Florida Law Review

Volume 22 | Issue 1 Article 2

June 1969

Florida's Interjurisdictional Certification: A Reexamination to Promote Expanded National Use

Christy F. Harris

Follow this and additional works at: https://scholarship.law.ufl.edu/flr

 Part of the Law Commons

Recommended Citation

Christy F. Harris, *Florida's Interjurisdictional Certification: A Reexamination to Promote Expanded National Use*, 22 Fla. L. Rev. 21 (1969).
Available at: https://scholarship.law.ufl.edu/flr/vol22/iss1/2

This Note is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

existing plans. This note has presented some of the major provisions in present victim compensation statutes in other states. Consideration of similar legislation for Florida demands further analysis of these provisions and other provisions too detailed for discussion here. The innocent victim of crime no longer can be allowed to remain a second-class citizen.

MICHAEL P. SMODISH

FLORIDA'S INTERJURISDICTIONAL CERTIFICATION: A REEXAMINATION TO PROMOTE EXPANDED NATIONAL USE

In 1945, Florida enacted the first enabling legislation for interjurisdictional certification, allowing federal appellate courts to certify questions of uncertain state law to the Supreme Court of Florida.[1] This first interjurisdictional certification procedure lay idle for fifteen years until the United States Supreme Court breathed life into it by suggestion.[2] As a result, the Florida supreme court amended the Florida Appellate Rules to provide a workable system of federal-state cooperation.[3] During its dormant period, the enabling act was noted with interest and enthusiasm by the commentators as a possible substitute for less functional alternatives.[4] After the amendment of the appellate rules, and actual use of the procedure, federal judges joined commentators in lauding certification.[5] Although used successfully in Florida

1. Fla. Stat. §25.031 (1945). "The Supreme court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer."

2. Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960). "The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision." *Id.* at 212.

3. *In re* Florida Appellate Rules, 127 So. 2d 444 (Fla. 1961). Florida Appellate Rule 4.61 was adopted pursuant to the power vested in the Florida supreme court under article V of the Florida Constitution.

4. *See, e.g.*, Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 643-44 (1951); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358, 1368-69 (1960); Note, *Inter-Sovereign Certification as an Answer to the Abstention Problem*, 21 LA. L. REV. 777 (1961).

5. *See, e.g.*, Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656, 657 (5th Cir. 1968); Gibbs, *How Does the Federal Judge Determine What Is the Law of the State?*, 17 S.C.L. REV. 487, 493 (1965).

since 1961, the procedure has only been adopted by four other states: Hawaii, Maine, New Hampshire, and Washington.[6]

The cool reception given to certification is traceable to a lack of legislative and judicial definition, which created problems and criticism that have not gone unnoticed.[7] The purpose of this note is to reexamine the Florida certification procedure in light of eight years of varied use, discussion, and adoption, and to propose changes that may revitalize this valuable contribution to federalism.

BASIS OF THE PROBLEM — THE *Erie* DILEMMA

In *Erie R.R. v. Tompkins*[8] the United States Supreme Court held that neither Congress nor the federal judiciary had the power to establish a federal substantive common law, that power being reserved to the states by the tenth amendment to the Constitution of the United States.[9] Prior to *Erie*, federal courts had been free to disregard the law declared by state courts and thus to ignore nonstatutory state policies by applying federal common law principles.[10] With *Erie*, the substantive law of the states emerged as the touchstone of federal decisional law in diversity of citizenship cases.[11]

The Court has explained and extended the *Erie* decision as problems with its interpretation have arisen,[12] but a workable procedure for administering *Erie* has been elusive. Two basic problems that have plagued the courts are how the federal court will ascertain the state law and what value as precedent such federal pronouncements of state law will have. Both problems may be valuably considered in relation to an evaluation of certification.

---

6. Each state enacted certification enabling acts in 1965. HAWAII REV. STAT. §602.36 (1968); ME. REV. STAT. ANN, tit. 4, §57 (Supp. 1968); N.H. REV. STAT. ANN. §490: App. R. 21 (1968); WASH. REV. CODE ANN. §2.60 (Supp. 1968).

7. *See, e.g.*, Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656, 658 (5th Cir. 1968) (Jones, J., specially concurring); Kaplan, *Certification of Questions from Federal Courts to the Florida Supreme Court and its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413, 430-33 (1962). Professor Moore predicted the cool reception. 1A J. MOORE, FEDERAL PRACTICE 3332, ¶0.309 [3] (2d ed. 1961).

8. 304 U.S. 64 (1938).

9. *Id.* at 78.

10. In Erie v. Tompkins, 304 U.S. 64, 69 (1938), Mr. Justice Brandeis called this the "oft-challenged doctrine" of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). It has been suggested that *Swift* was dying on its own from its own inadequacies. An agonizing demise would merely have prolonged the uncertainty of determining what law federal courts would apply, and how. Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 386-88 (1964).

11. Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 644 (1951).

12. Among the most noted of these decisions are: Hanna v. Plummer, 380 U.S. 460 (1965) (the balancing of interests test); Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1958) (the federal countervailing considerations test); Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (the outcome determinative test).

