

Setting the Supreme Court's Agenda: Is There a Place for Certification?

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Introduction

Complaints about the Supreme Court's current certiorari practices are legion. Broadly speaking, these objections tend to reduce to two general assertions: first, the Court is taking too few cases; and second, the Court is not taking the "right" cases.

To be sure, these larger complaints often overlap. So, for example, many argue that the Court is not taking enough of certain kinds of cases, and many, like Professors Paul Carrington and Roger Cramton, also think that the Court is taking too many of certain other kinds of cases—in particular, cases involving major questions of constitutional law.¹ In keeping with this complaint, Professors Carrington and Cramton echo Judge Richard Posner by suggesting that the Court has transformed itself into something akin to a "superlegislature."² On this score, they point to what they view as the Court's propensity "to proclaim new law to govern future transactions and relations."³ Further, Professors Carrington and Cramton chastise the Court for having "forsaken the humble task[s] of correcting errors of lower courts"⁴ and resolving conflicts that have divided them.⁵ On the latter point, the two highlight the fact that conflicts left to fester in the circuits "impart an additional and useless complexity to the national law," and thereby undermine legal planning.⁶

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¹ See Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009).

² See *id.* at 590 (quoting Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 35–39, 60 (2005)); see also Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1383 (2006) (expressing the same concern).

³ Carrington & Cramton, *supra* note 1, at 590.

⁴ *Id.* at 597.

⁵ See *id.* at 622.

⁶ *Id.*

To address what they view as the Court's improperly focused docket, Professors Carrington and Cramton propose creating a certiorari division of appellate judges to choose cases for the Court.⁷ The proposal shares some qualities with the much-debated and ultimately unsuccessful proposal by the Freund Committee to create a national court of appeals that would sit between the circuits and the Supreme Court.⁸ Specifically, Professors Carrington and Cramton propose that the certiorari division be composed of circuit judges who will be empowered to choose "perhaps as many as 120 cases a term that the Court would be obliged to decide in the manner of *Marbury v. Madison*."⁹ The Court members, in turn, could supplement those cases with additional cases chosen at their discretion.¹⁰ Although the authors do not suggest specific criteria for case selection, it appears that they believe that greater priority should be assigned in the process to issues of federal law that have divided the courts of appeals.¹¹ Toward that end, their proposal "would vest the power to select a large part of the Court's cases in judges who are in the best position to know what issues of national law are most in need of authoritative attention."¹²

Professors Carrington and Cramton have added an important new chapter to the debate over the role of the Supreme Court in our judicial system. Specifically, they have offered a provocative suggestion as to how we might rethink the manner in which the Court's cases are chosen. Nonetheless, there are formidable problems with the proposal, not least of which is its questionable political viability. Notwithstanding these problems, a major attribute of the Carrington-Cramton proposal is that it seeks to involve in the case selection process the very judges who increasingly have called for greater guidance from

⁷ See *id.* at 632; see also Letter from Professor Vikram D. Amar et al. to Joseph R. Biden, Vice President of the United States, et al. (Feb. 9, 2009), available at <http://www.scotusblog.com/2009/02/groups-proposals-for-supreme-court-reform> (follow "Four Proposals for a Judiciary Act of 2009" hyperlink) (setting out four proposals for a Judiciary Act of 2009, many of which build on the work of Professors Carrington and Cramton).

⁸ See FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 18–24 (1972) (popularly known as the Freund Committee); Paul A. Freund, *Why We Need the National Court of Appeals*, 59 A.B.A. J. 247, 250 (1973); see also Carrington & Cramton, *supra* note 1, at 593 n.32 (listing five prior independent studies that have found problems in the relationship between the Supreme Court and lower courts).

⁹ Carrington & Cramton, *supra* note 1, at 632. The authors contemplate that retired Justices could also sit on the certiorari division. See *id.*

¹⁰ See *id.* at 633.

¹¹ See *id.*

¹² *Id.* at 635.

the Court on questions that divide them. I agree with Professors Carrington and Cramton that these judges “are in the best position to know what issues of national law are most in need of authoritative attention.”¹³ Significantly, there is already a procedural tool in place by which lower federal court judges may participate formally in composing the Court’s docket: certification.

Part I of this Essay reviews the debate over the Supreme Court’s role in our judicial system and its case selection methods. Part II describes the certiorari division proposal put forth by Professors Carrington and Cramton, noting some of its shortcomings while highlighting its important contribution to this debate. Part III suggests that the certification of issues by lower federal courts to the Supreme Court—a practice that dates back almost as far as the federal courts themselves, but one that is now largely a “dead letter”¹⁴—deserves a good dusting off.

I. Debating the Work of the Supreme Court

There is reason to question why the Court today decides something on the order of half the cases it decided just twenty years ago,¹⁵ and all this while certiorari petitions have exploded in number.¹⁶ Indeed, looking back, there was a time when some thought that the Court could hear considerably more cases. Thus, when Congress debated the Judges’ Bill,¹⁷ which launched “the modern Supreme Court”¹⁸ in 1925 by expanding the Court’s discretionary jurisdiction, the Solicitor General testified that he expected the Court to hear roughly 400 to 500 cases each Term under the new arrangement.¹⁹ Needless to say, that prediction stands decidedly at odds with the

¹³ *Id.*

¹⁴ Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1712 (2000).

¹⁵ Compare Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100 (1987) (noting that the Court tended to hear about 150 cases per year in the mid- to late 1980s), with Carrington & Cramton, *supra* note 1, at 630 (noting that the Court tended to hear about eighty cases per year in the mid- to late 2000s).

¹⁶ Starr, *supra* note 2, at 1368; see *id.* at 1369 tbl. (tracking growth in Supreme Court docket size from 1926 (1183 cases) to 2004 (8593 cases)).

