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Certified Questions from the Federal Courts: Review and Re-proposal

LARRY M. ROTH*

In examining the history and intent behind the enactment of the Florida interjurisdictional certification procedure, the author points out several salient problems with the process of certification as it exists today. Delay and additional costs in certifying a question to the Supreme Court of Florida have caused a hesitancy in the federal courts to certify questions of state law, thereby defeating the very reasons for the existence of the certification process. To remedy these problems, and to promote federal-state comity while ensuring that state courts remain the final arbiters on issues of state law, the author suggests the establishment of a Florida court designed to hear only questions certified by federal courts.

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I. INTRODUCTION

In 1945, the Florida Legislature enacted a statutory procedure which allowed the federal courts of appeal and the Supreme Court of the United States to certify questions of state law to the Supreme Court of Florida.¹ It permitted certification where an issue of state

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1. 1945 Fla. Laws, ch. 23098, § 1 (codified at FLA. STAT. § 25.031 (1977)). The Act provided

[t]hat 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 propo-

law was "determinative of the said cause" and where there were "no clear controlling precedents" in decisions of the supreme court. While this legislation was acclaimed as an example of "rare foresight,"² use of the certification process was another sixteen years in the future.³ Since that time, however, the federal appellate courts, primarily the United States Court of Appeals for the Fifth Circuit, have certified a multitude of Florida law questions to the highest tribunal of the state.⁴

The system proved highly effective. Both the Fifth Circuit⁵ and legal commentators⁶ praised the merits of the certification procedure and encouraged its use. Indeed, the Florida certification process had become a viable alternative to federal courts deciding state law issues. Unfortunately, a flaw developed in the process. The burgeoning caseload of the Supreme Court of Florida produced lengthy time delays in the certification process.⁷ As a result, the

sitions 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, 212 (1960); Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 717 (1969). Before this statutory process was ever used Professor Philip Kurland hailed the legislation as a viable example of federal-state cooperation in attempting to bridge the jurisdictional gap caused by federalism. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 489-90 (1960). Since the process had yet to be used, Professor Kurland was uncertain as to the practical application and benefit of the certification process. The same year Professor Kurland made his remarks, however, the Supreme Court stamped its imprimatur on the process in *Sun Insurance*. Thereafter, the door was open to full and frequent use of certification.

3. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961); *In re Florida Appellate Rules*, 127 So. 2d 444 (Fla. 1961); see Kurland, *supra* note 2, at 489-90.

4. See *Barnes v. Atlantic & Pac. Life Ins. Co. of America*, 514 F.2d 704, 705 n.2 (5th Cir. 1975), for an extensive list of cases certified to the Supreme Court of Florida.

5. *Id.* For a discussion of certification and the lead taken by the Fifth Circuit "in restoring the functional supremacy of the state courts," see Brown, *Certification—Federalism in Action*, 7 CUM. L. REV. 455 (1977).

6. See, e.g., 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 (1962); McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 ME. L. REV. 33 (1964); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960); Note, *Florida's Interjurisdictional Certification: A Reexamination to Promote Expanded National Use*, 22 U. FLA. L. REV. 21 (1969) [hereinafter cited as *Florida's Interjurisdictional Certification*]; Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344 (1963).

7. See Note, *Supreme Court—Pressures and Priorities*, 53 FLA. B.J. 268, 269 (1979); *Report of the Supreme Court Commission on the Florida Appellate Court Structure*, 53 FLA. B.J. 274, 276 (1979); England & McMahon, *Quantity Discounts in Appellate Justice*, 60 JUD. 442 (1977).

Fifth Circuit has been reluctant to certify state law questions;⁸ the certification process has become another statistical victim of the "ballooning" supreme court docket.⁹

The Fifth Circuit, of course, has its own docketing problems, and it may be an untold period of time before that court is in a position to certify a question initially. Nevertheless, the beneficial procedures of certification envisioned by the legislature and the supreme court¹⁰ run the risk of becoming inoperative through the impractical delays caused by the supreme court. Litigants are harmed by these delays, and the added costs are becoming prohibitive.

This article briefly explores both the background and development of the certification process as well as its present status. From this analysis, it is proposed that federal court certification should be preserved and enhanced. To accomplish this, it is submitted that a new and specialized state tribunal must be established.

II. THE CERTIFICATION PROCESS

A. *The Origin of the Process*

The 1945 Florida statute established the first state interjurisdictional certification procedure.¹¹ It was not until fifteen years later, however, that the Supreme Court of the United States, in *Clay v. Sun Insurance Office, Ltd.*,¹² instructed the federal courts of appeal to use the certifying process. The Supreme Court stated:

[A]s the Court of Appeals indicated, it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute. 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.¹³

8. See, e.g., *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275-76 (5th Cir. 1976), where the Fifth Circuit stated that the effect of delay was the determinative factor in the denial of the certification request.

9. For more extensive data on the workload of the supreme court, see England & McMahon, *supra* note 7, at 445; Note, *supra* note 7, at 269.

10. See *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 375-76 (Fla. 1977); FLA. R. APP. P. 9.510.

11. See Kaplan, *supra* note 6.

12. 363 U.S. 207 (1960).

13. *Id.* at 212 (citations omitted). It is interesting to note that Mr. Justice Frankfurter authored the majority opinions in *Sun Insurance* and in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), the decision which first developed the abstention doctrine. See text

Shortly before the certified questions in *Sun Insurance* were answered, the Supreme Court of Florida promulgated procedural rules governing the certification process.¹⁴ Thereafter, the Fifth Circuit began regularly to certify questions to the supreme court.

Surprisingly, only a few states have followed the lead set by

accompanying notes 22-31 *infra*. Justice Frankfurter was a believer that the state courts should determine their own legal matters affecting state interests. He maintained that federalism did not sound the death knell for legitimate state interests. In that regard, Justice Frankfurter closely followed his mentor, Oliver Wendell Holmes, Jr. See generally Frankfurter, *Mr. Justice Holmes*, 48 HARV. L. REV. 1279 (1935); Frankfurter, *The Early Writings of O.W. Holmes, Jr.*, 44 HARV. L. REV. 717 (1931).