Ascertaining State Law

Mr. Justice Brandeis stated in the *Erie* decision that federal courts should apply state law "either declared by its legislature . . . or by its highest court."[13] An almost immediate erosion of this *Erie* guideline became necessary in order for federal courts to comply with the mandate to apply state law. State law had often been pronounced only at the intermediate appellate or trial court level. In response to this problem, expansion of the sources of state law available for consideration by federal courts began with *Fidelity Union Trust Co. v. Field*,[14] in which the Supreme Court held that a federal court must follow a decision by a New Jersey Court of Chancery with statewide, original jurisdiction even though that court's decisions were not binding on state appellate courts or even on the chancellor himself. Three companion cases followed *Field* in holding state intermediate appellate court decisions to be binding on federal courts.[15] Lower federal courts followed *Field*, even to the point of relying on state court decisions of very questionable value.[16] A reaction to the possible absurdity of this trend was soon in coming. In *King v. Order of United Commercial Travelers of America*,[17] the Supreme Court initiated a constantly expanding trend permitting federal courts to determine state law based on the federal court's own interpretation.[18] *King* focused upon the issue of whether the circuit court of appeals had erred in refusing to follow the decision of a South Carolina Court of Common Pleas.[19] The Court held[20] that since common pleas decisions were not binding on other South Carolina courts, they could not bind federal courts consistent with the ruling in *Guaranty Trust Co. v. York*[21] that federal courts in diversity cases were just another court of the state. The result of this new freedom for federal judges has been to make it impossible to determine how the state law will be ascertained. Both *Field* and *King* have coexisted and been expanded to opposite extremes of uncertainty.[22] Of course, the more obvious and most extreme difficulty arises when there is *no* indication of state law at any level

13. 304 U.S. at 78.

14. 311 U.S. 169, 179 (1940).

15. Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940); West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Six Companies v. Joint Highway Dist. No. 13, 311 U.S. 180 (1940).

16. *See, e.g.*, Gustin v. Sun Life Assurance Co., 154 F.2d 961 (6th Cir. 1946), *cert. denied*, 328 U.S. 866 (1946), in which an unreported decision of a court of appeals of Ohio, not even entitled to state recognition, was followed.

17. 333 U.S. 153 (1948).

18. Gibbs, *How Does the Federal Judge Determine What is the Law of the State?*, 17 S.C.L. REV. 487, 491 (1965).

19. 333 U.S. at 154.

20. *Id.* at 157.

21. 326 U.S. 99, 108 (1945).

22. *See, e.g.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956) (decision of state's highest court may be disregarded due to its age unless recently confirmed); Delduca v. United States Fidelity & Guar. Co., 357 F.2d 204 (5th Cir. 1966) (court chose between conflicting *dicta* of Florida intermediate appellate courts in its search for state law).

of the state judiciary.[23] Yet, *Erie* has been interpreted to require federal court ascertainment of state law even if the states have not decided the question at all.[24]

DIVERSITY DECISIONS AS PRECEDENT

Closely related to the problem of ascertaining state law is what binding effect a federal court decision based on state law will have. The function of a legal decision is generally to decide the rights and liabilities of the particular parties and to establish precedent contributing to the body of decisional law.[25] When federal courts apply state law under *Erie*, the second objective cannot be realized because state courts are not bound by federal court interpretations of state law and may ignore or disapprove them.[26] If the federal opinion is based on a decision of the highest state court, this is not likely to occur; but it may occur at lower court levels of the state system.[27] Federal courts have been forced to temper their decisions in recognition of this fact,[28] and the Florida-federal relationship has presented a vivid illustration of the uncertainty created by lame federal court decisions.[29] The obvious result is an inequitable application of the law and a return to forum shopping, which *Erie* sought to avoid.[30] Attempts to alleviate these drawbacks

23. Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960). Judge Friendly said it best: "Our principal task, in this diversity . . . case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought."

24. Propper v. Clark, 337 U.S. 472, 490-91 (1949); Estate of Spiegal v. Commissioner, 335 U.S. 701, 707 (1949); Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943).

25. Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 323 (1967).

26. *Id.*

27. Duke v. Sun Oil Co., 320 F.2d 853, 858 (5th Cir. 1963). The court stated: "[W]e are . . . conscious all the while that our decision loses authority when the first Texas writing court declares to the contrary."

28. Lee v. Bickell, 292 U.S. 415, 426 (1934); Glenn v. Field Packing Co., 290 U.S. 177, 179 (1933). In both cases, perpetual injunctions were imposed below against a state tax after a finding of state law by the federal district court. The Court in each case modified the orders to allow subsequent application for a further decree if the tax measures were found to be valid by a state court.

29. The Court of Appeals for the Fifth Circuit ruled that general maritime law conferred no cause of action upon the personal representative of a deceased maritime employee to recover indemnity for his death, and that the action must be under Florida's Wrongful Death Act as enforced by common law principles. Emerson v. Holloway Concrete Prod. Co., 292 F.2d 271, 275 (5th Cir. 1960); Graham v. A. Lusi, Ltd., 206 F.2d 223, 225 (5th Cir. 1953). The Second District Court of Appeal of Florida, faced with the same issue, specifically rejected the interpretation of Florida law made by the federal court. Weed v. Bilbrey, 201 So. 2d 771, 774 (2d D.C.A. Fla. 1967). While the Florida decision was pending before the Florida supreme court on certiorari, the issue was certified under FLA. APP. R. 461 from the Fifth Circuit Court of Appeals to the Florida supreme court and was answered in conformity with the previous Fifth Circuit rulings. Moragne v. State Marine Lines, Inc., 211 So. 2d 161, 167 (Fla. 1968). The *Weed* decision was later reversed by the Florida supreme court. Bilbrey v. Weed, 215 So. 2d 479, 481 (Fla. 1968).

30. Gibbs, *supra* note 18, at 489.

in the *Erie* doctrine have met with varying degrees of success and have themselves generated problems. Interjurisdictional certification is merely the latest of these attempted solutions. Discussion of the other alternatives is necessary to further an understanding of the contributions of certification.