¹⁷ Act of Feb. 13, 1925 (Judges’ Bill), 43 Stat. 936.

¹⁸ Hartnett, *supra* note 14, at 1646.

¹⁹ See *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10,749 Before the H. Comm. on the Judiciary*, 67th Cong. 20 (1922) [hereinafter 1922 Hearings] (statement of James M. Beck, Solicitor General of the United States), cited in Hartnett, *supra* note 14, at 1646. At the time, the Court was hearing about 225 cases each year and affirming other cases without the benefit of oral argument. See Jonathan Sternberg, *Deciding*

Court's practice today, which has the Court resolving approximately eighty cases on the merits each Term.²⁰ There are many theories explaining the Court's shrinking docket, and I will not repeat them here.²¹ Surveying the cases that the Court does resolve, though, suggests that Professors Carrington and Cramton may be right when they note that the cases being granted at a lesser rate in the wake of the Court's shrinking docket are those in which the lower courts have divided on questions of statutory interpretation or other matters that are not the stuff of newspaper headlines, but are, all the same, vitally important to the fair and orderly administration of justice in the lower courts.

But any proposal to alter the Court's certiorari process undoubtedly follows, as Professor Sanford Levinson has noted, from a normative view about what the Court *should* be doing,²² and there is hardly robust agreement on that score. Some have made the case for the proposition that the Court should, in fact, be taking *more* high-profile constitutional law cases, not fewer.²³ And others have argued in a similar vein that we should go back to the days when the Court had a broader category of cases over which it possessed mandatory jurisdic-

Not to Decide: The Judiciary Act of 1925 and the Discretionary Court, 33 J. SUP. CT. HIST. 1, 5 fig. (2008).

²⁰ Carrington & Cramton, *supra* note 1, at 630. The rise and fall in the number of signed opinions issued by the Court is captured in a chart compiled by Professor David Stras. See David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 965 fig.1 (2007) (book review).

²¹ Much literature focuses on the role of the law clerks and the cert pool. See, e.g., ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 143–44 (2006) (citing Tony Mauro, *Justices Give Key Role to Novice Lawyers*, USA TODAY, June 5, 1998, at 1A) (observing that law clerks in the cert pool are predisposed against recommending granting certiorari petitions). Professor Stras's work also highlights that the turnover of Justices in the late 1980s and early 1990s resulted in the replacement of Justices who voted to grant certiorari at a higher rate than those who took over their seats on the Court. See David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. (forthcoming 2010), available at <http://ssrn.com/abstract=1476537>.

²² Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 102 (2010), <http://yalelawjournal.org/2010/02/01/levinson.html>.

²³ Senator Specter has taken this position. See Arlen Specter, *The Chamber of Secrets*, NAT'L L.J., Aug. 3, 2009, at 38 (arguing that the Court should be taking, among others, more key cases testing the legality of executive action in the war on terrorism); see also SUSAN LOW BLOCH, VICKI C. JACKSON & THOMAS G. KRATTENMAKER, *INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES* 448 (2d ed. 2008) (asking where the country would be without *Brown v. Board of Education*, 347 U.S. 483 (1954)). But see J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L.J. ONLINE 67, 67 (2009), <http://yalelawjournal.org/2010/01/07/wilkinson.html> (suggesting that the Court's case selection process currently works fine).

tion—the idea being that certain issues are so substantively important that they should *require* the Court’s attention.²⁴ Well before he took his position on the Court, William Howard Taft—the person most responsible for passage of the Judges’ Bill—combined these ideas by suggesting that “questions of constitutional construction” were of such paramount importance that they should comprise the Court’s mandatory appellate jurisdiction.²⁵ Still others have questioned the importance of uniform application of the laws, and in so doing have challenged the idea that the Court should spend its time resolving issues that have divided the lower courts.²⁶ There are also those who believe that the Court is playing too little of a supervisory role to ensure that the lower courts—both federal and state—are in practice following its broad pronouncements.²⁷

On this last point, it is rather surprising that much of the ongoing debate over what the Supreme Court’s docket should look like seems to ignore the role that state courts play in the larger judicial system,²⁸ the fact that the decline in the Supreme Court’s docket has affected

²⁴ This suggestion arose in the comments of several participants at a fall 2009 conference on the Supreme Court sponsored by the Yale Supreme Court Advocacy Clinic and the *Yale Law Journal Online*. See Vicki Jackson, Remarks at the Yale Law School Clinic Conference: Important Questions of Federal Law: Assessing the Supreme Court’s Case Selection Process (Sept. 18, 2009) (audio recording available at <http://www.law.yale.edu/academics/10082.htm>); Carter Phillips, Remarks at the Yale Law School Clinic Conference: Important Questions of Federal Law: Assessing the Supreme Court’s Case Selection Process (Sept. 18, 2009) (audio recording available at <http://www.law.yale.edu/academics/10082.htm>). Professor Vicki Jackson, for example, suggested that to the extent that Congress reverts back to the days of providing for greater mandatory jurisdiction, it should require the Supreme Court to hear all direct appeals in death penalty cases. See Jackson, *supra*.

²⁵ See William H. Taft, *The Attacks on the Courts and Legal Procedure*, KY. L.J., Nov. 1916, at 3, 3, 18 (publishing address delivered on May 23, 1914), cited in Hartnett, *supra* note 14, at 1661.

²⁶ See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1570 (2008) (questioning whether the Supreme Court’s “fixation on standardizing the interpretation of federal law is worth the effort”).

²⁷ As one set of commentators phrased things:

[I]f the [C]ourt is deciding considerably fewer cases, and if it is determined to settle as little controversy as possible in each case, then it is exerting only the most minimal supervisory control over the lower courts. Rather than “one supreme Court” being in charge of the judicial branch, as the Constitution provides, the hundreds of lower court appellate judges and thousands of lower court trial judges are increasingly on their own to do as they see fit in broad areas of commercial, criminal and constitutional law.

