The Case For Certification

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INTRODUCTION

Much concern has recently arisen over the excessive delay in the American court systems. An element of this delay can often be attributed to the uncertainty surrounding the determination of “state law” by the federal courts.¹

This note will discuss the inter-jurisdictional certification procedure utilized by the federal courts when faced with the task of interpreting uncertain state law.² Under this procedure, the federal court may stay proceedings by applying the abstention doctrine and send a certified question to the state's highest court requesting an interpretation of the unsettled law. The state court may then answer the question and certify the answer back to the federal court.³ The suit may thereupon be resumed, the federal court applying the certified interpretation of state law. It is the premise of this note that this certification procedure offers promise of easing the delay-causing burdens of the federal courts.

BASIS FOR ABSTENTION AND CERTIFICATION—WHAT IS STATE LAW?

In *Erie R.R. v. Tompkins*⁴ the United States Supreme Court reversed *Swift v. Tyson*,⁵ a rule of one hundred years' duration, which had re-

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⁴. 304 U.S. 64 (1938).

quired the federal courts to follow only state statutes, or long-established local custom having the force of law, in compliance with the Rules of Decision Act. The Court in its new interpretation of "the laws of the several states" clause held that the law to be applied was to be the law of the state, whether that law was declared by its legislature in a statute or by its highest court in a decision. The source of the law was not the concern of the federal court.

The Erie Doctrine was pressed further by the Court when it held that in any area of substantive concern, where the outcome would be affected, state not federal law must be applied. The outgrowth of these interpretations of the "state law" clause in Erie-Guaranty was to increase the burden on the federal courts to determine what precisely the state law was in a particular case. Judge Clark was quick to recognize this situation soon after the Erie decision. He stated that when state law is "... confused or nonexistent ... [this is] without hesitation, ... the most troublesome ... of all the rules based upon the Tompkins case." Although there have been some limits placed on the Erie Doctrine, its basis remains unchanged—the responsibility of a federal court to determine what constitutes state law is not abrogated just because there is no state law or because it is difficult to ascertain.


6. Judiciary Act of 1789, § 34, 1 Stat. 92, provides:

The laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

7. Id.


12. Meredith v. City of Winter Haven, 320 U.S. 288 (1943). See also Propper v. Clark, 337 U.S. 472 (1949); Estate of Spiegel v. Commissioner, 335 U.S. 710 (1949);
Abstention

In recent years, however, federal courts have utilized the procedure of staying proceedings and deferring to the state court on an issue of local law. This has become known as the abstention doctrine.3

The reasons for abstention are varied and many. Wright, in his treatise on the federal court system,4 divides the abstention doctrine into four “abstention doctrines”.

Thus abstention is variously recognized: (1) to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket.5

The first aspect of the abstention doctrine is appropriately utilized

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> It is most true, that this court will not take jurisdiction if it should not: but it's equally true, that it must take jurisdiction, if it should . . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We 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 to the Constitution.

The Meredith doctrine has been followed by the lower federal courts, e.g., Food Fair Stores v. Food Fair, 177 F.2d 177 (1st Cir. 1949). See Wright, supra note 11, at 240 nn. 29, 30. But see United States v. City of Tacoma, 330 F.2d 153 (9th Cir. 1964).


The abstention doctrine has not met with universally favorable comment. See Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960) (Douglas, J., dissenting); Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 YALE L.J. 267 (1946). Clark's dislike for the abstention doctrine showed in his decisions, see, e.g., Amtrong Trading Corp. v. Miehle Printing Press & Mfg. Co., 206 F.2d 103 (2d Cir. 1953). See also Corbin, The Laws of the Several States, 50 YALE L.J. 762 (1941) (Erie should not be interpreted so as to require federal judges to be bound by laws of a state made by judges of that state’s courts. Corbin stressed that federal judges use their “judicial brains, not a pair of scissors and paste pot”. Id. at 775).

14. Wright, supra note 11.

15. Id. at 196.
in suits asking for equitable relief.  It is believed in that situation that the federal court should abstain if the state's interpretation of an issue pertaining to uncertain state law may avoid a federal constitutional question as to the validity of a statute.

The second facet of the abstention doctrine is applied when a decision by a federal court would necessarily involve determination of a state's domestic policy or would result in an unnecessary interference with the action of state regulatory activities at the administrative stage.

The reason for abstention here is to avoid federal-state friction, since intervention by the federal court might endanger the success of state policies.


17. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959) (If the state law is fairly open to interpretation then the federal court should stay its proceedings until the state courts have been allowed an opportunity to pass on the issue.)


As a practical matter, the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide. . . . Delay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double system of review.


The background of the third aspect of the abstention doctrine starts with the statement of the Supreme Court in *Meredith v. Winter Haven.* The Court held that where jurisdiction of the federal court is based on diversity of citizenship, the difficulty of ascertaining what the state law is does not in itself afford a sufficient ground for a federal court to decline to exercise its jurisdiction. However, since then, inroads have been made on the *Meredith* Doctrine which allow the federal court, when there are exceptional circumstances present, to stay proceedings until a state determination of state issues can be had.