FEDERAL COURT ABSTENTION

As an alternative to forcing federal courts to make educated guesses on questions of first impression in the forum state, two basic procedures have been judicially developed by the Supreme Court and collectively labeled "abstention."[31] The first type of abstention is exemplified by *Railroad Commission v. Pullman Co.*,[32] which established the doctrine in 1941. The typical case has been described as one in equity with an injunction being sought against application of a state statute or administrative order on both federal and state grounds.[33] It has been the policy of federal courts not to decide a constitutional issue unless no other alternative exists. If a state issue exists upon which a decision may be reached, the court is under a duty to determine that law.[34] Under *Pullman*, if the controlling state law is uncertain, the federal court may hold the case in abeyance, retaining jurisdiction, and direct the litigants to proceed through state channels to a decision on the state issues. If the disposition in the state court system does not obviate federal issues, the parties may return to federal court for an adjudication of those issues.

The second type of abstention is illustrated by *Burford v. Sun Oil Co.*,[35] and is said to be based upon "a sound respect for the independence of state action."[36] This type of abstension is generally employed in diversity cases when no federal issue is involved and the state issue in question involves an "aspect of sovereign prerogative,"[37] or is "fairly open to interpretation."[38]

---

31. Kaplan, *Certification of Questions from Federal Appellate Courts To the Florida Supreme Court and Its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413, 416 (1962).

32. 312 U.S. 496 (1941). The Texas Railroad Commission issued an administrative order that no sleeping car could be used on any railroad in Texas unless such car was attended by a conductor (of the white race) rather than by a porter (of the Negro race). Plaintiff sleeping car company brought a bill in equity to enjoin the enforcement of the order on the grounds that it violated both Texas and federal law. *See also* Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944).

33. Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960).

34. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941). *See also* Albertson v. Millard, 345 U.S. 242, 244 (1953), in which the action was commenced five days after a state act regulating the Communist Party became law.

35. 319 U.S. 315 (1943). In a suit to enjoin enforcement of a Texas Railroad Commission order, the federal district court dismissed the complaint. The Court cited the *Pullman* decision and noted the value in preventing renewal of federal-Texas conflict over decisions in federal courts involving clearly state-oriented issues. *Id.* at 331-32.

36. *Id.* at 334.

37. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959).

38. Harrison v. N.A.A.C.P., 360 U.S. 167, 176 (1959).

This second abstention is unlike the first in that it requires the federal court to dismiss the suit entirely, without a retention of jurisdiction.[39]

CRITICISM OF ABSTENTION

Abstention has proved as difficult to administer as the *Erie* decision, which it sought to facilitate. The United States Supreme Court has said abstention should not extend to cases where the state law in a diversity case is merely unclear.[40] The Court has strictly limited the doctrine to the special circumstances requiring avoidance of a federal question or presenting extreme state policy interest.[41] As a practical matter, however, when the state law is uncertain neither federal court guesswork nor abstention is satisfactory.[42] Although abstention solves the problem of ascertaining state law, its disadvantages weigh heavily on the litigant, who immediately faces the question of where to bring his suit. If the litigant is fortunate, the state may allow a petition to the highest court for a declaratory judgment; if less fortunate, he must petition a lower court and face a possible appeal if he is not successful.[43] Some states, which have no Declaratory Judgment Act,[44] would require that the litigant repair to the court of original jurisdiction and work his way to the highest court if necessary.[45] The potential delay in such cases is perhaps the greatest source of criticism of abstention, with some litigants spending up to nine years in federal and state courts.[46] Such drawnout litigation is a not uncommon terror of the abstention procedure.[47]

---

39. Kaplan, *supra* note 31, at 418. *See, e.g.*, Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

40. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27 (1959); Meredith v. City of Winter Haven, 320 U.S. 228 (1943). *But see* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 31-38 (1959) (dissenting opinion); Albertson v. Millard, 345 U.S. 242, 245 (1953) (dissenting opinion).

41. Propper v. Clark, 337 U.S. 472, 489 (1949). The Court stated that in absence of circumstances such as those in Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944), involving the constitutionality of a state tax, or Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940), involving state law determinative of a bankruptcy matter, it would not submit an issue to the state courts.

42. Vestal, *supra* note 11, at 645.

43. Kaplan, *supra* note 31, at 424.

44. Thirty-eight states, Puerto Rico, and the Virgin Islands have adopted the Uniform Declaratory Judgments Act. 9A UNIFORM LAWS ANN. at 1-2 (table of states).

45. Kaplan, *supra* note 31, at 424.

46. In Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944), the litigant reached the United States Supreme Court in his suit to enjoin enforcement of a state tax provision. The Court abstained, noting the availability of a state declaratory judgment, but retained jurisdiction. The litigant brought action in the state courts immediately in 1944, but his case did not come to trial until 1947. The state supreme court affirmed the state law, but held the lower court erred in deciding federal law. Spector Motor Serv., Inc. v. Walsh, 135 Conn. 37, 40-41, 61 A.2d 89, 91-92 (1948). The litigant then returned to the United States Supreme Court for a decision — nine years after the litigation began. Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951). H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 868-69 (1955)

47. Agata, *Delaney, Diversity, and Delay: Abstention or Abdication?*, 4 HOUS. L. REV. 422

An equally perplexing problem with which the litigant is faced is which issues to urge in the state court. If both federal and state issues are involved, and only the state issues are litigated in state court, the doctrine of res judicata may bar future litigation of the federal issues in the federal court retaining jurisdiction.[48] The complexities of this problem alone are such as to place it beyond the scope of this note.[49] Suffice it to say it is one of abstention's grosser evils.

Abstention seems particularly harsh to the litigant in diversity cases if the traditional view of that jurisdiction is accepted. The litigant is in federal court to avoid state court bias and inequitable administration of the law; yet he may find his case submitted to the state court for a decision on admittedly uncertain law. If anything, the chances for inequity are magnified.[50]

Abstention has been vigorously attacked as being contrary to the concept of diversity jurisdiction and the *Erie* decision's mandate to federal courts.[51] In recognition of these obviously valid criticisms, it has been suggested that if abstention must be used it should be strictly limited to state issues and used only when a declaratory judgment is available in state court.[52] As a solution to the *Erie* dilemma, abstention must be said to have failed because of its own inadequacies.