Margaret Cordray & Richard Cordray, *Numbers that Don’t Befit the Court*, WASH. POST, July 11, 2006, at A17.

²⁸ In a departure from this common practice, Professor Levinson has suggested that state judges should sit on the certiorari division. See Levinson, *supra* note 22, at 111.

state court decisions disproportionately,²⁹ and the view shared by many litigants and lawyers that they are simply not getting a fair shake in those courts. This complaint surfaces routinely when one speaks with litigators who have national practices. This is particularly true for the criminal defense bar, which represents clients for whom review in the Supreme Court on direct appeal, by and large, is the only meaningful opportunity for federal-court review of their state-court convictions in this age of incredibly limited collateral federal habeas corpus jurisdiction.³⁰

With all of this said, there is one complaint that comes up time and again when one talks with lower federal court judges about the Supreme Court's case selection process, and it is this observation that should give Court analysts pause. A large number of these judges routinely say that they are not receiving enough guidance from the Supreme Court on matters that regularly come before them.³¹ Indeed, even where the Court does take up an issue, two factors often leave lower courts to work out on their own—often to widely varying results—the many questions left in the wake of the Court's opinions.³² First, there has been a significant rise in “the number of decisions in which there is no simple majority opinion.”³³ Second, there is a “growing tendency on the part of the Court to avoid issuing a clear, general, and subsequently usable statement of the Court's reasoning or the Court's view of the implications of its decision.”³⁴

For this reason, Professors Carrington and Cramton's assertion that greater emphasis should be given to cases involving matters of federal law that have divided the lower courts is well founded, even if

²⁹ See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 433 (6th ed. 2009) (citing Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 *IND. L. REV.* 335 (2002)) (“In the years since [the 1988 amendments to eliminate all mandatory review of state court decisions], the Supreme Court has reduced the number of cases that it hears annually, and a recent study found that the decline was particularly sharp for the state courts.”).

³⁰ See, e.g., 28 U.S.C. §§ 2244, 2253–2254 (2006) (limiting the opportunities for collateral habeas review of state court convictions and mandating deference to state court determinations of federal law).

³¹ See, e.g., Honorable Gerald B. Tjoflat, Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit, Remarks at The George Washington University Law School Conference: Rethinking the Law Governing the Structure and Operation of the Supreme Court: Altering the Certiorari Process (Nov. 20, 2009) (transcript on file with *The George Washington Law Review*).

³² See Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 *SUP. CT. REV.* 205, 206–07.

³³ *Id.* at 207.

³⁴ *Id.*

not wholly uncontroversial.³⁵ It was Justice Holmes, after all, who once said that “one of the first things for a court to remember is that people care more to know that the rules of the game will be stuck to, than to have the best possible rules.”³⁶ Put another way, more often than not, both fairness and rule-of-law principles strongly dictate that uniform rules should be a cornerstone of our federal scheme.

This proposition sweeps well beyond matters of federal taxation law, a field in which Erwin Griswold once championed uniform rules.³⁷ The same holds true in a broad range of federal statutory schemes where legal planning depends crucially on consistency and reliability in the law, such as the fields of securities regulation and the Employee Retirement Income Security Act of 1974,³⁸ to name but two examples. In a slightly different vein, consider the area of federal criminal sentencing, where due process notice considerations come into play and counsel in favor of clear rules. It should be more than a little troubling that the myriad questions left in the wake of the *Apprendi v. New Jersey*,³⁹ *Blakely v. Washington*,⁴⁰ and *United States v. Booker*⁴¹ decisions effectively have resulted in disparate sentencing

³⁵ In an essay discussing the certiorari division proposal, Professor Daniel Meador refers to the assertion that lower courts and lawyers “need more definitive guidance from the top . . . as to the mass of non-constitutional business that forms the grist of their everyday work” as “a relatively non-controversial proposition.” Daniel J. Meador, *Reining in the Superlegislature: A Response to Professors Carrington and Cramton*, 94 CORNELL L. REV. 657, 662 (2009). Many others have echoed this idea. See, e.g., Starr, *supra* note 2, at 1364, 1383 (promoting the role of the Court in fostering uniformity of federal law). But see Frost, *supra* note 26, at 1637 (questioning this conclusion).

³⁶ Letter from Oliver Wendell Holmes, Jr., to Franklin Ford (Feb. 8, 1908), in THE ESSENTIAL HOLMES 201 (Richard A. Posner ed., 1992). In this regard, Justice Brandeis’s famous observation on stare decisis speaks equally to the need for uniform application of federal law. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”).

³⁷ Carrington & Cramton, *supra* note 1, at 622 (citing Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1173 (1944)).

³⁸ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 (2006)).

³⁹ *Apprendi v. New Jersey*, 530 U.S. 466, 544 (2000) (holding that any fact other than an offender’s recidivism that increases a criminal penalty beyond the statutory maximum “must be submitted to a jury and proved beyond a reasonable doubt”).

⁴⁰ *Blakely v. Washington*, 542 U.S. 296, 303 (2004) (expanding *Apprendi*’s principle to require jury factfinding of factors contained in sentencing guidelines that expand an offender’s maximum criminal sentence).

