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Is Making State Constitutional Law Through Certified Questions a Good Idea or a Bad Idea?

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IS MAKING STATE CONSTITUTIONAL LAW THROUGH CERTIFIED QUESTIONS A GOOD IDEA OR A BAD IDEA?

Honorable Randall T. Shepard*

I. INTRODUCTION

Early in the current renaissance of state constitutional law, state court judges sometimes lamented the lack of opportunities to develop the jurisprudence and expressed eagerness for more chances to do so. Such invitations inevitably led litigants to plead the state constitution more frequently, both in cases initially filed in state court and in cases docketed in federal courts.

Federal judges hearing cases that contained a state constitutional claim would necessarily regard themselves less well positioned to decide such issues than would be the case if they were, for example, construing a state statute. Federal judges have thus sometimes found it suitable to certify questions of state constitutional law to state supreme courts, for whom the certifications have presented additional opportunities for state judges to expound on issues that might not otherwise arise in the course of litigation initially brought in state court.

There are a good number of reasons why these opportunities are problematic, including the confining manner in which certified questions are litigated, the general need for judicial restraint in "playing the constitutional card," and unanswered questions regarding the precedential value of such decisions. In this article, I highlight examples of developing state constitutional law, examine the reasons for federal courts to certify questions of state constitutional law, and discuss the impact that certification has on state constitutional jurisprudence.

II. DEVELOPMENT OF STATE CONSTITUTIONAL JURISPRUDENCE

The work of state judges in developing the jurisprudence of the several state constitutions, of course, predates the existence of the United

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States Constitution.[1] For most of our national history, it was a central part of what state judges did.

When the Warren Court embarked on an expansion of rights recognized under the federal constitution, however, little room remained for further state constitutional development. When a succession of Republican judicial appointments brought the Warren/Brennan revolution to a close, those seeking expansion of individual rights sought other opportunities. In a 1975 dissenting opinion, Justice Brennan strongly encouraged state judges to employ their own state constitutions to vindicate rights not recognized under federal authority.[2] Many state judges heeded the call, and the number of litigants pleading state constitutional claims notably increased.[3]

The proliferation of state constitutional litigation has altered the legal landscape in two significant ways. First, state judges have distinguished the application of state provisions from their federal counterparts.[4] Second, state judges have advanced the development of unique state constitutional provisions. Both developments have contributed to the movement, which is now referred to as judicial federalism.

Nearly from the beginning of this movement, there have been both opportunities and risks. In an early and influential opinion of the judicial federalism movement, Justice Thomas Hayes of the Vermont Supreme Court counseled:

> The development of state constitutional jurisprudence will call for the exercise of great judicial responsibility as well as diligence from the trial bar. It would be a serious mistake for this Court to use its state constitution chiefly to evade the impact of the decisions of the United States Supreme Court. Our decisions must be principled, not result-oriented.[5]

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1 *See, e.g.*, Washburn v. Fourth Parish of W. Springfield, 1 Mass. (1 Will.) 32 (1804); Turpin v. Locket, 10 Va. (6 Call) 113 (1804).

2 Michigan v. Mosley, 423 U.S. 96 (1975) (Brennan, J., dissenting).

3 *See* New Jersey v. Hunt, 450 A.2d 952 (N.J. 1982).

4 United Artists' Theater Circuit, Inc. v. City of Philadelphia, 635 A.2d 612 (Pa. 1993).

5 Vermont v. Jewett, 500 A.2d 233, 235 (Vt. 1985).

He urged litigants to make the traditional constitutional arguments for state provisions as they would for the federal constitution including historical, textual, doctrinal, prudential, structural, and ethical arguments.[6] Justice Hans Linde of the Oregon Supreme Court offered the following guidance:

> My own view has long been that a state court always is responsible for the law of its state before deciding whether the state falls short of a national standard, so that no federal issue is properly reached when the state's law protects the claimed right.... I think most courts would take that approach for granted when a state statute rather than a state constitution is involved. Of course we pay attention and respect to Supreme Court opinions on issues common to the two constitutions, and it is to be expected that on many such issues courts will reach common answers. The crucial step for counsel and for state courts, however, is to recognize that the Supreme Court's answer is not presumptively the right answer, to be followed unless the state court explains why not.
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> The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand.[7]

The Indiana Supreme Court's approach to evaluating state constitutional claims has reflected this same view.

> The Indiana Constitution has unique vitality, even where its words parallel federal language. We resolve Indiana constitutional claims by "examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose

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6 *Id.* at 236-37 (citing P. BOBBITT, CONSTITUTIONAL FATE—THEORY OF THE CONSTITUTION 25 (1982)).

7 Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 178-79 (1984); *see also* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997).

> and structure of our constitution, and case law interpreting the specific provisions."[8]

We have taken this view even when the state and federal provisions contain the same words, as is the case with search and seizure. In *Brown v. Indiana*,[9] the court most succinctly stated the difference between a claim of unreasonable search and seizure brought under the Fourth Amendment and one brought under the Indiana Bill of Rights.