INTERJURISDICTIONAL CERTIFICATION — THE FLORIDA EXPERIENCE

Florida's interjurisdictional certification enabling act was designed to alleviate the problems created by the *Erie* decision and abstention in our federal system.[53] It was the first act of its kind in the United States, although the procedure is not entirely untried.[54] Certification in Florida was in direct response to the inadequacies of abstention. The enabling act was probably a reaction to the decision of the United States Supreme Court in *Meredith v. Winter Haven*,[55] where the Court noted the evils of abstention and refused to

(1966). The article focuses on the plight of the parties in United Service Life Ins. Co. v. Delaney, 358 F.2d 714 (5th Cir. 1966). After five years the litigants received a determination of the construction of one term in an insurance contract.

48. Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358, 1362 (1960).

49. *See generally* Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358, 1360-68 (1960), for an in-depth treatment of the problem as it may affect the hapless litigant.

50. Agata, *supra* note 47, at 435-37.

51. *Id.* at 433-34. The article suggests that *Erie* tells us how to decide diversity cases, not *who* should decide them. The view is that *Erie* "assumed" the federal court would decide the case. *Id.* at 438.

52. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 432 (1964) (concurring opinion); East Coast Lumber Terminal, Inc. v. Town of Babylon, 174 F.2d 106, 112 (2d Cir. 1949) (Judge Learned Hand writing for the majority).

53. FLA. STAT. §25.031 (1967). *See* note 1 *supra*.

54. England enacted two similar statutes in the 19th century to facilitate ascertainment of foreign law when that law was controlling in conflicts problems. One statute has been favorably utilized. Vestal, *supra* note 11, at 643-44.

55. 320 U.S. 228 (1943).

abstain, deciding an issue of municipal powers in Florida without the benefit of a Florida pronouncement of the law.[56] For fifteen years following its enactment, however, the statute was unused, although marked with approval by federal judges.[57] Then in 1960, the situation anticipated by the statute arose in *Clay v. Sun Insurance Office, Ltd.*,[58] where a federal question could be avoided by a decision based on uncertain Florida law.[59] After praising the "rare foresight" of the Florida legislature, the United States Supreme Court hurdled what might have been an obstacle to certification – the fact that no rule of court had been promulgated to carry the act into effect. The Court confidently sidestepped the problem:[60]

> It is not to be assumed, however, that such rules are a jurisdictional requirement for the entertainment by the Florida Supreme Court of a certificate under [Florida Statutes] §25.031.

The questions were certified by the court of appeals on August 12, 1960. On March 1, 1961, the Florida supreme court adopted Florida Appellate Rule 4.61 and rendered its opinion on the certified questions on October 18, 1961.[61] Certification had finally been utilized.

THE CERTIFICATION PROCEDURE – WHEN TO CERTIFY

The question when to certify under a state certification procedure has been most troublesome for federal courts. The Florida, Hawaii, Maine, and Washington statutes and the New Hampshire court rule all provide for certification when it appears to the certifying court that there are involved in any proceeding before it questions or propositions of the laws of the state, which are determinative of the cause, and there are no clear controlling precedents in the decisions of the highest court of the state.[62] The statutory

---

56. Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358, 1368 n.68 (1960).

57. *E.g.*, Standard Accident Ins. Co. v. New Amsterdam Cas. Co., 249 F.2d 847, 854 (7th Cir. 1957) (concurring opinion).

58. 363 U.S. 207 (1960). Petitioner, a Florida resident, sued on an Illinois insurance contract that contained a time limitation for reporting claims. Petitioner's claim was filed late, but the district court ruled FLA. STAT. §95.03 (1957) rendered the limitation clause invalid, and a jury awarded petitioner $6,800 in claims. The Court of Appeals for the Fifth Circuit reversed, holding that Florida's application of its statute to an Illinois contract was a violation of due process. The Supreme Court granted certiorari to set the stage for use of the certification procedure.

59. The Court felt the court of appeals erred when it "assumed" Florida would apply its statute and reached a federal constitutional question without a determination of that fact. If Florida would not apply its statute, the federal issue would have been mooted. 363 U.S. 207, 209-11 (1960).

60. *Id.* at 212 n.3.

61. Sun Ins. Office, Ltd. v. Clay, 319 F.2d 505, 508 (1963).

62. FLA. STAT. §25.031 (1967); HAWAII REV. STAT. §602-36 (1968); ME. REV. STAT. ANN. tit. 4, §57 (Supp. 1968); N.H. REV. STAT. ANN. §490:App. R. 21 (1968); WASH. REV. CODE

language is plain, yet the uncertainty remains. The problem has arisen because the limiting rules previously applied to federal court abstention have been read into the statutes by some federal courts[63] and commentators.[64] This appears to be an erroneous interpretation of the statutes involved. It is understandable that federal judges and commentators might graft the experiences of abstention to the procedure, but the danger inherent in such a practice is that certification will not offer itself as a desirable alternative to abstention, which it seeks to replace. States are understandably reluctant to adopt a procedure that seems to offer them no advantage over the existing limitations of abstention.