⁴¹ *United States v. Booker*, 543 U.S. 220, 243–44 (2005) (holding United States Sentencing Guidelines unconstitutional for making a defendant’s presumptive sentencing range turn on facts found by a judge rather than a jury).

schemes around the country, notwithstanding the fact that the relevant criminal punishment is being meted out by the same sovereign.⁴²

Professor Edward Hartnett's work on the Judges' Bill, moreover, highlights that these larger concerns were very much at the forefront of the debates over that legislation and its provision for discretionary certiorari jurisdiction. As Professor Hartnett's exposition of the history of that legislation notes, Chief Justice Taft and the other Justices who testified before Congress in favor of the bill told Congress that they viewed cases involving conflicts among the courts of appeals as comprising a good portion of the Court's primary business.⁴³ Much more recently, Chief Justice Roberts declared in no uncertain terms: "Our main job is to try to make sure [that] federal law is uniform across the country."⁴⁴

II. The Certiorari Division Proposal

Even assuming the existence of broad support for the proposition that the Supreme Court should resolve more of the issues that divide the lower courts, it is not clear that creating a certiorari division will achieve significant inroads in that regard. Given that the proposal is likely to arouse the opposition of current Court members, one must question whether it is worth the battle.

⁴² As one *Harvard Law Review* student commentator observed: "*Apprendi v. New Jersey* spawned a series of Supreme Court sentencing decisions which, when viewed together, are at best confusing and at worst contradictory." *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 225 (2007) (footnote omitted); see also Douglas A. Berman, *Foreword: Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653, 676 (2005) (offering a similar observation).

⁴³ See Hartnett, *supra* note 14, at 1705. For example, Justice McReynolds testified: "[T]he real function of our court is this: To settle the law, so that lawyers may know how to advise their clients and so that trial judges may know how to instruct their juries or how to decide cases that come before them." *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing on H.R. 8206 Before the H. Comm. on the Judiciary*, 68th Cong., 2d Sess. 22 (1925) (statement of Justice McReynolds). Professor Hartnett notes that the Justices who testified also listed cases raising constitutional claims as among those cases that should always be granted. See Hartnett, *supra* note 14, at 1705.

⁴⁴ *Justices in Their Own Words: Granting Certiorari* (C-SPAN television broadcast June 19, 2009), available at http://supremecourt.c-span.org/Video/JusticeOwnWords/SC_Jus_GrantingCertiorari.aspx [hereinafter *Granting Certiorari*] (interview with Chief Justice John G. Roberts). This is not a new proposition by any stretch. As Professor Levinson noted recently, it goes back at least as far as the Court's decision in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), in which Justice Story emphasized "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution" and referred to a state of disuniformity as "truly deplorable," *id.* at 347–48, cited in Levinson, *supra* note 22, at 100 & n.3.

As noted above,⁴⁵ the proposal has the certiorari division selecting up to 120 cases for the Court to hear in a given Term but would also allow the Justices to take additional cases of their own choosing.⁴⁶ The currently governing criteria for case selection already emphasize the resolution of conflicts among the lower courts.⁴⁷ As Professor Daniel Meador has noted, it would be challenging, to say the least, to draft guidelines for the certiorari division that emphasize such conflicts more than the existing criteria already do.⁴⁸ Further, the 120 cases that the division would choose would constitute but a modest increase in the number of cases that the Court hears, and it is therefore likely that such a change would leave untouched the vast majority of cases on which the lower courts are split.⁴⁹

There is also a hint in the certiorari division proposal, born of the authors' articulated concern over what they view as the Court's metamorphosis into a "superlegislature," that it seeks to remove politics from the case selection process.⁵⁰ (To be sure, this is not a transparent objective of the proposal, but it seems to underlie the authors' desire to move the Court's docket away from the resolution of so many constitutional cases.) By placing the selection authority in a separate body, however, it does not necessarily follow that politics will be removed from the process. There is, for example, no reason to think that the circuit judges comprising the certiorari division would choose cases any differently than sitting Supreme Court Justices would. After all, nearly every member of the current Court previously sat on a federal court of appeals.⁵¹ Just like the Justices, moreover, circuit judges surely have their own predisposed views of which issues warrant the Court's attention, and those issues may encompass major constitu-

⁴⁵ See *supra* text accompanying notes 9–10.

⁴⁶ See Carrington & Cramton, *supra* note 1, at 632–33.

⁴⁷ See SUP. CT. R. 10 (providing that the existence of a conflict among the lower courts on an important issue of federal law may counsel in favor of a grant of certiorari); see also 28 U.S.C. §§ 1254, 1257 (2006) (providing for the Supreme Court's certiorari jurisdiction and specifying additional case selection criteria).

⁴⁸ Meador, *supra* note 35, at 663–64.

⁴⁹ To be sure, this is somewhat of an unfair criticism, because it would be hard for any proposal, short of possibly that put forth by the Freund Committee, see *supra* text accompanying note 8, to accomplish anything else. Further, this criticism potentially could be levied at the suggested revival of certification advanced here. See *infra* Part III.

⁵⁰ See Carrington & Cramton, *supra* note 1, at 590–91, 634.

⁵¹ Until Justice Stevens's retirement—and his replacement by former Solicitor General Elena Kagan—the Court was comprised of nine Justices who had previously served as federal appellate judges. See Biographies of the Current Justices, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Aug. 12, 2010).

tional matters just as much as (if not more than) they include the bread and butter of the lower-court diet.⁵²

More broadly, it is certainly not the case that the questions of statutory construction that often divide the lower courts are themselves devoid of politics. After all, methodology is just as important in statutory as it is in constitutional interpretation, and there is great disagreement—predicated on competing visions of separation of powers and the judicial role—behind the competing methodologies in this realm.⁵³

III. Reviving Certification?

With all of this said, to the extent that lower court judges in our federal court system believe they are receiving insufficient guidance from the Supreme Court on important matters of federal law, Professors Carrington and Cramton are right to call attention to the fact that the Court is falling short at what Chief Justice Roberts recently described as its “main job.”⁵⁴ Toward that end, I offer a suggestion that is directed at the very audience that has raised these concerns: federal appellate judges. Specifically, I recommend that the courts of appeals consider reviving certification by dusting off this tool and using it to place before the Supreme Court those issues that they believe warrant the Court’s timely attention. In turn, I suggest that the Supreme Court abandon its practice of routinely dismissing such requests out of hand and take more seriously invitations from appellate judges to provide direction on matters of great concern to them. Among its attributes, this suggestion in its most modest form has the benefit of not requiring any changes to existing laws governing the jurisdiction of the Supreme Court.