> Protection against unreasonable searches and seizures is one of the most essential constitutional rights. It holds a central place in both federal and state constitutional criminal procedure. A violation of the federal right occurs when a criminal trial court, over an appropriate objection by the defendant, admits evidence obtained in a search that neither possesses judicial sanction nor falls into one of the exceptions to the warrant requirement. A similar violation of the state right occurs when evidence is admitted that the State has obtained by means of an unreasonable search.[10]

When applying the Indiana Constitution search and seizure provision, our supreme court looked to historical context, the text of the provision, and analogous cases.[11] While modest differences in text provide an argument for attorneys attempting to enlarge the protections of a particular provision and another reason for state judges to distinguish themselves from federal jurisprudence, this distinction should have little impact on the state court's willingness or ability to further its own state constitutional jurisprudence. As Justice Linde wrote:

> Some state courts make too much of identity or slight differences between the texts of similar constitutional clauses. The first step is to overcome the sense that divergence from Supreme Court doctrines is more legitimate when the state's text differs from its federal counterpart than when they are the same. In

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8 Indiana v. Gerschoffer, 763 N.E.2d 960, 965 (Ind. 2002) (quoting Ind. Gaming Comm'n v. Moseley, 643 N.E.2d 296, 298 (Ind. 1994)).

9 653 N.E.2d 77 (Ind. 1995).

10 *Id.* at 79 (footnotes omitted).

11 Moran v. Indiana, 644 N.E.2d 536 (Ind. 1994).

> truth the state court is equally responsible for reaching its own conclusion in either case. A textual difference only makes this easier to see. It may alert courts and counsel to look past familiar caselaw and actually to read the state's text, on the assumption that those who drafted it were not incompetent in the use of English. It may alert them also to look into the origins and history of the state's clause.[12]

The Oregon Supreme Court developed its state's privileges and immunities jurisprudence under such a rubric. In *Oregon v. Clark*,[13] the court evaluated the appellant's claim under the Oregon Constitution before considering a federal argument under the Fourteenth Amendment and noted differences in language and context between its own privileges and immunities clause and the federal counterpart.[14] The Oregon provision reads as follows: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."[15] In discussing the historical context of the provision, the court distinguished its provision. "Antedating the Civil War and the equal protection clause of the fourteenth amendment, its language reflects early egalitarian objections to favoritism and special privileges for a few rather than the concern of the Reconstruction Congress about discrimination against disfavored individuals or groups."[16] The court then set forth the protections guaranteed by their privileges and immunities clause.

> The clause forbids inequality of privileges or immunities not available "upon the same terms," first, to any citizen, and second, to any class of citizens. In other words, it may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs.[17]

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12 Linde, *supra* note 7, at 181-82.

13 630 P.2d 810 (Or. 1981).

14 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

15 OR. CONST. art. I, § 20.

16 *Clark*, 630 P.2d at 814.

17 *Id.*

The distinctions drawn by the Oregon Supreme Court illustrate the importance of textual differences between state and federal provisions and the historical reasons supporting the differences. Noting these differences sheds light on the purpose and uniqueness of state constitutions.

Finally, there are numerous state constitutional provisions without federal counterparts. Clearly, these provisions require independent analysis by state judges, for it is these provisions that are most uniquely tailored to the state and its history. Several states have equal rights and privacy provisions.[18] Quite obviously, the plethora of unique provisions run from the momentous to the comically idiosyncratic.[19] I mention two examples of the former that demonstrate the uniqueness and vitality of state constitutions: property tax provisions and education guarantees.

California has a long history of referendum and initiative, reflecting the population's dedication to direct democracy.[20] These initiatives have regularly risen to constitutional importance, including the famous Proposition 13 through which the people of California set off an earthquake in local fiscal matters. "The modern era of direct democracy in local fiscal decision-making has its origins in [Proposition] 13. [Proposition] 13 was an extraordinary political event in American history by any measure, a 'modern Boston Tea Party,' according to the New York Times."[21]

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[18] The following state constitutions contain an equal rights provision: CAL. CONST. art. I, § 8; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20 (1965, amended 1974); HAW. CONST. art. I, § 3 (1968, amended 1982); ILL. CONST. art. I, §§ 17, 18; LA. CONST. art. I, §§ 3, 12; MD. CONST. art. 46, Declaration of Rights; MASS. CONST. art. VI; N.M. CONST. art. II, § 18; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1 (1889, amended 1972); WYO. CONST. art. I, § 3. *See* Linde, *supra* note 7, at 182 n.40.

The following state constitutions contain a privacy provision: ALA. CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 12; HAW. CONST. art. I, § 6; ILL. CONST. art. I, §§ 6, 12; LA. CONST. art. I, § 5; MISS. CONST. art. III, § 23; MONT. CONST. art. II, §§ 9, 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7. *See* Linde, *supra* note 7, at 182 n.41.

[19] The New York Constitution provides for the width of ski trails. N.Y. CONST. art. XIV, § 1.

[20] Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511 (2002) (discussing direct democracy's effect on the property tax movement).

[21] Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191, 197 (2001) (footnotes omitted) (citing Robert Lindsey, *California Tax Revolt: Lesson for Legislators*, N.Y. TIMES, June 12, 1978, at B10).