An analysis of the purpose of the statute creating certification should correct any erroneous interpretation. Section 25.031 of the Florida Statutes was enacted *because* limiting rules were applied to abstention in *Meredith v. Winter Haven*,[65] depriving the state of the opportunity to decide its own law. In view of this fact, and the plain language of the statute, it is obvious that certification is an alternative to abstention — not a companion to it. It should be further recognized that certification is a statutory procedure, not a judge-made rule as is abstention.[66] Its scope is therefore delineated within the four corners of the statute, which is explicit as to when to certify. A final consideration is that in certification the state has provided the procedure — not the federal courts.[67] Thus, if a federal court elects to certify,[68] it need only follow the "plain meaning" of the statutory language. It will be for the state's highest court to interpret its statute and accept or reject the certificate. It has even been suggested by a Supreme Court justice that by overrestricting abstention the federal courts would encourage the states to adopt

---

ANN. §2.60.020 (Supp. 1968). The Washington statute provides for certification when the local law "has not been clearly determined." Thus, perhaps the lack of a decision by the highest court of the state is not required under the Washington procedure.

63. *See, e.g.*, Motor Vehicle Cas. Co. v. Atlantic Nat'l Ins. Co., 374 F.2d 601, 602 n.1 (5th Cir. 1967), "where the issue was neither intricate nor repetitive enough to warrant a *Clay*-type referral to the Supreme Court of Florida."

64. Kaplan, *supra* note 31, at 433. "[I]t must be remembered that this procedure can be used only in those cases which require the operation of abstention and *not in all cases involving issues of uncertain state law.*" *See also* McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 U. ME. L. REV. 33, 40 (1964).

65. 320 U.S. 228, 234 (1943).

66. The abstention procedure originated in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

67. It is generally agreed that a federal court cannot compel a state court to answer certified questions. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 434 (1964) (concurring opinion). "We cannot require the States to provide such a procedure . . . ." *See also* Agata, *supra* note 47, at 445. *But see* Wright, *supra* note 25, at 325; Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358, 1369 (1960).

68. FLA. APP. R. 4.61 (c) (1962). "The provisions of this rule may be invoked by any of the federal courts . . . upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court." New Hampshire's court rule is substantially the same. On occasion, federal courts have refused to certify what appear to be eligible issues. Greer v. Associated Indem. Corp., 371 F.2d 29 (5th Cir. 1967).

certification.[69] The implication is that certification must fulfill the state law requirements of *Erie* where abstention has been overly restrictive and has failed to do so. If those same restrictions are transferred to certification, the impossibility of an extensive acceptance of certification is apparent.

What Court May Certify

Florida Statutes, section 25.031, allows certification by the federal appellate courts, but not by the district courts. Hawaii similarly limits its procedure.[70] When Florida adopted certification, it was feared that to permit certification from the federal district courts would result in over-crowded dockets.[71] Since Florida was the first to experiment with certification, it was perhaps best to test its validity and administrative ease under a lighter caseload situation. When a certification procedure was proposed in Maine,[72] it was modeled after that of Florida, but with the addition of district court certification. The problem of crowded dockets was felt not to exist in that state.[73] Washington also allows district court certification, and its supreme court has indicated that the value of the procedure far outweighs any crowded docket problems.[74] The New Hampshire court rule provides for district court certification, but the rule appears never to have been utilized. In light of the successful use of certification in Florida under its present system, Florida, as the innovator state, should not fail to evaluate the possibilities of extending its own procedure to the district courts.[75] The arguments for and against such an extension may be profitably considered at this point.

District Court Certification

One commentator has listed reasons for *not* allowing district court certification as follows: such procedure is not in accord with generally accepted federal-state relationships; dockets would be clogged by the procedure; there will not have been a finding of fact by the district court; and the appellate court accepting certification is not a factfinding tribunal.[76] To these may be

69. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 434 (1964) (Justice Douglas, concurring). "[B]y asserting the independence of the federal courts and insisting on prompt adjudications we will encourage its use."

70. Hawaii adopted FLA. STAT. §25.031, verbatim. HAWAII REV. STAT. §602-36 (1968).

71. McKusick, *supra* note 64, at 41.

72. *Id.* at 40-42. The proposed statute and rules were adopted by the Maine Legislature substantially as suggested.

73. The prediction has proved to be true. In three years only three questions have been certified by the United States District Court for the District of Maine. Letter from Honorable Edward T. Gignoux, Judge United States District Court, Portland, Maine, to Christy F. Harris, April 3, 1969.

74. *In re* Elliot, 446 P.2d 347, 350 (Wash. 1968).

75. Under the present system, it does not appear that the availability of district court certification would appreciably increase the caseload of certified questions in Florida. Even if it did, the Washington court's attitude seems worthy of adoption.

76. Note, *Inter-Jurisdictional Certification as an Answer to the Abstention Problem*, 21 LA. L. REV. 777, 780 (1961).

added the impracticality of interrupting a jury trial in order to certify a state law question, and the fact that at the appellate level briefs are occasionally required to determine the advisability of certification.[77]

In answer to these propositions it may be said first that a new and valuable means of implementing federal-state cooperation should not be impeded merely because it implies a new concept of federal-state relations. The flexibility of the federal system must qualify as its best feature. Second, dockets may or may not be overcrowded, as the Florida and Maine experiences have shown. Each state must weigh the conflicting interests involved in its own circumstances. The question of factfinding is not as easily resolved, but a consideration of some practical realities based on experience only recently available may answer the problem. Maine, one state with district court certification, has compared its procedure with that envisioned by the Declaratory Judgment Act.[78] The problems posed concerning factfinding are similar.[79] As in the case of a declaratory judgment action, the certificate must provide "a statement of facts showing the nature of the case, and the circumstances out of which the question of law arises . . . ."[80] It is conceivable that such a statement of facts could be completely disputed and make it impossible to render a dispositive determination of the law. Such a situation has occurred, and led to Maine's refusal to answer a certificate.[81] Such a situation will not always exist as, for example, when the facts are not in dispute[82] or can be stipulated. Washington, the second state with district court certification, would seem to *require* a "certified agreed statement of facts" to eliminate the problem entirely.[83] It is also possible that the facts will have been found by the district court prior to its certification of the question of state law, as when the certificate comes on a motion for a new trial, or judgment notwithstanding the verdict.[84] This admitted problem of a lack of sufficient fact basis for certification arises in some instances, but has not been considered serious enough to forbid district court certification in Maine. Admittedly, the presence of a jury makes it impractical to interrupt the actual trial for certification. However, just as it is possible to certify after the trial, it is more likely that certification will be agreed on by counsel at the pretrial conference in an atmosphere of cooperation between judge and counsel.[85] If the judge felt argument on the matter was necessary, it could be presented at a motions hearing. In short, the prospect of extending Florida's certification pro-