Certification is “essentially a simple appellate procedure.”⁵⁵ It allows one court to put questions of law to another court, the resolution

⁵² See Meador, *supra* note 35, at 663 (observing that the certiorari division “can hardly deny” all “‘hot button’ social cases”). There is, moreover, no reason to think that members of the division will not vote strategically in the same manner and to the same extent that Justices are accused of doing from time to time. Cf. H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 12–16 (1991) (discussing and calling into question the popular belief that strategic voting is common at the certiorari stage).

⁵³ See generally, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (refining the modern textualist approach to statutory interpretation while maintaining that, unlike the purposivist approach, textualism alone honors legislative supremacy in statutory lawmaking).

⁵⁴ *Granting Certiorari*, *supra* note 44.

⁵⁵ See James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 1 (1949).

of which will assist the certifying court in reaching a judgment in a case pending before it.⁵⁶ When used as a means of putting questions from the courts of appeals to the Supreme Court, certification accomplishes the very same thing that Professors Carrington and Cramton highlight as a benefit of their proposal: namely, it involves those “judges who are in the best position to know what issues of national law are most in need of authoritative attention” in the dialogue on how the Supreme Court focuses its attention.⁵⁷ In what follows below, this Essay discusses an important recent case in which the Supreme Court, in keeping with its modern resistance to certification, declined an invitation from the Fifth Circuit to resolve an important statute of limitations question on certification. The Essay then turns to explore the historic origins of certification. Finally, the Essay suggests that in keeping with the original purpose of certification—helping draw the Supreme Court’s attention to important issues that have divided the lower courts—the practice should be revived. The Essay concludes with some ideas as to how this revival might be accomplished.

My point of departure is the recent case of *United States v. Seale*.⁵⁸ This is a case in which the en banc Fifth Circuit divided 9–7 over an important statute of limitations issue that has come up in a host of decades-old Klan-violence cases currently being prosecuted by the federal government.⁵⁹ When the judges could not agree on how to resolve the very complicated statute of limitations question that governed whether the government could even bring these prosecutions, a majority of the en banc Fifth Circuit certified the question to the Supreme Court.⁶⁰ Ultimately, the Court declined the Fifth Circuit’s invitation to resolve the issue.⁶¹ This was in keeping with the Court’s modern practice of treating certification as discretionary, notwith-

⁵⁶ See *id.* at 1–2.

⁵⁷ See Carrington & Cramton, *supra* note 1, at 635.

⁵⁸ *United States v. Seale (Seale II)*, 570 F.3d 650 (5th Cir. 2009) (per curiam opinion by an equally divided en banc court), *vacating* *United States v. Seale (Seale I)*, 542 F.3d 1033 (5th Cir. 2008) (panel opinion).

⁵⁹ See *id.* at 650–51. Specifically, the question posed in *Seale* was which statute of limitations applied to Seale’s prosecution under 18 U.S.C. § 1201 (2006). The government commenced its prosecution in 2007 and based it on a kidnapping that took place in 1964. See *United States v. Seale (Seale III)*, 577 F.3d 566, 568–69 (5th Cir.) (per curiam opinion by an en banc court) (certifying the question to the Supreme Court), *cert. dismissed*, 130 S. Ct. 12, 12 (2009) (mem.). On one construction, Seale’s prosecution could never be time-barred; on another construction, the statute of limitations had long since lapsed. See *id.*

⁶⁰ See *Seale III*, 577 F.3d at 567, 571 (certifying the question to the Supreme Court).

⁶¹ See *United States v. Seale*, 130 S. Ct. 12, 12 (2009) (mem.), *dismissing question certified by Seale III*, 577 F.3d at 567, 571.

standing the fact that—technically speaking—the certification statute is one of few remnants of the mandatory appellate jurisdiction scheme of old.⁶²

Justices Stevens, joined by Justice Scalia, dissented from dismissal of the certification, lamenting that the Court has, in effect, abandoned this important means by which lower court judges can prod the Court to take up issues of great importance to the lower courts.⁶³ Speaking to this particular case, the dissenters observed that there was “no benefit and significant cost to postponing the question’s resolution.”⁶⁴ They continued: “A prompt answer from this Court will expedite the termination of this litigation and determine whether other similar cases may be prosecuted.”⁶⁵ The two Justices were, for whatever reason, unable to find two more of their colleagues who shared their views.⁶⁶

⁶² The certification statute is now codified at 28 U.S.C. § 1254(2) (2006), having been revised and renumbered on several occasions over time. It provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following method[]:

. . . .

By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Id. Supreme Court Rule 19 also speaks to certification. It provides: “A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case Only questions or propositions of law may be certified” SUP. CT. R. 19(1).

Notwithstanding the current phrasing of the statute and Rule in terms that easily could be read as permissive rather than mandatory, “[i]n form and history, this certified question jurisdiction is mandatory.” 17 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 4038, at 62–64 & nn.2, 10 (3d ed. 2006); *see also* *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 577–78 (1930) (Van Devanter, J.) (describing certification jurisdiction as mandatory); *cf.* *Old Colony Trust Co. v. Comm’r*, 279 U.S. 716, 728–29 (1929) (Taft, C.J.) (describing certification as “an invocation of the [Court’s] appellate jurisdiction”).

