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Interjurisdictional Certification and Choice of Law

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Interjurisdictional Certification and Choice of Law

John B. Corr and Ira P. Robbins***

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I. INTRODUCTION

There is a story, probably apocryphal, that, at a 1970s conference discussing the great potential and even greater problems of some economically developing countries, a rather cynical American economist is supposed to have remarked that "Brazil is the country of the future—and always will be." Some commentators believe that much the same could be said about the certification process, but with greater accuracy.

Certification has beguiled and to some extent disappointed two

generations of legal scholars.¹ Intended to resolve problems that arise when a court of one jurisdiction must apply the law of another jurisdiction, certification is the process by which the first court may inquire of a court in the jurisdiction whose law is at issue for help in determining what the law is.² The certification process is inherently attractive because it eliminates the need for a court either to guess at another jurisdiction's uncertain law or to refrain altogether from trying to apply that law.

The difficulty that certification can ease typically arises in one of two situations. The first situation occurs when a federal court, for whatever reason, must identify and apply the substantive law of a state. Federal courts hearing diversity cases³ are the most likely to inquire into state law, but the problem can also arise when a federal court's subject-matter jurisdiction is based on the presence of a federal question.⁴ The second situation occurs when a state court's own conflict-of-laws rules direct it to apply the law of another state.⁵

1. Among the most influential of the earlier articles on certification is Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629 (1951). For a more recent discussion of certification see, for example, Roth, *Certified Questions from the Federal Courts: Review and Re-proposal*, 34 U. MIAMI L. REV. 1 (1979). The potential of certification has attracted support beyond the academic side of the bar. Chief Justice Rehnquist recently described certification as "a promising tool for obviating some of the great difficulties which result when a federal court attempts to interpret a state statute which has never been interpreted by the highest court of the state." W. Rehnquist, Remarks at the Meeting of the National Conference of Chief Justices, Williamsburg, Va., 15 (Jan. 27, 1988). Chief Judge William Holloway of the United States Court of Appeals for the Tenth Circuit, calling certification "a very important device that has not been appreciated fully," recently emphasized that the Oklahoma Supreme Court "deems it an honor to be asked to respond to a question." *Interview with Chief Judge William J. Holloway, Jr.*, THIRD BRANCH, Nov. 1987, at 1, 8.

2. See, e.g., *In re Sandy Ridge Oil Co.*, 807 F.2d 1332, 1338 (7th Cir. 1986) (indicating that Indiana appellate procedure "allows certification of a question of Indiana law to the Indiana Supreme Court when the question is determinative of the case and there is no clear controlling Indiana Supreme Court precedent"). Nearly half of the states provide a procedure whereby their trial courts may certify questions to their own high courts. See Vestal, *supra* note 1, at 632-33. States with such an intrajurisdictional certification procedure include: Alabama, Connecticut, Florida, Georgia, Hawaii, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Texas, West Virginia, and Wyoming. See *id.* at 632 nn.12-29 (citing various state statutes allowing certification).

3. 28 U.S.C. § 1332 (1982) (providing for federal subject-matter jurisdiction over suits between citizens of different states).

4. *Id.* § 1331 (providing for federal subject-matter jurisdiction over suits involving a federal question). In *Imel v. United States*, 523 F.2d 853 (10th Cir. 1975), for example, the dispute before the federal court involved questions of federal tax law, but resolution of those questions required a determination of how certain property would be apportioned under state law. Federal courts using their pendent jurisdiction to hear state questions might also have need for a procedure by which they can obtain an authoritative determination of state law from a state court. For further discussion of this matter, see *infra* note 96.

5. When litigation in state court involves parties from different states or transactions or events with interstate characteristics, the forum may choose to apply the law of another state.

The first situation, involving the use of certification by federal courts, has spawned a limited amount of case law. The second situation has produced neither reported opinions nor scholarly comment. In fact, the almost total dearth of scholarly discussion of certification in the state-to-state choice-of-law context demonstrates best of all the anomaly of certification that has consigned the process, like Brazil, to a future of eternally unrealized potential. On the one hand, certification has substantial promise. On the other hand, certification may remain just that—a doctrine whose promise is still mostly unfulfilled.

A purpose of this Article is to redress the scholarly deficiency in discussion of certification in the state-to-state choice-of-law situation. Part II of this Article traces the origin of certification in the aftermath of *Erie Railroad Co. v. Tompkins*,⁶ which altered so much the federal courts' approach to nonfederal questions. Parts III and IV of this Article explore the reasons offered for the relatively infrequent use of certification in both *Erie* and conventional state-to-state choice-of-law cases, with special attention to both the problems and the unique, mostly unnoticed promise of the use of certification in state-to-state choice-of-law litigation. The Article concludes with a discussion of the results and meaning of one of the few empirical studies of the use of certification in the United States.⁷

II. BACKGROUND: THE LEGACY OF *ERIE*

Certification is a byproduct of the revolution that *Erie* introduced to federal civil procedure. *Erie* overruled *Swift v. Tyson*,⁸ in which the Supreme Court declared that federal courts sitting in diversity cases were free to fashion federal common law if no state statute governed the issue.⁹ In place of *Swift*, *Erie* directed that federal diversity cases would be controlled by the same substantive law that would apply if the case were being heard in state court.¹⁰

Determining when and how a court should apply such law is at the heart of the field called "Conflict of Laws."

Not infrequently a federal court sitting in diversity must first determine the conflict-of-laws rules of the state in which the court sits, and then determine the substantive law of another state, to which the conflict-of-laws rules have directed the court. This process was mandated in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). In either or both of those inquiries, the federal court may find it difficult to determine state law. These problems prompted Judge Henry Friendly to remark that "[o]ur principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought." *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960).

6. 304 U.S. 64 (1938).

7. See *infra* notes 140-77 and accompanying text (discussing empirical study).

8. 41 U.S. 1 (1842).

9. *Id.*

10. 304 U.S. at 78-80.

In one sense, the *Erie* revolution is complete: *Swift* is no more. But *Erie* also created a welter of problems, among them the question of how a federal court could determine with confidence the substantive law of a state when that law was itself uncertain. State trial courts faced with the same uncertainty have two distinct advantages over their federal brethren: first, an appeal to higher state tribunals might well correct trial judges' errors; and, second, the state trial judges themselves typically have more experience in state law than federal judges do. Those comparative federal disadvantages are only highlighted when federal decisions interpreting state law are rebutted by subsequent state court decisions.¹¹

A. *The Costly Benefits of Abstention*

To combat such problems inherent in federal courts' application of state law, the courts have fashioned a technique for ascertaining the applicable state law. Abstention is the practice whereby a federal court will "stay its hand until the courts of the State . . . have declared the law of the State . . . which is applicable to and controlling in the disposition of [the] appeals."¹² Once a federal court abstains from deciding a case on an issue of state law, the litigants must proceed to the state courts for disposition on that issue.¹³ Usually, litigants bring a declaratory judgment action in the appropriate state court and proceed to the final appellate court through the tiers of the state judiciary.¹⁴

The abstention procedure has long been criticized for several reasons, including the financial costs and delay that abstention may im-

11. See, e.g., *Food Fair Stores, Inc. v. Trusel*, 131 So. 2d 730, 733-34 (Fla. 1961) (stating that the federal holding in *Pogue v. Great Atl. & Pac. Tea Co.*, 242 F.2d 575 (5th Cir. 1957), was not a correct interpretation of state law); see also *Arrington v. New York Times Co.*, 55 N.Y.2d 433, 434 N.E.2d 1319 (1982) (refusing to follow the interpretation of New York tort law advanced by the Second Circuit in *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978)); *Truck Ins. Exch. v. Seelbach*, 161 Tex. 250, 339 S.W.2d 521 (1960) (refusing to follow *National Sur. Corp. v. Bellah*, 245 F.2d 936 (5th Cir. 1957)).

12. *United Serv. Life Ins. Co. v. Delaney*, 328 F.2d 483, 484-85 (5th Cir.) (en banc), cert. denied, 377 U.S. 935 (1964). The Supreme Court has endorsed the use of abstention in a variety of circumstances. See, e.g., *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) (abstention may be appropriate when continued federal proceedings would only parallel existing state litigation); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (abstention appropriate so that state court could decide state issues, potentially obviating need to decide federal constitutional issue).

13. Some jurists are uneasy about abstention in diversity cases because abstention directs litigants away from their court of choice, despite the litigant's proper invocation of jurisdiction. See *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 228 (1960) (Douglas, J., dissenting) (indicating that "[t]he situations where a federal court might await decision in a state court or even remand the parties to it should be the exception not the rule").

14. Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. Rev. 888, 890-91 n.22 (1971).

pose.¹⁵ Essentially, abstention requires parties who have already filed an action in federal court, and expended time and money to get a judgment there, to forego their investment and retire to a state trial court. Moreover, the state trial court will likely be no more than an interim stop on the way to a state appellate court's final disposition of the legal question that caused the federal court to abstain. Abstention's consequence for the swift, efficient application of justice is obvious. Thus did Justice William O. Douglas "desire to give renewed protest to our practice of making litigants travel a long, expensive road in order to obtain justice."¹⁶ Douglas might have added that abstention imposes duplicative litigation on federal and state trial courts and also imposes a tax on the public treasury.

