THE ADMINISTRATIVE STATE(S): DELAWARE'S NEW ADMINISTRATIVE CERTIFICATION PROCEDURE

*Daniel R. Kahan**

TABLE OF CONTENTS

INTRODUCTION

The corporate scandals of the last decade—most notably, Enron, WorldCom, and Parmalat—ushered in a new era of corporate and securities law reform.[1] The beginning of that era was marked by the increasing involvement of the federal government in corporate governance matters, a phenomenon aptly described by two prominent commentators as the "new federalism of American corporate governance."[2] Yet, since that keen

---

* Georgetown Law, J.D. 2009; Georgetown University, A.B. 2006. I would like to thank Professor John Olson for encouraging me to write on this topic and for putting me in touch with several individuals whose wisdom dwarfs my own, and to whom I am also incredibly grateful.

1. *See generally* DAVID A. SKEEL, JR., ICARUS IN THE BOARDROOM: THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY CAME FROM 175-92 (2004) (describing the sweeping regulatory reform that followed the collapses of Enron and WorldCom).

2. William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953 (2003).

observation, at least one notable development suggests a possible shift away from federal agency oversight toward state judicial oversight of certain corporate governance matters.[3]

In 2007, the Delaware General Assembly amended the Delaware Constitution to permit the Delaware Supreme Court to consider legal questions certified to the Court by the Securities and Exchange Commission.[4] Through this new procedure, the SEC can request that the court, rather than SEC staff, decide novel questions of Delaware law.[5] The certification procedure has received little attention so far.[6] This is partly because the procedure has been used only once.[7] The relatively quiet reaction to the procedure should not, however, be taken as an indication that

---

3. Of course, this suggestion does not foreclose the possibility that other developments may suggest even greater federal involvement in governance matters. *See, e.g.,* Phred Dvorak & Kara Scannell, *Investors, Take Note: New Bill to Target Boards, 'Say on Pay'*, WALL ST. J., Apr. 25, 2009, at B2 (discussing Senator Charles Schumer's plan to introduce legislation requiring, inter alia, expanded proxy access, non-binding "say on pay" votes, and the creation of risk-management committees). My purpose here is merely to suggest that the particular reform discussed in this Article is a significant one that will expand the ability of the Delaware Supreme Court to resolve some controversial questions of corporate governance. Of course, Delaware's continued role in shaping corporate law will be shaped by the outcome of the ongoing debate over the propriety of federal corporate governance reform.

4. DEL. CONST. art. IV, § 11(8); DEL. SUP. CT. R. 41 (certification requirements and procedures); *see also* 76 Del. Laws ch. 37 (2007) ("The purpose of this amendment is to add the United States Securities and Exchange Commission to the list of entities that may certify questions of law to the Delaware Supreme Court."); 75 Del. Laws ch. 384 (2006) (first proposing the amendment).

5. Certification is not completely new to Delaware. In 1983, the Delaware Constitution was amended to allow the Delaware Supreme Court to hear and determine questions from the United States District Court for the District of Delaware. RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE 141 (2002). In 1993, the legislature amended the Delaware Constitution again to allow for certification from all federal courts and the highest courts of other states. *Id.* Not until 2007, however, did the Delaware Constitution allow the Supreme Court to accept certified questions from non-judicial entities.

6. There is one article that addresses the subject of the procedure directly, offering a defense of the procedure that differs from the one presented in this Article. *See* Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181 (2010). There are also some mentions of the procedure in other articles. *See, e.g.*, Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 BUS. LAW. 1079, 1089 n.35 (2008) ("[T]he Delaware Constitution now reflects the public policy determination that answering [certified] questions in a timely fashion is in the public interest."); J.W. Verret, *Federal vs. State Law: The SEC's New Ability to Certify Questions to the Delaware Supreme Court*, 16 CORP. GOV. ADVISOR 12 (2008) (providing an overview of the procedure). This Article expands these brief discussions into a broader description and analysis of the procedure.

7. *See* CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227 (2008) (en banc).

the procedure is unimportant. Indeed, this Article's purpose is to explain why the certification procedure is important for corporate governance, securities regulation, and federalism generally.

This Article proceeds in three parts. Part I provides an overview of certification procedures traditionally used by the federal courts and compares them to Delaware's new procedure. It then explains how Delaware's procedure is more similar to traditional judicial certification than to the issuance of advisory opinions. Part II describes the use of certification in corporate governance cases. Part III presents, and then responds to, some possible criticisms of the procedure. The Article concludes with some thoughts on the new procedure's potential for carving out a greater role for state oversight in corporate governance.

I. JUDICIAL CERTIFICATION

Certification is traditionally thought of as a procedural tool in the employ of the federal courts. When an unclear question of state law is presented to a federal court, the court may abstain from deciding the question unless it can first obtain an answer to the question from a state court. The most direct way to get that kind of answer is by certifying the question of law to a state supreme court. Yet that procedural option was not always available. This section provides a brief history and overview of question certification procedures. It first describes the development of certification procedures used in the federal courts and then shows how the adoption of Delaware's new certification procedure largely parallels the history of traditional judicial certification.

A. Abstention Doctrines in the Federal Courts

Certification procedures in federal courts developed largely in response to the increasingly confusing, and arguably inconsistent, body of case law concerning judicial abstention in the federal courts.[8] At its core, abstention "refers to judicially created rules whereby federal courts may not decide some matters before them even though all jurisdictional and justiciability requirements are met."[9]

Whether abstention is compelled by, or even permitted under, the Constitution is a controversial question. The basis for much of this controversy is Chief Justice's Marshall's pronouncement that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason

8. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 75-76 (1997).
9. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 12.1, at 783 (5th ed. 2007).

to the constitution."[10] More recently, critics of abstention have argued that the practice violates core separation of powers principles.[11] On the other side of the debate, defenders of abstention insist that jurisdiction is less a mandate than a presumption. Under this view, courts may permissibly consider a number of factors, including whether federal or state law issues predominate, to determine whether to depart from "the presumption favoring the assertion and exercise of jurisdiction."[12]

In any event, the Supreme Court has indicated that abstention may be appropriate in at least three situations:

1) when state law is unclear and a state court's clarification of state law might render a federal court's constitutional ruling unnecessary (*Pullman*-type abstention)[13];
2) when state law is unclear in diversity cases (*Thibodaux*-type abstention)[14]; or
3) when state law is unclear and there is a need to defer to complex state administrative procedures (*Burford*-type abstention).[15]

The first two situations are by far the most common. But all three situations raise the same question: What should a federal court do when it decides that abstention is either required or prudent in a particular case?

