicate[d] a substantial federal concern for the enforcement of arbitration agreements." *Id.* at 708. On the state interest side of the equation, however, the case appeared "to present nothing more than a run-of-the-mill contract dispute." *Id.* at 729. Furthermore, by the time the case reached the Supreme Court, the "hotly contested" issue of state law had been resolved by the California Supreme Court. *Id.* at 729. Consequently, there was no longer a concern that the federal and states courts would rule inconsistently on the issue. *See id.* at 729-30. Thus, the Court concluded "that the District Court's remand order was an unwarranted application of the *Burford* doctrine." *Id.* at 731. The Court acknowledged, however, that because it was deciding only whether the district court's abstention-based dismissal in a damages action was proper, it did not "find it necessary to inquire fully as to whether this case presents the sort of 'exceptional circumstance' in which *Burford* abstention or other grounds for yielding federal jurisdiction might be appropriate." *Id.*

> [I]n cases where the relief being sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court.[123]

In damages actions, however, federal courts do not have the power to dismiss or remand based on abstention principles.[124] They can only postpone the exercise of their jurisdiction by entering an abstention-based stay and remitting the parties to state court.[125]

III. THE SUPREME COURT AND CERTIFICATION

While the Supreme Court has approved of abstention-based stays, it also has recognized that sending the parties to state court to endure "a full round of litigation"[126] is costly for both the judicial system and the litigants. Thus, the Court has endorsed the use of certification in at least some federal question cases involving state law claims and in diversity cases.[127] Certification is a "procedure" that allows a federal court faced with an unsettled issue of state law to stay its proceedings and "put the question directly to the State's highest court."[128] In contrast to abstention, it "does not require litigating a new lawsuit through state appellate review."[129] As a result, it is typically both faster and less expensive than granting an abstention-based stay.[130] In addition, because certified questions are sent directly to a state's highest court, certification "increas[es] the assurance of gaining an authoritative response" from the only court that can provide one.[131] Accordingly, "certification of novel or unsettled questions of state

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123. *Id.* at 721.
124. *Id.*
125. *Id.*
126. Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997).
127. *See infra* Part III.A-B.
128. *Arizonans*, 520 U.S. at 76. For a discussion of the history of certification and an overview of the certification procedure, see Peter Jeremy Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 CONN. L. REV. 649, 650-59 (1999).
129. Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 381 (2000).
130. *Arizonans*, 520 U.S. at 76.
131. *Id.*

law . . . may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'"[132]

Today, almost all states as well as the District of Columbia and Puerto Rico permit certification.[133] Moreover, the Supreme Court itself has employed certification in federal question cases involving state law claims.[134] In the federal question context, the Court has provided some guidance to the lower courts regarding when certification is appropriate. Specifically, the Court has suggested that certification is warranted in a federal question case where *Pullman* abstention otherwise would be justified.[135] In the diversity context, however, the Court has provided little guidance to the lower courts regarding the circumstances under which certification is appropriate.

A. Certification in Federal Question Cases Involving State Law Claims

The Supreme Court primarily has addressed certification in the context of federal constitutional litigation involving state statutes. The Court has said that "[c]ertification today covers territory once dominated by . . . '*Pullman* abstention.'"[136] Thus, the Court has endorsed the use of certification in the same circumstances in which it has approved *Pullman* abstention[137] and has certified questions itself or remanded cases for certification on *Pullman* grounds.[138] Nevertheless, the Court has distinguished certification from

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132. *Id.* at 77 (quoting Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974)).

133. Only two states, Arkansas and North Carolina, do not have a certification procedure. While Missouri has a certification statute, MO. REV. STAT. § 477.004 (2007), the Missouri Supreme Court has declined to answer certified questions on the ground that the Missouri Constitution does not permit it to do so. *See* Zeman v. V.F. Factory Outlet, Inc., 911 F.2d 107, 109 (8th Cir. 1990) ("On July 13, 1990, the Missouri Supreme Court held that, notwithstanding the certification statute, the Missouri constitution did not grant the Missouri Supreme Court original jurisdiction to render opinions on questions of law certified by federal courts and declined to answer the certified question.").

134. *See infra* Part III.A.

135. *Arizonans*, 520 U.S. at 75-76 ("Certification today covers territory once dominated by . . . '*Pullman* abstention' . . . ." (citation omitted)).

136. *Id.* at 75.

137. *E.g.*, *id.* at 76 (stating that the availability of certification makes it unnecessary for the parties to institute a new lawsuit in state court in order to obtain clarification of "state-law questions antecedent to federal constitutional issues").

138. *See, e.g.*, Stewart v. Smith, 534 U.S. 157, 157-58 (2001) (certifying in a federal habeas corpus death penalty case where the district court and court of appeals had interpreted a state rule of criminal procedure differently and where under one interpretation the prisoner's constitutional claims would be waived, but under the other interpretation the claims could be heard on the merits); *id.* at 159-60 (stating that the state supreme court's answer to the certified question would "help determine the proper state-law predicate for [the Court's]

abstention, suggesting that the Court would approve the use of certification in federal question cases other than those that satisfy the criteria for *Pullman* abstention.[139]

In its earliest certification case involving a federal constitutional question, *Clay v. Sun Insurance Office Ltd.*,[140] the Supreme Court appeared to sanction the use of certification to resolve unclear issues of state law where *Pullman* abstention otherwise would be warranted. In *Clay*, the plaintiff bought an insurance policy from the defendant when he was a citizen of Illinois.[141] The defendant was licensed to do business in Illinois and several other states, including Florida.[142] The policy provided for world-wide coverage against personal property loss and "required that suit on any claim for loss must be brought within twelve months of the discovery of the loss."[143] After the plaintiff bought the policy, he moved to Florida and suffered personal property damage.[144] The defendant refused to pay, and the plaintiff filed suit in federal court more than two years after he discovered his loss.[145] The defendant defended, in pertinent part, on the ground "that under the time limitation for bringing suit, a restriction concededly valid under Illinois law, the suit was barred."[146]

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determination of the federal constitutional questions raised in [the] case"); Fiore v. White, 528 U.S. 23, 25 (1999) (certifying a question in a federal habeas corpus case where interpretation of state law would determine whether petitioner's conviction would be set aside); *id.* at 29 (stating that the state supreme court's answer to the certified question would "help determine the proper state-law predicate for [the Court's] determination of the federal constitutional questions raised in [the] case"); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 386 (1988) (certifying two questions in a First Amendment case where "an authoritative construction of the Virginia statute by the Virginia Supreme Court would substantially aid [the Court's] review of [the] constitutional holding [below], and might well determine the case entirely"); Elkins v. Moreno, 435 U.S. 647, 650-51, 661-62 & n.15 (1978) (certifying a question of state common law because the constitutional issues could not be resolved without first deciding the state law question as to which there were no controlling state law precedents, and there had been no showing that a constitutional decision was necessary); Bellotti v. Baird, 428 U.S. 132, 133, 148 (1976) (remanding for certification of state law questions regarding the proper construction of a state statute that was susceptible to "an interpretation [that] would avoid or substantially modify the federal constitutional challenge to the statute"); *see also* Aldrich v. Aldrich, 378 U.S. 540 (1964); Dresner v. City of Tallahassee, 375 U.S. 136 (1963).

139. *See Arizonans*, 520 U.S. at 79.
140. 363 U.S. 207 (1960).
141. *Id.* at 208-09.
142. *Id.* at 208.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

The district court applied Florida's "five-year limitation for actions on written contracts," and the case went to trial.[147] The court of appeals reversed on the ground that application of Florida's statute of limitations to a contract made in Illinois violated the Due Process Clause of the U.S. Constitution.[148] In the process of reaching its decision, the court considered whether Florida's statute of limitations applied to the policy.[149] The court did not decide "this threshold question," however, apparently because "it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute."[150] Instead, the court determined that it would decide the constitutional issue "that [was] presented only if the statute did apply."[151]

Relying on the "doctrine that the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it,"[152] the *Clay* Court found that, because resolution of the state law issue could have ended the case, the court of appeals should have decided the state law issues first and then, only if necessary, decided the due process issue.[153] The Court explained that the requirement that courts decide constitutional questions only if necessary is "a well-settled doctrine . . . which, because it carries a special weight in maintaining proper harmony in federal-state relations, must not yield to the claim of the relatively minor inconvenience of postponement of decision."[154] The Court ultimately vacated the court of appeals' decision and remanded the case for determination of the state law questions.[155]

In doing so, the Court recognized that the case involved unclear issues of state law.[156] The Court noted, however, that "[t]he Florida Legislature, with rare foresight, ha[d] dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision."[157] The Court further noted that even where certification statutes were unavailable it had "frequently deemed it appropriate, where a federal constitutional question might be mooted

147. *Id.* at 209 & n.2.
148. *Id.* at 209.
149. *Id.*
150. *Id.* at 209, 212.
151. *Id.* at 209.
152. *Id.* at 211.
153. *Id.* at 209-10.
154. *Id.* at 211-12.
155. *Id.* at 212.
156. *Id.*
157. *Id.*

thereby, to secure an authoritative state court's determination of an unresolved question of its local law."[158] Thus, in a case with facts very similar to *Pullman*,[159] the Court seemed to suggest that since Florida had a certification statute, the lower court should consider certifying the unclear questions of state law on remand rather than engaging in abstention.