At the same time, abstention carries with it a risk that federal courts will abdicate their responsibility to decide issues of law before them. As one federal judge has pointed out, the diversity statute¹⁷ created a duty as well as authority for federal courts to decide diversity cases.¹⁸ Moreover, the Supreme Court itself has held that the circumstances in which a federal court may abstain from deciding diversity cases are few and narrow: a federal court may abdicate its duty to decide questions of state law whenever necessary to render a judgment only when "some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred . . . would in exceptional cases warrant its non-exercise."¹⁹

A federal court's obligation to remain open to most jurisdictionally appropriate diversity suits thus coincides with considerations of economy and prompt dispensation of justice, and suggests that abstention is a practice that should rarely be employed.²⁰

B. *The Promise of Certification*

In many respects, certification is an outgrowth of the abstention era.²¹ The main argument in favor of abstention—that only state courts

15. The New York Law Revision Commission remarked that "[t]he expense and delay caused by proceeding through the lower state courts up to the highest state court to obtain a definitive resolution of state law can make abstention an onerous burden on litigants." Memorandum of the New York Law Revision Commission Relating to Certification of Questions of Law to the Court of Appeals, at 6 (1984).

16. *Clay*, 363 U.S. at 227 (Douglas, J., dissenting).

17. 28 U.S.C. § 1332 (1982).

18. See *Delaney*, 328 F.2d at 485 (Tuttle, C.J., dissenting).

19. *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943) (Stone, C.J.).

20. *Id.* (indicating that abstention should be employed only in "exceptional circumstances"); accord *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (federal courts' obligation to hear cases properly invoking federal jurisdiction should not be lightly cast aside).

21. *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 669 (W. Va. 1979) (certification largely a response to problems resulting from abstention, which itself was primarily a product of

and legislatures have authority to declare state law and policy—supports with equal force the certification process. But courts usually perceive certification as a better means of achieving the end for which abstention was fashioned. In *Bellotti v. Baird*,²² for example, the Supreme Court stated that, “[a]lthough we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis.”²³ As Justice Oliver Wendell Holmes noted in his dissenting opinion in *Chicago, B. & Q. Railroad v. Williams*,²⁴ certification is “a mode of disposing of cases in the least cumbersome and most expeditious way.”²⁵ Furthermore, state courts have been generally receptive to the certification process.²⁶

As a means of redressing many of the difficulties raised by abstention, certification has itself become a subject of controversy. Proponents of the procedure claim that certification respects federal-state autonomy, while relieving litigants of some of the burdens imposed under the abstention doctrine.²⁷ For every advocate, however, certification seems

Erie).

22. 428 U.S. 132 (1976).

23. *Id.* at 151; see also *Elkins v. Moreno*, 435 U.S. 647, 662-63 n.16 (1978) (no need to defer to federal district court's finding on state law when there exists an efficient means of certifying question to state high court).

24. 214 U.S. 492 (1909).

25. *Id.* at 495-96 (Holmes, J., dissenting). For additional remarks favorable to the certification process, see *Essex Universal Corp. v. Yates*, 305 F.2d 572, 580 (2d Cir. 1962) (Friendly, J., concurring), and *Standard Accident Insurance Co. v. New Amsterdam Casualty Co.*, 249 F.2d 847, 854 (7th Cir. 1957) (Finnegan, J., concurring).

26. See, e.g., *White v. Edgar*, 320 A.2d 668 (Me. 1974) (noting that certification spares litigants delay caused by abstention). In addition, as the Supreme Court of Maine has suggested, “certification is likely to provide the litigants with a decision of the highest court of the State, as a definitive determination of the state law issues, almost as speedily as they would have the federal Court's [non-definitive] decision of them (if the federal Court does not abstain).” *Id.* at 683. But see *Holden v. N.L. Indus., Inc.*, 629 P.2d 428, 430 (Utah 1981) (state certification statute unconstitutional because Utah constitution's grant of “appellate jurisdiction” does not include power to answer certified questions).

27. See *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 375-76 (Fla. 1978). See generally Comment, *Abstention and Certification in Diversity Suits: Perfection of Means and Confusion of Goals*, 73 YALE L.J. 850, 868 n.85 (1964) (noting that certification is obviously less costly to litigants than abstention because it skips the trial and intermediate appellate stages of state litigation and permits quicker resolution by a state's highest court); Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 350 (1963) (indicating that certification “not only achieves the objectives of abstention—to prevent federal invasion of the state law-making function and to avoid needless federal-state friction—but also represents a more perfect attempt at cooperative judicial federalism”). In *White v. Edgar* the Supreme Court of Maine noted that

[t]he extra costs to the litigants in money, energy, time and general inconvenience are likely to be far less in the certification process than in the prosecution of an independent state action to be carried through the trial and appellate levels of the state judicial system (the result produced by federal abstention).

also to evoke a critic. Though it may be an improvement on abstention, certification's promise remains mostly a promise for the future, not performance in the present.

III. ARGUMENTS AGAINST CERTIFICATION

Some of the objections raised to certification share a great deal in common with the concerns originally addressed to abstention.²⁸ Others, such as the apprehension that certification may require state supreme courts to render advisory opinions,²⁹ are unique to certification. Concerns unique to certification are better understood by first clarifying the typical procedure by which a court may certify a question.

The New York City Bar Association's Committee on Federal Courts recently reported³⁰ that many states permitting certification have followed the model of the Uniform Certification of Questions of Law Act (hereinafter U.L.A. or the Act), proposed by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. The Act provides that certification may be obtained either on motion of a party or by order of the court *sua sponte*.³¹ Once a question is certified, parties usually brief and argue the case before the state supreme court in a manner consistent with normal procedures for hearing appeals to that court.³² An important difference between appellate procedure and certification is that the state supreme court hearing a typical appeal from its own inferior courts usually has the full record of the case as it proceeded through those lower courts, while the court hearing a certified case often has before it only whatever record or statement of facts the certifying court deems necessary for the state supreme court to decide the certified question.³³

320 A.2d at 683. The Maine Supreme Court also observed that it was and would "continue [to be] a strong policy of this Court . . . to implement the certification process." *Id.* at 676; *cf.* *Tri-Continental Leasing Corp. v. Cicerchia*, 664 F. Supp. 635, 638 n.3 (D. Mass. 1987) (regretting absence of certification in New Jersey, "for it cannot be that the values and interests of the citizens of New Jersey are best served by having a federal court in Massachusetts decide these unsettled questions of New Jersey law in the first instance").

28. See *supra* notes 12-20 and accompanying text.

29. See *infra* notes 34-52 and accompanying text.

30. Committee on Federal Courts, *Analysis of State Laws Providing for Certification by Federal Courts of Determinative State Issues of Law*, 42 REC. A.B. CTRY N.Y. 101, 103 (1987) [hereinafter *Analysis of State Laws*].

31. UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT § 2, 12 U.L.A. 53 (1967) [hereinafter U.L.A.] provides that "this [Act][Rule] may be invoked by an order of any of the courts referred to in section 1 upon the court's own motion or upon the motion of any party to the cause." The United States Court of Appeals for the Seventh Circuit recently exercised its power to certify *sua sponte*. *Collins Co. v. Carbohine Co.*, 837 F.2d 299, 302-03 (7th Cir. 1988).

32. U.L.A. § 6, 12 U.L.A., *supra* note 31, at 54, provides that briefs filed and arguments heard are to be governed by local rules or statutes.

33. U.L.A. § 3, 12 U.L.A., *supra* note 31, at 53, reads: "A certification order shall set forth: (1)

Questions decided on certification also differ from cases heard on appeal (including cases in which federal courts sitting in diversity have abstained) in the way the case is handled after the highest state court issues a holding. If that court remands a typical case on appeal to a lower state court for proceedings consistent with the higher court's decision, the case remains in the state court system and is thus theoretically still within the control of the state high court. When a certified question is answered and returned to the certifying court, however, the state high court's influence over the case is effectively ended.

Thus, the certifying mechanism creates potentially anomalous situations that have themselves become occasion to question the appropriateness of certification processes.

A. *Certification Seeks Advisory Opinions to Abstract Questions of Law*

1. Advisory Opinions

Probably the most damaging argument against the use of certification is the claim that certified questions seek advisory opinions from the state courts. In responding to a certified question, one commentator has argued that the state court may be rendering an advisory opinion because the state court "is not necessarily resolving the dispute brought in the federal court, and arguably, the parties are not bound by the state court resolution of the issue(s) certified since the parties return to the federal court to litigate the cause there pending."³⁴

Some courts possess both the power and the willingness to issue advisory opinions, but many state constitutions and judicial enabling acts prohibit the rendering of such opinions.³⁵ Section 1 of the U.L.A. attempts to address the advisory opinion issue with the following lan-

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

Although this requirement suggests that the proceedings must be substantially advanced before certification is possible, most questions certified before trial courts reach a judgment will typically be certified on an incomplete record. Therefore, the record on a certified question will often be substantially less complete than the record of a case being heard on appeal. Because the answering court has no power to conduct additional factfinding, it can do little directly to expand the record. *But see* Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963) (answering court can remand certified question for more facts).