---

10. Cohens v. Virginia, 19 U.S. 264, 404 (1821).

11. *See, e.g.*, MARTIN REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 47-74 (1991) (criticizing abstention doctrine as violating separation of powers principles); Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 72; 77-78; 115 (1984) (criticizing the "questionable logic underlying traditional abstention").

12. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 579 (1985).

13. *See* CHEMERINSKY, *supra* note 9, § 12.2.1, at 785-89 (discussing Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941)).

14. *Id.* § 12.2.2, at 797-802 (discussing Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959)). This situation exists because of the requirement established in Erie Railroad v. Tompkins, 304 U.S. 64 (1938), that federal courts apply state law in diversity cases. *Id.* §12.2.2, at 797.

15. *Id.* § 12.2.3, at 802-07 (discussing Burford v. Sun Oil Co., 319 U.S. 315 (1943)). These are all doctrines that require courts to abstain from deciding questions that implicate vertical federalism concerns—that is, concerns involving the relationship between the federal government and the states. Similar doctrines either require or allow courts to refrain from deciding questions that implicate horizontal federalism concerns—involving the relationship between different branches of the federal government—as well. *See, e.g.*, Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1309-10 (2002) (describing and criticizing the "limited discretion [federal courts have] to abstain from deciding in the first instance matters delegated to [federal] agencies.").

B. Problems in Abstention Practice

Each abstention situation is governed by a different kind of procedure. The procedure is simplest in the case of *Burford*-type abstentions. In these cases, the action brought in federal court is simply dismissed and the litigants' claims are resolved through state administrative proceedings.[16] With the other two types of abstention, however, the process is more complex. A federal court does not generally dismiss the case, but instead retains jurisdiction pending a resolution by a state court.[17] This wait-and-see approach was articulated by the Supreme Court in *England v. Louisiana State Board of Medical Examiners*.[18] In *England*, Justice Brennan explained that "abstention 'does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise.'"[19] The Court then held that the proper course for courts to take in *Pullman*- or *Thibodaux*-type abstentions is to postpone judgment until the litigants have tried the state law issues in state courts.[20] Once the state law issues are resolved, the litigants can return to federal court to have their remaining federal claims decided.[21]

The *England* procedure is simple in theory, but not in practice. As Justice Norvell of the Supreme Court of Texas observed, "[t]here are serious difficulties on the state side of the question."[22] This is because, in post-abstention state litigation, the state court is faced with a situation "in which a cause or at least portions thereof are pending in two courts, one of which (the state court) is not empowered to render a final enforceable judgment."[23] As a result, the state court may view the request for relief (typically, a declaratory judgment) as nothing more than a request for an advisory opinion—a request that most state supreme courts will not grant.[24] There are also practical problems. Justice Norvell described post-abstention

16. 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4245 (3d ed. 2009).

17. *Id.* § 4243.

18. 375 U.S. 411 (1964).

19. *Id.* at 416 (quoting Harrison v. NAACP, 360 U.S. 167, 177 (1959)).

20. *Id.* at 416 n.7.

21. *Id.* at 417. By definition, *Thibodaux* abstention situations arise in diversity cases involving state law; those cases may not require the resolution of other, federal law questions. Once the state law issue is resolved by a state court, there may be nothing left for the federal court to decide and, as a result, "the effect of sending the case to state court is likely a permanent end to the federal court proceedings." CHEMERINSKY, *supra* note 9, § 12.3, at 812.

22. United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 858 (Tex. 1965).

23. *Id.* at 858-59.

24. This was indeed the case in Texas when *Delaney* was decided, though Justice Norvell recognized that the Supreme Court of Louisiana had issued an advisory opinion under similar circumstances. *See id.* at 861.

litigation, which requires litigation in state trial, appellate, and supreme courts, as "highly cumbersome, expensive and time consuming."[25]

In response, the U.S. Supreme Court created an alternative to the process established in *England*. In *Harris County Commissioners Court v. Moore*, the Court held that federal courts should dismiss an action without prejudice where the post-abstention state litigation would, as in Texas, pose justiciability problems.[26] Under the modified procedure, once the litigants resolved the issue in state court, the plaintiff could return to federal court by bringing a new action.[27] But this solution addressed only part of the problem,[28] and it was actually more burdensome than the *England* procedure. Consider the course such litigation might take: A plaintiff brings an action in federal court. The court dismisses that action pending a resolution of the state-law questions by the state supreme court. Traditionally, though, the plaintiff cannot go directly to that court. Instead, the plaintiff must first bring an action in a state trial court, pursue appeals through intermediate appellate courts, and finally, ask the state supreme court to review those decisions.[29] Then, with that decision in hand, the plaintiff must—if she wishes to proceed after receiving clarification from the state's highest court—re-file her suit in federal court.[30] As Justice Norvell of the Texas Supreme Court colorfully described it, post-abstention state litigation is "rather like burning a house to roast a pig."[31]

C. The Certification Solution

The procedural problems created by early abstention practice were not inevitable. In *Clay v. Sun Insurance Office, Ltd.*,[32] the Supreme Court recognized that there was indeed a better alternative.[33] The plaintiff in *Clay*

---

25. *Id.* at 864.

26. 420 U.S. 77, 88-89 (1975).

27. *Id.*.

28. Professor Chemerinsky even raises the possibility that it does not solve the problem at all. *See* CHEMERINSKY, *supra* note 9, § 12.3, at 812 ("One must wonder whether this alternate procedure will really satisfy the state court's concerns. So long as the matter can return to the federal court—whether or not it remains on the docket while the case is in state court—the state is not issuing the final decision in the case.").

29. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997) ("Attractive in theory because it placed state-law questions in courts equipped to rule authoritatively on them, *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state-court system before any resumption of proceedings in federal court.").

30. Because the first federal action would have been dismissed without prejudice, the new suit would not be barred on res judicata grounds. *See Harris County*, *supra* note 26.

31. *Delaney*, *supra* note 22, at 864.

32. 363 U.S. 207 (1960).