Precisely when resort to this procedure may be contemplated is unclear. At present the decisions of lower federal courts are in a state of uncertainty. Some have abstained in routine diversity cases simply because the state law was unclear, while other courts have expressly rejected this view.

The validity and scope of the fourth "abstention doctrine" is extremely limited. Only one court has relied solely on the excuse of an overcrowded docket to stay a proceeding while a declaratory judgment action on the same issue was being pursued in a state court, but one other decision has recognized the court's power to follow such a course.

Applying the certification procedure in connection with the abstention doctrine will necessitate focusing only on the first and third "abstention doctrines". The second aspect of abstention is inappropriate in the certification context for when a federal court stays proceedings, in

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21. 320 U.S. 228 (1943).
22. Id. at 234.
24. United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir.), cert. denied, 377 U.S. 935 (1964); see cases cited note 23 supra.
order to avoid or minimize federal interference with state domestic policy, it is the dismissal of the action, rather than retention of jurisdiction pending a state court determination, which is appropriate.\textsuperscript{28} By dismissing the action, the federal court obviates the need for obtaining answers to unsettled questions of state law by way of certification or declaratory judgment. It should be noted that any deprivation of federal rights of either litigant, which might occur in the course of subsequent litigation in the state court, can be rectified by the Supreme Court upon review.\textsuperscript{29}

The fourth aspect of the abstention doctrine, effective in easing the congestion of the court docket, has been used infrequently. And, when it has been applied, the issue of unsettled state law was pending determination in a state court.\textsuperscript{30} Again, there would be no need for certification since the federal court could merely await the outcome of the suit in the state court to have its answer on the issue of state law involved.

The majority of the abstention cases,\textsuperscript{31} however, fall within the ambit of either the first or third "abstention doctrines," and it is here that the certification procedure has its greatest impact.

**Consequences of Abstention**

*Delay*—The basic problem created by the abstention doctrine is the
delay which results when a court stays proceedings and sends the litigants into a state court to obtain an interpretation of state law. An often cited example of the length and seriousness of this delay is the Spector case which required nearly a decade to adjudicate.

One writer feels that a substantial reason for this delay is the inappropriate use of abstention. Whether caused by misuse or not, when the abstention doctrine is applied and the federal court stays proceedings, the parties must then obtain a decision on the substantive issues from the highest state court. One way this can be accomplished is by means of a declaratory judgment proceeding. Unfortunately, however, not all states have a direct means available to secure a judgment from the state’s highest court. As a result, the parties must often bring the suit in a lower state court which has original jurisdiction and reach the higher court by way of appeal.

34. Kurland, supra note 32, Kurland proposes a solution whereby the state court would pass on both the federal and state questions when the case is remanded to it. "Direct review of the states high court's resolution of the federal issue by the Supreme Court would then [be] available." Contra, Propper v. Clark, 337 U.S. 472 (1949).
Expense—Delay is not the only adverse effect of the abstention doctrine. Along with the delay goes the increased expense to the litigants of starting a "second suit" in the state courts and appealing the judgment to the state’s court of last resort.37 These effects are further magnified by the three-tiered judiciary systems employed in sixteen states.38

Issues to be Decided by the State Court—After a federal court stays proceedings and sends the litigants into a state court to obtain a declaratory judgment, another problem often develops—precisely what issues is the state court to decide? Some cases have been relatively clear, indicating that the state court was only to decide state issues.39 However, a federal court cannot prevent a state court from deciding a federal question if presented.40

Certification

The certification procedure can be traced through a long history in England41 as well as in the United States.42 Florida was the first state

37. County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 196 (1969) (abstention "would accomplish nothing except require still another law suit with added delay and expense for all parties); Note, Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism, 111 U. Pa. L. Rev. 344, 347-48 (1963) (discouragement of future litigants whose claim is composed of both federal rights intermingled with a claim for state relief or, if a diversity of citizenship claim, the fact that they may have to traverse two judicial systems).


42. 28 U.S.C. §§ 1291-1298 (1958). Allows for certified questions from federal courts
to adopt a certification procedure authorizing the Supreme Court of Florida to receive and answer certified questions of state law from federal appellate courts.\footnote{43} The constitutionality of this procedure was upheld in \textit{Sun Insurance Office, Ltd. v. Clay},\footnote{44} where the Florida Supreme Court concluded that

in the absence of a constitutional provision expressly or by necessary implication limiting the jurisdiction of the Supreme Court to those matters expressly conferred upon it, and in the absence of a constitutional provision expressly conferring upon another court jurisdiction to exercise the judicial power which is the subject matter of § 25.031 and Rule 4.61, and in the light of the well settled rule that all sovereign power, including the judicial power, "not limited by a state constitution inheres to the people of [the] state", such power may be granted to this court by statute if it is deemed to be substantive matter or by a rule of this court if it is deemed to be a matter of "practice and procedure."\footnote{45}

However, it was not until 1960 (fifteen years after the enactment of Florida section 25.031) that the United States Supreme Court for the first time suggested that the Court of Appeals for the Fifth Circuit make use of the Florida procedure.\footnote{46} Mr. Justice Frankfurter, expressing the opinion of the Court, stated,