In contrast, in *City of Houston v. Hill*[160] the Court refused to abstain or certify under *Pullman*. In *Hill*, the Court faced "the question whether a municipal ordinance that makes it unlawful to interrupt a police officer in the performance of his or her duties is unconstitutionally overbroad under the First Amendment."[161] The City asked the Court to abstain under *Pullman*, and the Court refused.[162] The Court explained that abstention was inappropriate because the ordinance at issue was "not susceptible to a limiting construction" that would render it constitutional.[163] The Court noted that the Texas appellate courts had not yet interpreted the statute,[164] but pointed out that "Houston's Municipal Courts . . . [had] had numerous opportunities to narrow the scope of the ordinance."[165] The Court also said that even where no state court has interpreted a statute, a federal court need not abstain if the statute is unambiguous.[166] Thus, the Court concluded, "if [a] statute is not obviously susceptible of a limiting construction, then even if the statute has 'never [been] interpreted by a state tribunal . . . it is the duty of the federal court to exercise its properly invoked jurisdiction.'"[167]

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158. *Id.*

159. *See supra* Part II.A.

160. 482 U.S. 451 (1987).

161. *Id.* at 453.

162. *Id.* at 467-68.

163. *Id.* at 468. In reaching its decision, the Court said that it was "particularly reluctant to abstain in cases involving facial challenges based on the First Amendment," but "[e]ven if [the] case did not involve a facial challenge under the First Amendment, [it] would find abstention inappropriate." *Id.* at 467-68. In a footnote, the Court also commented on the lateness of the City's request for abstention. *Id.* at 467 n.16. The Court noted that the City "did not raise the abstention issue until after it had lost on the merits before the panel of the Court of Appeals." *Id.* Until that point, the City had argued "that the ordinance was both unambiguous and constitutional on its face." *Id.* The Court said that "[t]hese circumstances undercut the force of the city's argument, but [did] not bar [the Court] from considering it." *Id.*

164. *Id.* at 469-70.

165. *Id.* at 470 ("[W]here municipal courts have regularly applied an unambiguous statute, there is certainly no need for a federal court to abstain until state appellate courts have an opportunity to construe it.").

166. *Id.* at 469.

167. *Id.* at 468 (quoting Harman v. Forssenius, 380 U.S. 528, 535 (1965)).

The *Hill* Court also emphasized that "[t]he possibility of certification [did] not change [its] analysis."[168] The Court noted that "certification . . . is useful in reducing the substantial burdens of cost and delay that abstention places on litigants."[169] The Court explained, however, that certification, like *Pullman* abstention, is inappropriate "where . . . there is no uncertain question of state law whose resolution might affect the pending federal claim."[170] Thus, because the ordinance in the case at bar was "neither ambiguous nor obviously susceptible of a limiting construction," the Court could discern no reason to abstain or certify under *Pullman*.[171]

More recently, in *Arizonans for Official English v. Arizona*,[172] the Supreme Court discussed certification at length in dicta and suggested that the lower courts should have certified the state law question at issue based on *Pullman* abstention principles. In *Arizonans*, Arizona amended its state constitution to provide that English was "'the official language of the State of Arizona'–'the language of . . . all government functions and actions.'"[173] The plaintiff, a state employee who spoke both English and Spanish, filed suit in federal court alleging that the amendment violated the U.S. Constitution.[174] The district court and the Ninth Circuit held that the amendment was unconstitutional.[175] Despite the state Attorney General's request for certification and the fact that the Arizona Supreme Court had not interpreted the amendment, the lower courts refused to certify the question of the amendment's proper interpretation.[176] The lower courts reasoned that certification was unwarranted because the language of the amendment was "plain" and "the Attorney General's limiting construction unpersuasive."[177]

The Supreme Court declared the case moot because the plaintiff had left her job as a state employee for a private position during the course of the

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168. *Id.* at 470.
169. *Id.*
170. *Id.* at 471.
171. *Id.* at 471; *see also* Stenberg v. Carhart, 530 U.S. 914, 945 (2000) (refusing to certify in a case where the plaintiff challenged the constitutionality of a state abortion statute that had not been construed by the state courts because, inter alia, "[c]ertification of a question (or abstention) is appropriate only where the statute is 'fairly susceptible' to a narrowing construction" and the statute at issue was not susceptible to such a construction (citation omitted)).
172. 520 U.S. 43 (1997).
173. *Id.* at 48 (alteration in original) (quoting ARIZ. CONST. art. XXVIII, § 1(1), (2)).
174. *Id.* at 50.
175. *Id.* at 55, 78.
176. *Id.* at 62.
177. *Id.* at 76.

litigation.[178] Nonetheless, the Court went on to reprimand the district court and the Ninth Circuit for failing to certify "[g]iven the novelty of the question and its potential importance to the conduct of Arizona's business, plus the views of the Attorney General and [the amendment's] sponsors"[179] that a limiting construction of the statute was possible.[180]

Furthermore, the Court reiterated the principles underlying *Pullman* abstention.[181] It explained that in order to avoid "premature adjudication of constitutional questions" and "friction-generating error," federal courts should be very careful about deciding the constitutionality of state statutes that have not been construed by the state's highest court.[182] The Court said: "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court."[183] The Court concluded that the district court and the Ninth Circuit should have been more "cautious" in approaching the question whether certification was appropriate.[184] Thus, the Court endorsed the use of certification in a case that otherwise satisfied the criteria for *Pullman* abstention because it involved a state statute that had never been interpreted and might be construed by the state courts so as to moot the constitutional issue.

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178. *Id.* at 72.

179. *Id.* at 78.

180. *Id.* The Court's discourse on certification is interesting given its decision that the case was moot. The Court did not stop at chastising the lower courts and discussing certification at length in dicta. The Court went to some lengths to ensure that the federal system left no footprints on the state constitutional amendment at issue. First, the Court did not simply dismiss the case. *Id.* at 75. Instead, the Court vacated the judgment of the Ninth Circuit and remanded the case to the district court for dismissal. *Id.* at 80. By vacating the Ninth Circuit's judgment, the Court effectively erased that court's interpretation of the amendment. Furthermore, the Court specifically stated that it "express[ed] no view on the correct interpretation of" the amendment or its constitutionality. *Id.* at 49. At the time the federal case reached the Supreme Court, the question of the proper interpretation of the statute was pending before the Arizona Supreme Court. *Id.* at 63 n.18. The state case had been stayed pending the Supreme Court's decision. *Id.* The Supreme Court noted that given its decision, the Arizona Supreme Court could "rule definitively on the proper construction" of the amendment. *Id.* at 80. The Court opined that once the state supreme court had ruled, "adjudication of any remaining federal constitutional question may indeed become greatly simplified." *Id.*

181. *See* discussion *supra* Part II.A.

182. *Arizonans*, 520 U.S. at 79.

183. *Id.* (internal quotation marks omitted) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)).

184. *Id.* at 77.

Despite the Court's statement that "[c]ertification today covers territory once dominated by . . . '*Pullman* abstention'"[185] and its endorsement of certification in cases, like *Arizonans*, that are similar to *Pullman*, the Court has not explicitly limited certification in federal question cases involving state law claims to federal constitutional litigation. Moreover, in *Arizonans*, the Court specifically distinguished certification from abstention. Echoing the "exceptional circumstances" language of the abstention doctrines, the Ninth Circuit in *Arizonans* "found 'no unique circumstances . . . militating in favor of certification.'"[186] The Supreme Court concluded that the Ninth Circuit had improperly "[b]lend[ed] abstention with certification."[187] The Court then stated unequivocally: "Novel, unsettled questions of state law, however, not 'unique circumstances,' are necessary before federal courts may avail themselves of state certification procedures."[188] It is unclear whether the *Arizonans* Court intended to sanction the use of certification in federal question cases whenever "novel, unsettled questions of state law" are involved, regardless of the underlying circumstances of the case. The Court's statement, however, seems to suggest that it has opened the door to that interpretation.

B. Diversity Certification

In the diversity context, the Supreme Court has addressed certification in only one case: *Lehman Bros. v. Schein*.[189] *Lehman* involved three shareholders' derivative suits that were filed in federal district court on the basis of diversity jurisdiction and consolidated on appeal.[190] The district court concluded that Florida law applied to the disputes and that, under Florida law, the cases must be dismissed.[191] Although the court of appeals found that Florida law was unclear, it nonetheless reversed the district court and held that under Florida law the plaintiffs could recover.[192]

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185. *Id.* at 75.

186. *Id.* at 79 (quoting Yniguez v. Arizonans for Official English, 69 F.3d 920, 931 (9th Cir. 1995)).

187. *Id.*

188. *Id.* The Court noted, as it had previously, that certification does not "entail the delay[], expense, and procedural complexity that generally attend abstention decisions" and that "[t]aking advantage of certification . . . may 'greatly simplif[y]' an ultimate adjudication in federal court." *Id.* (citation omitted).

189. 416 U.S. 386, 387 (1974).

190. *Id.*

191. *Id.* at 388-89.

192. *Id.* at 389.

The Supreme Court vacated the judgment of the court of appeals and remanded the cases so that the court could "reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court."[193] The Court said that certification seemed "particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law."[194] The Court made clear, however, that even where state law is unclear and certification is available, certification is not mandatory.[195] Rather, the Court said that the decision whether to use certification "in a given case rests in the sound discretion of the federal court."[196]

By remanding *Lehman* for consideration of whether certification was warranted, the Supreme Court endorsed the use of certification under the same circumstances in which it had rejected abstention in *Meredith v. City of Winter Haven*.[197] *Meredith*, like *Lehman* was a diversity case that involved unclear state law.[198] The court of appeals in *Meredith* dismissed the case because it believed that the case should be decided in a state forum.[199] The Supreme Court reversed the court of appeals on the ground that abstention is inappropriate where state law is uncertain but where there are no exceptional circumstances present.[200] As the *Lehman* Court explained, *Meredith* "teaches that the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit."[201] Thus, by sanctioning the use of certification in *Lehman* under circumstances in which it would not have approved of abstention, the Court implicitly distinguished certification in diversity cases from abstention in diversity cases. Furthermore, by specifically stating in *Lehman* that the difficulty of state law will not support sending the parties to state court "for the start of another lawsuit"[202] and yet approving certification, the Court suggested that certification where state law is unclear is proper precisely because it does not require a full round of litigation in state court.