34. Comment, *Inter-Jurisdictional Certification and Full Faith and Credit in Federal Courts: To Certify or Not to Certify, Is that a Question?*, 45 WASH. L. REV. 167, 172 (1970).

35. *See, e.g., In re Arnold M.*, 298 Md. 515, 471 A.2d 313 (1984); *United Serv. Life Ins. Co. v. Delaney*, 396 S.W.2d 855 (Tex. 1965); *Thiry v. Atlantic Monthly Co.*, 74 Wash. 2d 679, 445 P.2d 1012 (1968) (Hale, J., dissenting) (arguing that answering certified questions is giving advisory opinions, which is unconstitutional). For a detailed discussion of state courts' outlook on advisory opinions, see Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969).

guage: "The [supreme court] may answer questions of law certified to it [if they involve issues] of law of this state which *may be determinative* of the cause then pending in the certifying court."³⁶ Seven states have modified the U.L.A.'s language to require that the issue of law must actually be dispositive of the case,³⁷ but even among those jurisdictions doubt exists that the language employed has obviated the question entirely.³⁸

When courts acknowledge that a response to a certified question resembles an advisory opinion, they have taken different approaches to avoid crossing the advisory opinion line. For example, Florida has avoided the advisory opinion argument against certification by declaring advisory opinions to be permissible under the state constitution.³⁹ Similarly, although the Supreme Court of Washington did not believe certified answers to be violative of the state prohibition against advisory opinions, the court followed Florida's lead and declared advisory opinions to be valid pronouncements of state law.⁴⁰

The United States Court of Appeals for the Fifth Circuit was the original federal advocate of the certification procedure; thus its developing view of the advisory opinion argument may shed some light on the certification process from the federal point of view. In *Sun Insurance*

36. U.L.A. § 1, 12 U.L.A., *supra* note 31, at 52 (emphasis added).

37. See *Vestal*, *supra* note 1, at 632 nn.12-29 (citing Alabama, Florida, Georgia, Indiana, Louisiana, Mississippi, and New Mexico statutes or rules); see also IDAHO APP. R. 12.1 (providing that "[t]he question of law certified is a controlling question of law in the pending action in the U.S. court as to which there is no controlling precedent"); MONT. R. APP. P. 44(a) (employing the language "controlling question of Montana law as to which there is substantial ground for difference of opinion"); see also *Masters Mach. Co. v. Brookfield Athletic Shoe Co.*, 663 F. Supp. 439, 441 (D. Me. 1987) (denying motion to certify because resolution of the issue would not be "determinative of the cause" and, in addition, a state precedent already existed); cf. *Trust for Quinn v. United States*, 823 F.2d 851 (5th Cir. 1987) (certifying to Louisiana Supreme Court that answer to a certified question will be determinative of the case).

38. Notwithstanding the statutory requirement that the answer be determinative of the case, the Florida Supreme Court has answered certified questions when further proceedings apparently would be necessary in the federal court. See, e.g., *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960). But cf. *Greene v. Massey*, 384 So. 2d 24 (Fla. 1980) (Florida Supreme Court refused to answer certified question from United States Court of Appeals because response would not be determinative of cause).

39. *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 739-43 (Fla. 1961).

40. *In re Elliot*, 74 Wash. 2d 600, 446 P.2d 347 (1968). The court also reasoned that the need to answer certified questions of significant public importance justified rendering an advisory opinion. *Id.* at 616-17, 446 P.2d at 358. The Kansas Supreme Court has held that a certified question arising from a real case or controversy does not violate prohibitions on advisory opinions. *Spencer v. Aetna Life & Casualty Ins. Co.*, 227 Kan. 914, 611 P.2d 149 (1980); see also *Delaney*, 328 F.2d at 489 (noting that certified question was vital and important to contesting litigants).

Commentators also are inclined to call for state courts to answer questions certified to them by a federal court, irrespective of the certified answer's potentially advisory nature. See, e.g., Roth, *supra* note 1, at 21.

*Office, Ltd. v. Clay*⁴¹ the Fifth Circuit voiced skepticism about the authoritative nature of certified answers. The court stated that such answers might be "merely advisory and entitled, like dicta, to be given persuasive but not binding effect."⁴² The court's feeling toward the weight given to certified answers, however, changed within five years of *Clay*. In *Hopkins v. Lockheed Aircraft Corp.*⁴³ the Fifth Circuit proclaimed certified answers to be clear, positive, and final because certified answers state "what the law actually is on the precise point presented."⁴⁴

If a prohibition against advisory opinions applies to certified questions, the prohibition binds the state court answering the question, not the certifying court, which undoubtedly has a real case or controversy before it. Some state courts, therefore, have escaped the advisory opinion prohibition by finding a real case or controversy in litigation before the certifying court. Thus, in *Spencer v. Aetna Life & Casualty Insurance Co.*⁴⁵ the Kansas Supreme Court examined the statutory language of the Kansas certification procedure in light of the litigation before the certifying court. The *Spencer* court concluded that the certified question "arises from an actual case and controversy and although presented as a question of law, it neither violates the case or controversy requirement nor the separation of powers doctrine on advisory opinions."⁴⁶ Similarly, in *Wolner v. Mahaska Industries, Inc.*⁴⁷ the

41. 319 F.2d 505 (5th Cir. 1963).

42. *Id.* at 509.

43. 394 F.2d 656 (5th Cir. 1968).

44. *Id.* at 657. The concurring opinion in *Hopkins* rejected the advisory opinion argument even more strongly. The concurring judge wrote:

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. . . . The action of the [state] court was not an adjudication, since only the Federal courts could enter and enforce judgment. Hence, the action by the [state] 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 [the state] by judges well qualified to give an opinion.

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

45. 227 Kan. 914, 611 P.2d 149 (1980).

46. *Id.* at 915, 611 P.2d at 151. For a subsequent Kansas case ruling on similar grounds, see *Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. 988, 666 P.2d 711 (1983). In *Kline* the Kansas Supreme Court decided issues of Kansas law certified by the federal district court in Kansas. The state issue involved the possible liability of a corporation for punitive damages awarded for an employee's tortious action. In holding that Kansas law did not make a corporation liable for such damages, the Kansas Supreme Court specifically noted that the case at bar "arises from an actual controversy between the parties." *Id.* at 988, 666 P.2d at 712.

47. 325 N.W.2d 39 (Minn. 1983).

Minnesota Supreme Court specifically rejected the argument that answers to certified questions are advisory opinions. Agreeing with the Fifth Circuit's rationale in *Hopkins*,⁴⁸ the Minnesota court held that certified answers represent "a pronouncement of law with the same effect as our pronouncements of law in cases arising in the courts of this state."⁴⁹

Occasionally, the language of a state's certification statute requiring that questions certified be "determinative" of the issue, if not the case, has provided state courts with an effective rebuttal to the advisory opinion argument.⁵⁰ In particular, the Maine Supreme Court has refused to answer certified questions unless the case is in such a posture that the state court's decision on the applicable Maine law will—in truth and in fact—be determinative of the cause of action.⁵¹ The Louisiana Supreme Court has taken yet another tack: on the one hand, the court has acknowledged that certified questions seek an advisory opinion; on the other hand, however, the court has recognized that providing answers to such questions is a matter of courtesy to, and respect for, the United States Supreme Court.⁵²

Most state high courts thus have sought and found one way or another around the advisory opinion objection to certification. Some of the answers, such as Louisiana's, speak more to practical considerations than to rigorous judicial analysis. In fact, the sheer variety of answers to the advisory opinion issue suggests that no single, entirely satisfactory answer to that objection exists. The clear preponderance of opinion that answers to the objection can be found, however, suggests that concerns about rendering advisory opinions will not be a significant barrier to certification in the future.

2. Abstractness

Some courts and opponents of certification argue that certified questions are too abstract for judicial resolution.⁵³ Many of the same

48. 394 F.2d 656, 657 (5th Cir. 1968).

49. *Wolner*, 325 N.W.2d at 41.

50. *See, e.g.*, *White v. Edgar*, 320 A.2d 668 (Me. 1974); *In re Richards*, 223 A.2d 827 (Me. 1966); *In re Certified Question*, 549 P.2d 1310 (Wyo. 1976) (Wyoming court would not answer certified questions unless the federal court followed the state decision precisely); *see also supra* notes 43-48 and accompanying text.

51. *White*, 320 A.2d at 677 (if answering question of state law in one of several possible ways will produce resolution of federal litigation, the question of state law is sufficiently determinative of the case so as to satisfy state certification statute).

52. *Leiter Minerals, Inc. v. California Co.*, 241 La. 915, 132 So. 2d 845 (1961).