The California Supreme Court heard its first constitutional challenge to Proposition 13 in *Amador Valley Joint Union High School District v. State Board of Equalization.*[22] This challenge was brought against the constitutional amendment as approved by voters earlier that same year by Proposition 13, seeming to complicate the traditional constitutional analysis. The circumstances by which the case was before the court emphasized the "joie de vivre" of pure state constitutional jurisprudence. The court stayed the course, however, and stated its intentions clearly.

> We stress initially the limited nature of our inquiry. We do not consider or weigh the economic or social wisdom or general propriety of the initiative. Rather, our sole function is to evaluate article XIII A legally in the light of established constitutional standards. We further emphasize that we examine only those principal, fundamental challenges to the validity of article XIII A as a whole.[23]

Commensurate with California's active referendum process and in addition to traditional constitutional analysis, courts also consider language from official ballot pamphlets, voter intent, and the intent of ballot framers.[24]

California's experience with Proposition 13 certainly garnered many headlines, but other states have been dealing with property taxes on their own terms. Several states have experienced extensive litigation regarding the applicability of their constitutions' uniformity clause to property assessment schemes. Wisconsin's rich history of cases under its uniformity clause dates from 1859.[25] More recently, the Wisconsin Supreme Court applied the same clause to a statute which undervalued assessments of agricultural land and placed an unequal tax burden on owners of residential property.[26]

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22 149 Cal. Rptr. 239 (1978).

23 *Id.* at 241.

24 Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 111 Cal. Rptr. 2d 336 (2001); Hill v. Nat'l Collegiate Athletic Ass'n, 26 Cal. Rptr. 2d 834 (1994).

25 Knowlton v. Bd. of Supervisors of Rock County, 9 Wis. 410 (1859); *see also* Jack Stark, *A Comparison of the Wisconsin and Iowa Constitutions*, 31 RUTGERS L.J. 1019 (2000).

26 Wisconsin *ex rel.* Boostrom v. Bd. of Review, 166 N.W.2d 184 (Wis. 1969).

In the Indiana version of this sort of litigation, the Indiana Supreme Court determined that the existing property wealth assessment system violated Indiana's Constitution.[27] The court again relied on the history and text.

> By instructing the General Assembly to "provide, by law, for a uniform and equal rate of property assessment and taxation" and to "prescribe regulations to secure a just valuation for taxation of all property," the Property Taxation Clause requires the creation of a uniform, equal, and just system. However, the constitutional text does not expressly provide a personal right of absolute uniformity and equality in assessment rate. We also note that this provision is not located in Article I of our state constitution, which generally protects individual liberty rights and limits government action.
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> . . . [W]hen Article X was under consideration at the Constitutional Convention of 1850-51, the delegate who proposed it, Daniel Read, acknowledged the aspirational nature of the provision's language and implied "that he did not expect the full achievement of absolute and precise exactitude." Delegate Read emphasized, "The rule will be a part of the organic law, and the people and the Legislature will endeavor to work up to a rule so manifestly just and equitable."[28]

Inescapably intertwined with property tax reform, school finance makes up the lion's share of state budgets, garners much political debate, and often requires the attention of the state judiciary. The issue pits state constitutional guarantees for a free education against local concerns of property tax rates and the quality of educational services against constitutional requirements for uniform taxation. As Professor Michael Heise has written:

> School finance reform efforts in this country frequently involve the courts through litigation or the threat of litigation. The scope, approach, and constitutional basis of such litigation has changed over

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27 State Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034 (Ind. 1998).

28 *Id.* at 1040 (citations omitted).

> the past two decades. School finance court decisions reflect these changes.
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> Commentators note three distinct "waves" of school finance court decisions. The first wave, which focused on the federal constitution's Equal Protection Clause, began in 1971 with *Serrano v. Priest*[29] and ended in 1973 with the [United States] Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.[30] The second wave, which concentrated on equal protection and education clauses found in state constitutions, began in 1973 with *Robinson v. Cahill*[31] and ended in 1989. The third and current wave of decisions, which began in 1989, focuses on education clauses in state constitutions.
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> Besides its focus on the education clauses of state constitutions, the most recent wave of school finance court decisions is distinguished by another important factor. Specifically, the third wave illustrates the replacement of traditional "equity" court decisions with "adequacy" decisions.[32]

Kentucky ushered in the "third wave" of school finance court decisions in *Rose v. Council for Better Education, Inc.*[33] Relying heavily upon comments made by framers of the Kentucky Constitution at the constitutional debates, the court declared Kentucky's school finance system unconstitutional under Section 183:

> It serves no purpose to further lengthen this opinion with more verbiage from the Constitutional debates. Delegates Beckner and Moore told their fellow delegates and have told us, what this section means.
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> . . . .

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29 487 P.2d 1241 (Cal. 1971).

30 411 U.S. 1 (1973).

31 303 A.2d 273 (N.J. 1973).

32 Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMPLE L. REV. 1151, 1152-53 (1995) (original footnotes omitted).

33 790 S.W.2d 186 (Ky. 1989).

> This Court, in defining efficiency must, at least in part, be guided by these clearly expressed purposes. The framers of Section 183 emphasized that education is essential to the welfare of the citizens of the Commonwealth. By this animus to Section 183, we recognize that education is a fundamental right in Kentucky.[34]

State courts have greatly enriched a history of state constitutional jurisprudence in recent decades. While the rapid increase in state constitutional claims has inevitably led to dramatic development in a compressed period that sometimes left inadequate time for modest steps, the results are nevertheless impressive. As state judges warmed to the idea of developing state constitutional provisions and litigants realized their importance, bench and bar alike looked for additional sources of state constitutional claims.