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193. *Id.* at 391-92.
194. *Id.* at 391.
195. *Id.* at 390-91.
196. *Id.* at 391.
197. *See* discussion *supra* Part II.A.
198. Meredith v. City of Winter Haven, 320 U.S. 228, 231 (1943).
199. *Id.*
200. *Id.* at 234-35, 238.
201. *Lehman*, 416 U.S. at 390.
202. *Id.*

IV. CERTIFICATION BY FEDERAL APPELLATE COURTS IN DIVERSITY CASES

Given the Court's suggestion in both federal question cases involving state-law claims and diversity cases that certification and abstention are two separate doctrines[203] and the Court's apparent endorsement in *Lehman* of certification in diversity cases where state law is unclear,[204] it would be reasonable to expect that federal appellate courts[205] would have adopted the "*Lehman* approach" to certification in diversity cases. Surprisingly, however, the circuits generally have not done so. Instead, at least six of the circuits tend to rely on abstention principles derived from the *Thibodaux* and *Burford* abstention doctrines to determine when they should certify.[206] In particular, these courts require "exceptional circumstances" before they will certify. The First Circuit, on the other hand, takes a dual approach to certification, employing both the abstention-based approach and the *Lehman* approach to certification. Four circuits appear to lean exclusively toward the *Lehman* approach,[207] while one circuit, the Tenth, takes an ad hoc approach that is impossible to classify.[208] In addition, all of the circuits, at times, also consider "secondary" factors in deciding whether to certify.[209]

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203. *See supra* Part III.A-B.

204. *See supra* Part III.B.

205. For purposes of this Article, the phrases "federal circuit courts" and "federal appellate courts" refer to the First through Eleventh Circuits and the District of Columbia Circuit.

206. *See supra* Part II.A-C. The circuits that rely on abstention principles to determine when certification is appropriate are the District of Columbia Circuit, the Second Circuit, the Third Circuit, the Fifth Circuit, the Seventh Circuit, and the Ninth Circuit.

207. These circuits are the Fourth, Sixth, Eighth, and Eleventh Circuits.

208. The Tenth Circuit has said, in more than one diversity case, that "certification is appropriate 'where the legal question at issue is novel and the applicable state law is unsettled' . . . ." Enfield v. A.B. Chance Co., 228 F.3d 1245, 1255 (10th Cir. 2000) (quoting Allstate Ins. Co. v. Brown, 920 F.2d 664, 667 (10th Cir. 1990)); *see also* Pehle v. Farm Bureau Life Ins. Co., 397 F.3d 897, 900 n.1 (10th Cir. 2005) (same). In the cases where the court has made this statement, however, it has declined to certify. *E.g.*, *id.* (declining to certify because state law was settled); *Enfield*, 228 F.3d at 1255 (declining to certify because the party "did not seek certification until after it received an adverse decision from the district court"); *Brown*, 920 F.2d at 667 (declining to certify because state law was settled). Thus, these cases do not necessarily indicate that the Tenth Circuit *will* certify when state law is uncertain.

Furthermore, in discussing certification, the Tenth Circuit has quoted *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943), for the proposition that federal courts have a duty to decide state law issues absent exceptional circumstances. *See* Copier v. Smith & Wesson Corp., 138 F.3d 833, 838 (10th Cir. 1998) (reviewing the district court's refusal to certify); *see also Enfield*, 228 F.3d at 1255 ("'[U]nder the diversity statutes the federal courts have the duty to decide questions of state law even if difficult or uncertain.'" (quoting *Copier*, 138 F.3d at

A. Federal Appellate Courts and Abstention-based Certification

The District of Columbia, Second, Third, Fifth, Seventh and Ninth Circuits use an abstention-based approach to certification. In deciding whether to certify in diversity cases, these circuits commonly ask: (1) whether state law is unsettled; and (2) whether an interest of sufficient importance to the State is involved. In analyzing the second factor, the circuits are concerned about whether considerations of federal-state comity indicate that the issue before them is one that warrants certification. Accordingly, like the *Thibodaux* and *Burford* Courts, the circuits examine whether the issue is "intimately" related to the state's "sovereign prerogative,"[210] whether the issue is one of "vital public concern,"[211] whether the state has an interest in "maintaining uniformity in the treatment of an essentially local problem,"[212] or whether the state has an interest in "retaining local control over difficult questions of state law bearing on policy problems of substantial public import."[213] While the circuits do not often use this precise language from the abstention cases to describe the second factor, they do employ very similar language and appear to be equating certification with

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838)). Confusingly, however, the Tenth Circuit has also recognized that in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), the Supreme Court said that "'[n]ovel, unsettled questions of state law . . . not 'unique circumstances,' are necessary before federal courts'" can certify. *Copier*, 138 F.3d at 839 (quoting *Arizonans*, 520 U.S. at 79). To complicate matters further, in most, if not all, of its published certification cases, the Tenth Circuit has declined to certify for myriad reasons, none of which are related to whether the issue involved is sufficiently important to the State. Given the Tenth Circuit's contradictory statements regarding whether it follows the *Lehman* approach or an abstention-based approach to certification and the lack of case law establishing that it follows either method, it is impossible to classify the court's approach. Due to the lack of diversity cases in which the Tenth Circuit has certified, perhaps the most that can be said is that the court is very reluctant to certify and views certification with great circumspection.

209. These factors are: (1) whether the issue is or may be dispositive; (2) the likely recurrence of the issue; (3) the timing of the request for certification; (4) whether the party requesting certification chose the federal forum; and (5) whether the denial of certification will lead to forum shopping or inequitable administration of the laws. They are "secondary" because the circuits sometimes apply them and sometimes ignore them. In addition, a factor that receives weight in one case may not be mentioned in another case. The secondary factors are discussed *infra* Part V.

210. *See supra* notes 118-19 and accompanying text.

211. *See supra* note 118.

212. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 728 (1996); *see also supra* notes 120-25 and accompanying text.

213. *Quackenbush*, 517 U.S. at 728; *see also supra* notes 120-25 and accompanying text.

abstention by, in effect, requiring exceptional circumstances before they will certify. For the most part, however, the circuits do not acknowledge that they are relying on abstention principles or explain their reasoning for taking this approach to certification.

The District of Columbia Circuit provides an illustration of the abstention-based approach to certification. The D.C. Circuit certifies where state law is "'genuinely uncertain' with respect to the dispositive question . . . and . . . the case 'is one of extreme public importance.'"[214] In *Nationwide Mutual Insurance Co. v. Richardson*,[215] for example, the plaintiff worked as a security guard in an apartment complex managed by a District of Columbia company.[216] The company purchased a comprehensive general liability insurance policy from Nationwide for the apartment complex.[217] The policy included a pollution exclusion clause which "exclude[d] liability coverage for injuries or damage arising out of events involving the release or escape of 'pollutants.'"[218] While the plaintiff worked at the complex, she allegedly was exposed to carbon monoxide that leaked from one or more gas furnaces.[219] The plaintiff sued the company in state court claiming that she was injured from exposure to carbon monoxide fumes.[220] Nationwide then filed a declaratory judgment action in federal district court in the District of Columbia "seeking a declaration that it was not obligated to defend or indemnify"[221] the company because the pollution exclusion clause barred coverage for the plaintiff's alleged injuries.[222] The district court agreed with Nationwide and granted its motion for summary judgment.[223]

On appeal, the D.C. Circuit certified the question whether "the pollution exclusion clause appl[ied] to injuries arising from alleged carbon monoxide poisoning" to the District of Columbia Court of Appeals.[224] The court

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214. Nationwide Mut. Ins. Co. v. Richardson, 270 F.3d 948, 950 (D.C. Cir. 2001) (quoting Dial A Car, Inc. v. Transp., Inc., 132 F.3d 743, 746 (D.C. Cir. 1998)). *Cf.* Karen LeCraft Henderson, *Certification: (Over)due Deference?*, 63 GEO. WASH. L. REV. 637, 638 (1995) (stating that in the D.C. Circuit, the decision whether to certify "usually turns on the clarity of state law").

215. 270 F.3d 948 (D.C. Cir. 2001).

216. *Id*. at 951.

217. *Id.*

218. *Id.* at 950.

219. *Id.* at 951.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 951-52.

224. *Id.* at 950-51.

reasoned that certification was warranted because District of Columbia law was genuinely uncertain: the District of Columbia courts had not addressed the scope of the pollution exclusion clause, and other jurisdictions that had interpreted similar clauses had reached conflicting conclusions.[225] The court further reasoned that it should certify because "the question [was] one of significant import to the public."[226] The clause was a common feature of commercial comprehensive general liability policies, and its interpretation therefore "potentially affect[ed] the insurance coverage of most businesses in the District of Columbia."[227] Thus, in *Richardson*, the D.C. Circuit essentially applied abstention principles to determine whether certification was appropriate.[228]

The Second Circuit's approach to certification, like the D.C. Circuit's, demonstrates the use of certification as a proxy for abstention in diversity cases. Interestingly, the Second Circuit has stated specifically that certification is proper "only where there is a split of authority on the issue, where [a] statute's plain language does not indicate the answer, or when presented with a complex question of [state] common law for which no [state] authority can be found."[229] This suggests that the Second Circuit has adopted the *Lehman* approach to certification in diversity cases and asks only whether state law is sufficiently unclear in deciding whether to certify. Nevertheless, the Second Circuit usually considers not only whether state law is unclear, but also whether the issue involves important state public

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225. *Id.* at 952.