33. When a court has decided to abstain from ruling on some state law issue, certification may not necessarily be the best method to resolve the issue. As discussed in

was an Illinois resident who had purchased an insurance policy from the defendant, a corporation with operations in several states, including Illinois and Florida.[34] The policy, which covered against worldwide personal property loss, "required that suit on any claim for loss must be brought within twelve months of the discovery of the loss."[35] The plaintiff moved to Florida, where he suffered a personal property loss.[36] He filed a claim with the defendant, and when the defendant refused to pay, the plaintiff filed his suit in federal district court, "more than two years after discovery of the losses."[37] The defendant argued, and the plaintiff conceded, that the policy's two-year restriction was valid under Illinois law.[38] But the parties disagreed as to whether the restriction was valid under Florida law.[39]

Rather than applying the limitation provision in the contract, the district court applied Florida's "five-year limitation for actions on written contracts."[40] The defendant appealed, and the Fifth Circuit reversed on the ground that applying Florida's statute of limitations violated the Due Process Clause of the U.S. Constitution.[41] Though the court of appeals considered whether the statute of limitations applied to the case, it chose to decide on constitutional grounds instead[42] since "it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute."[43]

The Supreme Court granted certiorari and reversed. The Court found the Fifth Circuit's approach inconsistent with principles of constitutional avoidance.[44] In other words, the Court reasoned that the court of appeals should have determined in the first instance whether Florida law required the application of the five-year statute of limitations; only after resolving that question affirmatively should the court have reached the constitutional question.[45] The Court also recognized, just as the Fifth Circuit did, that the

---

Part I.A *supra*, there are different types of abstention, and certification may be more appropriate in some circumstances than in others. *See generally* Deborah J. Challener, *Distinguishing Abstention from Certification in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 RUTGERS L.J. 847 (2007).

34. 363 U.S. at 208.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 209 & n.2.
41. *Id.* at 209.
42. *Id.*
43. *Id.* at 212.
44. *Id.* at 211 (noting that "the Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'" (quoting Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885))).
45. *Id.*

question involved an unclear area of state law.[46] But the Court, unlike the Fifth Circuit, realized that Florida's legislature had recently passed a statute that allowed the Florida Supreme Court to hear and determine questions certified to it by federal courts.[47] The Court ultimately vacated and remanded the case to the Fifth Circuit with the strong suggestion that it take advantage of the opportunity to certify the state law questions to the Florida Supreme Court.[48]

Following Florida's example, many states have now adopted statutes or amended their constitutions to provide their supreme courts (and, sometimes, intermediate appellate courts) the ability to hear and answer certified questions.[49] A handful of states even accept certified questions from non-Article III institutions like the Court of International Trade, the Tax Court, the Judicial Panel on Multidistrict Litigation, and tribal courts.[50] But no state other than Delaware accepts certified questions from federal administrative agencies. The procedure is thus another first for the First State.

D. Delaware's Certification Procedure

The Delaware Constitution now permits the Delaware Supreme Court to consider legal questions certified to it by the SEC.[51] The 2007 constitutional amendment simply added the SEC to a list of other institutions that were already able to certify legal questions to the Delaware

46. *Id.* at 212.

47. *Id.* (recognizing the "rare foresight" demonstrated by the Florida legislature in adopting the certification statute). Indeed, Florida was the first state to adopt a certification statute. *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1553 n.502 (1997).

48. *Id.* The *Clay* story has an interesting epilogue. On remand, the Fifth Circuit did certify the question to the Florida Supreme Court, and that court determined that the five-year limitations period applied. Now unable to avoid the constitutional question, the Fifth Circuit reiterated its original view that applying Florida's statute of limitations violated the Due Process Clause. The Supreme Court again granted certiorari, and again, reversed. This initial foray was not exactly certification's shining moment; after four years and as many federal appellate court decisions, the parties ended up in the same position as they were after the initial decision of the district judge. *See* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1687 n.55 (2003).

49. *See* 17A WRIGHT ET AL., *supra* note 16, at § 4248 (cataloging state certification provisions).

50. *See* JONA GOLDSCHMIDT, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE 17-18 (1995).

51. DEL. CONST. art. IV, § 11(8).

Supreme Court.[52] Article IV, Section 11 of the Delaware Constitution now provides that "[t]he Supreme Court shall have jurisdiction . . . [t]o hear and determine questions of law certified to it by . . . the United States Securities and Exchange Commission."[53] Shortly after the constitutional amendment became effective, the court amended its rules to include the SEC among a list of "entities" with the power to certify questions to the court.[54]

Jurisdiction over certified questions is not automatic. Clause 8 of Section 11 establishes an important prerequisite for accepting certified questions: it must "appear[] to the Supreme Court that there are important and urgent reasons for an immediate determination of such questions by it."[55] Clause 8 further provides that "[t]he Supreme Court may, by rules, define generally the conditions under which questions may be certified to it and prescribe methods of certification."[56] The court has exercised its power under this provision. Rule 41 not only reiterates the constitutional requirements for certification, but also clarifies the court's own requirements. Significantly, Rule 41(b) establishes that "[a] certification will not be accepted if facts material to the issue certified are in dispute."[57] This requirement ensures that only ripe disputes are decided by the court.[58]

Rule 41 also provides a non-exhaustive, illustrative list of reasons for accepting certification.[59] First, the court may accept certified questions that present original questions of law, defined as questions that are of "first instance" in Delaware.[60] Second, the court may accept certification where

---

52. That list includes lower Delaware courts, the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court, or the highest appellate court of any other state. *Id.*

53. *Id.* Recall that one type of traditional judicial abstention, *Burford*-type abstention, involves a federal court deferring to complex state administrative proceedings. *See supra* Part I.A. & note 15. Viewed narrowly, the reverse situation occurs when a state court defers to federal administrative proceedings. The Delaware procedure, then, falls somewhere between the two, given that it involves a federal agency deferring to a narrow state judicial proceeding. Viewed more broadly, though, the new procedure is the exact opposite of *Burford*-type abstention. In *Burford*-type abstentions, the judiciary defers to an administrative agency; with the new administrative certification procedure, an agency defers to the judiciary.

54. DEL. SUP. CT. R. 41(a)(ii).

55. DEL. CONST. art. IV, § 11(8). Rule 41 makes clear that this is a necessary condition, not merely a sufficient one. DEL. SUP CT. R. 41(b) ("Certification will be accepted in the exercise of the discretion of the Court only where there exist important and urgent reasons for an immediate determination by this Court of the questions certified.").

56. *Id.*

57. DEL. SUP. CT. R. 41(b).

58. For more on ripeness, and the problems it may present in the certification context, *see infra* Part I.E.

59. DEL. SUP. CT. R. 41(b) ("Without limiting the Court's discretion to hear proceedings on certification, the following illustrate reasons for accepting certification . . .").

60. DEL. SUP. CT. R. 41(b)(i).

"decisions of the trial courts are conflicting upon the question of law."[61] Third, the court may accept certification for "[u]nsettled question[s]."[62] This last category sounds much like the first, but it relates only to the "constitutionality, construction or application" of a Delaware statute,[63] whereas "original" questions need not relate to statutes. Rule 41 then goes on to explain the procedures to be used by trial courts in certifying questions to the Delaware Supreme Court.[64] Interestingly, the rules do not yet provide procedures to be followed by the SEC, or even appellate courts outside Delaware, in certifying questions.