III. CERTIFIED QUESTIONS FROM FEDERAL COURTS

One class of opportunities came in the form of certified questions from federal courts. It provided a match between state judges exploring new ways of advancing state constitutional jurisprudence and federal judges searching for more efficient ways of complying with the mandate of *Erie Railroad Co. v. Tompkins*.[35]

In their attempts to determine state substantive law, federal judges are faced with three basic options: predicting unsettled state law, declining supplemental jurisdiction over cases with novel or complex state law,[36] or certifying a question to the state's supreme court for clarification.[37] After a good deal of experimentation by courts and extensive discussion among academics, the third of these options has become a standard procedural tool.

> Certification is perhaps uniquely suited to further the principles of judicial federalism underlying the Supreme Court's decision in *Erie*. By allowing state,

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34 *Id.* at 206. "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." KY. CONST. § 183.

35 304 U.S. 64 (1938); *see also* Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305 (1994).

36 28 U.S.C. § 1367(c) (2000).

37 IND. APP. R. 64.

> rather than federal, courts to supply "an authoritative response" in the very case in which an unsettled question of state law arises, certification ensures that states—acting through agents of their choice—rather than federal courts will exercise the "sovereign prerogative of choice" inherent in the resolution of unsettled questions of state law.[38]

In a recent survey, federal judges cited to the following benefits of certification:

> "orderly development of law, particularly in diversity cases"; "result produced is a reliable and controlling precedent"; "avoidance of needless conflicts on state law"; "comity"; "allows for judicial economy and cost saving measures to the litigants"; "will usually help other state or federal courts with similar case issues"; "uniformity of results and justice"; "reducing risks of different outcomes depending on forum choice, reducing forum shopping, quicker resolution by state court of last resort of issues affecting many pending decisions in both state and federal courts"; "can avoid useless wheel-spinning"; and "avoiding conflicts between different panels in the same circuit."[39]

In 1945, the Florida legislature passed the first act permitting a state supreme court to answer certified questions.[40] The statute lay dormant for fifteen years until the United States Supreme Court revived it by encouraging the court of appeals to certify two questions to the Florida Supreme Court for authoritative resolution and offered support for the process.[41] "The Florida Legislature, with rare foresight, has 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."[42] All but three states now have a certification

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38 Bradford R. Clark, *Ascertaining the Laws of the Several States*, 145 U. PA. L. REV. 1459, 1550 (1997) (footnotes omitted).

39 JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 53 (1995).

40 1945 Fla. Laws ch. 23098, § 1 (codified at FLA. STAT. ANN. § 25.031 (West 1988)).

41 Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960).

42 *Id.* at 212.

process in place.[43] The court rules or statutes governing the process generally borrow provisions from the Uniform Certification of Questions of Law Act or adopted it wholesale. In 1995, the National Conference of Commissioners on Uniform State Laws revised the uniform act to provide more direction to judges and a more orderly process.[44]

The uniform act centers on two significant sections, which in turn permit federal courts to certify questions to the highest state court and authorize the highest state court to answer. In the prefatory note, the commissioners expressed the uniform act's purpose as follows:

> The Uniform Act/Rule provides a relatively simple means by which federal courts and state appellate courts can efficiently obtain answers to questions of law from the highest court of the controlling State. Where adopted, it would allow a federal court or state appellate court, having determined that the law of another State controls a controversy, to avoid guessing what that law is when there is no definitive answer in the law of the controlling State. Instead, the court would simply certify the question of law to the highest court of the controlling State.[45]

The power to certify is carefully tempered by sections two and three of the act.

> The [Supreme Court] [or an intermediate appellate court] of this State, on the motion of a party to pending litigation or its own motion, may certify a question of law to the highest court of another State [or of a tribe] . . . if:
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> (1) the pending litigation involves a question to be decided under the law of the other jurisdiction;
> (2) the answer to the question may be determinative of an issue in the pending litigation; and
> (3) the question is one for which an answer is not provided by a controlling appellate decision,

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43 New Jersey, North Carolina, and Pennsylvania do not have a certification process in place. *See* Clark, *supra* note 38.

44 The Act remains in draft form.

45 UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, prefatory note, 12 U.L.A. 68 (1996).

> constitutional provision, or statute of the other jurisdiction.[46]

The power to answer language mirrors this section in relevant part.[47] The uniform act also prescribes the record to be forwarded to the answering court,[48] and various procedures regarding the certification process.[49]

Predictably, federal judges have been receptive to certifying questions to state supreme courts. The process not only satisfies their *Erie* obligation, but also relieves them of the burden of deciding important state issues, a burden more readily apparent when the affected state is not one within the federal judge's circuit. A federal judge sitting in New York, for example, may find it more difficult to decide a complicated claim under the Alabama Constitution. Notwithstanding a few concerns regarding delay and a cautious approach taken by some state supreme courts, federal judges regularly employ the process.