53. *Id.* at 927, 132 So. 2d at 850 (noting abstractness of the issue, but answering the question out of respect for the certifying court). *But see* *United Serv. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 862-63 (Tex. 1965) (rejecting approach of *Leiter* and holding Texas Supreme Court unable to render opinion, even when request for it came in the form of a declaratory judgment action).

arguments noted in the discussion concerning advisory opinions also apply to discussions of the abstract nature of certified questions. But there is one significant difference: if the advisory opinion objection has vitality, the only responses would be either to abandon certification altogether or to modify the applicable laws or constitutional provisions that prohibit advisory opinions. The first response may well be an unacceptable alternative, and the second might be an arduous task that would run into opposition grounded in principled concerns about advisory opinions. By contrast, if the problem is one of abstractness in the manner in which a certified question is framed, it is likely that rather obvious corrections in the way a question is certified may adequately deal with the problem.

Proponents of certification have argued that certified questions are not abstract when they are accompanied by a statement of facts,⁵⁴ especially when the factual statement is drafted by both parties involved.⁵⁵ As noted by one commentator, a state court's determination of the applicable law of the state "should produce no more abstract questions than cases appealed from lower state courts, and no one would maintain that ordinary appeals from inferior courts present abstract questions of law."⁵⁶

State courts, however, sometimes express concern about the abstractness of the questions certified. In *Sydenstricker v. Unipunch Products, Inc.*,⁵⁷ for example, the West Virginia Supreme Court of Appeals answered the questions certified, but noted that the abstract nature of the answer was due to the conclusory nature of the facts presented.⁵⁸

The United States Court of Appeals for the Fifth Circuit estab-

54. Lillich & Mundy, *supra* note 14, at 901-02.

55. 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, 431 (1962); see also Lillich & Mundy, *supra* note 14, at 901-02 (suggesting that "[i]t seems apparent, in light of the experience of states using the procedure, that abstractness presents at most a drafting problem").

56. Lillich & Mundy, *supra* note 14, at 902.

57. 169 W. Va. 440, 288 S.E.2d 511 (1982).

58. *Id.* at 444-45, 288 S.E.2d at 514; cf. *Trail Builders Supply Co. v. Reagan*, 235 So. 2d 482, 485 (Fla. 1970) (Florida Supreme Court added a fact from record not included in the certificate of the appellate judge).

The U.L.A. makes a statement of facts mandatory: "A certification order shall set forth: (1) the questions of law to be answered; and (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose." U.L.A. § 3, 12 U.L.A., *supra* note 31, at 53. Professor Allan Vestal stated that this language is to ensure that the certifying court gives a complete background of the case as it developed to the answering court, in order to reduce the problem of abstractness. A. Vestal, *Transcript of Proceedings of Uniform State Laws, Uniform Certification of Questions of Law Act 32* (Aug. 1, 1967) (available on microfiche, on file with the Authors).

lished precedent for dealing with this criticism of certification by transmitting the entire record of proceedings in the federal system to the state court.⁵⁹ A practice of transmitting necessary documents and material to the state court ensures that the issues are not abstract, or at least no more abstract than issues in typical appellate cases. Furthermore, the Fifth Circuit's precedent parallels the technical requirements enforced by the United States Supreme Court in an analogous situation. To decide an intrajurisdictional certification question,⁶⁰ the Supreme Court must find that there is an actual legal issue that is isolated in a particularized factual setting.⁶¹

In general, corrections in the way in which a question is certified may adequately deal with the claim that certified questions are too abstract for judicial resolution. Abstractness itself, therefore, appears to pose no insuperable barrier to the effective use of certification procedures.

B. Difficulties in Formulating Certified Questions

1. The Problem

Abstractness is one aspect of a more generalized problem with certification: the inability of a federal court to fashion questions that will give the answering court maximum help in reaching an informed decision. Addressing one certified matter, Justice Roy Vance of the Kentucky Supreme Court dryly remarked that

[i]t is almost always helpful in deciding important legal issues to have the issue clearly stated, to have a record of evidence pertaining to the issue, and to have the briefs and arguments of counsel presenting all sides of the question. We do not have that situation here.⁶²

59. See *Barnes v. Atlantic & Pac. Life Ins. Co. of Am.*, 514 F.2d 704, 709 (5th Cir. 1975) (noting that court sent entire record, court's opinion, briefs of both parties, and counsel's memorandum on certification).

60. For a brief discussion of certification within a jurisdiction, see *supra* note 2.

61. Note, *supra* note 27, at 352-54.

62. *In re Beverly Hills Fire Litig.*, 672 S.W.2d 922, 927 (Ky. 1984) (Vance, J., dissenting). Inadequate framing of the questions and the occasional absence of a proper factual background characterize many courts' complaints about certified issues. In *Flannery v. United States*, 297 S.E.2d 433 (W. Va. 1982), *cert. denied*, 467 U.S. 1226 (1983), the West Virginia Supreme Court of Appeals observed that the certifying court presented only one question, but concluded that the question encompassed two distinct issues requiring separate answers. *Id.* at 436. In *In re Question Concerning State Judicial Review*, 199 Colo. 463, 610 P.2d 1340 (1980), the court complained that, "[d]ue to the limited record which has been supplied to this court regarding the four cases which gave rise to this question of state judicial review, it is difficult for this court to give a definitive answer to the question." *Id.* at 465, 610 P.2d at 1341; see also *Thiry v. Atlantic Monthly Co.*, 74 Wash. 2d 679, 689, 445 P.2d 1012, 1017 (1968) (Hale, J., dissenting) (issue should not have been decided by state court because issues were not clearly defined in memorandum); *cf.* *Payton v. Abbott Laboratories*, 386 Mass. 545, 437 N.E.2d 171 (1982) (noting that several issues certified to the court were factual).

In all cases involving certification, the state decision relies heavily on the questions certified to the state court by the federal court. The language and scope of the questions certified determine, to a large extent, the interpretation and application of the state law or policy in question. Acknowledging this fact, the federal court's duty to assist in the formulation of the questions of law cannot be doubted. As Justice Felix Frankfurter noted, "[p]utting the wrong questions is not likely to beget right answers even in law."⁶³

When courts have no standard procedure to classify the questions of law or the specific issues involved, the very formulation of the questions may lead to confusion and inconsistency in judgments.⁶⁴ Although poorly stated legal issues create most of the confusion, facts surrounding particular cases may also lead to inconsistent judgments. In *Mason v. Gerin Corp.*,⁶⁵ for example, the Kansas Supreme Court noted that the statement of facts set out in the federal court's certification memorandum and order provided the court with the relevant facts at issue. The court did state, however, that "it is not clear from the record before us when the plaintiff's original action was initiated."⁶⁶

As is so often the case with problems relating to certification matters,⁶⁷ the United States Court of Appeals for the Fifth Circuit has developed procedures designed to minimize the problem of inadequate formulation of questions. In most cases, the Fifth Circuit requests that the parties formulate the questions based on an agreed statement of facts.⁶⁸ If the parties cannot agree on the statement of facts or the language of the questions to be posed to the state court, the Fifth Circuit formulates them independently of the parties.⁶⁹ In either situation, the federal court should review the statement of facts to ensure its adequacy and thoroughness.

Dissenting in *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960), Justice Hugo Black struck an empathetic note: "Perhaps state courts take no more pleasure than do federal courts in deciding cases piecemeal on certificates. State courts probably prefer to determine their questions of law with complete records of cases in which they can enter final judgments before them." *Id.* at 227 (Black, J., dissenting).

63. *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 170 (1946).

64. Stein, *Choice of Law and the Doctrine of Renvoi*, 17 MCGILL L.J. 581, 582 (1971).

65. 231 Kan. 718, 647 P.2d 1340 (1982).

66. *Id.* at 719, 647 P.2d at 1341.

67. See *supra* notes 41-44 & 59 and accompanying text; *infra* notes 68-69 & 71-72 and accompanying text.

68. See, e.g., *Ward v. State Farm Mut. Auto. Ins. Co.*, 539 F.2d 1044, 1050 n.3 (5th Cir. 1976).

69. See, e.g., *Cesary v. Second Nat'l Bank of N. Miami*, 567 F.2d 283, 284 (5th Cir. 1978) (stating that the court drafted the statement of facts and the parties formulated the questions of law); *Nardone v. Reynolds*, 508 F.2d 660, 664 n.7 (5th Cir. 1975) (parties required to submit joint statement of facts).