The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal

\footnote{43. Originally enacted by the Florida legislature in ch. 23098, § 1 [1945] Fla. Laws 1291 which later became FlA. STAT. AN. § 25.031 (1961).}
\footnote{44. 133 So. 2d 735 (Fla. 1961).}
\footnote{45. \textit{Id.} at 742-43. The Supreme Court of Maine in upholding the constitutionality of its certification statute has held that answering questions certified to it was not a forbidden advisory opinion under its constitution so long as the state court's decision, in fact, was determinative of the case. \textit{In re Richards}, 223 A.2d 827, 832 (Me. 1966). We conclude as did the Florida court that our participation in the certification procedure will constitute a valid exercise of "judicial power". . . . We are satisfied that more will be involved than the mere rendering of a purely advisory opinion. This certification by the federal court becomes by the force of our statute the jurisdictional vehicle for placing the matter before the court for its action.}
court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. 47

Since the Clay decision, five other states, Hawaii, 48 Maine, 49 Montana, 50 New Hampshire, 51 and Washington, 52 have provided for the certification of questions of state law from a federal court to the states' highest courts. For an analysis of the content of the above acts or rules see Chart II infra.

Objections to Certification

Abstractness and Advisory Opinions—The first objection usually voiced against certification is its abstractness. 53 Abstractness results from the fact that the questions certified are severed from the facts which "spawned them." 54 Were a federal court to certify a question to a state court, posed in the form of an abstract question, and then incorporate the advisory state court answer into its final adjudication of the case, the result might well be a clear violation of the "case or controversy" 55 principle. 56 By way of emphasis, it has been seen that state

47. Id. at 212. Justice Black, dissenting, felt that the questions of state law were not so vague or ambiguous as to require certification. Id. at 213. As to the use of certified questions, Black argued that the Supreme Court of Florida had never formulated any rules of court whereby section 25.031 could be carried into practice. Id. at 226. See Fla. App. R. 4.61.


A controversy . . . must be one that is appropriate for judicial determination [and] . . . is . . . distinguished from a difference or dispute of a hypothetical or abstract character . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

See also Moore & Vestal, supra note 42.
courts will not answer a completely abstract question of state law that arises by way of state intra-jurisdictional certification procedures. These procedures generally require that the contents of the certification order contain a statement of all facts relevant to the questions certified and fully show the nature of the controversy in which the question arose. Additionally, to obviate the problems of advisory opinions, most states require that the answer to the question certified be determinative of the case. The procedure of certifying all relevant facts to the state court when coupled with the requirement that the state court decision be determinative of the issues.

57. Note, supra note 53, at 351 n. 54.

58. Spector Motor Service, Inc. v. Walsh, 135 Conn. 37, 61 A.2d 89 (1948); See Justice Musmanno's dissent in In re Mack, 386 Pa. 251, 126 A.2d 679, 699 (1956): "The decision of the majority in this case is a stranger to justice because it is based on a premise which has no factual existence." Sun Ins. Office Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961) (the court avoided the issue of justiciability by basing its jurisdiction on state law); Leiter Minerals Inc. v. California Co., 241 La. 915, 132 So. 2d 845 (1961).


60. Fla. App. R. 4.61(d); N.H. Rev. Stat. Ann. ch. 490: App. R. 21, §§ 3, 4 (1968) (this court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of this court, the record or portion thereof may be necessary in answering the questions); Me. R. Civ. P. 76B (b); Wash. Rev. Code Ann. §§ 2.60.010 (4), (5), 2.60.030 (2) (Supp. 1970); Uniform Certification of Questions of Law [Act] [Rule] § 3; see Chart II infra.

involved should satisfy almost all the states' requirement of a justiciable controversy.  

Certification Violates the Federal Constitution—The attack upon constitutionality has been based upon the fact that judicial power is given to the federal courts by authority other than that established by Article III of the Constitution. A corollary to this objection is that the litigants will be deprived of their right to a federal adjudication if a state court is to determine the issues.

The validity of the above arguments fail when viewed in light of Erie. The Erie Court held that there is no delegation of federal judicial power to state courts since that power does not include the making of state law. Certification would, in fact, seem to further the "spirit of Erie," uniform interpretation of state law, in that regardless of which forum a party were to choose, state or federal, the state law would be applied similarly. Whatever question of constitutionality existed seems to have been put to rest by the Supreme Court in Clay v. Sun Office Ltd., advocating the use of Florida's certification procedure and its subsequent application by the Court in later cases.

Delay—The certification procedure has been criticized for the delay which has resulted from its use. The prime example often cited is Clay v. Sun Insurance Office Ltd. However, most of the time required for litigation of this case was consumed in the federal court system. After abstention, the actual amount of time involved in certifying the question to the Florida Supreme Court and obtaining an answer was

69. United States District Court for the Southern District of Florida, rev'd, 265 F.2d 522 (5th Cir. 1959), vacated, 363 U.S. 207 (1960), question certified, (noted in) 319 F.2d 505 (5th Cir. 1963), certified question answered, 133 So. 2d 735 (Fla. 1961), rev'd, 319 F.2d 505 (5th Cir. 1963), rev'd, 377 U.S. 179 (1964).
433 days. When compared with an average of 876 days for similar abstention cases in which the certification procedure was not available, it can be seen that there is a substantial reduction of delay. It should be emphasized that a major factor which caused the Florida Supreme Court to respond slowly in Clay was the lack of applicable court rules; these rules had to be adopted before the court could answer. Since Clay only one other case has taken as long.