E. The Differences Between Answers and Advisory Opinions

Answers to certified questions are not advisory opinions. In Delaware, for example, the justices of the supreme court are allowed to render advisory opinions in certain circumstances.[65] But those opinions are obtained through a novel, quasi-judicial process initiated by another branch of the state government.[66] There is no requirement that there are parties with adverse interests. Facts need not be concrete. In fact, it is possible that no one has standing to bring a suit to challenge the legislative or executive action that is the subject of an advisory opinion request. All the justices need before them is the subject of the opinion, such as the text of a proposed statute.[67] If there are no adverse parties, the justices may appoint counsel to make the arguments for both sides.[68] The subject addressed in an advisory opinion may be important, but it may or may not meet the traditional requirements of justiciability.

---

61. DEL. SUP. CT. R. 41(b)(ii).

62. DEL. SUP. CT. R. 41(b)(iii).

63. *Id*.

64. DEL. SUP. CT. R. 41(c).

65. The Justices may render advisory opinions in their individual capacities, though the court itself cannot issue such opinions. *See* HOLLAND, *supra* note 5, at 142. The process is codified both in the Delaware Code and in the Supreme Court Rules. DEL. CODE ANN. tit. 10 § 141(a) (2009) (authorizing the Justices to render advisory opinions); DEL. CODE ANN. tit. 29 § 2102 (authorizing the Governor to seek advisory opinions from the Justices); DEL. SUP. CT. R. 44 (establishing the procedure whereby Governor or General Assembly may request advisory opinions from the Justices). The process was invoked recently, in an attempt by the Governor to determine the constitutionality of a statute enabling sports betting. *See In Re Request of the Governor for an Advisory Opinion*, _ A.2d _, No. 150, slip op. at 6-7 (2009) (on file with author) (concluding that the sports-betting statute did not violate the Delaware Constitution).

66. DEL. SUP. CT. R. 44(b) ("The request shall be docketed with the Clerk of the Court and, after designation of counsel, shall be processed through briefing and argument in the same manner as an appeal or as an original proceeding in the Supreme Court.").

67. HOLLAND, *supra* note 5, at 142.

68. *See supra* note 65, at 4 (appointing counsel to present "affirmative" and "negative" responses to Governor's question).

Proceedings involving certified questions are fundamentally different. For one, there are adverse parties. In the judicial certification context, the adversarial relationship may be taken as a given.[69] In the administrative certification context, the adverse parties will likely be the issuer, on one side, and a shareholder-proponent, on the other.[70] The Delaware Supreme Court treats these adverse parties like normal litigants and requires them to submit briefs as appellant and appellee.[71] The court has before it a record containing not just the text of a shareholder proposal, but also any communications between the parties and the SEC, legal opinions from Delaware counsel, and briefs from both sides. The parties present oral arguments to the court. The SEC is not itself a party to the proceedings; its role is limited to certifying the appropriate questions and transmitting the certification request to the court.[72]

Certified questions may, however, present other justiciability concerns. In particular, one could argue that cases certified by the SEC are not ripe for adjudication. In *Bebchuk v. CA, Inc.*, Professor Lucian A. Bebchuk[73] asked the company to adopt a bylaw prohibiting the adoption of a poison pill unless it was either ratified by the shareholders or approved unanimously by the board.[74] The bylaw also provided that any pill adopted by the board, without shareholder ratification, must expire no later than one year after the pill's adoption.[75] When CA requested a no-action letter from

---

69. This is because the certifying court has ample time, and strong incentives, to dismiss at an early stage a case that does not involve adverse interests.

70. This was indeed the case in the first case to use the procedure. *See infra* Part II.B.

71. In *CA*, the issuer was designated the appellant and the proponent was designated the appellee. CA, Inc. v. AFSCME Employees Pension Plan, No. 329, 2008 (Del. July 1, 2008) (order accepting certified question and establishing procedures to be followed), available at http://law.du.edu/images/uploads/corporate-governance/sec-governance-ca-order-accepting.pdf. This makes sense, given that under Rule 14a-8, the issuer carries the burden of showing that exclusion is justified, *see* 17 C.F.R. § 240.14a-8(g) (2008), just as an appellant carries the burden of proving the trial court's error in a typical appeal, *see, e.g.*, BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON APPELLATE PROCEDURE AND TRIAL PRACTICE INCIDENT TO APPEALS § 604, at 518 (1892) ("The rule, as stated by the courts, imposes upon a complaining party the burden of showing very clearly and very strongly that the trial court abused its discretion.").

72. In *CA*, the certification request was accompanied by a letter from the Commission's General Counsel, Brian Cartwright, explaining the request. *See* Letter from Brian G. Cartwright, General Counsel, SEC, to Clerk, Supreme Court of Del. (June 27, 2008), *available at* http://law.du.edu/images/uploads/corporate-governance/sec-governance-ca-letter-cartwright.pdf.

73. William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance & Director of the Program on Corporate Governance at Harvard Law School.

74. Bebchuk v. CA, Inc., 902 A.2d 737, 738-39 (Del. Ch. 2006).

75. *Id.* The bylaw further provided that it could not be repealed without the unanimous consent of the board. *Id.*

the SEC, Bebchuk sought declaratory relief from the Delaware Court of Chancery.[76] Bebchuk asked the court to declare that his bylaw was valid under Delaware law, and hence, not excludable under Rule 14a-8(i)(2).[77] Ultimately, Vice Chancellor Lamb concluded that the case was not yet ripe for adjudication.[78] The court found it especially important that the "key event necessary to vest jurisdiction"—the shareholder vote and adoption of the proposed bylaw—had not yet occurred, and might never occur.[79] As such, the injury complained of by the plaintiff was too remote and hypothetical to create a justiciable controversy.[80] Although the court did not grant the relief Bebchuk sought, its analysis recognized that, "[a]t a minimum, the issue of the legality of the proposed bylaw is an important, undecided one."[81] Eventually, CA agreed to include the proposal, albeit in modified form.[82]

Based on that case, one could argue that the Delaware Supreme Court should reject questions certified by the SEC as non-justiciable. Because questions are likely to be certified while no-action proceedings are pending, and before an actual shareholder vote, neither "party" has yet sustained an injury sufficient to vest jurisdiction. But ripeness is a device used by the courts to ensure they do not exceed general jurisdictional grants conferred upon them by the legislature. Accordingly, when the legislature explicitly and specifically provides for jurisdiction over a particular type of dispute, the ripeness inquiry becomes more or less irrelevant. At that point, the legislature has made a policy judgment that certified questions should be heard, and decided, by the court.[83] Essentially, the legislature has taken a class of disputes that might otherwise be unripe, and "ripened" it.[84]

---

76. *Id*. at 739.