2. Allowing Answering Courts to Reformulate Certified Questions

Regardless of the clarity of the record, facts, and issues certified, the answering court must have the power to reformulate the questions posed. Although the court should not answer questions unrelated to the case at hand, the answering court should have the same freedom to analyze the factual circumstances that it would have if the entire case were before the court. Indeed, the ability of the answering court to reshape or add to the issues is necessary to further the goals of certification. The answering court may be best situated to frame the question for precedential value and to control the development of its laws. If state courts take offense at a poorly framed question, they may miss a genuine opportunity to settle state law on a particular point.⁷⁰

The Fifth Circuit has specifically approved an answering court's recasting of issues. In *Martinez v. Rodriguez*⁷¹ the court stated that the particular form of the certified question

is not to restrict the [State] Supreme Court's consideration of the problems involved and the issues as the [State] Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the [State] Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given⁷²

Even without invitation, state courts have often decided to adopt the course urged by the Fifth Circuit.⁷³ The requirement in most state certification statutes that parties submit briefs and present oral arguments reduces the possibility of erroneously reshaping an issue.⁷⁴ Briefings and arguments that take place are generally limited to the

70. Nevertheless, some courts have refused to recharacterize the issues. *See, e.g.,* *Krashes v. White*, 275 Md. 549, 557, 341 A.2d 798, 802 (1975) (refusing to reformulate the questions certified absent district court approval). At least two other courts have also been reluctant to recast questions. *In re Certified Question from the U.S. District Court, E. D. of Mich., S. Div.*, 420 Mich. 51, 359 N.W.2d 513 (1984); *Jones v. Harris*, 460 So. 2d 120 (Miss. 1984). The more common practice, however, is for the certifying court to invite a recharacterization of the questions certified or for the answering court to assume authority to alter the issues presented. *See infra* notes 71-72 and accompanying text. In some measure such cooperative practices may obviate initial weaknesses in framing issues and in failing to provide adequate factual backgrounds. *See supra* note 62 and accompanying text.

71. 394 F.2d 156 (5th Cir. 1968).

72. *Id.* at 159 n.6; *see St. Paul Fire & Marine Ins. Co. v. Caguas Fed. Sav. & Loan*, 825 F.2d 536, 537 (1st Cir. 1986) (inviting Supreme Court of Puerto Rico to comment on any other questions of relevant state law in addition to questions certified); *see also Barnes v. Atlantic & Pac. Life Ins. Co. of Am.*, 514 F.2d 704, 709 n.10 (5th Cir. 1975).

73. *See, e.g., Walters v. Inexco Oil Co.*, 440 So. 2d 268 (Miss. 1983); *Lenhardt v. Ford Motor Co.*, 102 Wash. 2d 208, 683 P.2d 1097 (1984); *see also Barnes v. Atlantic & Pac. Life Ins. Co. of Am.*, 530 F.2d 98 (5th Cir. 1976).

74. Section 6 of the U.L.A. provides: "Proceedings in the [Supreme Court] shall be those provided in [local rules or statutes governing briefs and arguments]." U.L.A. § 6, 12 U.L.A., *supra* note 31, at 54.

questions of law presented in the certificate.⁷⁵

C. Certification Places Too Heavy a Burden on Federal Litigants

The United States Supreme Court has recognized that, compared to abstention, certification provides substantial efficiencies in the resolution of difficult questions of state law.⁷⁶ At the same time, however, a procedure in which a federal trial court or appellate court⁷⁷ stays its own process, certifies a question to a state high court, and then upon receipt of an answer proceeds with the trial or appeal in the federal system cannot be said to be devoid of delay. Thus, the Supreme Court also has noted that certification can impose burdens on litigants, and considerations of delay and expense would inevitably limit the utility of the procedure.⁷⁸

State courts also have drawn upon this negative feature of certifica-

75. See, e.g., *Toll v. Moreno*, 284 Md. 425, 437, 397 A.2d 1009, 1015 (1979) (excluding defendant's arguments that fell outside scope of certificate). *But cf. In re Chicago, M., St. P. & Pac. R.R.*, 334 N.W.2d 290, 294 (Iowa 1983) (court responded to matters raised outside of certificate).

76. In *Lehman Bros. v. Schein*, 416 U.S. 386 (1974), Justice Douglas wrote: "We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Id.* at 390-91.

77. Certification statutes typically permit federal appellate courts, as well as district courts, to certify questions. *But see Allstate Ins. Co. v. Shelby*, 672 F. Supp. 956, 958 n.3 (N.D. Tex. 1987) (Texas certification statute allows certification only by appellate court).

U.L.A. § 1, which serves as the model for most certification statutes, enumerated the Supreme Court of the United States, a Court of Appeals of the United States, and a United States District Court, as among those courts that may certify questions. U.L.A. § 1, 12 U.L.A., *supra* note 31, at 52. In fact, when the issue of which courts might certify was being considered, the consensus was stronger in favor of vesting such power in federal appellate courts rather than federal trial courts. See A. Vestal, *supra* note 58, at 8-9, 18-19. The arguments for limiting certification authority to appellate courts were, first, that only truly difficult questions of state law would be certified, and, second, that the certification process would somehow be speeded up. Note, *supra* note 27, at 361. As one commentator has remarked:

[L]imiting certification to the courts of appeals removes the risk—inherent in abstention and involved to a lesser degree should district courts be permitted to certify—that prospective litigants with state claims might be discouraged from invoking federal question or diversity jurisdiction because they believed that they could obtain speedier relief in state court.

Id. Any requirement, however, that federal litigants appeal a district court decision before obtaining certification of a close state question might only encourage appeals in the federal system that vesting certification power in a federal district court could possibly avoid.

78. *Bellotti v. Baird*, 428 U.S. 132 (1976). Last year the Court again raised its sensitivity to this feature of certification. See *City of Houston v. Hill*, 107 S. Ct. 2502, 2514 (1987) (noting that certification is inappropriate where the question of state law is unclear); *accord Rizzuto v. Joy Mfg. Co.*, 834 F.2d 7, 9 (1st Cir. 1987); *Grant v. Meyer*, 828 F.2d 1446, 1448 n.5 (10th Cir. 1987) (en banc). A federal district court recently cited considerations of delay and expense for its refusal to certify a question unresolved in Virginia but settled by the great weight of authority in other jurisdictions. *West Am. Ins. Co. v. Bank of Isle of Wright*, 673 F. Supp. 760 (E.D. Va. 1987). *But see Lehman Bros.*, 416 U.S. at 391 (certification "does, of course, in the long run save time, energy, and resources").

tion. Two frequently cited state decisions addressing certification have summed up quite effectively the arguments surrounding the delay and expense of certification. In *White v. Edgar*⁷⁹ the Maine Supreme Court took a fairly benign view of the delay issue. The *White* court viewed certification as beneficial because it allows a litigant to have both his federal and state claims in essentially a single federal suit. The court concluded:

It is likely that the litigant will look upon the federal Court's certification, to the State Court of last resort . . . as, essentially, an aspect of the underlying federal Court proceedings; and, to the extent that two courts become involved in fact, the litigant most probably will consider the costs of such duality (likely in any event to be minimal) as, on balance, a price worth paying for the enormous benefit of a reasonably speedy definitive determination of the state law questions.⁸⁰

Other courts have expressed greater concern about the delays caused by certification. *White* contrasts sharply with the dissenting opinion in a Washington case. In *In re Elliott*⁸¹ the dissenting judge strongly objected to the delay involved in certification, which he found inherent in a

procedure whereby at one stage the case comes to a halt in the federal system, moves over into the state system to await docketing, briefing, hearing, writing, filing of the opinion and petition for rehearing and then moves back again into the system of origin to take its place on the judicial conveyor for resumption of proceedings in the federal system.⁸²

Even the Fifth Circuit Court of Appeals, an originator and leader of the certification process, acknowledged that, in determining appropriate cases for certification, courts must "take into account [the] practical limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court."⁸³

Granting that certification has only reduced, not eliminated, problems of expense and delay characteristic of abstention, the question remains what courts should do to minimize the delay associated with certification. The answer to the question depends heavily on one's perception of the source of the problem. One commentator, for example, has suggested that federal courts take too long to decide if the case should be certified, quite apart from the work that must be done once a decision to certify is reached.⁸⁴ Another commentator has responded to

79. 320 A.2d 668 (Me. 1974).

80. *Id.* at 683.

81. 74 Wash. 2d 600, 446 P.2d 347 (1968).

82. *Id.* at 640-41, 446 P.2d at 371 (Hale, J., dissenting).

83. *Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 275 (5th Cir.) (footnote omitted), *cert. denied sub nom. Standard Oil Co. v. Florida*, 429 U.S. 829 (1976).

84. *Mattis, supra* note 35, at 726.

this suggestion with a proposal that federal courts employ an attorney to review and evaluate each state issue, which presumably would expedite the federal decision on certification.⁸⁵ Once the attorney determined whether the issue was controlling and established the relative certainty of state law on point, the federal court could decide whether to certify the state issues in the case.⁸⁶

The state courts also may be a source of delay and expense, however, and proposals have been forthcoming to ease the process of certification in the answering courts. The Maryland Court of Appeals, for example, has tried to attack the "expense" half of the problem by holding one litigant responsible for the costs of the certification procedure.⁸⁷ That practice does little to reduce delay, however, and indeed only apportion, rather than reduces, expense; thus, holding one litigant responsible for certification costs has not been a substantial improvement in certification practices in state courts.⁸⁸

Speeding the process in the state courts seems more likely to encourage the use of certification, but other proposals directly addressing that point have not achieved general acceptance. Answering courts generally have been reluctant to accord certified questions preferential treatment on the docket.⁸⁹ Another idea is to empower the chief justice of each state high court to appoint a special certification court charged with reviewing and, when appropriate, answering questions of state law certified by federal courts.⁹⁰ This proposal, however, loses its initial appeal on closer inspection. A special certification court's decisions probably would not be afforded the same precedential power as decisions of a state high court. Thus, what looks initially to be a means of speeding up the certification process might in fact add to the problems now attendant upon certification.