77. *See, e.g.*, Vandercook & Son, Inc. v. Thorpe, 344 F.2d 930, 931 (5th Cir. 1965).
78. *In re* Richards, 223 A.2d 827, 830 (Me. 1966).
79. *Id.*
80. ME. R. CIV. PRO. 76 B (b).
81. *In re* Richards, 223 A.2d 827, 833 (Me. 1966).
82. Norton v. Benjamin, 220 A.2d 248, 250 (Me. 1966).
83. *In re* Elliot, 446 P.2d 347, 354 (Wash. 1968).
84. Although this has never occurred, District Judge Gignoux, who has certified three questions to the Supreme Judicial Court of Maine, suggests that he would certify on a motion for a new trial or for judgment notwithstanding the verdict. Letter, note 73 *supra*.
85. All three questions certified by the United States District Court for the District of Maine were agreed upon at the pretrial conference. *Id.*

cedure to United States district courts should not be overlooked. Such an extension would allow certification to be available in *all* instances when abstention is possible, thus better replacing it. A weighing of interests will decide the advisability of district court certification in each state.

THE STATE CONSTITUTION — A BAR TO CERTIFICATION

The constitutionality of a state's certification procedure must be determined by each state. In Florida, the issue was considered and disposed of, sua sponte by the Florida supreme court in conjunction with its first opinion under the procedure.[86] The court felt the issue turned on the question whether article V, section 4, of the Florida Constitution prohibited judiciary powers beyond those expressly authorized. The court held that Florida Statutes, section 25.031, was a valid enlargement of the judicial power since it did not diminish the constitutional jurisdiction of any other court and was not expressly forbidden by the constitution.[87] Florida's new constitution has not altered the judicial article and should not affect these earlier findings of constitutionality.[88]

When the Supreme Judicial Court of Maine received its second certified question,[89] pursuant to its enabling statute[90] and procedural rules,[91] the court was forced to answer a motion to dismiss the certificate on the ground it violated the constitution of Maine. Citing Florida's decision on the constitutionality of certification, the court held the procedure did not call for an advisory opinion (which the Maine court could not give), and that certification was a valid judicial power under article VI, section 3, of the constitution of Maine.[92] The Washington supreme court drew upon the Florida experience in holding that its legislature could enlarge the judicial power. The court further held that the enabling act was "permissive," not mandatory, thus allowing the court to avoid any unconstitutional application through judicial self-restraint.[93]

---

86. Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735, 739-40 (Fla. 1961). The court requested briefs from the parties and amicus curiae to determine the constitutionality of entertaining certified questions.

87. *Id.* at 741-42. The court cited Pournelle v. Baxter, 142 Fla. 517, 195 So. 163 (1940), for this proposition.

88. *Compare* FLA. CONST. art. V (1885), *with* FLA. CONST. art. V (1968).

89. *In re* Richards, 223 A.2d 827 (Me. 1966). Three certificates have reached the Supreme Judicial Court of Maine since enactment of the Maine statute. Letter note 73 *supra*. *See also* Norton v. Benjamin, 220 A.2d 248 (Me. 1966); In the latest case, Pierce v. Secretary, Civil No. 10-61 (D. Me. 1969), Judge Gignoux entered summary judgment for the defendant after the Supreme Judicial Court answered in the negative the question whether common law marriages were valid in Maine. Letter from Honorable Edward T. Gignoux, Judge, United States District Court, Portland Maine, to Christy F. Harris, July 24, 1969.

90. ME. REV. STAT. ANN. tit. 4, §57 (Supp. 1968).

91. ME. R. CIV. PRO. 768.

92. *In re* Richards, 223 A.2d 827, 832 (Me. 1966).

93. *In re* Elliott, 446 P.2d 347, 351-54 (Wash. 1968).

THE FUTURE OF CERTIFICATION — PROPOSED IMPROVEMENTS

Insuring a Justiciable Controversy

The future acceptance of certification by any large number of states will depend on how well the procedure stands up to state constitutional requirements. The justiciability requirements of the states vary, and these are the major obstacles to the introduction of any new judicial procedure. In the case of certification, the justiciability question may be phrased in terms of whether the state court's decision of a certified question is in the nature of an advisory opinion with no binding effect, or is dispositive of real legal issues founded in a justiciable controversy, having the binding force of law. A majority of the states will respond to a controversy only if their judgment will be res judicata and a stare decisis adjudication of state rights involved.[94] Only a handful of states allow advisory opinions, and then only of a limited nature.[95] A closer look at the experience of certification will establish as unfounded the reluctance of some states and encourage more widespread adoption of certification.

It appears that some federal judges and commentators have erroneously attributed the qualities of an advisory opinion to certification proceedings.[96] This is attributable at least in part to a lack of definition given the procedure by the Florida supreme court in drafting facilitating rules[97] and in rendering decisions on certified questions.[98] A comparison of the advisory opinion procedure with that visualized by the certification procedure should clearly separate and define the two.[99]

---

94. Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 356 (1963).

95. Stevens, *Advisory Opinions—Present Status and an Evaluation*, 34 WASH. L. REV. 1 n.2 (1959). In Alabama, Delaware, Florida, Maine, Massachusetts, New Hampshire, North Carolina, Oklahoma, Rhode Island, and South Dakota the procedure is allowed under certain circumstances.