226. *Id.* at 950.

227. *Id.*

228. The D.C. Circuit has used abstention principles to decide whether to certify other diversity cases. *See, e.g.*, Dial A Car, Inc. v. Transp., Inc., 132 F.3d 743, 746 (D.C. Cir. 1998) (declining to certify the question of whether there was a private right of action under a District of Columbia statute because the "precedent regarding implied private rights of action [was] reasonably clear" and the case "[was] not one of 'extreme public importance' in the District of Columbia"); Joy v. Bell Helicopter Textron, Inc., 999 F.2d 549, 563-64 (D.C. Cir. 1993) (certifying a question regarding "the conditions under which . . . police officers will be held liable in tort for actions taken in the course of performing their public functions" because state law was genuinely uncertain and the case was one of extreme public importance); Eli Lilly & Co. v. Home Ins. Co., 764 F.2d 876, 884 (D.C. Cir. 1985) (certifying where state law was uncertain and "the State . . . ha[d] a very substantial interest in [the] dispute").

229. Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.2d 47, 51 (2d Cir. 1992). In a case decided five years after *Riordan* the Second Circuit said, "*Riordan* establishes the standard applicable in this Circuit for determining whether it is appropriate to certify a question to a state court." McCarthy v. Olin Corp., 119 F.3d 148, 154 n.3 (2d Cir. 1997).

policy considerations.[230] Thus, in deciding whether to certify in a diversity case, the Second Circuit actually uses a standard that is similar to the D.C. Circuit's and also appears to be derived from abstention principles.[231]

Very recently, for example, in *Colavito v. New York Organ Donor Network, Inc.*,[232] the Second Circuit certified several "novel questions of [state] statutory interpretation" that involved an "important and sensitive area of state law and policy" to the New York Court of Appeals.[233] The plaintiff in *Colavito* had end-stage renal disease.[234] When he did not receive a kidney that allegedly had been directly donated to him, he brought suit in federal court under diversity jurisdiction against the New York Organ Donor Network ("NYODN") and two NYODN officials.[235] The plaintiff claimed that the defendants had engaged in fraud and had committed the common law tort of conversion by violating New York Public Health Law.[236] The plaintiff also asserted a private right of action under New York Public Health Law.[237] The Second Circuit affirmed the district court's grant of summary

230. *See, e.g.*, Colavito v. N.Y. Organ Donor Network, Inc., 438 F.3d 214, 229 (2d Cir. 2006) ("Where unsettled and significant questions of state law will control the outcome of a case, we may certify those questions . . . ." (citation and internal quotation marks omitted)); Regatos v. N. Fork Bank, 396 F.3d 493, 498 (2d Cir. 2005) (certifying where the case involved "unsettled and significant" issues of state law); Carvel Corp. v. Noonan, 350 F.3d 6, 25-26 (2d Cir. 2003) ("[I]n deciding whether to certify . . . this Court looks to both the extent of existing state precedent and the nature of the questions to be asked. In particular, whether to certify a question depends to some extent upon whether the question implicates issues of state public policy." (citation and internal quotation marks omitted)); City of Burlington v. Indem. Ins. Co. of N. Am., 332 F.3d 38, 40 (2d Cir. 2003) (certifying questions because the state courts had not yet ruled on the issues and because the issues involved "important public policy considerations" for the state); N.Y. Univ. v. First Fin. Ins. Co., 322 F.3d 750, 756 (2d Cir. 2003) (certifying a "significant and novel public policy question").

231. *See, e.g.*, DiBella v. Hopkins, 403 F.3d 102, 111 (2d Cir. 2005) ("We do not believe this case presents any of the *exceptional circumstances* that would justify using the certification procedure." (emphasis added)); Kidney v. Kolmar Labs., Inc., 808 F.2d 955, 957 (2d Cir. 1987) (stating that certification is a "valuable device for securing prompt and authoritative resolution of unsettled questions of state law, especially those that seem likely to recur and to have significance beyond the interests of the parties in a particular lawsuit"). *Cf.* Kaye & Weissman, *supra* note 129, at 397-422 (2000) (discussing New York's experience with certification).

232. 438 F.3d 214 (2d Cir. 2006).

233. *Id.* at 216, 229.

234. *Id.* at 217.

235. *Id.* at 217, 219-20.

236. *Id.* at 220.

237. *Id.*

judgment to the defendants on the fraud claim, but "reserve[d] decision on the remaining issues" and certified several questions.[238]

Specifically, the Second Circuit said that before it reached the merits of the plaintiff's other claims, it had to determine whether those claims even existed under state public health law.[239] After examining the statutory sections at issue, the court concluded that it could not determine whether the claims "[gave] rise to enforceable rights for individuals."[240] The court ultimately held that certification was appropriate because the statutory language was ambiguous and there was very little pertinent case law interpreting the statutory provisions.[241] In addition, the court reasoned that certification was justified because it did not have the "experience, expertise, or authority" to ascertain the public policy underlying the statutes at issue.[242] According to the court, the goal behind the statutes—increasing organ donation—could be achieved either by protecting "organ procurement organizations from liability or by giving donors and donees enforceable rights to remedy and deter misconduct."[243] The court concluded that "it would be imprudent to embark on an excursion . . . into the state statutory incentive structure in this important and sensitive area of state law and policy."[244] Therefore, after applying abstention principles, the Second Circuit determined that certification was warranted.[245]

A case from the Seventh Circuit, *Doe v. American National Red Cross*,[246] provides an additional compelling example of a court's tacit use of abstention principles to decide whether to certify.[247] The *Doe* court certified

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238. *Id.* at 232-33.
239. *Id.* at 223.
240. *Id.* at 228.
241. *Id.* at 229.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. 976 F.2d 372 (7th Cir. 1992).
247. While the Seventh Circuit has said that it considers multiple factors in deciding whether to certify, see *Allstate Ins. Co. v. Menards, Inc*., 285 F.3d 630, 638 (7th Cir. 2002), its case law (including *Doe*) indicates that the court primarily considers whether state law is uncertain and whether the issue is sufficiently important to the State. *See, e.g.*, *Menards*, 285 F.3d at 639 (certifying a question about the applicable statute of limitations primarily because the intermediate appellate courts were in conflict, the state supreme court "[had] not had an opportunity to address the question squarely," and "[s]tatutes of limitations reflect significant policy choices by the state and have grave consequences for the administration of justice within the state"); Valerio v. Home Ins. Co., 80 F.3d 226, 229 (7th Cir. 1996) (certifying a question regarding the proper interpretation of a phrase in an insurance policy because the

the question of "[w]hether a blood bank, sued in negligence for failing properly to screen donors and test blood or blood products, is 'a person who is a health care provider' within the meaning of the Wisconsin medical malpractice statute of limitations."[248] Using abstention language without citing abstention cases, the court said that certification was appropriate because the issue "concern[ed] a matter of vital public concern" and "an appropriate respect for the prerogatives and responsibilities of Wisconsin" required that the state supreme court decide the issue.[249] The *Doe* court further reasoned that certification was justified because, *inter alia*, state law was uncertain.[250] Thus, the *Doe* court, like the *Richardson* and *Colavito* courts, required "exceptional circumstances," as well as uncertain state law, before it would certify.[251]

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answer would "control the outcome of [the] appeal;" the state courts had "not yet construed [the] phrase, which [was] common to many policies;" and the state had a "significant interest in the interpretation and enforcement of insurance policies executed within its borders"); Shirley v. Russell, 69 F.3d 839, 844 (7th Cir. 1995) (certifying where there were no state decisions on point and the question had "important implications for the state").

248. *Doe*, 976 F.2d at 376.

249. *Id.* at 374; *see also* Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968) (finding that the lower courts should have abstained because, inter alia, the issue was one of "vital concern" to the state); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959) (approving abstention because, inter alia, the state law issue was "intimately involved with [the state's] sovereign prerogative"). For a detailed discussion of *Kaiser* and *Thibodaux*, see *supra* Part II.B.

250. *Doe*, 976 F.2d at 375. The *Doe* court also found that certification was appropriate because allowing the Wisconsin Supreme Court to decide the question would "ensure that Wisconsin's public policy [was], from the outset, applied evenhandedly to all litigants whether they [found] themselves in a state or federal forum," and the answer to the certified question would determine whether the cause of action survived. *Id.* at 374; *see infra* Part V.

251. Like the D.C., Second, and Seventh Circuits, the Third, Fifth, and Ninth Circuits also have applied abstention principles to decide whether certification is justified.

The Third Circuit has taken a somewhat circuitous route to adopting its certification factors. Judge Becker first wrote in dissent that "a federal court should be authorized to certify a question of law to the state court when: (1) the issue is one of importance; (2) it may be determinative of the litigation; and (3) state law does not provide controlling precedent through which the federal court could resolve the issue." Hakimoglu v. Trump Taj Mahal Assocs., 70 F.3d 291, 303-04 (3d Cir. 1995) (Becker, J., dissenting). In *Hakimoglu*, the court faced the question of "whether under New Jersey law a casino patron may recover from a casino for gambling losses caused by the casino's conduct in serving alcoholic beverages to the patron and allowing the patron to continue to gamble after it becomes obvious that the patron is intoxicated." *Id.* at 292 (majority opinion). According to Judge Becker, *Hakimoglu* was a "textbook case for certification" because the issue was "determinative of the litigation; important public policy issues [were] at stake; and little authority guide[d] [the court's] decision." *Id.* at 304 (Becker, J., dissenting).