14. FLA. R. APP. P. 4.61, 127 So. 2d 444 (Fla. 1961), provided:

a. When Certified. When it shall appear to the Supreme Court of the United States, or to any of the Courts of Appeal of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that 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 law of this State to the Supreme Court of Florida for instructions concerning such questions or propositions of state law.

b. Jurisdiction. Questions or propositions of law referred to in subparagraph (a) hereof shall be certified for answer to the Supreme Court of this state.

c. Method of Invoking Rule. The provisions of this rule may be invoked by any of the federal courts referred to in sub-paragraph (a) hereof upon its own motion or upon the suggestion or motion of any interested party when approved by such federal court.

d. Contents of Certificate. The certificate provided for herein shall contain the style of the case, a statement of facts showing the nature of the cause and the circumstances out of which the questions or propositions of law arise and the question of law to be answered.

e. Preparation of Certificate. The certificate may be prepared by stipulation or as directed by such federal court. When prepared and signed by the presiding judge of said federal court, it shall be certified to the Supreme Court by the clerk of the federal court and under its official seal. The Supreme Court may, in its discretion, require the original or copies of all or any portion of the record before the federal court to be filed with said certificate where, in its opinion, such record may be necessary in the determination of said cause.

f. Costs of Certificate. The costs of the certificate and filing fee shall be equally divided between the parties unless otherwise ordered by this Court.

g. Briefs and Argument. The appellant or moving party in the federal court shall file and serve upon its adversary its brief on the question certified within thirty days after the filing of said certificate in the appellate court of this State having jurisdiction. The appellee or responding party in the federal court shall file and serve upon its adversary its brief within twenty days after the receipt of appellant's or moving party's brief and a reply brief shall be filed within ten days thereafter.

h. Oral Argument. Oral argument may be granted upon application and, unless for good cause shown the time be enlarged by special order of the Court prior to the hearing thereon, the parties shall be allowed the same time as in other causes on the merits.

Florida and have adopted similar statutory schemes.¹⁵ Among the states within the Fifth Circuit that have adopted certification procedures are Georgia,¹⁶ Louisiana¹⁷ and Alabama.¹⁸ In addition, both the Court of Appeals for the Second Circuit¹⁹ and the Supreme Court of the United States²⁰ have used the Florida procedures to certify state law questions to the supreme court.

The eventual rise of certification procedures can be related to the problems caused by the abstention doctrine.²¹ The concept of federal court abstention had its genesis in *Railroad Commission v. Pullman Co.*,²² where the Supreme Court of the United States set forth the principle that when controlling state law was uncertain, the federal court may hold the case in abeyance, retain jurisdiction and direct the parties to proceed through state channels to a decision on the state issues. Abstention sought to give procedural meaning to the doctrine formulated in *Erie Railroad v. Tompkins*²³ which required federal courts to use applicable state law in deciding issues of state substantive law. In short, where there are issues of state law to be decided, the federal court must decide the issue on the basis of the applicable state law. When there is an issue of state law, abstention holds the federal action in limbo to permit the litigants the opportunity to proceed in state court, by declaratory judgment,

15. See *Lehman Bros. v. Schein*, 416 U.S. 386, 390 n.7 (1974) for a list of states which have made certification procedures available. See also 1A MOORE'S FEDERAL PRACTICE ¶ 0.203[5], at 2142-43 nn.1 & 2 (2d ed. 1979); *Florida's Interjurisdictional Certification*, *supra* note 6, at 28-29 n.62.

The Mattis article discusses problems with certification that may have caused other states not to follow the lead set by Florida. They are primarily problems of delay, piecemeal litigation, impracticality, forum-shopping, advisory opinions and precedential value. See Mattis, *supra* note 2, at 725-34.

16. GA. CODE § 24-3902 (1978).

17. LA. REV. STAT. ANN. § 13:72.1 (West Supp. 1979).

18. ALA. CONST. art. 6, § 140(b)(3).

19. *Schein v. Chasen*, 478 F.2d 817 (2d Cir. 1973), *vacated sub nom. Lehman Bros. v. Schein*, 416 U.S. 386 (1974), *on certification*, 313 So. 2d 739 (Fla. 1975).

20. *Aldrich v. Aldrich*, 375 U.S. 75 (1963), *on certification*, 163 So. 2d 276 (1964); *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963), *on certification*, 164 So. 2d 208 (1964). In *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), the Supreme Court lauded the merits of certification to the Florida courts, stating that it saves "time, energy, and resources and helps build a cooperative judicial federalism." *Id.* at 391 (footnote omitted).

21. For excellent discussions on the principles of abstention, see Agata, *Delaney, Diversity and Delay: Abstention or Abdication*, 4 HOUS. L. REV. 422 (1966); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960).

22. 312 U.S. 496 (1941).

23. 304 U.S. 64 (1938). Chief Judge Brown of the Fifth Circuit, in commenting on this doctrine and the role of the federal judiciary, recently stated that "[i]n carrying out our *Erie* role that federal courts must apply state substantive law in diversity actions, the federal judge must often trade his judicial robes for the garb of a prophet." Brown, *supra* note 5, at 455 (footnote omitted).

to secure a determination on that state law issue.

Normally, abstention applies in two types of cases. First, where a determination of state law will avoid the necessity of having to decide a federal constitutional issue, the federal court will stay the action while the parties proceed to the state court for determination of the unsettled law.²⁴ Second, where a federal decision on state law will unnecessarily interfere with state regulatory administration and policy, the federal court will dismiss the case altogether without retaining jurisdiction.²⁵ Abstention furthers the smooth melding of federal-state comity; it defers to the judgment of the state court regarding uncertain state issues. The doctrine, however, has been severely criticized not only for the divergent results emanating from its application, but also for its cumbersome procedures which add delays and costs to the litigation. Many of the litigants are in no position to bear the added burdens of simultaneous federal-state court litigation.²⁶ In an effort to assuage these problems, certification was initiated to reduce the costs and delays inherent in the abstention doctrine.²⁷

The enactment of section 25.031, the certification statute, by the Florida Legislature followed close on the heels of the decision of the Supreme Court of the United States in *Meredith v. Winter Haven*.²⁸ *Meredith*, which involved a question on the redemption of municipal bonds, allowed the federal courts to decide a purely state law issue, holding "abstention" inapplicable even where state court decisions on issues of statutory and state constitutional law were uncertain.²⁹ The *Meredith* case was a reaction to the use of the

24. See, e.g., *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 498 (1941). See generally 1A MOORE'S FEDERAL PRACTICE ¶ 0.203[1] (2d ed. 1979), wherein it is stated that "[t]he *Pullman* abstention doctrine represents an attempt to accommodate three important principles: (1) federal courts are obligated to decide cases properly within their jurisdiction; (2) decision of constitutional issues should be avoided whenever possible; and (3) conflict between the federal and state systems should be minimized." *Id.* at 2101-02 (footnotes omitted).