⁶³ *See Seale*, 130 S. Ct. at 12–13 (Stevens, J., dissenting from dismissal of certified question).

⁶⁴ *See id.* at 13.

⁶⁵ *Id.*; *see also id.* at 12 (“This certificate presents us with a pure question of law that may well determine the outcome of a number of cases of ugly racial violence remaining from the 1960s.”).

⁶⁶ Although the historical origins of certification put it within the Court’s mandatory jurisdiction, and the Court technically treats certified questions this way when it dismisses them (rather than denying review of them), the Court’s modern practice appears to be to apply the Rule of Four to certification requests no differently than petitions for certiorari. *See, e.g., Atkins v. United States*, 426 U.S. 944, 944 (1976) (mem.) (dismissing certificate notwithstanding the vote of three Justices to accept it).

This is unfortunate. Indeed, the *Seale* case presented a strong candidate for certification. There was nothing to be gained by waiting for the case to return later on certiorari, for the factual record would shed absolutely no light on the purely legal statute of limitations question that the Fifth Circuit certified to the Court.⁶⁷ In brief, depending on how one interprets the intersection of various statutes and the Court's precedents on point, either there is or is not a limitations period that curtails the government's ability to prosecute Seale and others like him on kidnapping charges arising out of their alleged actions in the 1960s.⁶⁸ By denying certification in Seale's case, the result is a continuation of appellate proceedings, when it may well be the case, legally speaking, that the charges against him never should have been brought.⁶⁹

But whatever the merits of *Seale* as a candidate for certification, it is the larger complaint registered in Justice Stevens's opinion in that case that warrants special attention. As he noted, the Court has not taken up a certified question from one of the circuits for almost three decades.⁷⁰ As Justice Stevens also observed:

The certification process has all but disappeared in recent decades. The Court has accepted only a handful of certified cases since the 1940s and none since 1981; it is a newsworthy event these days when a lower court even tries for certification. [The certification rules] remain part of our law because the certification process serves a valuable, if limited, function. We ought to avail ourselves of it in an appropriate case.⁷¹

This view echoes a similar dissent once registered by Justice Holmes, who viewed certification in cases involving "questions of pure law" as

⁶⁷ See *Seale*, 130 S. Ct. at 12 (Stevens, J., dissenting from dismissal of certified question).

⁶⁸ See *Seale III*, 577 F.3d 566, 568–69 (5th Cir.) (per curiam opinion by an en banc court) (certifying the question to the Supreme Court), *cert. dismissed*, *Seale*, 130 S. Ct. 12, 12 (2009) (mem.).

⁶⁹ See *Seale*, 130 S. Ct. at 12–13 (Stevens, J., dissenting from dismissal of certified question).

⁷⁰ *Id.* at 13.

⁷¹ *Id.* ("In my judgment, this case should be briefed and set for argument."). Notably, it is not just the Supreme Court that has resisted the practice. In a 1950 decision, a Second Circuit panel composed of Judges Learned Hand, Swan, and Clark suggested that the proper practice for the courts of appeals is to certify questions only where an aggrieved party might not have the ability to petition for a writ of certiorari or where a similar question is already pending before the Court. See *Taylor v. Atl. Mar. Co.*, 181 F.2d 84, 85 (2d Cir. 1950) (per curiam).

eminently appropriate.⁷² In his words: “[S]uch questions are to be encouraged as a mode of disposing of cases in the least cumbersome and most expeditious way.”⁷³

Some history is illuminating. Congress enacted the first certification statute in 1802, providing in it that the Supreme Court “shall . . . finally decide[]” questions put to it by circuit court judges unable to reach agreement on the matter.⁷⁴ In the Evarts Act of 1891,⁷⁵ Congress modified the statute to account for the creation of the courts of appeals, giving the Supreme Court the option of either resolving only the certified question or calling for the record in order to decide the “whole matter in controversy.”⁷⁶ Importantly, Senator Evarts saw certification as playing a key role in ensuring that matters that divided the newly created courts of appeals (what today we often refer to as “circuit splits”) would be resolved by the Supreme Court. Thus, he viewed certification as a means by which the courts of appeals could “guard against diversity of judgment in these different courts” by “send[ing] up” those questions of law that had divided them.⁷⁷

Certification also played a significant role in the passage of the Judges’ Bill. As Professor Hartnett’s work on that legislation summarizes: “In the hearings on the Judges’ Bill, it was repeatedly noted that the Supreme Court would not alone control its jurisdiction, but that the courts of appeals, by use of certification, would share in that con-

⁷² *Chi., Burlington & Quincy Ry. v. Williams*, 214 U.S. 492, 496 (1909) (Holmes, J., dissenting).

⁷³ *Id.* at 495–96.

⁷⁴ *See* Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159. This procedure was an important means by which deadlocks in the circuits, which were quite common because the circuits sat in panels of two, could be resolved. *See* Moore & Vestal, *supra* note 55, at 12; *see also id.* at 10–12. Indeed, during this period, the Justices riding circuit sometimes purposefully divided with their counterparts so that decisions that might not otherwise qualify for Supreme Court review could be reviewed on certification. *See* G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, 1815–35, at 173–74 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, vols. 3–4, 1988).

⁷⁵ Act of Mar. 3, 1891 (Evarts Act), ch. 517, § 6, 26 Stat. 826, 828.