B. Federal Appellate Courts and the Lehman *Approach to Certification*

1. The Dual Approach to Certification

In contrast to the circuits that seem to equate certification with abstention, the First Circuit uses a somewhat schizophrenic approach to certification. It sometimes applies abstention principles to decide whether to certify and, at other times, employs the *Lehman* approach to certification. For example, the First Circuit has repeatedly stated that "[a]bsent controlling state court precedent, [it] . . . may certify a state law issue to the state's

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Although Judge Becker proposed his certification factors in dissent, the other panel judges, Nygaard and Alito, joined the part of Judge Becker's dissent that discussed certification "and enthusiastically endorse[d] his recommendations therein." *Id.* at 293 n.2 (majority opinion). Nonetheless, certification was not an option in *Hakimoglu* because the case involved New Jersey law and, at that time, New Jersey did not have a certification procedure. *Id.* at 304 (Becker, J., dissenting). Thus, even though Judges Nygaard and Alito joined the section of Judge Becker's dissent on certification to form a majority, Judge Becker's proposed certification factors were merely dicta.

Since *Hakimoglu*, however, the Third Circuit appears to have adopted Judge Becker's factors for deciding whether certification is proper. *See* Travelers Indem. Co. of Ill. v. DiBartolo, 171 F.3d 168, 169 n.1 (3d Cir. 1999) (declining to certify because "the issue was neither sufficiently important nor sufficiently difficult to command the attention" of the Pennsylvania Supreme Court); *see also* Delta Funding Corp. v. Harris, 426 F.3d 671, 675 (3d Cir. 2005) (certifying in a federal question case because it could not "predict with confidence how the [state] Supreme Court would decide the issues presented" and because "the questions of law certified [were] of . . . substantial public importance").

The Fifth and Ninth Circuits also generally apply abstention principles in diversity cases to determine whether certification is warranted. *See, e.g.*, Fairfield Ins. Co. v. Stephens Martin Paving, L.P., 381 F.3d 435, 437 (5th Cir. 2004) ("Because the issue whether punitive damages awards are insurable under Texas public policy is significant for Texas law and because the Texas intermediate courts have reached competing rulings with no definitive guidance from the Supreme Court of Texas, we hereby certify the . . . question."); Kremen v. Cohen, 325 F.3d 1035, 1037 (9th Cir. 2003) ("The certification procedure is reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts."); Blue Ridge Ins. Co. v. Jacobsen, 197 F.3d 1008, 1011 (9th Cir. 1999) (certifying a question where there was "no clearly controlling precedent in the case law of the California appellate courts" and the answer would "resolve an important question of insurance law . . . that . . . [was] best determined by the California Supreme Court rather than a federal court"); Free v. Abbott Labs, Inc., 164 F.3d 270, 274 (5th Cir. 1999) ("[C]ertification may be advisable where important state interests are at stake and the state courts have not provided clear guidance on how to proceed.") (citing Transcon. Gas Pipeline Corp. v. Transp. Ins. Co., 958 F.2d 622, 623 (5th Cir. 1992)).

highest court."[252] Moreover, the First Circuit often takes the *Lehman* approach to certification and considers primarily whether state law is uncertain in deciding whether to certify. Thus, in *Reagan v. Racal Mortgage, Inc.*,[253] the First Circuit certified where the state statute at issue was ambiguous and the statute's "interpretive case law"[254] did not permit the court to "conclusively determine whether [the statute] applie[d] to [the] case."[255] Recently, the First Circuit even seemed to recognize the distinction between abstention and certification when it stated in a diversity case that abstention was inappropriate because exceptional circumstances were not present, but certification was available to obtain a proper interpretation of the state statute at issue.[256] In some instances, however, the First Circuit takes an abstention-based approach to certification in diversity cases and asks both whether state law is uncertain and whether the issue is sufficiently "important" to warrant certification.[257]

2. The *Lehman* Approach to Certification

The Fourth, Sixth, Eighth, and Eleventh Circuits appear to employ primarily the *Lehman* approach to certification. Multiple Eleventh Circuit cases demonstrate that the Eleventh Circuit, more than any other, certifies solely because state law is unclear.[258] In contrast to the numerous diversity

252. *E.g.*, Collazo-Santiago v. Toyota Motor Corp., 149 F.3d 23, 25 (1st Cir. 1998) (internal quotation marks omitted) (quoting VanHaaren v. State Farm Mut. Auto. Ins. Co., 989 F.2d 1, 3 (1st Cir. 1993)).

253. 135 F.3d 37 (1st Cir. 1998).

254. *Id.* at 45.

255. *Id.* at 44; *see also* CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co., 46 F.3d 1211, 1222 (1st Cir. 1995) (certifying a question where state law was unclear and the issue was determinative of the appeal).

256. Sevigny v. Employers Ins. of Wasau, 411 F.3d 24, 29 (1st Cir. 2005); *see also* Pyle v. S. Hadley Sch. Comm., 55 F.3d 20, 22 (1st Cir. 1995) (federal question case) ("While uncertainty or difficulty regarding state law is generally not sufficient to justify traditional abstention, it may be enough to counsel certification where that procedure is available." (citing Meredith v. City of Winter Haven, 320 U.S. 228 (1943), and Lehman Bros. v. Schein, 416 U.S. 386 (1974))).

257. *E.g.*, Trull v. Volkswagen of Am., Inc., 187 F.3d 88, 103 (1st Cir. 1999) (certifying a question where state law was unclear and the issue to be decided was "quintessentially a policy judgment appropriately made for the state by its own courts"); Med. Prof'l Mut. Ins. Co. v. Breon Labs., Inc., 141 F.3d 372, 376 (1st Cir. 1998) (certifying where the issue was "sufficiently unclear and important").

258. In its certification cases, the Eleventh Circuit often says: "Where there is doubt in the interpretation of state law, a federal court may certify the question to the state supreme court to avoid making unnecessary *Erie* guesses and to offer the state court the opportunity to

cases in the Eleventh Circuit where the court has taken the *Lehman* approach to certification, there are very few published diversity-based certification cases in the Fourth and Sixth Circuits. While making conclusions about the circumstances under which these circuits certify is therefore speculative at best, the available case law suggests that they also take the *Lehman* approach to certification.[259]

Similarly, while the Eighth Circuit also seems to take the *Lehman* approach to certification,[260] there are too few published cases in the Eighth Circuit from which a definitive conclusion can be drawn. Nevertheless, the Eighth Circuit provides an interesting case study because, like the First Circuit, it has explicitly distinguished certification from abstention in diversity cases. In deciding whether to certify in *Hatfield v. Bishop Clarkson Memorial Hospital*,[261] for example, the Eighth Circuit stated: "[T]he Supreme Court has recognized that certification is not the drastic procedure that the Court in *Meredith* . . . held abstention to be."[262] The *Hatfield* court explained that a certification-based stay in the case at bar, in contrast to the abstention-based dismissal in *Meredith*, "would not deprive [it] of jurisdiction, nor would it force the parties into state court, but rather would afford the parties a state forum for a state law question which process may

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interpret or change existing law." Tobin v. Mich. Mut. Ins. Co., 398 F.3d 1267, 1274 (11th Cir. 2005) (citing multiple cases for the same proposition). For examples of Eleventh Circuit cases in which the court takes the *Lehman* approach to certification and considers primarily whether state law is unclear in deciding whether to certify, see, for example, *id.* (certifying where the appeal "depend[ed] on resolution of questions of unsettled Florida law and [would] affect many other cases"); Miller v. Scottsdale Ins. Co., 410 F.3d 678, 678 (11th Cir. 2005) ("Because there is no controlling Florida authority on this question, we certify this issue to the Florida Supreme Court."); Freeman v. First Union Nat'l, 329 F.3d 1231, 1234 (11th Cir. 2003) (certifying where there was "no clear, controlling precedent in the decisions of the state's highest court" and the "unanswered questions of state law" were "determinative of [the] appeal").

259. *See, e.g.*, C.F. Trust, Inc. v. First Flight L.P., 306 F.3d 126 (4th Cir. 2002) (certifying where state law uncertain); Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370, 372 (6th Cir. 1995) (stating that "[r]esort to the certification procedure is most appropriate when the question is new and state law is unsettled" and declining to certify because the pertinent case law was "relatively settled"); Langley v. Pierce, 993 F.2d 36, 37 (4th Cir. 1993) (certifying where there was "no controlling precedent in [state] law that addresse[d] the exact controversy between the parties").

260. *See, e.g.*, Kulinski v. Medtronic Bio-Medicus, Inc., 112 F.3d 368, 372 (8th Cir. 1997) (certifying where there was no "controlling precedent in the decisions of the Minnesota Supreme Court which would enable [the] court to reach a sound decision without indulging in speculation or conjecture").

261. 701 F.2d 1266 (8th Cir. 1983) (en banc).

262. *Id.* at 1268.

obviate further extensive consideration by this court."[263] Furthermore, the Eighth Circuit has said that while *Meredith* prevents federal courts from declining to exercise their jurisdiction in diversity cases solely because state law is difficult to determine, certification may solve the problem of ascertaining unclear state law in such cases.[264]

Thus, in contrast to all of the other circuits, the Eighth Circuit has not only differentiated between certification and abstention, but has attempted to explain its rationale for doing so. Certification, unlike abstention, does not require a federal court to surrender its jurisdiction or force the parties into state court for a full round of litigation there. Instead, certification merely permits a state's highest court to decide a question of law.