25. See, e.g., *Burford v. Sun Oil Co.*, 319 U.S. 315, 318-32 (1943).

26. See, e.g., *Agata*, *supra* note 21, at 442-43; Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815 (1959); *Florida's Interjurisdictional Certification*, *supra* note 6, at 27-28; 1A MOORE'S FEDERAL PRACTICE ¶ 0.203[5], at 2145-46 (2d ed. 1979).

27. *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 375-76 (Fla. 1978). "The certification process was initiated to eliminate both the expense and delay of abstention, by permitting the federal litigation to be abated while the doubtful question of state law was referred directly to the highest state court for resolution." *Id.* (footnote omitted).

28. 320 U.S. 228 (1943). There are no known recorded reports or hearings with regard to the legislative history of FLA. STAT. § 25.031 (1977).

29. The *Meredith* case has been held to stand for the proposition that "the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit." *Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974). See *Mattis*, *supra* note 2, at 728-30; *Kaplan*, *supra* note 6, at 419. It has been argued that *Meredith* arose

abstention doctrine by the federal courts to avoid decisions on "difficult" state issues. The Florida certification statute was designed to be consistent with the theory behind the abstention doctrine and yet not do violence to the *Meredith* principle.³⁰

B. *The Procedures Involved*

Section 25.031 of the Florida Statutes³¹ sets forth the conditions when a federal court "may" certify a question to the supreme court.³² There are two criteria: the state issue must be determinative of the cause, and there must be no clear controlling state precedent. The deficiencies are obvious.³³ It is difficult to ascertain when an issue is determinative, since the state court only answers certified questions and then returns the case to the federal court for final disposition.³⁴ Furthermore, since certification is discretionary on the part of the federal court, there is no control over when the federal court believes it is without a "clear controlling" state precedent.³⁵

because the lower federal courts sloughed their constitutional responsibilities and abstained from deciding on state law merely because the issues involved were difficult. *Mattis, supra* note 2, at 728.

30. In his article, Professor *Mattis* argues that certification does, in fact, violate the *Meredith* doctrine by allowing the lower federal courts to use certification to avoid answering difficult questions of state law. *Mattis, supra* note 2, at 728-30. He relied on *Life Ins. Co. v. Shifflet*, 359 F.2d 501 (5th Cir. 1966), *on certification*, 201 So. 2d 715 (Fla.), *on receipt of answers to certification*, 380 F.2d 375 (5th Cir. 1967) and *Vandercook & Son, Inc. v. Thorpe*, 344 F.2d 930 (5th Cir. 1965) to support that proposition. Although these cases cited may have been bad applications of the certifying procedures, they do not undermine the theoretical basis of certification. It must be remembered that *Meredith* merely complemented the abstention doctrine. Its aim was to cure the abuses of abstention misuse. To that end, certification also complements abstention. Therefore, abuse of certification can violate the *Meredith* principal, just as abuses of *Meredith* may also controvert the abstention doctrine.

31. FLA. STAT. § 25.031 (1977).

32. In light of *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), it cannot be denied that the federal court exercises its sound judicial discretion when determining whether or not to certify a question of state law. Therefore, that determination will not be overturned except in those limited occasions where there has been an abuse of discretion.

33. See *Mattis, supra* note 2, at 725-34; *Florida's Interjurisdictional Certification, supra* note 6, at 28-29, 33-35.

34. A good example of this problem is *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla.), *on receipt of answers to certification*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964).

35. "Clear controlling" state precedent is the lodestar under § 25.031 as well as FLA. R. APP. P. 9.510(a) and former rule 4.61.

One reason this article proposes the formulation of a Fifth Circuit local rule is to define more clearly the standards used by that court in certifying a question of state law. Presently, the Fifth Circuit only determines to certify on the basis of the requirement of FLA. STAT. § 25.-31(1977) and FLA. R. APP. P. 9.510. There is no standardized interpretation because the rule or statute of another state may be interpreted, and each state with a certification procedure may have a differently worded statute or court rule.

Some writers have suggested that the control comes from the state's highest court, since they must interpret the state statute and can accept or reject the certificate.³⁶

Either upon motion of one of the parties or of the court *sua sponte*, a particular state law issue will be certified.³⁷ The federal court will request that the parties prepare a stipulation of the facts and the legal issues to be certified.³⁸ If the parties cannot agree, the court will draft the facts and issues, although this adds to the time delays.³⁹ The court will usually refer to their boilerplate recital in advising the parties of the procedure to follow.⁴⁰ The question and the record on appeal are then certified to the Supreme Court of Florida. Briefing requirements, costs and other procedures are governed by rule 9.510 of the Florida Rules of Appellate Procedure.⁴¹

Since the court may decide to certify a question on its own motion, or by motion of either party, the certification decision is not always met with unanimous consent. In *National Educ. Ass'n v. Lee County Bd. of Pub. Instruction*, 448 F.2d 451, 452 n.1 (5th Cir. 1971), one of the parties disagreed with the decision to certify, but this did not dissuade the court from certifying the question.

It seems doubtful whether a court in review would reverse a case based upon the decision to certify a state law question. An after the fact appeal or certiorari would not be effective to correct an abuse of discretion, if any. Perhaps the only viable argument in such a certified question case on review would be that the court erred in *not* certifying the issue to the state court. See *Lehman Bros. v. Schein*, 416 U.S. 386 (1974).

36. See *Florida's Interjurisdictional Certification*, *supra* note 6, at 29.

37. FLA. R. APP. P. 9.510.

38. *Green v. American Tobacco Co.*, 304 F.2d 70, 86 (5th Cir. 1962).

39. See *Allen v. Estate of Carman*, 446 F.2d 1276, 1277 (5th Cir. 1971). In certifying a question, the Fifth Circuit will point out that the Supreme Court of Florida is not limited to answering the question according to its precise form and scope. Instead, it has the "widest discretion" in considering the problem posed by the case. The Florida court can even reformulate the question. *Id.* This provision is aimed at preventing the technical delays between courts on how to word the question and thus the "ping-pong" effect with regard to the formulation of the question.

40. A typical example of the procedure is found in *National Educ. Ass'n v. Lee County Bd. of Pub. Instruction*, 448 F.2d 451 (5th Cir. 1971). "Following 'our experience-born practice we requested that the parties submit a proposed agreed certificate of the issue or issues for decision.' This they have done. Except for some rearrangement and slight elaboration, the certificate below tracks or is a paraphrase of the agreed proposal." *Id.* at 452 (citations omitted).