⁷⁶ *See id.*

⁷⁷ *See* 21 CONG. REC. 10,222 (1890) (statement of Sen. Evarts); *see also* Moore & Vestal, *supra* note 55, at 17 (“[T]he statute left little doubt that this procedure was devised to allow the circuit courts of appeals to assure themselves of the rectitude of the decisions which they rendered.”). In the wake of the Evarts Act, the Supreme Court rebuffed one effort by a court of appeals to certify an issue on which the circuits had divided, indicating that a division of authority was not, by itself, an appropriate basis for certification. *See* *Columbus Watch Co. v. Robbins*, 148 U.S. 266, 270 (1893) (dismissing the certified question). The Court, however, later answered a certified question arising out of similar circumstances. *See* *United States v. Woo Jan*, 245 U.S. 552, 553, 558 (1918) (answering a certified question that had “given rise to diversity of decision” among the district courts and courts of appeals).

trol.”⁷⁸ So, for example, Chief Justice Taft told Congress that certification would serve as a means pursuant to which the courts of appeals could exercise their own “discretion” to “place” particular legal issues before the Supreme Court.⁷⁹ And Justice Van Devanter, in the final testimony on the bill prior to its passage, highlighted that the bill allowed the circuit courts “[w]henever they are so disposed” to certify “important questions of law” to the Supreme Court.⁸⁰ The understanding that emerged in the wake of the Judges’ Bill, reflected in Frankfurter and Landis’s 1930 *Harvard Law Review* foreword, was that “[p]etitions for *certiorari* the Court can deny, but questions certified *must* be answered.”⁸¹

It did not take long, however, for that understanding to fall by the wayside. In the decade following the passage of the Judges’ Bill in 1925, the circuits issued on average approximately seven certifications per Supreme Court Term.⁸² In the next decade, however, the average dropped to two per Term,⁸³ and it has steadily declined ever since, such that today, “certification is practically a dead letter.”⁸⁴ Indeed, only five years after passage of the Judges’ Bill, Frankfurter and Landis were already remarking on the Court’s “hostility” to the practice.⁸⁵ In the decades since, the Court has set forth a range of reasons for dismissing certified questions, some of which are quite compelling, others of which do not hold up nearly so well with the benefit of hindsight.⁸⁶ In all events, Justice Stevens was certainly right that today it is newsworthy if a court of appeals even *attempts* by certification to prod the Court into addressing an issue.⁸⁷

Ironically, the demise of certification as a means of formal communication between the courts of appeals and the Supreme Court has taken place as the Supreme Court itself has increased its own practice

⁷⁸ Hartnett, *supra* note 14, at 1710.

⁷⁹ See 1922 *Hearings*, *supra* note 19, at 3, *quoted in* Hartnett, *supra* note 14, at 1665.

⁸⁰ See *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States, Hearing on H.R. 8206 Before the H. Comm. on the Judiciary*, 68th Cong. 29 (1924) (statement of Justice Van Devanter), *quoted in* Hartnett, *supra* note 14, at 1691.

⁸¹ Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 36 (1930) (emphasis added).

⁸² See Hartnett, *supra* note 14, at 1710 (noting that the courts of appeals issued seventy-two certificates between 1927 and 1936).

⁸³ *Id.* at 1710–11.

⁸⁴ *Id.* at 1712.

⁸⁵ See Frankfurter & Landis, *supra* note 81, at 36.

⁸⁶ See 17 WRIGHT ET AL., *supra* note 62, § 4038, at 65–80 & nn.16–21, 30–35, 38–47 (discussing various reasons and illustrative cases).

⁸⁷ See *United States v. Seale*, 130 S. Ct. 12, 13 (2009) (mem.) (Stevens, J., dissenting from dismissal of certified question).

of certifying questions to the highest courts of the states.⁸⁸ The Court also now takes the position that certification to the state courts is the preferred course of action for lower federal courts faced with resolving important and unsettled questions of state law.⁸⁹ As Justice Ginsburg wrote for the Court in *Arizonans for Official English v. Arizona*: “Through certification of novel or unsettled questions of state law for authoritative answers by a State’s highest court, a federal court may save ‘time, energy, and resources and hel[p] build a cooperative judicial federalism.’”⁹⁰ In keeping with the Court’s admonition and example, this kind of certification is very much on the rise.⁹¹

This trend highlights the fact that both federal and state courts have grown to develop a certain comfort level with certification as a means of communicating—*except* in this particular context, which, ironically, is the form of certification with the richest historical pedigree.⁹² It also bears noting that the principal criticism of new forms of certification—namely, that they occasion delays in the final resolution of cases—does not apply in the context of certification by courts of appeals to the Supreme Court. On the contrary, the latter form of certification often results in more efficient resolution of cases. Consider again, in this regard, the *Seale* case.

In addition, comparable provisions that Congress enacted in 1958 to provide for interlocutory review in the courts of appeals when the district and circuit courts agree that such review is appropriate⁹³ “have

⁸⁸ By my count, there have been at least six such cases since 1982, including one this past Term. See, e.g., *United States v. Juvenile Male*, No. 09-940 (U.S. June 7, 2010) (per curiam) (certifying to the Montana Supreme Court); *Stewart v. Smith*, 534 U.S. 157, 159–60 (2001) (per curiam) (certifying to the Supreme Court of Arizona); *Fiore v. White*, 528 U.S. 23, 29 (1999) (certifying to the Pennsylvania Supreme Court); *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 398 (1988) (certifying to the Virginia Supreme Court); *Fla. Star v. B.J.F.*, 484 U.S. 984, 984 (1987) (mem.) (certifying to the Florida Supreme Court); *Zant v. Stephens*, 456 U.S. 410, 416–17 (1982) (per curiam) (certifying to the Georgia Supreme Court). There may well be more. As noted above, this trend marries with a similar increase in lower federal courts certifying questions to state courts, something for which Second Circuit Judge Guido Calabresi (among others) has long advocated. See Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301 (2003).

⁸⁹ See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75–80 (1997); *id.* at 76 (observing that in this context certification may reduce costs and delay as compared to federal court abstention); see also Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1549–56 (1997) (promoting certification in light of *Erie*).