V. WHY FEDERAL APPELLATE COURTS NEED NOT EMPLOY ABSTENTION PRINCIPLES TO LIMIT THE CERTIFICATION OF STATE-LAW QUESTIONS IN DIVERSITY CASES

A. Introduction

As Part IV demonstrates, many of the federal circuits essentially have equated certification with abstention in diversity cases. While they recognize that certification is procedurally distinct from abstention in that certification does not require remitting the parties to state court for the start of another lawsuit, they fail to recognize any substantive distinction between the two doctrines and offer no explanation for their use of abstention principles to determine whether they should certify.

Because the circuits do not explain their rationale for equating certification with abstention in diversity cases, the reasons for this failure are indeterminate. Nevertheless, several possibilities suggest themselves. First, because certification and abstention are both devices for resolving unclear issues of state law, it is possible that the circuits simply have inferred that abstention principles should be used to determine whether certification is

263. *Id.* Interestingly, even though the *Hatfield* court distinguished certification from abstention, the court still seemed to consider whether exceptional circumstances were present in deciding whether to certify the question before it. Thus, the *Hatfield* court reasoned that certification was appropriate not only because state law was unclear but also because "the public policy aims involved in the statutes at issue [were] conflicting." *Id.* at 1267. The court also reasoned that certification was proper because a case involving the same statutes and issues was before the state supreme court. *Id.* at 1268.

264. *See* Guillard v. Niagara Mach. & Tool Works, 488 F.2d 20, 24-25 (8th Cir. 1973) (remanding to the district court with directions to certify an unclear question of state law if necessary).

warranted. Second, given the Supreme Court's relative silence regarding certification in diversity cases,[265] the circuits may have taken their cue from the Supreme Court's use and endorsement of certification in *Pullman* abstention cases.[266] Because the Supreme Court has suggested that certification is proper in cases where *Pullman* abstention previously would have been justified,[267] the circuits may assume that certification in diversity cases is proper only where the Court has approved abstention in diversity cases. Finally, the circuits may reason that federal courts abdicate their duty to exercise their jurisdiction when they certify in diversity cases. Accordingly, the circuits may have concluded that certification (like abstention) is warranted only where exceptional circumstances are present.

Regardless of the reasons for the circuits' application of abstention principles to certification issues, the question that has not been answered is whether federal courts *must* employ abstention principles to limit the certification of state-law questions in diversity cases. This Part argues that they need not. First, this Part contends that the Supreme Court has never limited certification in federal question or diversity cases to exceptional circumstances, and therefore the lower courts are not compelled to do so. Second, this Part maintains that the decision whether to certify should not turn on the presence of exceptional circumstances because certification does not result in abdication of the duty to exercise jurisdiction. Instead, when a federal court certifies a question of law to a state's highest court, it merely postpones the exercise of its jurisdiction. Thus, there is no reason for federal courts to use the exceptional circumstances requirement of the abstention doctrines to restrict the use of certification.

B. The Supreme Court has not Limited Certification to Exceptional Circumstances in Federal Question Cases Involving State-Law Claims or Diversity Cases

While there is no question that the majority of Supreme Court cases addressing certification involve *Pullman*-type constitutional litigation and unclear state law,[268] the Court has never explicitly limited certification in federal questions cases involving state-law claims to cases in which *Pullman* abstention previously would have been appropriate. Indeed, the *Arizonans*

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265. *See supra* Part III.B.

266. *See supra* Part III.A.

267. *See supra* Part III.A.; Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997).

268. *See supra* Part III.A.

Court unambiguously distinguished certification from abstention when it chided the Ninth Circuit for blending the two doctrines.[269] Additionally, the *Arizonans* Court suggested that unsettled questions of state law, and not exceptional circumstances, are the only condition on certification.[270] More importantly, in *Lehman*, a diversity case, the Court approved of certification where state law was unsettled but no exceptional circumstances were present.[271] In so doing, the Court implicitly recognized that certification in diversity cases need not be limited by abstention principles.

Thus, the Supreme Court has distinguished certification from abstention in both the federal question and diversity contexts. Furthermore, in both types of cases the Court has indicated that the only prerequisite for certification is unclear state law. Consequently, the lower federal courts should not regard Supreme Court precedent as permitting certification only in exceptional circumstances.

C. Certification Need not be Limited to Exceptional Circumstances Because Federal Courts Do not Abdicate Their Strict Duty to Exercise Their Jurisdiction When They Certify

1. Abstention-Based Stays, Abdication of the Duty to Exercise Jurisdiction, and the Exceptional Circumstances Requirement

The Supreme Court has said that when a federal court remands a removed case to state court or dismisses a case outright on abstention grounds, the court abdicates its strict duty to exercise its jurisdiction.[272] Thus, the Court has authorized abstention-based remands and dismissals only in exceptional circumstances where considerations of federal-state comity require deference to another sovereign.[273] The Court also has said that when a federal court stays its proceedings on abstention grounds in a diversity case, it does not abdicate its strict duty to exercise its jurisdiction.[274] Instead, the federal court merely postpones the exercise of its jurisdiction until the state courts resolve a question of state law involved in the case.[275] Even though the Court has opined that abstention-based stays do not result in the

269. *See supra* Part III.A; *Arizonans*, 520 U.S. at 79.
270. *See supra* Part III.A.
271. *See supra* Part III.B; Lehman Bros. v. Schein, 416 U.S. 386 (1974).
272. *See supra* Part II.A.; Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 721 (1996).
273. *See supra* Parts II.A-C.
274. *See supra* Part II.B.; *Quackenbush*, 517 U.S. at 721.
275. *See supra* Part II.B.

abdication of duty, however, the Court nevertheless has sanctioned abstention-based stays, like abstention-based remands and dismissals, only in exceptional circumstances.[276]

Because a federal court allegedly does not abdicate its duty when it grants an abstention-based stay, there is no apparent reason that such stays should be limited to exceptional circumstances in diversity cases. The Court itself has offered no direct justification for this contradiction.[277] One possible explanation for the Court's inconsistency, however, is that the Court implicitly recognizes that an abstention-based stay in a diversity case is the equivalent of an abstention-based remand or dismissal and effectively results in a federal court's abdication of its duty to exercise its jurisdiction.[278] Therefore, because the consequences of abstention-based remands, dismissals, and stays in diversity cases are the same, the Court has imposed the exceptional circumstances requirement on abstention-based stays to limit their use to those circumstances in which it has approved abstention-based remands and dismissals. By doing so, the Court has ensured that the lower courts are faithful to *Meredith* and do not abdicate their duty by granting abstention-based stays simply because state law is difficult to ascertain or unclear.[279]

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276. *See supra* Parts II.B-C.

277. *See* Meltzer, *supra* note 8, at 1899 (noting the contradiction created by "the Court's distinction between the dismissal or remand of a federal action, which the Court prohibits, and the stay of the action, which the Court suggests might be justified").

278. Professors Richard Fallon, David Shapiro, and Daniel Meltzer recognize the "functional similarity" between abstention-based stays and abstention-based remands and dismissals in their casebook when they ask: "If the federal action is stayed pending resolution of the state action, won't the state court's determination be dispositive of the federal action under doctrines of claim and issue preclusion? If so, isn't the practical effect of a stay identical to that of an order dismissing the federal action?" *Id.* at 1900 (internal quotation marks omitted) (quoting RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1193 (5th ed. 2003)); *see also* Yelin, *supra* note 61, at 1899 ("If the distinction between a stay and a dismissal is to have much significance, however, the Court will have to revise the application of the traditional doctrines of claim and issue preclusion with regard to the claims remaining before the federal court. Otherwise, the parties will be barred from relitigating the claim or any issues necessary for deciding the claim in the federal court."); *id.* at 1906 ("If the Court does not modify the preclusive effect of the state court judgment, or if it gives the state proceedings only collateral estoppel effect, then the federal court's stay will be functionally indistinguishable from dismissal since the effect of the stay 'is to require all or an essential part of the federal suit to be litigated in a state forum.'" (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 450 U.S. 1, 11 n.11 (1983))).

279. *See supra* Part II.A.

The Court's unwillingness to explicitly acknowledge the equivalency of abstention-based remands, dismissals and stays in the diversity abstention context can be attributed to the historic inability of courts to decline to exercise their jurisdiction in actions at law.[280] Because courts historically lacked the discretionary power to dismiss damages actions, federal courts today likewise cannot remand or dismiss actions for damages on abstention grounds.[281] If they do, they improperly abdicate their duty to exercise their jurisdiction when it is properly invoked.[282] In order to permit abstention in damages actions, therefore, the Court necessarily reasoned in cases like *Thibodaux* that a stay does not constitute abdication by a federal court of its duty to decide the case before it.[283] The Court concluded instead that a stay is merely a postponement of the exercise of jurisdiction.[284] By creating the fiction that federal courts sitting in diversity merely delay the exercise of their jurisdiction when they grant abstention-based stays, the Court was able to justify extending abstention principles to actions at law. At the same time, however, by limiting abstention-based stays to exceptional circumstances the Court silently acknowledged that, for all practical purposes, federal courts abdicate their jurisdiction when they grant abstention-based stays in diversity cases.