41. Rule 9.510 provides as follows:

(a) Applicability. Upon either its own motion or that of a party, the Supreme Court of the United States or the United States Courts of Appeals may certify a question of law to the Supreme Court of Florida whenever the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.

(b) Certificate. The certificate shall contain the style of the case, a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise, and the questions of law to be answered. The certificate shall be prepared as directed by the federal court. It shall be certified to the Supreme Court of Florida by the clerk of the federal court.

C. *The Problems Incumbent in the Process*

While the theory behind the certification process is valid,⁴² the problems now surrounding the procedure threaten its use and effectiveness. There are essentially two problems: first, there is no established formula by which the federal courts decide whether or not to certify a question;⁴³ and second, the time delay incumbent in certification may preclude its use.⁴⁴

Although the language of section 25.031 and rule 9.510 is clear in establishing a formula for the federal courts in deciding when to certify a question to the Supreme Court of Florida, its application has resulted in uncertainty at the federal level.⁴⁵ This is primarily because certification, even when controlled by an unambiguous state statute, is discretionary at the federal level.⁴⁶ This inevitably raises questions concerning the propriety of certification. Some federal courts have attempted to answer difficult questions of unsettled state law of distant states even though they lack the sensitivity necessary to act as a state court.⁴⁷ If the theory behind the federal judicial concept is uniformity and coherence in the law where national interests are supreme, then logically a federal court cannot don the cloth of the state judiciary to decide an isolated issue of state statutory or constitutional law. The federal courts are not guardians of the rights of states. They are not designed for that purpose, regardless of the geographic provinciality of the federal

(c) Record. The Supreme Court of Florida, in its discretion, may require copies of all or any portion of the record before the federal court to be filed where the record may be necessary to the determination of the cause.

(d) Briefs. The brief of the party designated by the federal court as the moving party shall be served within 20 days of the filing of the certificate. Additional briefs shall be served as prescribed by Rule 9.210.

(e) Costs. The costs of these proceedings shall be equally divided between the parties unless otherwise ordered by the court.

For a procedural perspective of the treatment of the problem by the supreme court, see *Insurance Co. of N. America v. Avis Rent-A-Car Sys., Inc.*, 348 So. 2d 1149, 1154 n.12 (Fla. 1977).

42. See generally *Lehman Bros. v. Schein*, 416 U.S. 386 (1974); *Brown*, *supra* note 5, at 464-65.

43. See *United States v. Buras*, 475 F.2d 1370, 1375-76 nn.5 & 10 (5th Cir. 1972) (*Brown*, C.J., dissenting).

44. See *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 276 (5th Cir. 1976); *Mattis*, *supra* note 2, at 725-26.

45. See *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 276-77; *Florida's Interjurisdictional Certification*, *supra* note 6, at 28-29.

46. *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974).

47. "When federal judges in New York attempt to predict uncertain Florida law, they act . . . as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Id.* at 391.

judge who makes the decision.⁴⁸

The second problem involves what the state court does with the question once it is certified. This is of particular concern because of the lengthy time delay which seems inherent in certification.⁴⁹ In fact, this problem has become a major factor in the decision of the Fifth Circuit on whether to certify a question.⁵⁰ Lengthy delays undermine federal jurisdiction, which is already criticized for its sluggish nature. Some cases previously certified took over two years to be answered;⁵¹ this type of delay can only serve to emasculate the certification process. As previously noted, the cause of this problem is the exponential growth of the docket of the Supreme Court of Florida.⁵²

III. THE PROPOSAL

It is submitted that a two-tier plan, which calls for the Fifth Circuit to act in concert with the Florida Legislature, will remedy the problems enumerated above.

The Fifth Circuit should amend its local rules by adding a new rule which essentially tracks the language of section 25.031 and rule 9.510. It should be the announced policy of that court to certify any state law issue where there is no "clear controlling" precedent. "Clear controlling" precedent should be defined as any state court decision which is directly on point or any decision where the highest state court has definitively addressed the legal issue involved. The use of other standards, such as "fairly debatable" or "more likely than not," are too subjective and capricious to warrant reliance.

Such an approach is not constitutionally proscribed, for the Fifth Circuit would only be establishing a procedural policy. Thus, there would be no need for a legislative enabling act. The treatment of certification by the Supreme Court in *Sun Insurance*⁵³ and *Lehman Brothers*⁵⁴ would seem to resolve any doubts concerning the

48. See generally *Harrison v. NAACP*, 360 U.S. 167, 176-77 (1959) *Martin v. Creasy*, 360 U.S. 219, 228 (1959) (Douglas, J., dissenting).

49. See *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir. 1976); *Mattis*, *supra* note 2, at 725-26.

50. *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976). As the Fifth Circuit stated, "we must consider an inevitable side effect of certification—delay. The experience in our Circuit has been that the process requires a period approaching one year at the least—sometimes much more As a result, we believe that delay that is not absolutely necessary should be avoided." *Id.* at 275-76 (citations omitted).

51. *Allen v. Estate of Carman*, 486 F.2d 490 (5th Cir. 1973) (28 months); *Hopkins v. Lockheed Aircraft Corp.*, 394 F.2d 656 (5th Cir. 1968) (26 months).

52. See notes 7-10 and accompanying text *supra*.

53. 363 U.S. 207 (1960).

54. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974).

federal constitutionality of the certification process.

Concurrent with this local rule adoption, the Fifth Circuit should establish internal procedures whereby a staff attorney would expeditiously screen all civil cases to make an early determination of the presence of state law issues. The recommendations of the staff attorney would then proceed as regularly followed.⁵⁵ If the appeal was not set for oral argument, then the new local rule should authorize the summary calendar panel⁵⁶ to certify the question if appropriate under the circumstances. Indeed, there is nothing in the certification process that is inconsistent with summary calendar disposition. If an appeal can be expeditiously and judiciously decided under the aegis of summary calendar by having a question certified to the Florida courts, then certification would further the aims of the summary calendar.

In concert with this action by the Fifth Circuit, the Florida Legislature should amend section 25.031. While this section would continue to provide for certified questions under the circumstances currently permitted, the Supreme Court of Florida would no longer be the arbiter of these questions. Instead, the statute should be changed to permit the appointment, by the Chief Justice, of a special court which shall hear and determine all questions certified from the federal courts.

The purpose of establishing this judicial body is to render prompt answers to certified questions. A tribunal designed solely for certified questions can return answered questions with procedural quickness and thereby negate the cumbersome delay presently involved in the process of certification.