Another aspect of delay involved in certification is the delay caused by the condition of the state court's docket. When a question is certified, the state supreme court is confronted with yet another case to be added to its already overcrowded docket. Since all certification procedures presently in effect allow the state court to decline to answer a question certified, this would seem to be the course to follow if the court is faced with an overcrowded docket. Such a solution may, however, simply delay the inevitable, since the only other alternative available to the litigants is to start a declaratory judgment proceeding which will eventually appear on the court docket by way of appeal. Thus, certification would save the state time and money by avoiding numerous lower court trials and appeals.

- Forum Shopping—Since one of the thrusts of the Erie doctrine is the elimination of forum shopping by litigants, federal courts have demonstrated that they will consider the use of certification even after a decision on the merits has been reached. Thus a litigant who loses a case due to the court's determination of state law could request the court after the trial to certify such question of state law to the state for an authoritative answer. If the resulting interpretation of state law is favorable to the moving party, the judgment may be vacated.

70. Question certified August 12, 1960, see Clay v. Sun Ins. Office Ltd., 319 F.2d 505, 508 (5th Cir. 1960). Question answered October 18, 1961, see 133 So. 2d 735 (Fla. 1961).
71. FLA. APP. R. 4.61.
73. Thirty v. Atlantic Monthly Co., 74 Wash. 2d 679, 445 P.2d 1012, 1014-15 (1968) (Hale, J., dissenting): “At the time the instant case was argued in this court, . . . this court had pending a backlog of approximately 700 cases, some of which were of high precedential value and of exigent importance to the parties . . . . I believe that it received an undeserved priority on the calendar.”
74. Note 3, supra.
76. Vandercook and Sons, Inc. v. Thorpe, 322 F.2d 638 (5th Cir. 1963), rehearing, 344 F.2d 930 (5th Cir. 1965); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962).
This situation, however, seems easily rectifiable. Most federal courts certify upon their own motion or grant permission to certify to a moving party. Certification is therefore discretionary with the court. This discretionary power could be used to deny the use of certification after a judgment on the merits has been reached. Alternatively, the federal court might deem waived the right of the litigants to certify a question in the absence of a motion for certification before the court rules on the matter of state law.

Available Only to an Appellate Court—Two states restrict the use of certification to federal appellate courts. The reason for this restriction is the state court's fear that federal district court certificates would flood the state court dockets. It has been proposed that federal district courts could get around this restriction if Congress merely were to allow them to certify a question to an appellate court. The appellate court in turn could certify the question to the state's highest court, thus circumventing the state restriction.

It seems that the best solution is for a state in adopting a certification procedure to follow the Uniform Act which allows a district court to certify. The fear of "flooding" is ill-founded since answering the certificate is discretionary. Aside from the power to decline to answer, it seems that the federal district court, being better advised of local law and situated so as to make knowing decisions on state law, will be less likely to certify a question. The four other states with certification procedures allow federal district courts to certify questions to their courts; yet, the courts in these states have not been faced with flooding of their dockets by such certificates.

77. See Chart II, § 1 infra.
78. FLA. STAT. ANN. § 23.031 (1961); FLA. APP. R. 4.61 (a); HAWAII REV. STAT. § 602-36, -37 (1968).
81. UNIFORM CONSTRUCTION OF QUESTIONS OF LAW [ACT] [RULE].
82. Id. § 1.
83. See Chart II, § 2 infra.
85. ME. REV. STAT. ANN. tit. 4, § 57 (1970); ME. R. CIV. P. 76B; MONT. SUP. CT. R. 1; N.H. REV. STAT. ANN. ch. 490; APP. R. 21, § 1 (1968); WASH. REV. CODE ANN. § 2.60.010(2) (Supp. 1969).
86. Certification has been sparingly used by the United States district courts which can avail themselves of it. The following is the number of reported cases where cer-
ADVANTAGES OF CERTIFICATION

Achieves the Objectives of Abstention and Promotes Federalism—Although there have been some problems attending the utilization of the certification procedure, they seem inconsequential when viewed in the light of the advantages to be gained by its use.

By using the certification procedure, the federal courts prevent federal intrusion into the state law-making function. The procedure represents a better attempt at cooperative judicial federalism, evincing concern for state sovereignty through an efficient and simple proceeding.

The feeling that the federal court is cooperating in the search for state law rather than seeking to impose its will upon the state might even make state judges more receptive to federal views, when federal questions are before state judiciaries.

In seeking a state determination of state issues, a federal court that applies the abstention doctrine severs itself from the case, leaving the state to make an independent determination of the state law issues. When certification is used, the federal court participates in the resolution of the entire case by framing the state law questions, specifying relevant facts and legal issues and certifying directly to the state's highest court.