IV. EFFECTS OF CERTIFICATION ON STATE COURTS

To be sure, the state courts reap certain advantages from the system of certification. Most notably for present purposes, a certified question insures that the state supreme court decides important and often novel issues of state constitutional law.[50] Moreover, because certification short-circuits state appellate procedure and presents questions directly to the state's highest court, it saves time and conserves finite state resources.[51] The practice of certification, however, is not always as successful as it is in theory. The process is sometimes not as efficient as it might be, and

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46 *Id.* § 2 (amended 1995), 12 U.L.A. 72 (alterations in original).

47 *Id.* § 3 (amended 1995), 12 U.L.A. 73. This section permits the answering court to accept the question if "the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State." *Id.*

48 A certification order must include: the question of law to be answered, facts relevant to the question, statement acknowledging that the receiving court may reformulate the question, and names and addresses of counsel of record and unrepresented parties. *Id.* § 4 (amended 1995), 12 U.L.A. 74.

49 *Id.* §§ 5-10 (amended 1995), 12 U.L.A. 74-77.

50 Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373 (2000).

51 *Id.*

crafting a certified question that properly presents the issue in a workable manner has proven to be difficult on occasion.

> Certification allows federal courts to adjudicate cases presenting unsettled questions of state law in a manner consistent with both judicial federalism and the constitutional separation of powers. First, unlike prediction, certification ensures that agents of the state—rather than federal courts—make the policy choices necessary to resolve unsettled questions of state law. Second, unlike abstention, which effectively nullifies federal jurisdiction by ceding all three functions of adjudication (law declaration, fact identification, and law application) to state courts, certification allows federal courts to exercise jurisdiction by at least permitting them to perform fact identification and law application. Although certification leaves law declaration exclusively to the states, this is precisely where the Judiciary Act of 1789 and the Constitution, as interpreted in *Erie*, assign this function.[52]

In *Arizonans for Official English v. Arizona*,[53] the U.S. Supreme Court chastised the Ninth Circuit for avoiding an opportunity to certify a question to the Arizona Supreme Court. Justice Ruth Ginsburg stated that the certification process "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."[54] A poll of state justices cited similar benefits to answering certified questions:

> "better decisions"; "greater continuity of decisions"; "efficiency and comity"; "state highest courts may speak in advance of a mix of trial court and federal court predictions"; "important tool to stabilize the law"; "bench and bar are assisted by our new opinion"; "expeditious resolution of unsettled questions of state law"; "avoiding duplication of effort"; helps "federal courts avoid the embarrassment of a wrong guess on the

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52 Clark, *supra* note 38, at 1464.

53 520 U.S. 43 (1997).

54 *Id.* at 76.

> development of state law"; "could be of value to state intermediate appellate court if not used too often"; "state trial courts have guidance in an unsettled area of the law and not inaccurate precedent from the federal court."[55]

It has only been rather late in the forty-year history of certifications that these benefits have been reaped in cases in which a federal judge certified a state constitutional question.[56] In 1988, the Texas Supreme Court entertained a certified question from the U.S. Court of Appeals for the Fifth Circuit. It was the Texas court's first opportunity to answer a certified question, arriving only three years after a constitutional amendment provided for the procedure.[57] In *Lucas v. United States*,[58] the federal court of appeals in certifying the question determined that there was no precedent from the Texas Supreme Court on the constitutional issue:

> We are uncertain whether the Texas Supreme Court would uphold the statute under the Texas Constitution. Specifically, we find "no controlling precedent in the decisions of the Supreme Court of Texas." We are persuaded that we should certify this important question to the Texas Supreme Court, the final arbiter of this issue, rather than engage in an *Erie*-type guess.[59]

In a common refrain and according with the Texas Rules of Appellate Procedure,[60] the federal court appropriately recognized the need to avoid certification of unnecessary questions.

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55 GOLDSCHMIDT, *supra* note 39, at 53.

56 The New York Court of Appeals received thirty-nine requests by May 2000. One case presented a state constitutional issue, but the question was resolved on statutory grounds. *See Tunick v. Safir*, 731 N.E.2d 597 (N.Y. 2000). The court addressed a takings clause issue under the state constitution in *Federal Home Loan Mortgage Corp. v. New York State Division of Housing & Community Renewal*, 662 N.E.2d 773 (N.Y. 1995), even though the question was not directly before it. No other requests involved a state constitutional question. *See also* Kaye & Weissman, *supra* note 50, at 373.

57 "The supreme court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court." TEX. CONST. art. V, § 3-c.

58 757 S.W.2d 687 (Tex. 1988).

59 *Lucas v. United States*, 807 F.2d 414, 418 (5th Cir. 1986).