77. 17 C.F.R. § 240.14a-8(i)(2) (2008) (issuer may exclude proposal that "would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject").

78. 902 A.2d at 740-45 (citing, inter alia, Stroud v. Milliken Enters. Inc., 552 A.2d 476 (Del. 1989)).

79. *Id.* at 741.

80. *Id.* at 745.

81. *Id.* at 743.

82. Beth Bar, *Shareholder Rights: CA Stockholders to Consider Poison Pill Bylaw Change*, N.Y.L.J., June 29, 2006, at 5, col. 2.

83. This is not to say that all certified questions should be accepted. *See* DEL. SUP. CT. R. 41 (certified questions must present important and urgent reasons for an immediate determination by the Supreme Court); *see also* United States v. Anderson, 669 A.2d 73, 79 n.4 (Del. 1995) (certification requirements in Delaware Supreme Court Rule 41 are intended to "ensure[] that questions are ripe for judicial decision").

84. *See* Strine, *supra* note 6, at 1089 n.35 ("This expression of public policy might be thought to ripen disputes between issuers and stockholders about the validity of *proposed* bylaws, given that the Delaware Constitution now reflects the public policy determination that answering such questions in a timely fashion is in the public interest.") (emphasis in original).

Even if the class of bylaw disputes was not "ripened" by the constitutional amendment, answers to certified questions are still not advisory opinions. There are important formal distinctions between the two. The requirements for obtaining an advisory opinion are different from those necessary to receive an answer to a certified question.[85] Advisory opinions, moreover, are creatures of ordinary statutes and common law,[86] whereas jurisdiction over certified questions is provided for in the Delaware Constitution.[87] Thus, even disregarding the important substantive differences between advisory opinions and answers to certified questions, the two types of judicial processes can be distinguished by their formal differences.

II. CERTIFICATION IN CORPORATE GOVERNANCE MATTERS

Before the adoption of Delaware's new certification procedure, federal courts had used traditional certification to resolve controversial questions of corporate governance. This section provides an overview of one of the most significant certification cases involving corporate governance and compares it to the first use of the administrative certification procedure.

A. *International Brotherhood of Teamsters General Fund v. Fleming Companies*

In 1986, the Fleming Companies, Inc., an Oklahoma corporation, implemented a shareholder rights plan.[88] The plan was set to expire in 1996, at which point it could be renewed by Fleming's board of directors.[89] In 1996, just as the rights plan was about to expire, the International Brotherhood of Teamsters General Fund introduced a non-binding resolution at Fleming's annual shareholders meeting.[90] The proposal called for the company to let the plan expire and not renew it.[91] Despite a majority

---

85. *Compare* DEL. SUP. CT. R. 41(b) ("Certification will be accepted in the exercise of the discretion of the Court only where there exist important and urgent reasons for an immediate determination by this Court of the questions certified."), *with* DEL. SUP. CT. R. 44 (advisory opinions require only that the governor or legislature request such opinions). *See also* HOLLAND, *supra* note 5, at 141-43 (discussing certified questions and advisory opinions separately).

86. *See* HOLLAND, *supra* note 5, at 142-43.

87. DEL. CONST. art. IV, § 11(8).

88. Int'l Bhd. of Teamsters Gen. Fund v. Fleming Cos., 975 P.2d 907, 908 (Okla. 1999).

89. *Id.* at 909.

90. *Id.*

91. *Id.*

shareholder vote in support of the proposal, Fleming's board decided to renew the plan.[92]

In 1997, the Teamsters prepared a statement for inclusion in the proxy materials for Fleming's annual shareholders meeting.[93] The statement contained a proposal to amend the company's bylaws. The amendment required that the board put the adoption of any rights plan to a shareholder vote, and only after receiving approval from a majority of shareholders could the board adopt a rights plan.[94] As the Oklahoma Supreme Court explained: "[t]he proposal was essentially a ratification procedure wherein the shareholders would force the board to formulate a rights plan both the board and shareholders could agree on or do away with such a plan altogether."[95]

Fleming excluded the proposal from its proxy on the ground that it was not a proper subject for shareholder action under Oklahoma law.[96] In response, the Teamsters brought an action in the United States District Court for the Western District of Oklahoma. The district court granted summary judgment for the Teamsters' and issued an injunction ordering inclusion and a vote on the proposal.[97] Fleming appealed to the Tenth Circuit, and while the appeal was pending, sought a suspension of the injunction.[98] (The practical effect of the suspension would have been to prevent the proposal from being voted on at the annual meeting.) The

---

92. *Id.*

93. *Id.*.

94. *Id.* at 909 & n.3.

95. *Id.* at 909. The validity of this and similar proposals has given rise to a heated debate. *See, e.g.,* John C. Coffee, Jr., *The Bylaw Battlefield: Can Institutions Change the Outcome of Corporate Control Contests?*, 51 U. MIAMI L. REV. 605, 613–16 (1997); Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett*, 19 CARDOZO L. REV. 511, 544–51 (1997); Lawrence A. Hamermesh, *Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?*, 73 TUL. L. REV. 409, 479 (1998); Jonathan R. Macey, *The Legality and Utility of the Shareholder Rights Bylaw*, 26 HOFSTRA L. REV. 835, 837 (1998); see also Neil Lieberman, *Justice Jackson in the Boardroom: A Proposal for Judicial Treatment of Shareholder-Approved Poison Pills*, 2008 COLUM. BUS. L. REV. 360 (2008). In 2002, the *Delaware Journal of Corporate Law* featured an exchange between Professor Ronald Gilson, arguing that such bylaws were valid, and Martin Lipton and Paul Rowe, arguing the contrary. *See* Ronald J. Gilson, Unocal *Fifteen Years Later (and What We Can Do About It)*, 26 DEL. J. CORP. L. 491 (2001); Martin Lipton & Paul K. Rowe, *Pills, Polls, and Professors: A Reply to Professor Gilson*, 27 DEL. J. CORP. L. 1 (2002).

96. 975 P.2d at 909-10.

97. Int'l Bhd. of Teamsters Gen. Fund v. Fleming Cos., No. Civ. 96-1650-A, 1997 WL 996768, at *1 (W.D. Okla. Feb. 19, 1997).