Promotion of the "Spirit" of Erie—Consistency in Result—One of the foundations of the Erie Doctrine is that the result of litigation should not depend on whether the suit is brought in a state or federal court. Federal judges have often felt the burden of deciding issues of state law without assurance that their decision would be consistent with a later determination of the same issue by a state court. As Judge Friendly phrased the problem,

Our principal task, in this diversity of citizenship case, is to de-

87. See text accompanying notes 32-40 supra.
91. See, e.g., Essex Universal Corp. v. Yates, 305 F.2d 572 (2d Cir. 1962) (Friendly, J., concurring); Standard Accident Ins. Co. v. New Amsterdam Casualty Co, 249 F.2d 847, 853 (7th Cir. 1957) (Finnegan, C.J., concurring).
termine what the New York courts would think the California courts would think on an issue about which neither has thought.92

Many times, especially in areas where state law is unclear, a federal court has decided the state law inaccurately.93 This results in an injustice to the litigants when a state court later decides the state law involved differently.94 In such situations,95 federal courts have at times granted petitions for rehearing96 to undo a previous decision.97 By using certification, a federal court can eliminate any guesswork as to state law and assure the litigants a decision based on authoritative state law.98

In evaluating the certification procedure, it is helpful to consult the courts which have made use of it and note their comments. Circuit Judge Brown, in Martinez v. Rodriquez,99 expressed his thoughts on certification in the following words:

Once again we witness the effectiveness—both substantive and administrative—of Florida's remarkably helpful certification procedure by which the Florida Supreme Court determines for us the

95. Barnes v. Threshermen and Farmers Mutual Casualty Co., 146 So. 2d 119 (Fla. Ct. App. 1963), cert. denied, 153 So. 2d 305 (Fla.).
96. Maryland Casualty Co. v. Hallat, 326 F.2d 275 (5th Cir. 1964).
97. Maryland Casualty Co. v. Hallat, 295 F.2d 64 (5th Cir. 1961).
98. See, e.g., Life Ins. Co. of Va. v. Shiffler, 359 F.2d 501 (5th Cir. 1966) (upheld a jury verdict against the insurance company under the construction of the Florida Insurance Statutes concerning fraudulent misrepresentation), motion for rehearing granted, 370 F.2d 555 (5th Cir. 1967) (question certified to Supreme Court of Florida), certified question answered, 201 So. 2d 715 (Fla. 1967) (reaching a result opposite that reached in the original fifth circuit opinion). On receipt of the answer to the certified question the earlier judgment was vacated and the case remanded to the district court. 380 F.2d 375. See also Norton v. Benjamin, 220 A.2d 248 (Me. 1966). The district court in an earlier decision, Buckley v. Basford, 184 F. Supp. 870 (D. Me. 1960), decided the same issue as to state law, only to find it had decided wrongly when the Maine Supreme Court met the issue in Norton.
controlling question of Florida law. . . . For example, while this Court following the footsteps of the stalwarts below might have reached the same conclusion as that of the Florida Court with respect to the issue in this case, our decision would have had no assurance of predictable correctness. No matter how many Federal Judges, trial, appellate, three-judge panel, or the full panoply of the court en banc, any decision would have been an Erie-guess. Now the guesswork has been eliminated, and we are quickly presented with a definitive explication of Florida law.100

Judge Brown is only one of many who have extolled the virtues of the certification procedure.101

Defines the Issue(s) to be Decided—Control by the federal court of the form of the question certified and the accompanying record assures that the right question will be answered on the proper facts.102 This cures one of the problems attending abstention—what issues are to be decided by the state court?103

The federal courts have given, in their certified questions, the widest latitude to the highest state court in reaching a decision.104 The emphasis has been that the particular phrasing used in the certification question should not preclude the state court from considering the problems and issues involved as the state court perceives them. This latitude extends to the restatement of the issue or issues and to the manner in which the answers are to be given.105

100. Id. at 730.

[T]o the Justices of the Supreme Court of Florida we wish to express publicly and with deep sincerity our appreciation for their answer to the question which we certified to that Court. That answer has saved this Court, through the writer as its organ, from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice.

The Supreme Court of Florida has been a very real help in the administration of justice.


102. See text accompanying notes 39 and 40 supra.
103. Hopkins v. Lockheed Aircraft Corp., 358 F.2d 347, 349 n.2 (5th Cir. 1966).
104. Martinez v. Rodriguez, 394 F.2d 156, 159 n.6 (5th Cir. 1968).
Protection of Federal Rights—In obtaining authoritative answers to questions of state law the federal court retains jurisdiction in order to preserve for the litigants their right to a federal adjudication of the facts and issues of law not certified. If for some reason the state court does not respond, or does not respond expeditiously, the federal court may proceed to decide the issue of state law, thus protecting any federal rights of the litigants to a “just, speedy, and inexpensive” trial.

Avoids Delay and Expense Caused by the Abstention Doctrine—Besides carrying out the objectives of abstention and the *Erie* Doctrine, obtaining authoritative answers to unsettled questions of state law, and generally promoting federalism, certification avoids the delay and expense attending the abstention doctrine.