In furtherance of this proposal, the certification statute should be expanded to include the federal district courts.⁵⁷ There is no basis for prohibiting certification from the district court level. The experience in the State of Maine discounts that belief.⁵⁸ A federal district

55. See United States Court of Appeals for the Fifth Circuit, *Internal Operating Procedures Manual* 15-16 (rev. Oct. 20, 1978) [hereinafter cited as *Procedures Manual*]; 1 G. RAHDERT & L. ROTH, *APPEALS TO THE FIFTH CIRCUIT MANUAL*, ch. 2, at 14-16 (1977) [hereinafter cited as *FIFTH CIRCUIT MANUAL*].

56. See Fifth Circuit Local Rule 18.

57. See 1A MOORE'S FEDERAL PRACTICE ¶ 0.203[5], at 2149-50 & n.21 (2d ed. 1979), where it is stated that certification should be accomplished as early as possible, even at the district court level. Professor Moore cautions that since certification by district courts will increase the workload on state courts, the district courts should give "[d]ue regard for the interests of the states in conserving their judicial resources . . . in their use of certification procedure." *Id.* at 2150.

58. The Maine certification procedure, modeled after that of Florida, also includes certification from the federal district courts. See *Florida's Interjurisdictional Certification*, *supra* note 6, at 30.

court within the Fifth Circuit has already certified a question under the certification statute of another state.⁵⁹ Certification might occur at summary judgment, post-trial or even upon pretrial stipulated facts. The litigants and federal trial courts would decide the timing and format of the certified question.⁶⁰

The idea of a special court to hear and decide specified cases is not new. The United States Temporary Emergency Court of Appeals was established to decide only those appeals related to the Economic Stabilization Act of 1970.⁶¹ Hence, that court could expeditiously decide appeals without having to grind the decision through the regular federal appellate mill.⁶²

Florida has experienced this type of proposal. In 1970, an unsuccessful attempt was made to amend the constitution to establish a special appellate court having jurisdiction solely over administrative appeals.⁶³ These types of special courts and commissions have received favorable acceptance in foreign countries.⁶⁴ In the history of Anglo-American jurisprudence, there has been a tradition of specialized courts designed for limited purposes.⁶⁵

It is submitted that this new tribunal should consist of seven judges: two members of the supreme court,⁶⁶ three district court of appeal judges and two senior circuit judges. Each member of this suggested court would be appointed by the Chief Justice to six-year staggered terms, and each member could be reappointed.⁶⁷ Such a

59. *Bishop v. Sales*, 336 So. 2d 1340 (1976). See *Brown*, *supra* note 5, at 462 & n.32 for a discussion of this case.

60. The overwhelming arguments in favor of applying federal district court certification to our existing statute are set forth in *Florida's Interjurisdictional Certification*, *supra* note 6. One of the principal arguments against district court certification is that it would further clog the docket of the supreme court. See note 58 *supra*. This argument is adequately disposed of by the adoption of a special court designed solely to hear certified questions.

61. Economic Stabilization Act of 1970, § 211(b)(1), 12 U.S.C. § 1904 (1976).

62. S. REP. NO. 92-507, 92d Cong., 1st Sess., reprinted in [1971] U.S. CODE CONG. & AD. NEWS 2283, 2292-93.

63. Levinson, *Court of Administrative Appeals: Alternatives Available to Legislature, Following Defeat of 1970 Proposed Amendment of Judiciary Article of Florida Constitution*, 23 U. FLA. L. REV. 261 (1971).

64. *Id.* at 266-67 & n.33.

65. See generally BLACKSTONE'S COMMENTARIES ON THE LAW 536-50 (B. Gavit ed. 1941).

66. While it might be said that supreme court justices are already overworked, what is sought is to have their experience and knowledge on this specialized court. To be sure, the time of the justices would be better spent by participating in this court than by attending numerous Florida Bar committees or by touring on the seminar circuit. It is submitted by the author that judicial energies are best spent on the bench.

67. For the first six years there would be fluctuating lengths of terms in order to initiate the stagger. In selecting circuit court judges, the Chief Justice would need to remain cognizant of expiration of terms within the six year period. This time frame is purely arbitrary, but the length of time was determined with an eye towards longevity and consistency on the court.

structure would not only bring a wide variety of experience and perspective to this court from all levels of the Florida judiciary, but it would also enable the council of jurists to be a body that is representative of the interests of the state. Both qualities are indispensable to a tribunal called upon to decide important questions of state law.

All the earmarks of a normal justiciable controversy should be present in the proposed court just as if the question were before the supreme court. The tenets of *res judicata* and *stare decisis* are to apply to these decisions. Precedents set by the new court should be binding upon all courts of the state.⁶⁸ Only the supreme court, when deciding a controversy before it, could overturn or reject the *ratio decidendi* of the new court. Although adoption of this suggested procedure would vest substantial authority in the new court, it would not alter the appeal procedure presently available to a party after a question is certified to the supreme court. Under the present statute, parties disgruntled with a supreme court answer to a certified question have no immediate recourse, and neither would the litigants before this specialized court.

There shall be no direct appeals, writs of certiorari or other extraordinary procedures from the new court to the Supreme Court of Florida. Its decision should be final. As a practical matter, the only instance where a decision may be overturned is where, in a separate and unrelated case, the supreme court on certiorari would decide differently than the court of certified questions. To handle this particular situation, there appears to be no need to revise rule 9.030(a)(2),⁶⁹ which deals with certiorari jurisdiction. Provisions of the rule are adequate to encompass the isolated instances where

68. See generally *McGregor v. Provident Trust Co.*, 119 Fla. 718, 728-34, 162 So. 323, 327-29 (1935); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); *Florida's Interjurisdictional Certification*, *supra* note 6, at 34-36. It is recommended that the supreme court revise the Florida Rules of Appellate Procedure to include a provision which states that these decisions of the court shall have the binding effect of law until overturned by supreme court decision.

69. FLA. R. APP. P. 9.030(a)(2) provides as follows:

(2) *Certiorari Jurisdiction*. The certiorari jurisdiction of the Supreme Court may be sought to review:

(A) decisions of district courts of appeal that: (i) affect a class of constitutional or state officers;

(ii) pass upon a question certified to be of great public interest;

(iii) are in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same point of law;

(B) any interlocutory order passing upon a matter which, upon final judgment, would be directly reviewable by the Supreme Court;

(C) administrative action, including final orders of commissions established by general law having statewide jurisdiction.

certiorari might be accepted.