⁹⁰ *Arizonans for Official English*, 520 U.S. at 77 (alteration in original) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

⁹¹ See generally FALLON ET AL., *supra* note 29, at 1072–75.

⁹² See *supra* notes 74–81 and accompanying text.

⁹³ See Act of Sept. 2, 1958, Pub. L. No. 85-919, 72 Stat. 1770, 1770 (amending 28 U.S.C.

worked fairly well.”⁹⁴ There is no reason to think that reinvigorating the practice as a means of communication between the courts of appeals and the Supreme Court could not work equally well. As the *Federal Practice and Procedure* treatise notes, moreover, “[c]ertification, if wisely used, would have several advantages,” including that “[i]t would sharply distinguish a small handful of cases from the flood of frequently worthless certiorari petitions that engulf the Court.”⁹⁵ Another possible advantage is that certification allows the Court to ignore “[i]ncidental issues” that otherwise “might encumber a petition [for certiorari].”⁹⁶ But my focus on the practice sees a more immediate benefit: certification allows lower court judges themselves to inform the Court—directly and formally—that an issue is important, recurring, and in need of its resolution.⁹⁷

Conclusion

Modern practice has largely rejected a role for certification in placing matters on the Supreme Court’s agenda. Thus, for any real change to occur on this front, it may not suffice for circuit judges simply to certify questions more often than they do now. But then again, it might. Put another way, if enough circuit judges were to invoke the tool of certification in an attempt to single out important issues that they believe are in need of the Court’s resolution, perhaps a renaissance of the certification practice at the court of appeals level could take hold, in turn, at the Supreme Court.

Were these changes to occur and certification practice to increase, it might then be appropriate for the Court to develop norms as to which certified questions should receive the highest priority. Toward

§ 1292) (codified at 28 U.S.C. § 1292(b) (2006)) (providing that where a district judge in a civil action believes that an appeal “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation,” an interlocutory appeal of an otherwise unappealable order may proceed if the court of appeals, in its discretion, permits the appeal).

⁹⁴ 17 WRIGHT ET AL., *supra* note 62, § 4038, at 65 & n.15.

⁹⁵ *Id.* § 4038, at 65 (footnote omitted).

⁹⁶ *Id.* (footnote omitted). It is generally understood that even where a certified question is answered, the parties still enjoy the right to seek later review in the Supreme Court of other issues. See *United States v. Barnett*, 376 U.S. 681, 759 n.49 (1964) (Goldberg, J., dissenting) (“An answer to the certified question does not prevent defendants, if they are convicted, from raising other issues, not included in the certificate, on appeal from their convictions.”).

⁹⁷ Of course, to the extent that certification remains a dead letter, lower court judges certainly could make a practice of saying in published opinions that a particular issue is recurring and in need of clarification. But there are sometimes costs to waiting to decide issues that lend themselves well to certification. The *Seale* case demonstrates this point well. See *supra* notes 58–71 and accompanying text.

this end, the Court might view as especially warranting its attention those questions posed to it by a court of appeals sitting en banc.⁹⁸ Or it might choose to prioritize questions certified by a court of appeals that has gone so far as to declare that its judgment would have been different had it felt itself bound by the law of another circuit.⁹⁹ More generally, the Court might view with disfavor those questions posed “as to which instructions are desired” where the court of appeals has not itself already attempted to work through the problem.¹⁰⁰

Skeptics will suggest that the Supreme Court is unlikely to alter its practices without new legislation compelling it to do so. Thus, one could imagine calls to make certification truly mandatory or at least mandatory where an issue has been certified by more than one court of appeals.¹⁰¹ For now, I hesitate to go this far, in part from an appreciation for the benefits that discretion brings to the exercise of jurisdiction,¹⁰² and in part because I suspect that the Supreme Court is likely to be more receptive to a practice promoted within its own ranks in contrast to one imposed on it by Congress. With that said, if Congress were to revisit the certification rules, it should consider adding a means by which the highest courts of the states could certify questions to the Supreme Court, given that they too are in a position to gauge which unsettled issues of federal law are of great concern to the lower courts.¹⁰³

In the end, what I offer is hardly a complete answer to the Court's critics—nor is it intended to be. But if the courts of appeals

⁹⁸ One commentator suggested this some time ago. See Comment, *Federal Appellate Practice—Certified Question on a Division of Opinion Between Two Panels of a Court of Appeals Dismissed*, 43 IOWA L. REV. 432, 436 (1958) (“[T]here is good reason for not entertaining a certificate prior to a[n] en banc hearing of the issue when the total tabulation of the vote in all the panels that have considered the issue is not an equal division.”).

⁹⁹ Cf. SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 53–58 (1986) (discussing the Court's role to resolve intercourt conflicts); *id.* at 58 (calling a conflict “intolerable” and worthy of Supreme Court review where “at least three courts have passed on the question”). See generally Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 712–20 (1984) (discussing circuit court conflicts and proposing a managerial model of the Supreme Court for the promotion of uniformity in federal law).

¹⁰⁰ 28 U.S.C. § 1254(2) (2006).

¹⁰¹ Cf. ESTREICHER & SEXTON, *supra* note 99, at 53–58.

¹⁰² See generally David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (defending the practice of the federal courts to exercise discretion with respect to jurisdiction as contributing to easing interbranch and intergovernmental tensions).

¹⁰³ See *supra* text accompanying notes 27–30 (discussing the role of state courts in the judicial system).

revive certification in appropriate cases and the Supreme Court relaxes its longstanding hostility to the practice, the result could be that the Court would resolve *more* (though certainly not *all*) of the most significant issues that regularly divide the lower courts and on which lower court judges feel that they are in need of greater guidance. For this reason alone, perhaps it is well worth reinvigorating the practice.