A cross-section of abstention cases, some utilizing certification, and some not, were analyzed to determine the reduction in delay attributable to use of the certification procedure. The time segment compared began the day on which the federal court abstained and continued to the day on which the state’s highest court rendered an answer as to the state law involved. The first group of cases did not have the certification procedure available. As a result, in all of these cases, a declaratory judgment suit was required to obtain an answer from the state court. The average time required to get an answer in this manner was 876 days (over two years). This can be compared with 287 days (less than ten months) for cases where certification was utilized.

The large savings in time is further accented when cases in which certification was used are further analyzed. Both Washington and Maine have been asked few certified questions. It may be assumed that lack of experience has caused these courts to fail to reach their peak of proficiency in answering certified questions. Florida is the only state which has answered a substantial number of certification questions over the last ten years. Its familiarity with certified cases is evi-

109. Cases cited note 121 *infra.*
110. *Id.;* statutes cited note 36 *supra.*
111. See Chart I *infra.*
112. *Id.*
113. Cases cited notes 125-26 *infra.* Maine and Washington together have answered only five reported cases certified to them.
114. Cases cited notes 122-24 *infra.*
denced by its having the lowest average time, 240 days,\textsuperscript{115} of all the states. When viewed over the ten-year period it can be seen that the more cases certified the more proficient the Florida Supreme Court has become in answering.\textsuperscript{116} Chief Judge Brown expressed the Fifth Circuit's feeling as to the benefit of certification when he said:

> We certified the case on March 24, 1966. The first Opinion of the Florida Supreme Court was handed down within ten months on February 1, 1967. We have been able to dispose of it without further resubmission or argument. In these days of our exploding docket and the unavoidable delay as we try to cope with our overcrowded case load, . . . this slight period of time to afford Florida the opportunity to settle the issue presented demonstrates that delay really is not an insurmountable problem in the certification procedure and certainly it never need to be.\textsuperscript{117}

Hopefully inter-jurisdictional certification will attain the level of efficiency found in some state court intra-jurisdictional certification procedures.\textsuperscript{118} However, even now, the certification procedure, where it is available, results in a saving to the litigants of, on the average, some 589 days,\textsuperscript{119} not to mention the financial saving. This fact alone should prompt federal courts to make use of certification if it is available.

**Conclusion**

As long as the federal judicial system subscribes to the theory and "spirit" of the *Erie* Doctrine and continues to effectuate its use through the abstention doctrine, the need for accurate interpretation of state law will continue. The typical state declaratory judgment proceeding, when used in conjunction with abstention, has proved to be a slow, inefficient, and an inaccurate way of assessing state law. The certification procedure on the other hand was developed for and fits the needs of the federal court system. Its use will give a federal court the tools for obtaining authoritative state determinations of state law. The

\textsuperscript{115} See Chart I infra.

\textsuperscript{116} Id.

\textsuperscript{117} Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656, 657 n.3 (5th Cir. 1968).

\textsuperscript{118} Speer v. State, 27 Ala. App. 579, 583-84, 177 So. 162, 166 (1937) (answered certified question the same day); Georgia Power Co. v. Watts, 56 Ga. App. 322, 192 S.E. 493 (1937) (case returned within ten days after answering); Tex. Sup. Ct. R. 477 (certified questions acted on immediately).

\textsuperscript{119} The average certification time for all the certification cases analyzed: 287 days. Average time for cases not using certification: 876 days.
best recommendation for the use of certification comes from the judges and courts which have utilized it. Chief Judge Brown seems to have expressed a most logical conclusion when he stated:

There are, to be sure, purists who somehow feel that a struggle of uncertainty leading even to the likelihood of an erroneous but speedy result is better than the slight time it takes to get an authoritative answer. But so long as Florida is with us and has this responsive mechanism that not only lights our lights but keeps us straight at the same time, this tribunal is grateful for the substitution of certainty for the somewhat scholastic, always uncertain, exploration into what local Judges would say they would say the local law is.

With dispatch and positiveness Florida answers the Florida question. What more could one want?\textsuperscript{120}

\textbf{John A. Scanelli}

\textsuperscript{120} Martinez v. Rodriguez, 410 F.2d 729, 730-31 (5th Cir. 1969).
CHART I
AVERAGE ELAPSED TIME UNTIL RECEIPT OF ANSWER

CHART II
CERTIFICATION PROCEDURES

(overleaf)
CHART I

DAYS AVERAGE ELAPSED TIME UNTIL RECEIPT OF ANSWER

<table>
<thead>
<tr>
<th>DAYS</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>900</td>
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<td>200</td>
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</tr>
</tbody>
</table>

Without Certification

(La. 5th Cir. Ct. App. 1960), dismissed, 194 F. Supp. 521 (E.D. La. 1961) (the state court passed on all issues including federal constitutional issues), prob. juris. noted, 372 U.S. 904, rev'd, 375 U.S. 411 (1964); Louisiana Power & Light Co. v. City of Thibodaux, abstained, 153 F. Supp. 515 (E.D. La. 1957), rev'd, 255 F.2d 774 (5th Cir. 1958), cert. granted, 358 U.S. 893, rev'd, 360 U.S. 25 (1959), declaratory judgment suit instituted, 17th Judicial District Court, Lafourche Parish, aff'd, 126 So. 2d 24 (La. 1st Cir. Ct. App. 1960). The above cases were the only ones completely reported, and which thereby provided the necessary dates needed for computation. For a complete list of cases in which abstention has been applied see 1 BARRON & HOLTZOFF supra, note 13, § 64.