96. *See, e.g.*, Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656, 658 (5th Cir. 1968) (special concurring opinion); Kaplan, *supra* note 31, at 432, which states "The Supreme Court of Florida . . . renders only an *advisory opinion* to the federal judiciary."

97. FLA. APP. R. 4.61; ME. R. CIV. PRO. 76B; N.H. APP. R. 21. In each case there is no mention of whether the court has jurisdiction over the parties or whether the court's decision has binding effect on either the parties or in future litigation.

98. Green v. American Tobacco Co., 154 So. 2d 169, 170-71 (Fla. 1963). Certified question from a federal court diversity case, 304 F.2d 70 (5th Cir. 1962), wherein the plaintiff wife sued for damages for her husband's death, allegedly caused by the defendant's cigarettes. The theory of recovery was breach of implied warranty. The defense was lack of knowledge of the harmful effect of cigarettes. The Florida supreme court refused to decide the question of ultimate liability under the facts, or even the scope of the liability. It merely answered in the abstract a hypothetical question whether knowledge was relevant to liability under the theory of implied warranty in Florida.

99. The Washington supreme court seems to have rendered such a distinction unnecessary in that state. Although the court concluded the certification statute did *not* call for an advisory opinion, it said in dictum that it had the inherent power to render such an opinion even if it was merely advisory. *In re* Elliot, 446 P.2d 347, 358 (Wash. 1968).

It has been observed that an advisory opinion generally lacks the following elements of a justiciable controversy: the legal issue or proposition is formed in the abstract and answered in the abstract; there is a conspicuous absence of a concrete factual situation to aid in the formulation of the ultimate issue; the proceeding is ex parte, lacking the aid of counsel in an adversary proceeding; there are no parties to the litigation whose private rights will be affected; and there is no binding, res judicata determination of rights and liabilities based on an existing controversy.[100] By comparison, the certification procedure envisions a question of law framed in an actual factual situation to avoid the problem of abstraction. Maine and Washington have best exemplified this in their rules of procedure[101] and the Supreme Judicial Court of Maine has manifested its intention to be strict in actual practice by refusing to accept a certified question when the facts were disputed and would have required an abstract answer.[102] Florida's rule reads as Maine's, but in practice Florida has been less strict in its insistence on compliance.[103] By its action the Maine court has given needed definition to the certification procedure, from which Florida might profit.

Florida, Maine, New Hampshire, and Washington have provided for presentation of briefs and oral arguments to add the adversary element of counsel to certification.[104] It is said that what might otherwise be called an advisory opinion "takes on the character of a declaratory judgment" when actual disputes are argued by adverse parties.[105] In no sense, then, can a certification proceeding be considered ex parte. The parties to the federal litigation are the parties to the certification proceedings, and it is unquestionable that their private rights may be affected by the decision of the state court. In Florida, Maine, New Hampshire, and Washington the parties are classified as appellant and appellee and present their arguments to the state's highest court according to the rules of appeal.[106] The adversary atmosphere is maintained.

Certification and the Problem of Precedent

Whether a decision pursuant to a certified question is binding law is less easily determined than the issue of justiciability. The state court's decision as to the state law involved should be law of the case and res judicata as to the parties, and binding precedent within the state. It is the "law of the

---

100. *See* H. HART & H. WECHSLER, *supra* note 46, at 78-79; Stevens, *supra* note 95, at 8. Both discuss generally the quality of advisory opinions.

101. ME. R. CIV. PRO. 76B (b). "The certificate . . . shall contain . . . 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. §2.60.010 (4) (Supp. 1968), requires a "stipulation of facts approved by the federal court."

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

103. *See, e.g.*, Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).

104. FLA. APP. R. 4.61 (g); ME. R. CIV. PRO. 76B (b).

105. H. HART & H. WECHSLER, *supra* note 46, at 81.

106. FLA. APP. R. 4.61 (g), (h); ME. R. CIV. PRO. 76B (e); N.H. APP. R. 21 (b); WASH. REV. CODE ANN. §2,60.030 (4), (5) (Supp. 1968).

case" that controls the relationship of the trial and appellate courts in each individual litigation. Thus, it is this concept that dictates that the certifying federal court should be bound by the decision of the state court accepting the certificate on points of state law. Until the particular litigation has ended, it is this concept alone that governs the binding effect of the state court's determination of state law. "Res judicata" becomes important when and if the parties become involved in a collateral suit. It is this concept that governs the relationship of the parties and precludes reconsideration of the state court's answers to issues certified from federal court when, for instance, they initiate a subsequent suit in the state courts. Finally, it is the doctrine of "stare decisis" that produces a point or points of binding law controlling upon all state courts in all suits where the issue arises that was decided on certification.[107] Commentaries and decisions often appear to confuse or neglect these distinctions. All three concepts should be separately recognized to give binding effect to answers to certificates in their separate spheres, while combining to produce "binding law" on the over-all scheme. Both federal[108] and state[109] courts have held that the law pronounced by the state court is binding under the doctrine of stare decisis and under *Erie*. Again, Maine has added the needed definition to the certification procedure, which is necessary to its successful continuation:[110]

> This Court will treat that judgment on legal issues as having the force of decided case law within the courts of this state and as res judicata in our state.