Revisions and amendments, however, should be made to the appellate rules to provide briefing schedules and filing procedures for records and appendices. The amendments could parallel present rule 9.510. Briefing times should be lessened to speed the process. These procedural rules should dispense with any copies of the records of the transferor court and, instead, should require only "Record Excerpts" as presently used by the Fifth Circuit.⁷⁰ There is little need for further documentation since the facts and legal issues are certified.⁷¹ The court would not be bound to grant oral argument but could, within its discretion, decide the question on the briefs alone.

Under this plan, all certified questions would be processed through a newly created division within the office of the clerk of the supreme court. It may be sufficient to have only one clerk since the quantity of certified questions has not been voluminous. Oral arguments, perhaps, could be held in Tallahassee at the Supreme Court Building or in the building that houses the District Court of Appeal, First District. Oral argument calendars would have to be coordinated with the calendars of the appellate and circuit judges and with available courthouse space. This is surely a minor problem, one that has been handled easily by the Temporary Emergency Court of Appeals.

The proposed court, of course, could not be adopted without incurring some additional expense. On the whole, the cost should be relatively small and could be handled by the budgetary requests of the judiciary. Utilization of existing judges, courthouses and general support personnel to handle more expeditiously a workload now carried by the supreme court seems an efficient reorganization of current judicial tasks. Only travel and per diem expenses for the judges, where applicable, and the additional personnel in the office of the clerk could add to the expense of funding the current system.⁷²

IV. CONSTITUTIONAL RAMIFICATIONS OF THE PROPOSED COURT

The feasibility of establishing a court to answer certified questions is premised on the constitutionality of such a proposed court. As it affects the local rules of the Fifth Circuit, the proposal would not have to face a constitutional challenge. Clearly, the frequent use

70. See *Procedures Manual*, *supra* note 55, at 10; Fifth Circuit Local Rule 13.1.

71. The full record, of course, is always available, but it would normally not be essential.

72. See generally FLA. STAT. §§ 25.231, .241, 112.061 (1977). Reporting of decisions by the proposed court can be by the practices currently in use. *Id.* §§ 25.361, .381.

of the certification process by the Supreme Court of the United States,⁷³ as well as its resolution of *Sun Insurance*,⁷⁴ serve to dispel any notion of a constitutional prohibition to a Fifth Circuit rule change. There are, however, three arguments against the establishment of this court: (1) it is prohibited by article V, section 1 of the Florida Constitution; (2) it would deny due process; and, (3) it would deny access to the courts.

At the outset, it should be established that the proposed court will not intrude upon the jurisdiction of the supreme court as provided in article V, section 3 of the Florida Constitution. In *Sun Insurance*,⁷⁵ the supreme court stated:

[W]hile the legislature cannot restrict or take away jurisdiction conferred by the constitution, constitutional jurisdiction "can be enlarged by the legislature in all cases where such enlargement does not result in a diminution of the constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the constitution."⁷⁶

Sun Insurance recognized that since the exercise of certified question responses pursuant to section 25.031 was legislatively based, the legislature could retract or alter the grant just as easily as it conferred that grant. Because the supreme court in *Sun Insurance* found no constitutional prohibition against enlarging its jurisdiction by vesting certified questions in this court, it follows that the removal of that jurisdiction to our proposed court would be equally acceptable.⁷⁷

Article V, section 1 of the Florida Constitution provides that there shall be four levels of courts, and that no other courts shall be created.⁷⁸ On first analysis, this might suggest an inherent conflict with the establishment of the proposed court. In fact, however, this section has not been interpreted as proscribing the creation of judicial bodies outside of its realm. In addition, it is clear that the

73. See note 20 *supra*.

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

75. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (Fla. 1961).

76. *Id.* at 742, (quoting *Chapman v. Reddick*, 41 Fla. 120, 133-34, 25 So. 673, 677 (1899)).

77. It is difficult to see how the proposed court could contravene constitutional jurisdiction when there is nothing in the constitution concerning it in the first place. Furthermore, "[s]ince there is no express prohibition against the enactment of section 25.031, a constitutional implication prohibiting the authorization of the statute must be found, in order to invalidate it." Kaplan, *supra* note 6, at 426 (emphasis in original).

78. FLA. CONST. art. V, § 1 provides that "[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality." See, e.g., *Simmons v. Faust*, 358 So. 2d 1358, 1359 (Fla. 1978)(per curiam).

spirit and intent of this provision is in conformity with the proposed court.

The case of *Scholastic Systems, Inc. v. LeLoup*,⁷⁹ and its interpretation of article V, will permit the creation of this special court. *Scholastic Systems* stands for the proposition that a judicial body can exist independently from the constitutional provision relating to courts.⁸⁰ In this case, the supreme court held that review of decisions from the Industrial Relations Commission (IRC) was not mandated even though the IRC was not a court within the meaning of article V. To reach that result, the supreme court interpreted IRC judges as tantamount to circuit court judges and the IRC as equivalent to the district courts of appeal.⁸¹ Therefore, the right to an automatic appeal was satisfied by IRC review of the decision of a claims judge. Beyond that, review to the supreme court was only discretionary. In essence, the court established a parallel judicial hierarchy equivalent to the concept under article V, and it did so without specifically stating that the IRC was a "court" per se.⁸² Two subsequent opinions of the supreme court have continued to apply this type of analysis.⁸³

Scholastic Systems conferred upon the IRC all the trappings of being an appellate court, but by raising it to the level of a judicial body, it was not classified as within the limitations of article V, section 1. As the court pointed out:

All of these provisions make eminently clear the legislative intent to elevate the status of the IRC to that of a judicial body The IRC now occupies a position in the structure of our state government equivalent to the "Article I" courts found in the federal system. The lack of the word "court" in its title is irrelevant; the Board of Tax Appeals was no less a judicial body before its title was changed to that of "Tax Court of the United States."⁸⁴

79. 307 So. 2d 166 (Fla. 1974).

80. The supreme court stated that "[a] body may be a 'court' without being named within the constitutional article dealing with the judiciary . . . so long as it fulfills the requirements making it a judicial body of review." *Id.* at 169.

81. *Id.* at 170 (citing *Pierce v. Piper Aircraft Corp.*, 279 So. 2d 281 (Fla. 1973)).

82. 307 So. 2d at 171.

83. *See Meyers v. Hawkins*, 362 So. 2d 926, 932 (Fla. 1978); *Farrell v. Amica Mut. Ins. Co.*, 361 So. 2d 408, 410 (Fla. 1978). *See generally* FLORIDA WORKMAN'S COMPENSATION PRACTICE 4-5 (2d ed. Oct. 1978 Supp.).