60 TEX. R. APP. P. 58.1.

> To nourish that cooperative spirit necessary to allow the newly adopted certification process to achieve its potential, we are persuaded that we ought not seek the ruling of the Texas Supreme Court regarding an issue until we have decided other issues in the case to assure that the certified issue may be dispositive of the case before us. That court must dole its limited judicial time by taking for decision only issues of import that must be decided in a true case or controversy.[61]

The Texas court found that the state limit on medical malpractice damages violated the Texas Constitution's open courts provision, stating:

> Recently, state courts have not hesitated to look to their own constitutions to protect individual rights. This court has been in the mainstream of that movement. Like the citizens of other states, Texans have adopted state constitutions to restrict governmental power and guarantee individual rights. The powers restricted and the individual rights guaranteed in the present constitution reflect Texas' values, customs, and traditions. Our constitution has independent vitality, and this court has the power and duty to protect the additional state guaranteed rights of all Texans. By enforcing our constitution, we provide Texans with their full individual rights and strengthen federalism.[62]

In 1976, the Seventh Circuit certified a question to the Indiana Supreme Court regarding the constitutionality of Indiana's guest statute.[63] It was an issue of first impression. The Indiana Supreme Court accepted the question and upheld the statute against a challenge under the Indiana Constitution.[64] In 1993, the Indiana Supreme Court answered a certified question from the U.S. District Court for the

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61 *Lucas*, 807 F.2d at 421. The South Dakota Supreme Court decided a similar issue, holding that the state cap on medical malpractice damages was unconstitutional under the substantive due process provision of the state constitution. *In re* Certification of Questions of Law from U.S. Court of Appeals for Eighth Circuit, 544 N.W.2d 183 (S.D. 1996).

62 *Lucas*, 757 S.W.2d at 692.

63 Sidle v. Majors, 341 N.E.2d 763 (Ind. 1976).

64 *Id.* The statute was challenged under IND. CONST. art. 1, § 12 (open courts and due course of law) and IND. CONST. art. 1, § 23 (equal privileges and immunities). *Id.*

Northern District of Indiana, holding that a statute exempting all of a debtor's funds held for retirement from a bankruptcy action was unconstitutional.[65] Altogether, the Indiana Supreme Court has received twenty-four requests for certification, five of which have presented state constitutional issues.[66]

Even though the process is now well established, both federal judges and state justices have identified impediments to successfully certifying a question. Federal judges acknowledge delay, inadequate factual records, incomplete answers, and overreaching answers as problem areas.[67] State justices identify insufficient factual records, inadequate briefing or oral argument, unresolved factual disputes, abstract and isolated issues, unclear or poorly formed questions, and a tendency to certify questions which, even if unresolved, have little impact on the outcome of the case.[68] These difficulties manifest themselves in actual cases.

The certified questions before the Iowa Supreme Court in *Eley v. Pizza Hut of America, Inc.*[69] demonstrate why state justices occasionally decline to answer. The lengthy certification order as submitted to the Iowa Supreme Court is set out as follows:

> 1. Does the occupier of a business property to which the public is invited have a duty to exercise due care to prevent injury or harm to a person who is not and has not been on that property from the criminal activities of third persons on the business property which injures the person on the adjacent property?
>
> 2. Must the specific act that causes the injury originate on the business premises, or can liability be established without proof as to the third party's location when the rock was thrown, if there is evidence that the rock came from the general vicinity of the business

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65 *In re* Zumbrun, 626 N.E.2d 452, 455 (Ind. 1993).

66 The remaining cases presenting state constitutional issues through certified questions were: *Shook Heavy & Environmental Construction Group v. City of Kokomo*, 632 N.E.2d 355 (Ind. 1994); *Citizens National Bank of Evansville v. Foster*, 668 N.E.2d 1236 (Ind. 1996); and *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981).

67 GOLDSCHMIDT, *supra* note 39, at 55.

68 *Id.*

69 500 N.W.2d 61 (Ia. 1993).

premises and evidence that the crowd from which the rock was thrown had originally come to the area by reason of the fact that the business premises in question had become a hang out for the post-Friday night football game activities of the students?

3. Is there a duty on the part of the operator of a legitimate business to use due care to prevent harm to persons not patrons of that business from the criminal acts of person attracted to the vicinity by that business, if the operator knows or should know from experience that such persons are likely to become unruly and commit criminal acts that could injure persons in the vicinity but not on the business premises and that the criminal conduct could be eliminated by reasonable action on the operator's part?

4. Does the occupier of a business property have a duty to exercise due care to prevent injury or harm to persons who are within the zone of danger created by the criminal conduct of high school students if such persons have not been on the business property but the occupier knows or should have known:

(1) of the problems created by high school students congregating on and near the business premises after Friday night football games for several years,

and

(2) of the criminal propensities of the students including the use of alcohol and the tendency toward fights and violence,

and

(3) that the problems had been successfully eliminated in earlier years through the use of an on-premises security guard?[70]

The questions as certified necessitated that the Iowa Supreme Court rule on unsettled common law. Citing to unresolved factual disputes, the court stated:

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[70] *Id.* at 62.

> A request to expand our common law is a reasonable one. The problem we have with attempting to accommodate the parties in this case is that we do not have the specificity in the facts presented to us that we would have in the course of a normal appeal to our court.[71]

This sort of hesitation has occurred elsewhere. The Ohio Supreme Court declined to answer a certified question, stating that "it is not appropriate for this court to answer certified questions of state law that are so factually specific in nature."[72]

Proponents of certification often tout the process as a timesaving tool. While at least New York has experienced a short turn-around time,[73] this is not always the case.[74] Obstacles to an efficient certification process are not hard to imagine. State supreme courts have crowded dockets, and answering certified questions is not yet common enough to be routine. Certainly, a state supreme court would have little difficulty in timely answering a question regarding the meaning of a particular term within a statute. The task becomes more challenging when a principle of the state constitution is at play. Constitutional issues are difficult to resolve even when a fully developed and adjudicated case is before the court. When that same issue is before the court, prompted by a certified question, some judicial hesitancy is to be expected. In the final section, I explore how the perceived dangers of certifying state constitutional questions might affect state constitutional jurisprudence.