Perhaps the best way to approach the significant problems of delay and corresponding expense in certification is to recognize that they are

85. Roth, *supra* note 1, at 11.

86. *Id.*

87. See, e.g., *Toll v. Moreno*, 284 Md. 425, 444, 397 A.2d 1009, 1019 (1979) (ordering one party in action to pay costs of certification); *Walko Corp. v. Burger Chef Sys., Inc.*, 281 Md. 207, 216, 378 A.2d 1100, 1104 (1977) (same).

88. Moreover, the Maryland court's approach seems inconsistent with the general practice in American courts of requiring each litigant to pay his or her own way in the courts. Particularly when a federal court already has certified a matter as a serious question, it seems inappropriate to levy costs on one side only. To do so would suggest that the losing side has not only lost on the question at issue but has also advocated a frivolous legal position—a suggestion at odds with the original decision to certify.

89. See, e.g., *Thiry v. Atlantic Monthly Co.*, 74 Wash. 2d 679, 684, 445 P.2d 1012, 1014 (1968) (Hale, J., dissenting) (arguing that certified questions should not be afforded preferential treatment on state dockets).

90. Roth, *supra* note 1, at 11.

inherent in the process—less severe, to be sure, than the delay and expense that parties encounter in abstention,⁹¹ but a perhaps inevitable cost of using two distinct judicial systems to achieve good law and just results. That cost may well suggest that certification should be employed “sparingly and selectively.”⁹² It also may be, however, that, having adopted certification, which thereby reduces the amount of delay and expense attendant upon abstention, courts and commentators should recognize that good adjudication in difficult cases is not likely to be quick or cheap. This recognition does not mean that efforts to reduce costs and delay should end. It does indicate, however, that the long-range benefits of certification—consistency in the law and finality of state pronouncements that makes it unnecessary for future parties to litigate the same issue—will often outweigh the inconveniences imposed on the litigants involved in a particular case.⁹³

It is probably fair to conclude, therefore, that certification has achieved a sort of guarded approval as a means of resolving difficult questions that arise from the relationship between federal and state courts. The approval, though, is qualified by an assumption that the process has imposed its own costs on both litigants and courts.

This guarded approval of the certification process rests primarily on perceptions of the theoretical merits and disadvantages of certification, buttressed for the most part only by judges' and commentators' episodic experiences with particular certification opinions. Moreover, these perceptions leave two questions still unaddressed. The first is whether certification has significant unused potential in resolving questions that arise between the courts of different states. The second is whether an empirical study of certification can validate either the contending praise or criticism of the process. The following sections of this Article address those questions in order.

91. Lillich & Mundy, *supra* note 14, at 909 (suggesting that, “[e]ven if the certified question were placed at the end of the docket, the parties still would have saved the time and expense of proceeding through the lower state courts”).

92. *Analysis of State Laws*, *supra* note 30, at 102.

93. One judge has remarked:

[A]bout the only virtue an immediate decision has is that it is done. It is done now and delay is avoided. Delay, to be sure, is a thing we all strive to avoid and overcome. But what else is served? Is there any virtue in decision now simply for the sake of decision if—and that if is a very big one—the public importance of the question is certain soon to drive other litigants to the [state] courts where the outcome may well be quite different?

Brown, *Certification—Federalism in Action*, 7 CUMB. L. REV. 455, 465 (1977) (quoting *W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 266-67 (10th Cir. 1967) (Brown, C.J., dissenting in part and concurring in part), *rev'd*, 391 U.S. 593 (1968)).

IV. CERTIFICATION BETWEEN STATE COURTS

A. *The Unused Tool*

As is suggested by this Article's exclusive reliance on cases in which federal courts certified questions, certification is not employed by state courts obligated to apply the law of another state.⁹⁴ The absence of opinions addressing certification from one state to another is comprehensible, because most legislatures that have enacted certification statutes have excised the language of the U.L.A. that permits courts of other states to certify questions.⁹⁵ Even in the jurisdictions that will hear certified questions from another state, however, there are no published opinions indicating that any use has been made of the opportunity.

Explanations for the reluctance of state courts to use certification when it is available are necessarily matters of speculation, for a corollary of non-use has been an absence of justification for non-use. Even so, some possible explanations exist. First is the possibility that many state courts faced with the need to apply the law of another state, and uncertain of what that law is, are simply unaware that certification statutes might profitably be employed. Given the relatively small number of states that offer the process to sister-state courts, state courts' ignorance about certification is understandable.

A second possibility is that state courts feel less need to certify questions because they perceive themselves as having greater expertise in another state's law than a federal court is likely to have. State courts, after all, routinely deal in matters of state law, and so are likely to know more about state law generally than would federal courts, in which federal questions predominate on the docket.⁹⁶ Such familiarity

94. A search of state opinions reported from 1978 to 1987 disclosed no cases in which a question of law had been certified from a court of one state to a court of another state.

95. Twelve jurisdictions allow their courts both to answer certified questions from courts of another state and to certify questions to courts of another state. *See* IOWA R. APP. P. 451-61; IOWA CODE §§ 684A.1 to 684A.11 (1980); KAN. STAT. ANN. §§ 60-3201 to -3212 (1983); KY. R. CIV. P. 76.37; MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601 to -609 (1984); MASS. SUP. JUD. CT. R. 1:03; MINN. STAT. ANN. § 480.061 (West Supp. 1988); N.D. R. APP. P. 47; OKLA. STAT. ANN. tit. 20, §§ 1601 to 1612 (West Supp. 1988); OR. REV. STAT. ANN. §§ 28.200 to .255 (Butterworth Supp. 1987); W. VA. CODE §§ 51-1A-11 to -12 (1981); WIS. STAT. ANN. §§ 821.01 to .12 (West Supp. 1987); P.R. SUP. CT. R. 24-27; P.R. LAWS ANN. tit. 4 app. I-A (1978).

Several other jurisdictions allow their high courts to answer questions from courts of another state, but apparently do not allow their courts to certify questions to courts of another state. *See, e.g.,* ALA. R. APP. P. 18 (employing the language "a court of the United States," which would presumably include courts of other states); MICH. GEN. CT. R. 797.2 (employing the language "a federal court or state appellate court").

96. Surveys have regularly indicated that somewhat less than one-quarter of the cases on a typical federal docket are based on diversity jurisdiction. *See, e.g.,* 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3601 n.55 (1984) (22.3% of cases filed in fed-

might increase a state court's confidence in its ability to divine the law of another state without resorting to certification.

The second possibility is plausible, but probably not correct. For a state court to feel as if it were an expert in another state's law, the court would have to traverse a phenomenon of state-to-state choice-of-law problems whose existence has long been noted by choice-of-law commentators. That phenomenon is "forum bias"—the predisposition of courts, when faced with choice-of-law problems, toward the law of their own state. As this Article argues,⁹⁷ the existence of forum bias strongly, and perhaps necessarily, suggests that courts apply their own law in part because they feel unease when grappling with unfamiliar law from another state. A state court's unease in the face of applying foreign law is necessarily inconsistent with an assertion that state courts ignore certification because of their confident sense of expertise in state law generally.

A third possibility is that some state courts are uncertain whether the power to certify a question to the court of another state exists at all—even when the answering state has a certification statute. In the federal system, the Supreme Court has indicated that, when a certification procedure has been provided by a state, federal courts are free to use certification at their discretion.⁹⁸ By contrast, most state courts are circumscribed by state constitutions, and they do not have the inherent powers that the Supreme Court has identified in the federal courts.

Finally, state-to-state certification may become problematic when a jurisdiction employs the *renvoi* doctrine.⁹⁹ There is at least a three-tiered inquiry to determine whether certification is appropriate in a state-to-state situation. First, the choice-of-law rule of the certifying state, as applied, must refer that state court to the law of another

eral district court during 1983 were diversity cases). The jurisdictional basis of a case, however, may not be an accurate indicator of the percentage of cases in which federal judges must address questions of state law. In matters involving a federal district court's pendent jurisdiction, for example, the federal court decides state claims, notwithstanding an absence of diversity jurisdiction. Moreover, many federal questions either incorporate relevant portions of state law or require reference to state law before the court may address the federal question. An example of a federal question that requires reference to state law might be a suit over a federal income tax question that requires a determination of whether the taxpayer was legally married. Although federal judges probably have more experience in state law than their diversity dockets standing alone would indicate, state court judges remain more experienced in issues of state law.