98. *Id.*

district court refused to suspend the injunction.[99] At the annual meeting, the proposal received support from approximately 60% of the voted shares.[100]

On appeal, the Tenth Circuit decided, apparently *sua sponte*, to certify two questions of law to the Oklahoma Supreme Court.[101] The first question was whether Oklahoma law "restrict[s] the authority to create and implement shareholder rights plans exclusively to the board of directors."[102] The second question was whether shareholders could "propose resolutions requiring that shareholder rights plans be submitted to the shareholders for vote at the succeeding annual meeting[.]"[103]

The Oklahoma Supreme Court answered the first question negatively and the second affirmatively.[104] Recognizing that the questions were ones of first impression,[105] the court surveyed statutes of other states.[106] The court found particularly salient the fact that the Oklahoma legislature had not passed a "shareholders rights plan endorsement statute."[107] The court reasoned that such statutes, which had been adopted by 24 states when *Fleming* was decided,[108] gave the board "relative autonomy" in adopting a rights plan.[109] The court reasoned that Oklahoma's lack of an endorsement statute had essentially deprived boards of Oklahoma corporations of the autonomy enjoyed by boards in other jurisdictions.[110] Accordingly, the court held that "shareholders may, through the proper channels of corporate governance, restrict the board of directors [*sic*] authority to implement shareholder rights plans."[111] Interestingly, the outcome seemed to have as much to do with the lack of an endorsement statute as with any particular reading of Oklahoma's corporation statute.[112]

---

99. *Id.*

100. 975 P.2d at 910.

101. *Id.* at 908, 910; *see also* OKLA. STAT. ANN. tit. 20 § 1602 (West 2002) (giving the Oklahoma Supreme Court the power to "answer a question of law certified to it by a court of the United States").

102. *Id.* at 908.

103. *Id.*

104. *Id.*

105. *Id.* at 910.

106. *Id.* at 912-13.

107. *Id.* at 912.

108. *Id.* at 912 n.7 (citing John H. Matheson & Brent A. Olson, *Shareholder Rights and Legislative Wrongs: Toward Balanced Takeover Legislation*, 59 GEO. WASH. L. REV. 1425, 1554-58 (1991)).

109. *Id.* at 913.

110. *Id.*

111. *Id.*

112. *Id.* ("This Court understands much of the reasoning behind the enactment of rights plan endorsement statutes and why so many state legislatures are inclined to facilitate this takeover protection for their domestic corporations. . . . However, if, as in this case, the certificate of incorporation does not offer directors this broad authority to protect against

Upon receiving the answers to both certified questions, the Tenth Circuit allowed for some additional briefing.[113] The court then concluded that "the issues before [the court] have been resolved by the response of the Oklahoma Supreme Court, and further proceedings are not required."[114] The Tenth Circuit not only affirmed the decision of the district court, but also granted the Teamsters' motion for attorneys' fees.[115]

Not every federal court faced with similar questions has decided to certify those questions to a state court. In *Invacare Corp. v. Healthdyne Technologies, Inc.*,[116] the United States District Court for the Northern District of Georgia was faced with a similar question to the one presented in *Fleming*. On January 2, 1997, Invacare offered to acquire Healthdyne, a publicly traded Georgia corporation, for $12.50 per share. Healthdyne's board rejected the offer, finding it "grossly inadequate."[117] Over the next few months, Invacare incrementally increased its proposed purchase price—to $13.00, $13.50, and $15.00—but Healthdyne rejected each new offer.[118] In addition, Healthdyne implemented a rights plan with a "continuing director" feature. That feature "require[d] that any redemption or amendment of the rights plan be approved by one or more directors who were members of the Board prior to the adoption of the rights plan, or who were subsequently elected to the Board with the recommendation and approval of the other continuing directors."[119]

Invacare sought a preliminary injunction declaring the continuing director feature invalid and directing Healthdyne's board to remove it from the plan.[120] Like the Teamsters, Invacare also proposed a bylaw amendment that would make it more difficult for the board to adopt a rights plan.[121] Instead of requiring ratification of plans, however, Invacare's proposed amendment would require the board to amend its existing rights plan to eliminate the continuing director feature.[122] Healthdyne filed a counterclaim seeking a declaration that the proposed bylaw violated Georgia law, as well

---

mergers and takeover, corporations must look to Oklahoma's legislature, not this Court, which is more properly vested with the means to offer boards such authority.").

113. Int'l Bhd. of Teamsters Gen. Fund v. Fleming Cos., Nos. 97-6035, 97-6132, 1999 WL 166041 at *1 (10th Cir. Mar. 26, 1999)

114. *Id.*

115. *Id.* (granting motion for attorneys' fees and remanding to the district court "for determination of a reasonable amount of fees to be awarded").

116. 968 F. Supp. 1578 (N.D. Ga. 1997).

117. *Id.* at 1579.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

as an injunction preventing Healthdyne from soliciting proxies in support of it.[123]

The court addressed both questions directly. As to the validity of the continuing director feature, the court noted that Invacare's primary authority, a New York case, was inapposite because Georgia's corporation law differed from New York's in important respects.[124] The court further reasoned that because Georgia's Fair Price and Business Combination statutes embraced the continuing director feature, the use of such a feature in a rights plan was "not contrary to public policy in Georgia."[125] With respect to the bylaw, the court held that "Invacare's proposed bylaw is an attempt to limit the board's discretion to set the terms and conditions of the shareholders rights plan and ultimately runs afoul of the board fiduciary obligations to the corporation."[126] As such, it violated Georgia law and was therefore invalid.[127]

The distinction between the handling of these two cases is stark. In *Fleming*, a federal court was faced with the question of the validity of a bylaw amendment that would significantly impede, but not eliminate, the board's ability to adopt a poison pill. The same could be said of *Invacare*. Also, both were cases of first impression, at least in their respective jurisdictions. Yet, only in *Fleming* were questions certified to a state court.[128] What accounts for the difference in treatment between these cases?

The question has at least three responses. First, the type of court deciding the issue might make a difference. Recall that it was only on appeal that the questions in *Fleming* were certified. The district court in that case granted the injunction without certification. Appellate courts may, for some reason, be more likely to certify questions than trial courts. Perhaps if the district court's decision in *Invacare* had been appealed to the

---

123. *Id* at 1579, 1581.

124. *Id.* at 1580 (citing Bank of N.Y. v. Irving Bank Corp., 528 N.Y.S.2d 482 (N.Y. Sup. Ct. 1988)).

125. *Id.* at 1580-81(citing GA. CODE ANN. §§ 14-2-1111 & 14-2-1133(b)).

126. *Id.* at 1582.

127. *Id.* The conclusion that Georgia's corporation law was different from New York's was soon followed by a declaration by then-Vice-Chancellor Jacobs that the Delaware General Corporation Law supported the result reached in New York, not Georgia. *See* Carmody v. Tolls Bros., Inc., 723 A.2d 1180, 1192 n.38 (Del. Ch. 1998) ("[*Invacare*] is distinguishable and inapposite.").