84. 307 So. 2d at 171. The court continued: "Orders of the IRC are not *administrative* actions, but are *judicial* functions in their reviews of workmen's compensation appeals, just as are appeals to the state district courts which enjoy only certiorari as the principal means of review in this Court." *Id.* (emphasis in original).

This is precisely the position of the proposed court—similar to the Tax Court or the Temporary Emergency Court of Appeals. *Scholastic Systems* did not interpret article V, section 1 as a prohibition against this type of specialized court, whether or not it is labeled a “court.”⁸⁵ It should be noted that the intent behind article V, section 1 was to modernize the Florida judicial system and to raise the quality of justice being dispensed.⁸⁶ In its pre-1972 form, the constitution permitted the establishment of other courts by the legislature.⁸⁷ The 1972 revision of article V was designed to eliminate the duplication and ineffectiveness then existing in the judicial structure. It is this same notion of judicial reform, underlying the 1972 change to article V, which is also the fundamental justification for the present proposal. The intent is to create a more effective judicial vehicle by which federal courts can efficaciously ascertain undetermined issues of state law. As already noted, the delay and sluggish responsiveness of our present procedure create the threat that the federal courts will take it upon themselves to decide important questions of state law without prior guidance from the state courts.⁸⁸ With certification in frequent use, it is less likely that federal courts will foray into subjective areas of state law and thereby cause the usual consternation of federal-state conflicting decisions.⁸⁹

A more difficult problem arises when it is alleged that procedural due process⁹⁰ is violated by allowing a judicial body, not encompassed within article V, to decide legal issues which are determinative in a current controversy. This problem arises by virtue of classifying the proposed court as a judicial body outside the realm of article V. Since all litigants have a due process right not to be bound until they have had their “day in court,”⁹¹ the question arises whether this right is satisfied by the proposed court. Clearly, it is not sufficient to maintain that due process is satisfied because the

85. It would be unadvisable to label this new court as a commission or agency. To do so might cause problems with the Administrative Procedure Act, FLA. STAT. §§ 120.11-331 (1977). See generally England & Levinson, *Administrative Law*, 31 U. MIAMI L. REV. 749, 755-56 (1977).

86. See D'Alemberte, *Judicial Reform—Now or Never*, 46 FLA. B.J. 68 (1972).

87. See Levinson, *supra* note 63. Prior to the 1972 change, the constitution specifically allowed the creation of “such other courts . . . as the legislature may from time to time ordain and establish.” FLA. CONST. art. V, § 1 (1968, amended 1972).

88. See notes 43-53 and accompanying text *supra*. Under *Merdith v. Winter Haven*, 320 U.S. at 228, the federal courts could easily subvert valid state interests if no viable alternative were open to them. See text accompanying notes 29-31, *supra*.

89. See Brown, *supra* note 5, at 455-56.

90. FLA. CONST. art. I, § 9 provides that “[n]o person shall be deprived of life, liberty or property without due process of law”

91. 10 FLA. JUR. 2d *Constitutional Law* § 369 (1979).

same procedures are provided as if the question were certified to the supreme court. Any such analysis misconstrues the nature of the certification process.

The real answer to this challenge is that litigants in such a case have not invoked state court jurisdiction. Instead, they are in the federal arena, and the ultimate decision will be that of the federal court. The litigants have full due process rights before the federal court. There is a right to appeal from the district court; there is a right to direct or discretionary review from the court of appeals to the supreme court. There is also the opportunity to convince the certifying court against certification.⁹² In sum, the effect at the federal appellate level is the same for the litigants whether the question is answered by the Supreme Court of Florida or by the proposed court. In this regard, it is appropriate to study the remarks of Judge Jones, concurring in *Hopkins v. Lockheed Aircraft Corp.*:⁹³

This Court has jurisdiction over the parties and the subject matter and the power to affirm, reverse or modify the judgment brought before it for review on appeal. The Supreme Court of Florida had no jurisdiction over the parties or the subject matter. It had no power to make or enforce any adjudication of the controversy. The cause was not and could not have been adjudicated by it. It entered no judgment and made no decision. It did not have before it the parties or the subject matter, except as the parties voluntarily submitted argument. All that the Florida court had before it was a question posed by this Court, and all the Florida court did or undertook to do was to give its answer. This Court, adopting the Florida court's answer to the question, affirms the district court's adjudication. The action of the Florida court was not an adjudication, since only the Federal courts could enter and enforce judgment. Hence, the action of the Florida court was not an exercise of a judicial power. It was, so it seems to me, only the expression of an opinion on the law of Florida by judges well qualified to give an opinion.⁹⁴

As Judge Jones pointed out, the decision of the state court is not an adjudication but merely the expression of state law as interpreted by the highest court of that state. Since the process of certification by the certifying court is discretionary, the acceptance by that court of the answer of the state court becomes, in effect, the decision of the certifying court. This avenue of decisionmaking is

92. See, e.g., *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976), where that approach proved successful.

93. 394 F.2d 656 (5th Cir. 1968).

94. *Id.* at 658 (Jones, J., concurring).

infinitely more preferable than an attempt to decide state law based on what federal courts believe that state courts "would" hold. Needless to say, the proposed court must base its answer on a full and fair consideration of the record before it. Thus, due process will be satisfied when the certifying court reviews the procedures followed by the proposed court and determines that its answer was based on such considerations.

As to the claim that this proposal denies litigants the right of access to the courts under article I, section 21 of the Florida Constitution,⁹⁵ the same arguments are reiterated. The litigants have not invoked state court jurisdiction, rather they are in the federal courts where they receive the protections of the Constitution of the United States. The state court, by answering the question certified, is not adjudicating; rather, it is rendering an expression on the state law. In addition, the Supreme Court of Florida has recognized that the right of access to the courts is not violated when a "reasonable alternative" is provided to the litigants. In *Lasky v. State Farm Insurance Co.*,⁹⁶ a litigant argued that the Florida no-fault insurance law, which exempts individuals from tort liability under certain circumstances,⁹⁷ unconstitutionally denied the right of access to the courts. The supreme court stated that when a reasonable alternative is provided in place of the traditional action in tort, there is no violation of the right of access to the courts.⁹⁸ In the establishment of this proposed court, the litigants retain all of the protections provided in the federal realm; therefore, there is no problem of denial of access to the courts.