97. See *infra* text accompanying notes 134-39 (discussing unfamiliarity with foreign law as a motive for forum bias).

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

99. *Renvoi* deals with whether, when one state is referred by its choice-of-law rule to the law of another state, the referral is to the internal law of the other state only or to the whole law of the state, including its choice-of-law rule. For an additional discussion of *renvoi*, see Comment, *Renvoi and the Modern Approaches to Choice-of-Law*, 30 AM. U.L. REV. 1049 (1981).

state.¹⁰⁰ Second, certification is proper only if the other state court's answer may be determinative of the cause and if the other state's law is unclear.¹⁰¹ Third, the certifying state's choice-of-law rule, as applied, may refer the certifying court to a state employing the *renvoi* doctrine, which means potentially that the certifying court may find that the foreign state's law refers the question back to the law of the state of the certifying court or to the law of yet another state. *Renvoi* is a layer of analysis for which there is no parallel in a typical *Erie* situation. Thus, state courts, faced with a risk of the application of the *renvoi* doctrine, might be justified in ignoring certification altogether, and choosing to apply forum law.¹⁰²

As a practical matter, use of the *renvoi* doctrine is infrequent in American courts, so the last latent obstacle to certification may be more imagined than real. In a potential *renvoi* situation, however, the foreseeable mire might well make even the most conscientious jurist diffident about initiating the certification process.

The reasons why state courts have rarely, if ever, certified questions to courts in other states will probably remain a matter of speculation. The phenomenon of non-certification, however, need not continue. As this Article suggests, certification can make a major contribution to resolution of one of the knottiest, most durable problems afflicting state-to-state choice-of-law analysis: the phenomenon of forum bias.

B. Recognition That Forum Bias Is a Problem

Characterizing a tendency of courts to favor their own state's law as "bias" inevitably suggests that such a predisposition is undesirable. Although this Article maintains that forum bias of a certain kind is indeed a weakness in choice-of-law analysis, such a view should be a conclusion, not a presumption. Therefore, one must first establish why only some kinds of forum bias should be perceived as undesirable.¹⁰³

100. As a general rule, state choice-of-law rules afford state courts far more flexibility in choosing the law to be applied than *Erie* affords federal courts choosing between state and federal law. For example, while a state court's formal choice-of-law rules direct the court to apply the law of another state, the court may nevertheless refuse to do so because it deems application of the law of another state to be a violation of the forum's "public policy." See R. LEFLAR, L. McDUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* 143-45 (4th ed. 1986). No such public policy exception exists within the *Erie* system.

101. This requirement is common to certified questions that arise in either federal or state court.

102. See *supra* note 100 for an example of the manner in which a court can manipulate state choice-of-law rules to justify application of forum law, and thereby avoid certification questions altogether.

103. A criticism of significant judicial reliance on forum law should begin by acknowledging that: (1) different kinds of forum bias exist; (2) at least one kind of "bias" is properly a part of standard choice-of-law analysis; and (3) aversion to other kinds of forum bias is not universally

1. In Defense of Applying Forum Law

The kind of forum bias that is generally approved of—the “good” bias—begins with the premise that a court deciding a case with multi-state elements is entitled to assume, in the absence of contrary evidence, that the law to be applied is the law of the state in which the court sits.¹⁰⁴ Brainerd Currie, who has been called, with reason, the “godfather” of modern choice-of-law theories,¹⁰⁵ explained why this “good” bias has received such widespread acceptance: “The normal business of courts being the adjudication of domestic cases, and the normal tendency of lawyers and judges being to think in terms of domestic law, the normal expectation should be that the rule of decision will be supplied by the domestic law as a matter of course.”¹⁰⁶ Because most lawsuits do not contain interstate components sufficient to raise choice-of-law considerations, and are therefore properly decided under forum law, “good” forum bias is essentially a recognition that it is not unreasonable for a court to place upon interested parties the burden of explaining why in an unusual circumstance the law of some other jurisdiction should be interposed. Understandably, this sort of forum bias creates no cause for concern.

A second kind of forum bias appears in the unusual cases containing multistate elements that arguably justify a court’s possible application of the law of a jurisdiction other than the forum. These cases constitute a clear minority of the litigation before courts, and to that extent are not part of the normal body of litigation that Currie described. Cases with multistate elements, however, are the corpus upon which choice-of-law analysis operates, and it is among them that a different and undesirable kind of forum bias exists. This forum bias picks up where the “good” forum bias leaves off, overriding arguments for applying another jurisdiction’s law and instead favoring forum law that properly should have been displaced. The description of what constitutes such undesirable forum bias, as well as of what harm it can do to proper judicial decisionmaking, is the major topic of this portion of the Article.¹⁰⁷

shared within the family of choice-of-law scholars.

104. See R. LEFLAR, L. McDOUGAL & R. FELIX, *supra* note 100, at 263 (indicating that “[t]he forum court will often have a natural preference for its own substantive law as against the law of other states. It has been suggested that this is the dominant theme in the entire choice-of-law process”).

105. Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 174 (1981).

106. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 75 (1963).

107. From this point forward, reference to “forum bias” will exclude consideration of “good” forum bias in purely domestic cases, referring instead to the kind of forum bias that appears in cases that have a substantial link to more than one jurisdiction.

Even when forum bias appears in a case with multistate elements, though, the phenomenon has not received universal condemnation. In fact, some of the leading advocates of modern trends in choice of law defended, even advocated, a predisposition toward forum law.¹⁰⁸ Currie explicitly advocated the use of forum law to decide cases in which the forum has a legitimate interest.¹⁰⁹ In Currie's scheme, the forum court would defer to the interests of another state only when the forum had no legitimate interest in deciding the case under its own law.¹¹⁰ Thus, under Currie's original technique of interest analysis that is the foundation of modern trends in choice of law, a true weighing of interests of different states would be exceptional, because the forum law would control whenever the forum had an interest, which is the most likely scenario. The court would defer only when the forum was disinterested and the other state had a significant interest, which is a less likely scenario.¹¹¹ Currie even posited a situation in which a disinterested forum would apply its own law in the face of the competing interests of two other states. According to Currie, "[i]f the forum is disinterested, but an unavoidable conflict exists between the laws of the two other states,

108. This Article uses the terms "modern trends" or "modern learning" in choice of law to connote the ideas put forward and developed by Brainerd Currie and his followers. The basic thesis of these approaches to choice of law rests on a concept called "interest analysis," in which a court would apply to an issue the law of the jurisdiction with the greatest interest in having its law applied. Differences exist regarding the proper details of the modern learning, but in practice the similarities among various approaches to modern learning are much greater than the theoretical differences among its proponents. Professor Robert Leflar, for example, has noted that modern learning in practice "follow[s] a pattern of multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results which, interestingly, can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law." Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10, 10 (1977).

The counterpart to modern learning is, unsurprisingly, "traditional learning," whose theories rest heavily on application of the law of the jurisdiction in which an event took place. Thus in tort, for example, the applicable law would be the law of the place in which the last event necessary to complete the tort occurred; in contract, the law to be applied would be the law of the jurisdiction in which the contract was made or was to be performed, depending on the type of contract question at issue. Historically, the Bible of the traditional learning has been the *Restatement of the Law of Conflict of Laws* (1934).

109. B. CURRIE, *supra* note 106, at 183. Currie argued that, "[n]ormally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum." *Id.* Currie extended his preference for forum law to the phenomenon of what he called the "unprovided case." *Id.* at 152. He believed that, if the forum had no interest in applying its law because the beneficiary of that choice would be the party not a resident in the forum, and the other state had no interest in applying its law because the beneficiary of that choice would be the resident of the forum, then the forum should nevertheless apply its own law. *See id.* at 152-56. In subsequent discussions, however, Currie slightly modified his advocacy of forum bias. *See infra* note 113.

110. B. CURRIE, *supra* note 106, at 184.

111. For a detailed discussion of these ideas, see *id.* at 183-87.

and the court cannot with justice decline to adjudicate the case, it should apply the law of the forum—until someone comes along with a better idea."¹¹²

Very few courts and even fewer commentators have formally adopted Currie's original proposal.¹¹³ However, a central truth of the modern learning as it has actually operated has been an approach that commonly favors forum law. One of the most prominent and enthusiastic proponents of the modern learning, Professor Robert Sedler, has chronicled the way in which courts that apply modern learning have handled tort choice-of-law issues.¹¹⁴ The results of his research are revealing. Sedler examined the operation of modern learning in fourteen states, reaching the following general determination: "[W]henever the courts have concluded that they have a real interest in applying their own law in order to implement the policies reflected in that law, they have almost invariably applied their own law. In other words, in practice the courts have been applying the 'Currie version of interest analysis.'"¹¹⁵

112. Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1243 (1963).