Abstention places the parties before the state court, and they are bound by its decisions, which are res judicata and binding under stare decisis. It is only logical that certification proceedings should provide the same sure decisional law in order to qualify as a valid alternative to abstention. It is

---

107. In Florida, the "law of the case" is defined as "the principle that the questions of law decided on appeal to a court of ultimate resort must govern the case in the same court and the trial court, through all subsequent stages of the proceedings, and will seldom be reconsidered or reversed, even though they appear to have been erroneous." "Res judicata" is a less limited term defined as the principle that "a point which was actually and directly in issue in a former suit, and was there judicially passed upon by a domestic court of competent jurisdiction, cannot again be drawn in question in any future action between the same parties or their privies, whether the cause of action in the two suits be identical or different; and . . . a judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit between the same parties or their privies upon the same cause of action, so long as it remains unreversed." The broadest concept is "stare decisis . . . a maxim to the effect that, when a point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from." McGregor v. Provident Trust Co., 119 Fla. 718, 162 So. 323, 327-28 (1935).

108. *See, e.g.*, Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656, 657 (5th Cir. 1968). "It is the Florida law binding on us as we perform our *Erie* role." *But see* concurring opinion at 658.

109. *In re* Richards, 223 A.2d 827, 832 (Me. 1966).

110. *Id.* The Supreme Court of Washington has adopted the Maine rationale. *In re* Elliot, 446 P.2d 347, 355 (Wash. 1968).

unfortunate that any other interpretation has appeared. It is fortunate the Maine and Washington courts have avoided these interpretations.

Certification in Federal Question Cases

The question remaining unsettled is whether the federal courts should certify questions of state law when federal questions are also posed by the controversy. Florida allows such certification in litigation dealing with a federal question,[111] even though its decision on the state law may not be decisive of the entire controversy.[112] The Supreme Judicial Court of Maine seems to have adopted a contrary position by declining to answer a certificate when its decision would not have been dispositive of the cause, and the Supreme Court of Washington seems to agree with the Maine court.[113] The better position would require that the state court decide the state questions if they meet the previously outlined requirements, even if ultimate disposition may be based on a federal question. Any other result would require that abstention continue to be used where both federal and state issues are involved. This is undesirable if certification is to offer itself as a complete alternative to abstention, as it might valuably do.

CONCLUSION

Florida's certification procedure has been successfully used on numerous occasions by federal courts.[114] This is indicative of the desire of federal courts to cooperate with the states in this admittedly complex area of the federal system as defined by *Erie R.R. v. Tompkins*. Four other states have adopted certification, but only Maine and Washington appear to have utilized the procedure.[115] The reluctance of other states to accept certification is due to a combination of state constitutional prohibitions and lack of definition in the certification procedure as enacted by the pioneer states.[116] Maine has gone

111. Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).

112. Sun Ins. Office, Ltd. v. Clay, 319 F.2d 505, 509-10 (5th Cir. 1963), *rev'd*, 377 U.S. 179 (1964). The court decided the question on federal constitutional grounds after receipt of the Florida supreme court's answer to a certificate concerning state issues.

113. *In re* Richards, 223 A.2d 827, 833 (Me. 1966); *In re* Elliot, 446 P.2d 347, 358 (Wash. 1968).

114. *See, e.g.*, Dresner v. City of Tallahassee, 375 U.S. 136 (1963); Aldrich v. Aldrich, 375 U.S. 75 (1963); Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656 (5th Cir. 1968); Sun Ins. Office, Ltd. v. Clay, 319 F.2d 505 (5th Cir. 1963); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962).

115. Hawaii appears to have only its enabling act. HAWAII REV. STAT. §602-36 (1968). New Hampshire adopted its court rule without an enabling act or legislative approval, but appears not to have utilized the procedure. N.H. REV. STAT. ANN. §390:App. R. 21 (1968).

116. *See, e.g.*, United Serv. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965). The majority and a minority of three judges argued the constitutionality of giving a declaratory judgment under circumstances that would suggest certification. The majority suggested a certified question procedure, but felt a constitutional amendment would be required. *Id.* at 864. *See also* United Gas Pipeline Co. v. Ideal Cement Co., 277 Ala. 612, 173 So. 2d 777

far in expanding and defining certification, and the Florida supreme court should follow that state's lead in establishing certification as a truly valuable method of implementing federal-state cooperation under *Erie*.

It is suggested that the Florida supreme court amend the Florida Appellate Rules to provide that the parties to a certification proceeding shall be before the court and subject to its jurisdiction for the purpose of deciding the issues of state law certified. In this way the appellate nature of the proceeding will be emphasized, and the resulting decision will be the law of case, res judicata, and binding state law. The Florida supreme court should further require strict compliance with its amended provisions and avoid answering certificates that involve abstract questions of law. The federal courts could aid in the process of redefining certification by setting out rules under which certified questions would be prepared and placed in a sufficient factual circumstance so as to avoid abstraction. The American Law Institute has suggested that title 28 of the United States Code be amended to authorize federal court certification, but the amendment merely encourages federal courts to utilize preexisting state procedures. The institute raises and briefly treats some of the problems heretofore discussed, but seems to indicate that it will be left for the states to cure the defects in the present certification procedure.[117] Nor is the proposal intended to force state courts to adopt the procedure or alter existing procedure.[118] No doubt the institute's proposals can be viewed as an endorsement of the procedure and, in view of suggestions from various quarters that federal court diversity jurisdiction be abolished,[119] it is time that advocates of *Erie*, diversity, and certification concentrate their efforts in the interest of our federal system and the individual litigant, who has suffered too long at the hands of abstention.

CHRISTY F. HARRIS

(1965); Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845 (1961), where state supreme courts appeared willing to cooperate with federal courts, but questioned the constitutionality of such cooperation.

117. *See* ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §1371 (e) (Tent. Draft No. 6, 1968), and valuable commentary thereon, which raises some problems in discussing chronologically the history and prior use of certification by the states.

118. *Id.*, Commentary §1371 (3), at 216.

119. *See, e.g.*, Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656, 658 (5th Cir. 1968) (concurring opinion). "The opinion of the court well demonstrates the desirability of abolishing diversity jurisdiction of federal courts."