123. Hopkins v. Lockheed Aircraft Corp., United States District Court for the Middle District of Florida, question certified, 358 F.2d 347 (5th Cir. 1966), question answered, 201 So. 2d 743 (Fla. 1967), decided, 394 F.2d 656 (5th Cir. 1968); Life Ins. Co. of Va. v. Shifflet, United States District Court for the Southern District of Florida, aff'd, 359 F.2d 501 (5th Cir. 1966), question certified, 370 F.2d 555 (5th Cir.), question answered, 201 So. 2d 715 (Fla.), rev'd, 380 F.2d 375 (5th Cir. 1967); Martinez v. Rodriguez, United States District Court for the Southern District of Florida, question certified, 394 F.2d 156 (5th Cir.), question answered, 215 So. 2d 305 (Fla. 1968), aff'd, 410 F.2d 729 (5th Cir. 1969); Moragne v. State Marine Lines, Inc., United States District Court for the Middle District of Florida, question certified, (reported in) 409 F.2d 32 (5th Cir. 1969), question answered, 211 So. 2d 161 (Fla. 1968), aff'd, 409 F.2d 32 (5th Cir. 1969), cert. granted, 396 U.S. 900, rev'd, 90 S. Ct. 1772 (1970).

124. Gaston v. Pittman, United States District Court for the Northern District of Florida, question certified, 405 F.2d 869 (5th Cir.), question answered, 224 So. 2d 326 (Fla.), rev'd, 413 F.2d 1031 (1969); Trail Builders Supply Co. v. Reagan, United States District Court for the Southern District of Florida, decided to certify question, 409 F.2d 1059 (5th Cir. 1969), question certified, 410 F.2d 763 (5th Cir.), question answered, 235 So. 2d 482 (Fla. 1970).


CHART II
Certification Procedures

<table>
<thead>
<tr>
<th>Substantive:</th>
<th>Florida</th>
<th>Hawaii</th>
<th>Maine</th>
<th>Montana</th>
<th>New Hampshire</th>
<th>Washington</th>
<th>Uniform Act</th>
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<tbody>
<tr>
<td>§ 1. Who can certify a question?</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>U. S. Supreme Court</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>U. S. Courts of Appeals</td>
<td>Yes</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>U. S. District Courts</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>D. C. Court of Appeals</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Another State Court</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

§ 2. The state supreme court
*must* answer

|         | No | No | No | No | No | No | No |

*may* answer

|         | Yes | Yes | Yes | Yes | Yes | Yes | Yes |

§ 3. The certified question

*must*

|         | Yes | Yes | Yes | No | No | Yes | No |

*may*

|         | No | No | No | Yes | Yes | No | Yes |

(continued at 652)

133. Uniform Certification of Questions of Law [Act] [Rule] (1967). The Uniform Act provides the following:

Section 1. *(Power to Answer.)* The [Supreme Court] may answer ques-
tions of law certified to it by 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 or the intermediate appellate court of any other
state], when requested by the certifying court if there are involved in any
proceeding before it questions of law of this state which may be determina-
tive of the cause then pending in the certifying court and as to which it
appears to the certifying court there is no controlling precedent in the de-
cisions of the [Supreme Court] [and the intermediate appellate courts] of
this state.

Section 2. [Method of Invoking.] This [Act] [Rule] may be invoked
by an order of any of the courts referred to in section 1 upon the court's
own motion or upon the motion of any party to the cause.

Section 3. [Contents of Certification Order.] A certification order shall
set forth

(1) the questions of law to be answered; and
(2) a statement of all facts relevant to the questions certified and showing
fully the nature of the controversy in which the questions arose.

Section 4. [Preparation of Certification Order.] The certification order
shall be prepared by the certifying court, signed by the judge presiding at
the hearing, and forwarded to the [Supreme Court] by the clerk of the
certifying court under its official seal. The [Supreme Court] may require
the original or copies of all or of any portion of the record before the certi-
fying court to be filed with the certification order, if, in the opinion of the
[Supreme Court], the record or portion thereof may be necessary in an-
swering the questions.

Section 5. [Costs of Certification.] Fees and costs shall be the same as
in [civil appeals] docketed before the [Supreme Court] and shall be equally
divided between the parties unless otherwise ordered by the certifying court
in its order of certification.

Section 6. [Briefs and Argument.] Proceedings in the [Supreme Court]
shall be those provided in [local rules or statutes governing briefs and argu-
ments].

Section 7. [Opinion.] The written opinion of the [Supreme Court]
stating the law governing the questions certified shall be sent by the clerk
under the seal of the Supreme Court to the certifying court and to the
parties.

Section 8. [Power to Certify.] The [Supreme Court] [or the inter-
mediate appellate courts] of this state, on [its] [their] own motion or the
motion of any party, may order certification of questions of law to the
highest court of any state when it appears to the certifying court that there
are involved in any proceeding before the court questions of law of the
receiving state which may be determinative of the cause then pending in the
certifying court and it appears to the certifying court that there are no con-
trolling precedents in the decisions of the highest court or intermediate
appellate courts of the receiving state.