In any event, if it is resolved that the establishment of the proposed court is inconsistent with the relevant provisions of the Constitution of the State of Florida, it is recommended that the constitution be amended to allow for its existence. This could be accomplished by adding to article V, section 1, the provision that the legislature could create from time to time "such other courts." This suggestion leaves open the path for further judicial innovation, such as the proposals of Professor Levinson,⁹⁹ yet is in keeping with

95. FLA. CONST. art. I, § 21 provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

96. 296 So. 2d 9 (Fla. 1974).

97. FLA. STAT. § 627.737(1)-(2) (1977).

98. In *Lasky*, the reasonable alternative provided a tort plaintiff "[i]n exchange for his previous right to damages for pain and suffering . . . , with recovery limited to those situations where he can prove that the other party was at fault, . . . [is the assurance] of recovery of his major and salient economic losses from his own insurer." 296 So. 2d at 14.

99. See Levinson, *supra* note 63.

the essential four-tier structure designed to prevent the pre-1972 abuses of judicial organization.¹⁰⁰ Undoubtedly, an attempt to amend the constitution is not only costly and time-consuming, but has been shown in marked distrust by voters, at least in the recent past.¹⁰¹ It is submitted, however, that this approach is unnecessary inasmuch as the establishment of the proposed court meets all constitutional challenges.

V. OVERVIEW

By making use of the existing facilities and personnel, this proposal presents a sound and practical alternative to federal court prescience of state law. The cost of this proposal will be relatively small, but its benefits will ensure preservation of state court integrity. It is in line with current thinking on federal court diversity jurisdiction. Certification lessens the chance of bad results from diversity decisions.¹⁰²

Even if new supreme court jurisdictional limitations are adopted,¹⁰³ the case load pressure from original jurisdiction, historical prerogative, and certiorari will not appreciably abate its work load.¹⁰⁴ A District Court of Appeal has been created for the new Fifth District. Appellate cases will continue to abound, and recent proposals for our highest court made no allowance for certified questions from federal courts.¹⁰⁵ In the federal system, recent alterations can only increase the potential cases ripe for certification. There are more federal judges now than ever. The forecast, in spite of the increased numbers of judges, is only for a greater volume of federal court filings.¹⁰⁶ Despite all the arguments to the contrary, Congress has not abolished diversity jurisdiction.¹⁰⁷ Problems resulting from diversity cases helped provide the catalyst for these certification

100. See text accompanying notes 87-88 *supra*.

101. See Levinson, *supra* note 63.

102. An excellent example of the struggle of a federal court with a case of first impression in state law can be seen in *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976). The opinion is fraught with language to the effect that the Fifth Circuit must blindly piece together clues to determine what the state court would do in this situation. *Id.* at 771, 776. Georgia subsequently enacted a certification procedure similar to that of Florida. See note 16 *supra*.

103. See *Report of the Supreme Court Commission on the Florida Appellate Court Structure*, 53 FLA. B.J. 274, 274-95 (1979).

104. England, *1979 Report on the Florida Judiciary*, 53 FLA. B.J. 296, 298-99 (1979).

105. *Id.* See also Borgognoni & Keane, *Practice Before the Supreme Court of Florida: A Practical Analysis*, 8 STETSON L. REV. 318, 358-59 (1979).

106. See generally FIFTH CIRCUIT MANUAL, *supra* note 55, ch. 1, at 22-24.

107. See *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53-60 (1954) (Frankfurter, J., concurring); H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 139-52 (1973).

procedures.¹⁰⁸ Unless the Supreme Court of Florida expedites certified questions on the appellate docket, the delays which now threaten disuse of the process will not substantially diminish. Indeed, the supreme court cannot justify advanced appellate docketing of cases not arising in the state courts, especially with no assurance that the answers returned will have a guaranteed impact on the federal litigation. Thus, the need for the creation of this specialized court is more compelling today than ever.

This proposal would be a clear and ringing declaration to the federal courts. It evidences the intent to meet federal court criticisms of the certification system. The bottom line of this proposal is that federal courts should not decide unclear issues of state law. This admonition to the federal courts is as old as the Constitution. On issues of state law, the state courts are the supreme interpreters within their jurisdictions.¹⁰⁹ Federal courts should not pretend to have the knowledge of state court prerogatives, and this proposal would limit any such cavalier approach. It has far greater merit than the abstention doctrine or even the current certification process. Moreover, it adheres to the rationale underlying the *Erie* decision; in fact, it breathes new life into *Erie*. While the federal courts have paid tribute to the principles of *Erie*, their actions, when deciding an issue of state law which is unclear, are reminiscent of the era of *Swift v. Tyson*,¹¹⁰ where federal courts subjectively decided issues of state law.¹¹¹

The upshot of establishing this proposed court is the restoration of faith in a judicial system based on federal-state comity. Without doubt, the suggested alteration of present procedures will enhance the certification process and hopefully will reverse any current federal judicial mood disfavoring certification.

108. The enactment of GA. CODE § 24-3902 (1978) on certification was a direct result to the decision of the Fifth Circuit in *Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976).

109. *Erie R.R. v. Tompkins*, 304 U.S. 64, 64 (1938); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51-52, 81-88, 108 (1923).

110. 41 U.S. (16 Pet.) 1 (1842). *Swift* held that the word "laws" in the Rules of Decision Act of 1789 referred only to state statutes and matters of local usage, not to the general common law of a state. Thus, federal courts exercising diversity jurisdiction were free to find the "true" general common law themselves, regardless of the holding of the state courts upon the subject. This doctrine was severely criticized and eventually overruled in *Erie*.

111. See Kaplan, *supra* note 6, at 414-16. This problem becomes evident when a federal court makes a "guess" at the state law issue, and then later a state court, when confronted with the same issue on a state appeal, expressly disagrees with the conclusion reached by the federal court. See, e.g., *Food Fair Stores, Inc. v. Trusell*, 131 So. 2d 730, 733-34 (Fla. 1961) (expressly disapproving *Pogue v. Great Atl. & Pac. Tea Co.*, 242 F.2d 575 (5th Cir. 1957)).

As a final matter, it is recommended that the specialized court be entitled "The Court of Certified Questions."

AUTHOR'S NOTE

On November 28, 1979, while in special session, the Florida Legislature adopted a proposed constitutional amendment to article V of the Constitution of the State of Florida dealing with the organization and jurisdiction of the Supreme Court of Florida. The amendment, which will be presented to the electorate of Florida in March 1980, effectively narrows the supreme court's jurisdiction. See *Florida Bar News*, Dec. 15, 1979, at 1, col. 2. Proposed section 3(b) (6) would provide that the court, at its discretion: "May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida."

The author notes that this action makes his proposal all the more timely, as it presents a viable and practical solution to the problem of certified questions.