While the Court has not openly recognized that abstention-based stays are functionally equivalent to abstention-based remands and dismissals in its major decisions approving or rejecting abstention, it has done so in the context of deciding whether an abstention-based stay order is a "final order" that is appealable under 28 U.S.C. § 1291.[285] Thus, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[286] the Court held that an abstention-based stay order was "final" for the purposes of § 1291 because it put the plaintiff "'effectively out of court'" and therefore "amount[ed] to a dismissal of the suit."[287]

In *Moses H. Cone*, a hospital and a construction company entered into a contract which provided, in pertinent part, that certain disputes "could be

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280. *See supra* Part II.B.
281. *See supra* Parts II.B-C.
282. *See supra* Parts II.B-C.
283. *See supra* Part II.B.
284. *See supra* Part II.B.
285. 28 U.S.C. § 1291 (2000) provides in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."
286. 460 U.S. 1 (1983).
287. *Id.* at 2, 10.

submitted by either party to binding arbitration."[288] Eventually, the construction company informed the hospital that it had claims for "delay and impact costs."[289] The hospital then filed a declaratory judgment action in state court seeking, *inter alia*, a declaration that the company had no right to arbitration under the contract.[290] The company in turn filed suit in federal district court under diversity jurisdiction "seeking an order compelling arbitration."[291] Relying on *Colorado River Water Conservation District v. United States*, the district court stayed the federal action "pending resolution of the state-court suit because the two suits involved the identical issue of the arbitrability of [the company's] claims."[292] The company then appealed the district court's stay order.[293] The Fourth Circuit heard the case en banc and "held that it had appellate jurisdiction over the case under 28 U.S.C. § 1291."[294] The Court of Appeals then reversed the stay order, remanded the case to the district court, and instructed the district court to enter an arbitration order.[295]

On certiorari, the Supreme Court held that the district court's stay order was a "final decision" and therefore was appealable under 28 U.S.C. § 1291.[296] The Court explained that because the federal and state suits involved the same issue, the district court's "stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata."[297] The Court reasoned that because "the sole purpose and effect of the stay [was] precisely to surrender jurisdiction of a federal suit to a state court," it was functionally a dismissal.[298] Thus, the district court's stay order was final and appealable.

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288. *Id.* at 4.

289. *Id.* at 6. Specifically, the company's claims were "for extended overhead or increase in construction costs due to delay or inaction by the [h]ospital." *Id.*

290. *Id.* at 7.

291. *Id.*

292. *Id.*

293. *Id.* at 7-8.

294. *Id.* at 8.

295. *Id.*

296. *Id.* at 8-9.

297. *Id.* at 10.

298. *Id.* at 10 n.11 ("We hold . . . that a stay order is final when the sole purpose and effect of the stay are precisely to surrender jurisdiction of a federal suit to a state court."); *see also id.* at 28 ("[A] stay is as much a refusal to exercise federal jurisdiction as a dismissal."). The *Moses H. Cone* Court relied on its decision in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), in reaching its conclusion that the stay order at issue was a "final decision" for purposes of § 1291. *Id.* at 9. The Court explained that in *Idlewild* a district

The *Moses H. Cone* Court made clear that its decision did not apply to all stay orders but was limited "to cases where (under *Colorado River*, abstention, or a closely similar doctrine) the object of the stay is to require all or an essential part of the federal suit to be litigated in a state forum."[299] In the course of its decision, the *Moses H. Cone* Court also rejected the argument that an abstention-based stay is distinguishable from an abstention-based dismissal because a stay can be re-opened by a party upon "a showing that the state suit has failed to adjudicate its rights."[300] The Court said that regardless of whether a case is dismissed or stayed on abstention grounds, the federal courts would "remain open" to a party "who later demonstrated the inadequacy of the state forum."[301] Thus, the fact that stayed proceedings

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court "stayed [a] federal suit under the *Pullman* abstention doctrine." *Id.* The *Idlewild* Court "held that the District Court's action was final and therefore reviewable by the Court of Appeals." *Id.* The *Idlewild* Court reasoned that the stay was final and therefore appealable because it put the "[a]ppellant . . . effectively out of court." *Id.* (internal quotation marks omitted) (quoting *Idlewild*, 370 U.S. at 715 n.2). The *Moses H. Cone* Court said that "the argument for finality of the District Court's order [was] even clearer" in *Moses H. Cone* than in *Idlewild* because "[a] district court stay pursuant to *Pullman* abstention is entered with the expectation that the federal litigation will resume in the event that the plaintiff does not obtain relief in state court on state-law grounds." *Id.* at 9-10. In contrast, the stay order in *Moses H. Cone* "meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be res judicata." *Id.*

The Court faced a similar issue in *Quackenbush*, where the defendant removed a diversity case to federal court and the district court remanded the case to state court under *Burford*. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 709-10 (1996). The Court held that abstention-based remand orders are appealable as "final decisions" under § 1291 and, in the process, affirmed *Moses H. Cone*. *Id.* at 712-15. The Court reasoned that the remand order before it in *Quackenbush* was "in all relevant respects indistinguishable from the stay order [it] found to be appealable in *Moses H. Cone*." *Id.* at 714. Like the stay order in *Moses H. Cone*, the remand order "put[] the litigants . . . 'effectively out of court' and its effect [was] 'precisely to surrender jurisdiction of a federal suit to a state court.'" *Id.* (quoting *Moses H. Cone*, 460 U.S. at 11 n.11). The Court noted that the remand order actually was "more 'final'" than the stay order because "[w]hen a district court remands a case to a state court, the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court's docket." *Id.* The Court concluded that "because the District Court's remand order [was] functionally indistinguishable from the stay order . . . in *Moses H.* Cone . . . it [was] appealable." *Id.* at 715.

Interestingly, however, "in discussing the merits of the remand, the majority simply breezed by the persuasive demonstration in *Moses H. Cone* that an abstention-based *stay* did not differ in substance from an abstention-based *dismissal*." Meltzer, *supra* note 8, at 1900; *see supra* note 122 (explaining the *Quackenbush* Court's rationale for concluding that *Burford* abstention was inappropriate on the facts of the case).

299. *Moses H. Cone*, 460 U.S. at 10 n.11.

300. *Id.* at 27.

301. *Id.* at 28.

can be reopened did not demonstrate "any genuine difference between a stay and a dismissal."[302]

The abstention-based stay granted by the district court in *Thibodaux* is very similar to the stay in *Moses H. Cone*, and like the stay in *Moses H. Cone*, it was functionally a dismissal. In *Thibodaux*, the plaintiff sued to appropriate property from the defendant under a state eminent domain statute.[303] The defendant removed the case to federal court under diversity jurisdiction and sought compensation for the taking.[304] The district court stayed the federal proceedings and remitted the parties to state court to obtain an authoritative answer to the question of whether the statute permitted the taking at issue.[305] In upholding the stay, the *Thibodaux* Court emphasized that the district court had merely postponed the exercise of its jurisdiction.[306] To shore up this contention, the Court said that if the state courts found that the taking was permitted, then the parties would return to federal court for a determination of damages.[307] In addition, the Court noted that if the parties did not file suit in state court in a timely fashion, the district court could assert its jurisdiction and decide the case itself.[308]

Like the two cases in *Moses H. Cone*, the federal and state cases in *Thibodaux* involved the same issue: whether the state eminent domain statute at issue permitted the taking. As in *Moses H. Cone*, once the state courts resolved the statutory interpretation in *Thibodaux*, there would be no further litigation on that issue in the federal court because the state court's judgment on the issue would be res judicata. If the state courts found that the taking was not permitted, the federal case would be over. Even if the state courts found that the taking was permitted and the parties returned to federal court, however, the only task left for the federal court would be to award compensation. Thus, the object of the stay in *Thibodaux* was to require an *essential* part of the case to be litigated in state court. [309] Moreover, like the

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302. *Id.*

303. *See supra* Part II.B.; La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 26 (1959).

304. *See supra* Part II.B.; *Thibodaux*, 360 U.S. at 25.

305. *See supra* Part II.B.; *Thibodaux*, 360 U.S. at 26.

306. *See supra* Part II.B.; *Thibodaux*, 360 U.S. at 29.

307. *See supra* Part II.B.; *Thibodaux*, 360 U.S. at 43 (Brennan, J., dissenting).

308. *See supra* Part II.B.; *Thibodaux*, 360 U.S. at 29 (majority opinion).

309. As one commentator has explained:

> In [diversity cases] . . . a federal court's decision to stay federal proceedings to permit adjudication of the case in state court will have virtually the same effect as a dismissal. Even if the state proceeding is limited to a declaratory judgment action, there may be little or nothing left for the federal court to do after the state court

effect of the *Moses H. Cone* stay, the effect of the *Thibodaux* stay was to abdicate jurisdiction of a federal case to state court. While the *Thibodaux* Court stressed that the stay was simply a postponement of jurisdiction, it was, like the stay in *Moses H. Cone*, functionally a dismissal.[310] The *Thibodaux* defendant, as much as the *Moses H. Cone* plaintiff, was effectively out of federal court.

Because the stay in *Thibodaux* was functionally a dismissal, the Court's statement in *Thibodaux* that the district court postponed its jurisdiction when it granted the stay (and the Court's later statements in *Quackenbush* to the same effect)[311] are, at a minimum, suspect. It is more likely that the Court recognized that the stay in *Thibodaux* was, for all intents and purposes, a dismissal, but also understood that an abstention-based remand was not possible in a diversity action for damages. To avoid the improper abdication of the duty to exercise jurisdiction and, at the same time, allow for deference to another sovereign where necessary, the *Thibodaux* and *Quackenbush* Courts thus approved of abstention-based stays in diversity cases only where exceptional circumstances are present.

> renders its judgment. If the state court resolves a state-law claim against the plaintiff or a state-law defense in favor of the defendant, then the federal court need only dismiss the case or perhaps enter judgment in favor of the defendant. If, on the other hand, the state court rules in favor of the plaintiff, then the federal court is at most required to consider the appropriate remedy.

Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1528-29 (1997).

310. The ability of the district court in *Thibodaux* to lift the stay and adjudicate the case if necessary, like the ability of a party to reopen a stay in *Moses H. Cone*, does not demonstrate that there is a difference between a stay and a dismissal in this context.

311. *See supra* Part II.B; *see also* Meltzer, *supra* note 8, at 1899 (discussing the "practical effect" of a stay in cases like *Quackenbush*). As Professor Meltzer has explained:

> In a case like *Quackenbush*, the practical effect of a stay may be not merely to postpone, but to permanently prevent, the federal court litigation. For even if the plaintiff re-filed a state court action, the defendant could remove that action too and presumably have it stayed as well. Even where a stay might permit a litigant to re-file successfully in state court without facing the prospect of removal—as might be true where the only basis for federal jurisdiction is diversity and the suit is against an in-state defendant—the stay's effect is likely to be no different in the end than that of a dismissal.

Id. at 1899-1900.

2. Certification-Based Stays, Postponement of the Exercise of Jurisdiction, and the Exceptional Circumstances Requirement

In contrast to abstention-based stays, certification-based stays need not be based on exceptional circumstances because a federal court does not abdicate its duty to exercise its jurisdiction when it certifies. Certification-based stays, unlike abstention-based stays, actually result in the postponement of the exercise of jurisdiction rather than the surrender of jurisdiction to a state court.

When a federal court grants an abstention-based stay, it remits the parties to state court for a full round of litigation there. The parties begin in a state trial court and must pursue the litigation as far as possible in state court. Consequently, abstention-based stays "require federal courts to relinquish all three functions" that they "perform when they adjudicate cases: law declaration, fact identification, and law application."[312] In other words, a federal court abdicates its duty to exercise its jurisdiction when it grants an abstention-based stay.

On the contrary, when a federal court grants a certification-based stay, it asks the highest court of a state to answer a question of state law. When the state's high court answers the question, it returns the case to the federal court. The federal court then lifts the stay and adjudicates the controversy before it. Certification, therefore,

> generally requires federal courts to cede only one . . . function[]—law declaration. Federal courts remain free to undertake necessary fact identification both before and after certification, and to apply relevant principles of state law to the facts once the highest state court has supplied the necessary rules of decision.[313]

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312. Clark, *supra* note 309, at 1551; *see* Smith, *supra* note 128, at 657 (when a federal court abstains, it "severs itself from the case, leaving the state to make an independent determination of the state law issues" (citation and internal quotation marks omitted)).

313. Clark, *supra* note 309, at 1551; *see* Hatfield v. Bishop Clarkson Mem. Hosp., 701 F.2d 1266, 1268 (8th Cir. 1983) (stating "that certification is not the drastic procedure that the Court in *Meredith* . . . held abstention to be" and reasoning that "certification would not deprive [it] of jurisdiction, []or . . . force the parties into state court, but rather would afford the parties a state forum for a state law question which process may obviate further extensive consideration"); *see also* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 416 (1964) (discussing, in the *Pullman* abstention context, "the benefit of a federal trial court's role in constructing a record and making fact findings" and explaining that "[h]ow the facts are found will often dictate the decision of federal claims").

Thus, certification "enables the federal court to 'participate[] in the resolution of the entire case by framing the state law questions [and] specifying relevant facts and legal issues.'"[314] In other words, when a federal court certifies it delays the exercise of its jurisdiction, but it does not abdicate its duty to exercise its jurisdiction.

In *Lehman Brothers v. Schein*, the only diversity case where the Supreme Court has addressed certification, the Court itself indicated that certification-based stays need not be limited to exceptional circumstances because they do not involve the abdication of duty.[315] The *Lehman* Court remanded a case to the court of appeals for consideration of whether certification was appropriate given the novelty of the issue and the unsettled state of Florida law.[316] The case involved a run-of-the-mill shareholder's derivative suit and there was no suggestion that exceptional circumstances were present.[317] In reaching its decision, the Court recognized that it had reversed an abstention-based dismissal in *Meredith* on facts very similar to those in *Lehman*.[318] The *Lehman* Court explained that, under *Meredith*, "the mere difficulty in ascertaining [state] law is *no excuse for remitting the parties to a state tribunal for the start of another lawsuit*."[319] The problem in *Meredith*, of course, was that the lower court abdicated its duty to exercise its jurisdiction by sending the parties to state court for a new lawsuit absent exceptional circumstances.[320] The *Lehman* Court seemed to suggest, however, that ascertaining state law through certification, despite the absence of exceptional circumstances, is not problematic because the federal court is merely postponing the exercise of its jurisdiction rather than abdicating its duty altogether.[321]

Finally, Justice Rehnquist's concurrence in *Lehman* lends further support to the argument that certification-based stays constitute a postponement of

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314. Smith, supra note 128, at 657 (quoting John A. Scanelli, Note, *The Case for Certification*, 12 WM. & MARY L. REV. 627, 641 (1971)); *see also* Levin, *supra* note 10, at 350 ("[B]y abstaining, a federal court temporarily—if it has stayed the action . . . severs itself from the case, leaving the state court to make an independent determination of at least the state law issue. . . . In inter-jurisdictional certification, however, the federal court actively participates in the resolution of the entire case by framing the state law question, specifying relevant facts and legal issues, and certifying directly to the state's highest court.").

315. *See supra* Part III.B.

316. *See supra* Part III.B.; Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974).

317. *See supra* Part III.B.

318. *See supra* Part III.B.

319. *Lehman*, 416 U.S. at 390 (emphasis added).

320. *See supra* Part III.B.

321. *See supra* Part III.B.

the jurisdictional duty rather than its abdication. Rehnquist concurred in *Lehman* in order "to emphasize the scope of the discretion of federal judges in deciding whether to use . . . certification procedures."[322] He first explained that cases like *Meredith* and *Thibodaux* "deal[] with the issue of how to reconcile the exercise of the jurisdiction which Congress has conferred upon the federal courts with the important considerations of comity and cooperative federalism which are inherent in a federal system."[323] Rehnquist placed certification, however, "[a]t the other end of the spectrum."[324] He suggested that the decision whether to certify, unlike the decision whether to abstain, does not involve deciding whether exceptional circumstances exist such that the abdication of duty is warranted.[325] Instead, Rehnquist compared the use of certification by a federal court in a diversity case to "researching a point of state law" and described it as simply part of the "decisionmaking process."[326]

Justice Rehnquist's language in his *Lehman* concurrence certainly suggests that he did not view certification-based stays as involving the surrender of jurisdiction to a state court and the abdication of the duty to exercise jurisdiction. On the contrary, Rehnquist's language indicates that he viewed the decision whether to certify as one step out of many that a federal court takes in adjudicating a controversy. This in turn implies that Rehnquist saw certification for what it is: a postponement of the exercise of jurisdiction that need not be based on exceptional circumstances.

VI. CONCLUSION

Over ten years ago a federal judge wrote: "Federal courts evince no clear understanding of when, how, or even why to certify . . . ."[327] This Article has attempted to demonstrate that the federal circuit courts remained confused about the appropriate use of certification in diversity cases. More specifically, this Article has argued that several of the federal circuits mistakenly equate certification with abstention in diversity cases because

322. *Lehman*, 415 U.S. at 392 (Rehnquist, J., concurring).

323. *Id.* at 393-94.

324. *Id.* at 394.

325. *Id.* ("[I]n a purely diversity case such as this one, the use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisprudence.").

326. *Id.*

327. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .* , 29 SUFFOLK U. L. REV. 677, 691 (1995).

they incorrectly view certification as an abdication rather than a postponement of the duty to exercise jurisdiction. These circuits focus on whether state law is unclear and whether there are exceptional circumstances that warrant certification.

Instead of focusing on exceptional circumstances, however, the federal courts should consider turning their full attention to other factors that are highly relevant to the certification decision. For example, certification, like abstention, results in costs to both the federal and state court systems and the litigants in terms of both delay and expense. More importantly, a federal court's decision not to certify when state law is unsettled raises the *Erie*[328] specter of both forum shopping and inequitable administration of the laws. While the circuits do sometimes consider factors such as these in deciding whether to certify, they do so very inconsistently.[329] Indeed, it is impossible to identify the precise circumstances under which a federal court will consider factors other than the clarity of state law and the presence of exceptional circumstances.

It is a "bedrock fact" that only a state's highest court "can render an authoritative interpretation of that sovereign's laws."[330] Given this fact, federal courts can cause multiple problems when they unnecessarily decide questions of state law.[331] Thus, the federal courts should stop needlessly limiting certification in diversity cases and at least begin the process of clarifying when, how and why certification is appropriate.

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328. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73-77 (1938). The Supreme Court has identified the prevention of forum shopping and the inequitable administration of the laws as the "twin aims of the *Erie* rule." Hanna v. Plumer, 380 U.S. 460, 468 (1965).

329. The factors that the circuits sometimes consider are: (1) whether the issue is or may be dispositive; (2) the likely recurrence of the issue; (3) the timing of the request for certification; (4) whether the party requesting certification chose the federal forum; and, from time to time, (5) whether the denial of certification will lead to forum shopping or inequitable administration of the laws. *See, e.g.*, Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 249-55 (2005-2006) (discussing criticisms of certification); Clark, *supra* note 309, at 1556-63 (discussing some of these factors).

330. Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1237-38 (2004).

331. *Id.* at 1238 (describing the problems that federal courts can cause when they decide questions of state law, including forum shopping and inequitable administration of the law).