128. There is little doubt that the *Invacare* court could have certified the questions presented in that case, as the Supreme Court of Georgia does have a certification procedure. *See* GA. SUP. CT. R. 46 ("When it shall appear to the Supreme Court of the United States, or to any District Court or Circuit Court of Appeals of the United States, or to any state appellate court, that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such court may certify such questions or propositions of the laws of Georgia to this Court for instructions.").

Eleventh Circuit, the court of appeals would have certified the questions to a state court, just as the Tenth Circuit did in *Fleming*. The second (and more skeptical) response is that certification practice, at least with respect to matters involving corporate governance, may simply be inconsistent. Some courts may be more able, or more willing, to recognize that the resolution of a particular claim implicates a state law ambiguity. And some courts may be comfortable with tolerating a certain level of ambiguity, while others are not. A third response is that the sample size here is so small as to make it impossible to draw any meaningful, general inferences.[129]

B. *CA, Inc. v. AFSCME Employees Pension Plan*

The most recent chapter in the corporate governance certification story involves a bylaw proposal made by the AFSCME Employees Pension Plan. The bylaw proposal at issue in *CA, Inc. v. AFCME Employees Pension Plan* required that "[t]he board of directors shall cause the corporation to reimburse a stockholder or group of stockholders . . . for reasonable expenses . . . incurred in connection with nominating one or more candidates in a contested election of directors."[130] Those expenses included "printing, mailing, legal, solicitation, travel, advertising, and public relations expenses."[131] The proposal attached four requirements to reimbursement:

> [1] the election of fewer than 50% of the directors to be elected is contested in the election, [2] one or more candidates nominated . . . are elected to the corporation's board of directors, [3] stockholders are not permitted to cumulate their votes for directors, and [4] the election occurred, and the [e]xpenses were incurred, after [the] bylaw's adoption.[132]

AFSCME submitted its reimbursement bylaw proposal to CA on March 13, 2008. On April 18th, the company requested a no-action letter from the SEC, arguing that it could exclude the proposal on four grounds.[133] The SEC rejected CA's claims on the first two grounds: that it could exclude the proposal because it violated federal proxy rules or related to the nomination or election of directors.[134] But the SEC decided to certify the remaining two questions—(1) whether the proposal was an improper subject for shareholder action under Delaware law, and (2) whether, if

---

129. There are other certification cases involving corporate governance. *See, e.g.*, Rales v. Blasband, 626 A.2d 1364 (Del. 1993) (accepting certification from the U.S. District Court for the District of Delaware). However, these cases do not provide much additional insight as to when federal judges will certify these kinds of questions and when they will not.

130. 953 A.2d at 230.

131. *Id.*

132. *Id.*

133. CA, Inc., SEC No-Action Letter, 2008 WL 4193989, at *1-8 (June 27, 2008).

134. *Id.* at *1.

implemented, the proposal would cause the company to violate Delaware law—to the Delaware Supreme Court.[135] The case was the first in which the SEC had invoked the new procedure. The court accepted the certified question on July 1, and after expedited briefing, heard arguments on July 9.[136] Little more than a week later, on July 17, the court announced its decision.

The court's opinion contained two distinct holdings. First, the court held that the bylaw was not an improper subject for shareholder action.[137] The court recognized the unresolved tension between Sections 109(a) and 141(a) of the Delaware General Corporation Law,[138] and looked to other provisions of the statute to determine that the AFSCME proposal was within the statutory bylaw-making power granted to shareholders.[139] Second, the court held that the mandatory and inflexible nature of the bylaw could cause the directors to violate their fiduciary duties when, for example, the bylaw required them to reimburse a nominator whose reasons were solely personal or petty.[140] Because the bylaw could cause the directors to violate their fiduciary duties, the court answered the second certified question—whether the proposal, if implemented, would cause the company to violate Delaware law—in the affirmative.[141] The split nature of the holding offered hope to both activists and corporations.[142]

As in *Fleming*, once the state supreme court had resolved the certified questions, the certifying institution (here, the SEC) relied upon the state court's determination in granting relief. The Delaware Supreme Court concluded that one of CA's asserted bases for exclusion was consistent with Delaware law. This, in turn, led the Division of Corporation Finance to issue a no-action letter to CA on July 17, 2008, the same day as the decision.[143] Unsurprisingly, CA then excluded the proposal from its proxy.

---

135. *Id.*; *see also* SEC Certification Letter, Certification of Questions of Law Arising from Rule 14a-8 Proposal by Shareholder of CA, Inc. (June 27, 2008), *available at* http://www.sec.gov/rules/other/2008/ ca14a8cert.pdf.

136. 953 A.2d at 229.

137. *Id.* at 237.

138. *Id.* at 232, 233 n.8 (citing numerous authorities).

139. *Id.* at 233-34 (examining Sections 102(b)(1) and 109(b)).

140. *Id.* at 240.

141. *Id.*

142. This is because the holding undercut activists' claims that such proposals, if implemented, did not violate Delaware law, *see* 17 C.F.R. § 240.14a-8(i)(2) (2008), while at the same time undercutting issuers' claims that proposals were not a proper subject for shareholder action, *see id.* at § 240.14a-8(i)(1).

143. CA, Inc., SEC No-Action Letter (July 17, 2008), *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/2008/ca071708-14a8.htm.

III. CRITICISM AND DEFENSE OF THE NEW CERTIFICATION PROCEDURE

The chief virtue of the procedure is somewhat obvious: it saves the SEC from having to commit resources to develop what might amount to nothing more than a "shadow" body of Delaware corporate law. The procedure's drawbacks are less well known. This Part raises some possible problems with, and objections to, the procedure and then attempts to address those concerns.

One possible criticism of the certification procedure is that it allows the SEC to avoid its responsibility to protect investors. Shareholder protection, the criticism goes, requires that shareholders play a more significant role in governance matters. The Delaware courts are, for one reason or another, ill suited to perform this function. The SEC cannot, consistent with its mandate, delegate its responsibility to protect investors to the Delaware Supreme Court or, for that matter, any other institution.

This criticism is attractive on some level, but it is ultimately unavailing because it presupposes both that the SEC has the power to decide these questions and that it is competent to decide them. Neither assumption holds. With respect to the SEC's power, the real problem is not that the certification procedure circumscribes the SEC's authority. Rather, the SEC's power in this area is limited by the vertical federalist restraints contemplated by the drafters of the 1933 and 1934 Acts.[144] In creating the SEC, Congress did not intend to exercise complete authority over securities markets or corporate governance.[145] Instead, it established a system of concurrent authority where both the federal and state governments play a role.[146] Although Congress has carved out a greater role for federal action in recent years,[147] it has still left much to the states. Absent further congressional action, the SEC's role is limited by the reach of its statutory mandate. So long as the power of shareholders remains a matter of state rather than federal law, it is for the states to determine the contours of that power.