V. EFFECTS OF CERTIFICATION ON STATE CONSTITUTIONAL JURISPRUDENCE

While certification is proclaimed the solution to the federal court's need to determine state law, its impact on state constitutional jurisprudence has been largely ignored. Whether certification proves to be beneficial or detrimental in the end, we must at least explore certain aspects of the procedure which appear to forecast negative consequences for our state jurisprudence.

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71 *Id.* at 63.

72 Copper v. Buckeye Steel Castings, 621 N.E.2d 396, 396 (Ohio 1993).

73 Kaye & Weissman, *supra* note 50, at 373.

74 *See* Honorable Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677 (1995) (citing cases in which the certification process lasted for more than a year).

There are at least three difficulties with certification that affect the law-giving function. First, the procedural posture of certified questions forces a state court's collective hand to answer yes or no on complicated and often fact-sensitive issues. Second, judges are required to resolve constitutional issues when the case would be better decided on statutory grounds.[75] Third, the creation of precedent-setting law without a well-developed factual background before the state supreme court may very well undermine and dilute state case law.

A certified question arrives in a state supreme court in two parts: the question and a set of supporting facts. Either part may turn out to be problematic. A question can be poorly phrased, lacking in specificity, or unduly inclusive. Similarly, the facts may be lacking sufficient detail, disputed, or simply unclear. The uniform act attempts to solve such inherent difficulties in certification through reformation of the question, but it falls short of finding the solution.[76]

As already discussed, the phrasing of the question itself can make the court's legal analysis more difficult. Compounding the problem is the snowball effect of answering the poorly phrased question. For example, in *Eley v. Pizza Hut*, the question was so factually burdened that the myriad of legal issues raised were all but lost. If the Iowa Supreme Court had answered any of these questions, affirmatively or negatively, the value of such an opinion would have been open to doubt. The uniform act attempts to address this problem in section four, which reads as follows: "The [Supreme Court] of this State may reformulate a question of laws certified to it."[77] Reforming the question sometimes makes the state court's task more manageable by permitting the justices to frame legal issues in terms of their own jurisprudence, but it may not assist the federal court in resolving the controversy before it. Furthermore, reforming the question in a manner more consistent with state law or at least in state-specific terminology seems to be one step further away from the live controversy. Even when state constitutions do not prevent state courts from issuing advisory opinions, the practice should be undertaken cautiously.

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75 Ind. Wholesale Wine & Liquor Co. v. Indiana, 695 N.E.2d 99 (Ind. 1998).

76 Because every state with a certification process has its own version of rules, I use the uniform act as a point of reference. The uniform act is the most comprehensive and the most progressive.

77 UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 4 (amended 1995), 12 U.L.A. 74 (1996) (alteration in original); *see supra* note 48.

The phrasing of the question is not always the problem. In *Tunick v. Safir*, the New York Court of Appeals declined to answer three certified questions, the third of which challenged the constitutionality of a New York statute that may have prevented a public photo shoot of nude models.[78] The court reasoned that:

> [T]he presence of the State constitutional issue—the third question—explicitly weighed in the balance favoring certification[.] The parties themselves, however, did not raise, brief or argue a State constitutional issue. This Court could not responsibly engage on that question where the parties to the litigation have not sought relief under this State's Constitution and the issue would be first briefed and raised in our Court.[79]

Although the facts, as presented to the state supreme court, may be unclear or insufficient, certified questions, in this respect, are no different than any other case before the court. The true problem arises when the facts are in dispute. Issuing an opinion based on disputed facts clearly weakens the decision. This is a common reason for state supreme courts to decline a question. The Supreme Judicial Court of Maine declined to answer a certified question stating:

> If we are to participate and yet not render purely advisory opinions, we think it will be incumbent upon us to respond to questions only when it is apparent from the certification itself that all material facts have been either agreed upon or found by the court and that the case is in such posture in all respects that our decision as to the applicable Maine law will in truth and in fact be "determinative of the cause" as the statute conferring jurisdiction upon us requires.[80]

The uniform act attempts to address this problem in section six, which reads in relevant part as follows:

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78 731 N.E.2d 597 (N.Y. 2000); *see* N.Y. PEN. LAW §§ 245.01-245.02 (2000) (Public Sensibilities Offenses).

79 *Tunick*, 731 N.E.2d at 599.

80 *In re* Richards, 223 A.2d 827, 833 (Me. 1966).

> A certification order must contain . . . the facts relevant to the question, showing fully the nature of the controversy out of which the question arose. . . . If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.[81]

In theory, this section should resolve any factual disputes that might arise. In practice, however, determining relative facts complicates the posture of the case. Certainly, a federal district judge would not wish to be bound by an early determination of the facts, nor would a state supreme court wish to rule on a hypothetical fact pattern which may be altered by subsequent proceedings in the federal court. An altered fact pattern would also weaken an answer given by a state court.