Section 9. [Procedure on Certifying.] The procedures for certifica-
tion from this state to the receiving state shall be those provided in the laws
of the receiving state.

Section 10. [Severability.] If any provision of this [Act] [Rule] or the
application thereof to any person, court, or circumstance is held invalid, the
invalidity does not affect other provisions or applications of the [Act]
[Rule] which can be given effect without the invalid provision or applica-
## II. PROCEDURAL:

### § 1. Certification can be invoked by a federal court:

<table>
<thead>
<tr>
<th></th>
<th>Florida</th>
<th>Hawaii</th>
</tr>
</thead>
<tbody>
<tr>
<td>Upon its own motion</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Upon the motion of an interested party</td>
<td></td>
<td></td>
</tr>
<tr>
<td>with approval of court</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>without approval of court</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Maine</th>
<th>Montana</th>
<th>New Hampshire</th>
<th>Washington</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certification can be invoked by a federal court:</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

### § 2. Contents of the certificate must include:

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Question(s) of law to be answered</td>
<td>Yes</td>
</tr>
<tr>
<td>Statement of facts</td>
<td>Yes</td>
</tr>
</tbody>
</table>

### § 3. Cost of the certificate should be equally divided

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost of the certificate should be equally divided</td>
<td>Yes</td>
</tr>
</tbody>
</table>

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135. Uniform Certification of Questions of Law [Act] [Rule] § 1 (1967) ("A Court of Appeals of the United States").

136. Although this note does not concern itself with inter-jurisdictional certification between states, it is interesting to see that a majority of state supreme courts have the
power to adopt rules to effectuate such certification. FLA. STAT. ANN. § 25.032 (1961); HAWAII REV. STAT. § 602-36-37 (1968); N.H. REV. STAT. ANN. ch. 490: APP. R. 21 § 8 (1968) (the court is given the power to certify questions of law to the highest court of any state but not to receive such questions). Since the New Hampshire statute is based on the Uniform Act, it would seem that the intent of the New Hampshire Supreme Court was to adopt section 1 of the Uniform Act including the bracketed portion of lines 4 and 5.

137. The Supreme Court of Florida received a certified question from a Florida District Court of Appeal and held that the word "may" should not be construed as "shall", and therefore refused to answer the certified question. Stein v. Darby, 134 So. 2d 232, 237 (Fla. 1961).

138. The word "shall" was construed by the Supreme Court of Washington to be permissive. In re Elliott, — Wash. —, 446 P.2d 347, 353 (1968).

139. The Florida statute and appellate rules say the question(s) certified must be "determinative of said cause." FLA. STAT. ANN. § 25.031 (1961); FLA. APP. R. 4.61a. But see Green v. American Tobacco Co., 154 So. 2d 169, 171 (Fla. 1963) (the court answered the certified question but indicated that the inquiry did not request a response to the ultimate issue of liability).

140. The statute reads "one or more questions of law of this State which may be determinative of the cause. . . ." ME. REV. STAT. ANN. tit. 4, § 57 (Supp. 1970), ME. R. CIV. P. 76B (emphasis added); but see In re Richards, 223 A.2d 827, 833 (Me. 1966) where the court construed the statute such that its response "will be 'determinative of the cause' . . . ."; accord Norton v. Benjamin, 220 A.2d 248 (Me. 1966).

141. MONT. S. CT. R. 1. All that the Montana rule requires is "that the question upon which adjudication is sought is controlling in the federal litigation and adjudication by the Montana Supreme Court will materially advance termination of the federal litigation. . . ." Lewis v. Mid-Century Ins. Co., 278 F. Supp. 238, 240 n.3 (D. Mont. 1967).

142. The Hawaii Supreme Court, while authorized to adopt rules to effectuate the act, has not done so as of this writing.


144. The extent to which facts are included varies among the states: FLA. APP. R. 4.61(d) (facts "showing the nature of the cause and the circumstances out of which the questions . . . arise. . . ."); N.H. REV. STAT. ANN. ch. 490: APP. R. 21, § 3(2) (1968) ("a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the question arose"); accord, uniform certification of questions of law [Act] [Rule] § 3(2); ME. R. CIV. P. 76B(b) ("a statement of facts showing the nature of the case and the circumstances out of which the question of law arises. . . ."); WASH. REV. CODE ANN. § 2.60.030(2) (Supp. 1969) ("Certificate procedure shall include and be based upon the record and may include a supplemental record."). For a definition of "record" and "supplemental record" see id. § 2.60.010(4),(5).

145. All of the states provide that the costs shall be divided between the parties, subject in some cases to reallocation by the federal (certifying) court: N.H. REV. STAT. ANN. ch. 490: APP. R. 21, § 5 (1968); WASH. REV. CODE ANN. § 2.60.030(3) (Supp. 1969); uniform certification of questions of law [Act] [Rule] § 5; and in the others by the states' high courts: FLA. APP. R. 4.61(f); ME. R. CIV. P. 76B(d).