---

144. *See, e.g.*, Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 869 (2003) ("The government response to the excesses of the 1920s and to the pain of the Great Depression again led to calls for federal corporations law, but the New Deal Congress that passed securities legislation in 1933 and 1934 chose less intrusive means."); *see generally* Alison Grey Anderson, *The Meaning of Federalism: Interpreting the Securities Exchange Act of 1934*, 70 VA. L. REV. 813 (1984) (questioning the value of evaluating the 1934 Act, and implied rights of action in particular, under some kind of "federalism" framework).

145. *See* Thompson & Sale, *supra* note 144, at 869.

146. *Id.*

147. *See, e.g.*, Chandler & Strine, *supra* note 2, at 958-59 (2003) ("[T]he 2002 Reforms appear to be a relatively aggressive move by the federal government and the Exchanges into the realm of board decision making and composition, an area where, traditionally, the states have been predominant").

Beyond these federalism concerns, the SEC lacks the resources to decide novel questions of state law. That is, even if the SEC *may*, under some implicit mandate, interpret unclear state law, there is little reason to think that it *should* do so. The questions that were certified, and those that will be certified, to the Delaware Supreme Court are difficult ones; the SEC staff simply does not have the resources necessary to resolve these issues in a way that resembles the kinds of decisions produced by jurists whose business it is to interpret state law. To achieve parity with state courts, the SEC would have to recruit or train staff to interpret state statutes and court decisions—or, in other words, to emulate state court judges. This is difficult enough to do with one state, and becomes more difficult if other states follow Delaware's lead in allowing the SEC to certify questions to their supreme courts.[148] Moreover, as the state law questions before the SEC become even more novel, complex, and controversial, the resources required to resolve those questions would increase in turn. Put differently, there is no reason for the SEC to expend its precious resources to do what state courts are already doing: interpreting state law.

Finally, the "abdication" criticism miscomprehends the structure of the modern administrative state. Today, agencies regularly delegate tasks to self-regulatory organizations, or even private firms—often the very firms the agencies regulate.[149] The SEC is no exception.[150] Is each instance of regulatory delegation—that is, the assignment of some agency oversight functions to private firms—tantamount to abdication? If not, then it is difficult to see why delegating some oversight to the Delaware Supreme Court is any more problematic. Even if one thinks the delegation of oversight tasks to private firms or quasi-public institutions is an unacceptable form of abdication, there is little reason to think that delegation to a *public* institution presents the same kinds of concerns, particularly in terms of regulatory capture and accountability.[151] The Delaware courts are not strangers to criticism, especially in the area of corporate law.[152] Yet one would be hard-pressed to argue that those courts

148. Recall that when the Supreme Court urged the Fifth Circuit to certify the questions at issue in *Clay v. Sun Life Insurance*, Florida was the only state with a certification statute. Bradford *supra*, n. 47.

149. *See* Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 386 (2006) ("Regulators no longer command, they delegate. Private firms are no longer simply regulated; they are often assigned discretion to fill in regulatory detail analogous to the type exercised by administrative agencies.").

150. *Id.* at 390.

151. *See generally* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 3 (1971) (detailing the justification and mechanisms of regulatory capture by private firms).

152. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) (arguing that state competition over corporate

are subject to capture in the same manner or degree as a private firm that is left to regulate itself. In other words, it makes no sense to call certification a form of abdication in an environment where agencies can and do let regulated firms regulate themselves.[153]

CONCLUSION

Delaware's new certification procedure has the potential to move the line between federal and state regulation of corporate governance. The procedure is an especially important step in advancing the corporate governance dialogue because, unlike most developments of the last decade, the procedure pushes the line, even if subtly, in the direction of allowing greater state control over governance matters. The procedure is likely to assume even greater importance in the near future in light of the ongoing debate over corporate accountability, especially with respect to executive compensation, proxy access, and risk management.

Still, the promise of certification may be undercut by the fact that it is unlikely to be used very often. This is because many shareholder proposals (and their concomitant no-action requests) do not present novel and important issues of state law. Other controversial questions that might otherwise be ripe for certification may well be preempted by federal statute or agency rules before the SEC has the chance to certify those questions.[154] Moreover, in the rare instance where a proposal raises a truly novel question

---

charters created a "race for the bottom" in corporate governance). *But see* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 255-58 (1977) (arguing that charter competition instead provoked a "race to the top"). Several recent contributions to the corporate governance literature have revised these theses. *See, e.g.*, Robert B. Ahdieh, *Trapped in a Metaphor: The Limited Implications of Federalism for Corporate Governance*, 77 GEO. WASH. L. REV. 255, 257 (2009) (suggesting that the "race" metaphor "has obscured at least as much as it has revealed"); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003) (contending that "Delaware's chief competitive pressure comes not from other states but from the federal government"). Some still embrace Cary's narrative, including the author of a popular corporate governance blog. J. Robert Brown, *The Race to the Bottom* (last visited Jan. 31, 2010), *available at* http://www.theracetothebottom.org.

153. Similar abdication criticisms have been made with respect to traditional judicial certification. *See* 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) (contending that certification is "an abdication of the responsibility imposed by Congress to adjudicate cases when federal jurisdiction has been properly been invoked"); *see also* Nash, *supra* note 48. Others have responded to these criticisms, but I will not repeat their responses here. *See* Challener, *supra* note 33. For an alternative defense of Delaware's procedure, see Winship, *supra* note 6.

154. *See, e.g.*, Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29024 (proposed June 10, 2009) (to be codified at 17 C.F.R. pts. 200, 232, 240, 249, and 274) (proposing a comprehensive proxy access regime).

of state law, that question will be answered once, and only once, by the Delaware Supreme Court. If that same question arises again, it will no longer be novel, and hence, certification will be unnecessary.[155] As a result, the frequency with which the SEC certifies questions to the Delaware Supreme Court will be determined by both the outcome of current reform efforts[156] and by the creativity of shareholder-proponents. If recent history is any guide, Delaware's new administrative certification procedure will not go unutilized for lack of the latter.

155. If, however, the Delaware Supreme Court continues to limit its analysis in certification cases to the proposals "as drafted," as it did in *CA, Inc.*, *see* 953 A.2d at 238, 240, then there may be more "first instance[s]" of questions than I anticipate here.

156. *See supra* note 154.