A possible fix for fact-related problems would be accepting questions from federal appellate courts,[82] because appellate courts rely on the facts as determined by the district court, making the fact pattern more certain. This is not a very attractive solution for two reasons. First, the facts are sometimes subject to differing inferences even on appeal. Second, the party moving for certification of a question faces an awkward procedural dilemma. At trial, either the district court will deny their motion or the state supreme court will decline to answer the question because the facts are uncertain. If the party waits to move the appellate court for certification, the appellate panel might suspect forum-shopping or purposeful delay and again deny the motion. In response to a plaintiff moving to certify a question for the first time in the Seventh Circuit, Judge Frank Easterbrook wrote: "We are not sympathetic to plaintiffs who opt for a federal forum, lose, and then want a second opinion from a state court."[83]

Certification suffers from more than just procedural flaws. More fundamental concerns in answering constitutional certified questions face state courts.

When a certified question squarely places a constitutional issue before the state supreme court, the normal legal progression of resolving

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81 UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 6 (amended 1995), 12 U.L.A. 75.

82 *See, e.g.*, FLA. STAT. ANN. § 25.031 (West 2003).

83 Stamp v. Ins. Co. of N. Am., 908 F.2d 1375, 1379 (7th Cir. 1990).

issues is bypassed; mainly addressing constitutional issues only when necessary.

> It is long established that "a constitutional question unnecessary to a determination of the merits should not be decided." This long-standing policy of judicial restraint is necessary to the proper determination of such important questions. Shortly after the adoption of the present Indiana Constitution, Judge Stuart wrote for this Court:
>
> > Almost every case that comes here, though it be barren of any other point, is sure to involve a constitutional question.... While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both proper and more respectful ... to discuss constitutional questions only where that is the very *lis mota*.
>
> It therefore becomes "the duty of the court not to enter upon the consideration of a constitutional question where the court can perceive another ground on which it may properly rest its decision."[84]

Upon receipt of a certified question involving a state constitution, state justices must contemplate at least two preliminary determinations in order to protect state constitutional jurisprudence. First, is it appropriate to resolve the issue under the state constitution? Without performing this initial inquiry, a state court assumes that the federal court has evaluated state law and determined that neither statute nor common law answers the question. Second, does the question as presented appropriately frame the constitutional issue? Without this determination, the state supreme court assumes, for example, that a narrow interpretation will not save a challenged statute. In making such assumptions, a state supreme court errs in three significant ways: it may

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[84] Bureau of Motor Vehicles v. Scott, 497 N.E.2d 557, 559 (Ind. 1986) (citations and quotation marks omitted) (quoting Hoover v. Wood, 9 Ind. 286, 286-87 (1857)).

decide a constitutional issue when it is not necessary to the outcome; it may determine a particular statute to be unconstitutional on its face when it may only be unconstitutional as applied; and it allows a federal court to determine the applicable state statutory law. Permitting federal courts this determination violates both *Erie* and judicial federalism principles. We once described such concerns this way:

> If this were not a federal question, our analysis would focus first on potentially dispositive non-constitutional issues before turning to the constitutionality of the two statutes' application to the [parties]. Though presented in a particular factual context, the two questions before us require facial interpretation only, which not only prevents our review of otherwise relevant issues, but demands a sweeping pronouncement of the statutes' constitutionality regardless of the factual setting. Application of the law to case-specific facts has always been relevant to this Court's constitutional jurisprudence, and though our consideration of certified questions promotes the accurate application of state law in federal courts, we also acknowledge the shortcomings of such proceedings.[85]

To avoid such pitfalls, an answering court must be willing either to decline to answer an offending question or to rephrase the question as presented. As mentioned above, these solutions present their own problems.

Finally, the lack of a fully developed factual record raises further problems.[86] The difficulties of answering a poorly supported question itself are obvious. Less apparent are potential and unintended effects on the development of state constitutional law. Without the benefit of an opinion supported by a developed record, the precedential value of a previously unsettled point of constitutional law becomes uncertain. Future litigants relying on such an opinion will have a holding to bolster their position without the benefit of an analysis akin to what we sometimes call "mixed questions of fact and law."

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85 Citizens Nat'l Bank of Evansville v. Foster, 668 N.E.2d 1236, 1242 (Ind. 1996).

86 GOLDSCHMIDT, *supra* note 39, at 55.

Litigation by its very nature rises from facts, often complicated and ambiguous facts. Rarely, if ever, do courts decide pure questions of law. Constitutional issues are especially fact sensitive, requiring a litigant to argue the facts as much as the law. For example, every state constitution has a takings clause. Both litigants and the court are very familiar with the clause and the test by which it is applied. It is the regulations, rules, statutes, and circumstances unique to each case that distinguish each holding and develop the law. Any procedure that might diminish the reliability of facts in such cases must be carefully evaluated for potential repercussions.

VI. CONCLUSION

Inherent attributes of certification indicate that deciding state constitutional questions in this manner may, at best, temper the influence of answers and at worse, dilute the quality of state constitutional case law. In addition to all other factors that state justices consider when accepting or declining a certified question, I suggest that they also consider the ability to craft an answer that will not only resolve the issue, but also contribute positively to the state jurisprudence.