113. See, e.g., E. SCOLES & P. HAY, *CONFLICT OF LAWS* 567 (1982) (suggesting that "[t]he functionalists, Weintraub and von Mehren and Trautman, also regard governmental interests as relevant to the choice of law process, but—unlike Currie—openly admit and advocate a weighing of interests rather than the unusually strong forum preference" (footnotes omitted)); Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 389 (1966) (observing that, "[a]s far as I can see, all courts and writers who have professed acceptance of Currie's interest language have transformed it by indulging in that very weighing and balancing of interests from which Currie refrained" (emphasis in original)). But see *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972). In *Foster*, the Kentucky court applied Kentucky law to a wrongful death suit in which the accident occurred in Ohio and the defendant was an Ohio domiciliary, but the decedent had been a domiciliary of Kentucky. In so doing, the court stated: "We are now reaffirming our position . . . that if there are significant contacts—not necessarily the most significant contacts—with Kentucky, the Kentucky law should be applied." *Id.* at 829.

Currie himself modified his original ideas somewhat when he had the benefit of scholarly reaction, suggesting that the forum should take care to ensure that it indeed had a legitimate interest in applying its own law. If, however, upon careful reflection, the forum decided that it had such an interest, the conclusion, Currie believed, should still be the application of forum law. See Currie, *supra* note 112, at 1242-43.

114. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 (1977).

115. *Id.* at 980 (footnotes omitted). A few years later, Sedler restated the results of his research as follows:

The most "universal" tort rule of choice of law, followed by all the courts that have abandoned the traditional approach, is that when two residents of the forum are involved in an accident in another state, the law of the forum applies. Another rule of choice of law is that when two parties from a recovery state, without regard to forum residence, are involved in an accident in a non-recovery state, recovery is allowed. One situation where the courts are divided is where two parties from a non-recovery state are involved in an accident in a recovery state, and suit is brought in the recovery state. The majority view here is that the forum should apply its own law allowing recovery. Similarly, there have been a number of cases in

Curiously, this revival of Currie's thinking among advocates of modern learning has not been met with general disapproval among those who originally opposed Currie's forum bias. As Sedler noted, "there seems to be little dispute among the commentators that the courts are generally reaching functionally sound and fair results in the cases coming before them for decision."¹¹⁶ Thus, although the majority of Currie's scholarly disciples have formally deviated from his overt advocacy of forum bias in cases with multistate components, the courts applying the modern approaches have in practice sided with the founder of the modern school. In the end, the commentators have been mostly quiet about widespread application of the forum bias they nominally oppose. It remains for this Article to demonstrate, therefore, why forum bias should be curtailed.¹¹⁷

2. The Fatal Flaws of Forum Bias

a. Prudential Considerations

Some of the reasons why forum bias is undesirable seem so straightforward that it is hard to understand why any choice-of-law system would encourage forum bias. First, a predisposition toward forum law—whether built into a system, as Currie recommended, or a by-product of manipulative techniques, as in the traditional learning—is at odds with the task of a choice-of-law system. If choice-of-law doctrine has the goal of choosing the appropriate law to be applied to a suit with

which a recovery state plaintiff is injured by a non-recovery state defendant in the defendant's home state, but it is possible for the plaintiff's home state to exercise jurisdiction over the case, and the plaintiff brings suit there. Here the majority of the courts have held that the forum should apply its own law allowing recovery.

Sedler, *Choice of Law in Michigan: Judicial Method and the Policy-Centered Conflict of Laws*, 29 WAYNE L. REV. 1193, 1199-1200 (1983) (footnotes omitted).

116. Sedler, *supra* note 115, at 1199 (footnotes omitted). Sedler apparently assumed that the absence of scholarly criticism of the resurgence in Currie's analysis was a product of sound reasoning and fair results. Two other proponents of the modern approaches, however, inadvertently may have pointed out why scholars of the modern learning criticize so infrequently the judicial application of their work. These commentators remarked:

The case law which employs interest analysis presents a confusing picture. Imprecise and over-zealous citations to sundry authorities often make it difficult to determine with any kind of certainty on what theory a case may be said to have been decided, if indeed the theories are fully distinguishable. This imprecision and hedging by the courts invites theorists to claim an important case as supporting their own thinking . . .

E. SCOLES & P. HAY, *supra* note 113, at 567-68 (footnotes omitted).

117. Traditional approaches to choice-of-law problems may also be infected with forum bias; specifically, courts have justified application of forum law in the face of territorial rules to the contrary by employing the so-called "manipulative techniques" of the traditional learning. For a more elaborate discussion of the "manipulative techniques" in traditional learning, see Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27, 48-53 (1967).

multistate dimensions, an a priori inclination toward forum law can only short circuit the analysis. Such short circuiting can be the proper result only if the choice-of-law system was designed initially to choose forum law in most cases, as Currie advocated.¹¹⁸

Accepting the thesis that the plaintiff's conscious decision to take advantage of a court's predisposition toward its own law should not decide choice-of-law questions, it becomes clear that wholesale use of forum law is not likely to result in the routine selection of the appropriate law in particular cases. Instead, a systematized preinclination toward forum law operates irrespective of, or even in opposition to, what the proper choice-of-law decision (in the absence of forum bias) would be. Basing choice-of-law decisions on a preinclination toward forum law, without a circumstance that compels such an approach,¹¹⁹ provides an appearance of impropriety from the outset.

Apart from the impropriety of a choice-of-law system that is candidly, even blatantly, predisposed toward one body of law, other prudential considerations also suggest the lack of wisdom in such an approach. One such consideration derives from the operation of American courts as part of a federal system, in which most choice-of-law decisions involve selection or rejection of the law of a sister state, rather than the law of some truly foreign sovereign. The federal system operates more efficiently when the states behave with substantial respect for one another, including respect for the appropriateness of applying one another's law. Forum bias between states is little more than an expression of prejudice against the laws of co-equal states in a federal system. While such bias is of itself quite unlikely to shake the foundations of the federal system, it may be a source of unnecessary friction.

Moreover, although federalism will obviously survive poor choice-of-law systems, the deleterious impact of forum bias is not necessarily trivial. Beyond whatever corrosive influence forum bias may have on state judicial relationships, an unreasonable predisposition toward forum law also undermines judicial doctrine itself. Scholars may and often do dispute the relative merits of competing legal doctrines, but few commentators would argue with a premise that sound legal doctrine fairly applied is or should be an important part of judicial decisionmaking in the United States. Thus, in choice-of-law doctrine reasonable grounds may exist to argue for or against the relative merits of various systems or variants thereon; but, once a choice-of-law system is se-

118. See *supra* notes 109-12 and accompanying text.

119. This Article has previously discussed circumstances in which forum bias in choice of law may indeed be a proper, and perhaps the only proper, approach. See *supra* notes 104-06 and accompanying text. In the context of the current discussion, however, no similar compelling circumstance exists.

lected, courts should apply that system fairly and consistently. When forum bias interferes with the application of law to which a choice-of-law analysis would otherwise direct a judge, forum bias casts a shadow of skepticism over choice of law and, by extrapolation, over the validity of judicial doctrines generally. This skepticism may be a subtle price to pay, but in the long run it certainly could be an expensive one, particularly since forum bias is no longer only an unfortunate byproduct of parochial choice-of-law decisions, but is also a substantial part of choice-of-law systems themselves.

b. Systematized Forum Bias

When the traditional learning flourished across the United States, courts ameliorated the rigidity of the territorial approach upon which traditional learning was based by the use of "manipulative techniques" that allowed judges to achieve results they deemed more nearly just.¹²⁰ In practice, the more just result was "generally the application of forum law."¹²¹ To the extent that forum bias had infected traditional learning, the traditional approaches were no better than the more modern choice-of-law techniques.

An important difference exists, however, between forum bias in traditional learning and forum bias that has been nearly institutionalized in the modern approaches. In traditional courts, forum bias crept in through the application of the manipulative techniques that courts had used to escape from the territorial rules in exceptional cases. Thus, absent manipulative techniques, a court's application of traditional learning under the *First Restatement of the Law of Conflicts of Laws* normally would not include an infusion of forum bias, and the case affected by forum bias would be the exceptional one. In the modern learning, however, forum bias may be "the dominant theme in the entire choice-of-law process."¹²² Therefore, while both traditional and

120. See R. LEFLAR, L. MCDUGAL & R. FELIX, *supra* note 100, at 262 (in the traditional learning, use of a manipulative technique "may turn on a judicial desire to achieve justice in the particular case, on a public policy preference for one rule of law over another, on a preference for the forum state's own rule of law, on the plaintiff's pleadings, or on something else other than pure logic"). Writing of the manipulative technique of characterizing an issue as procedural, rather than substantive, so that a court could employ the forum's procedural law, the authors added:

When a . . . rule . . . is held to be procedural, so that a locally favored rule can be applied, it is apparent that the characterization technique is being used to achieve results that must be justified, if at all, by other real reasons. That other real reasons may exist cannot be doubted.

The valid questions are as to what the real reasons are, and why a cover-up device should be manipulated to conceal them.

Id. at 260-61 (footnotes omitted).

121. Sedler, *supra* note 117, at 49.

122. R. LEFLAR, L. MCDUGAL & R. FELIX, *supra* note 100, at 263; see also *supra* notes 108-16 and accompanying text.

modern systems have a problem to shed, the task will probably be more difficult in states that have adopted some variant of Currie's ideas that contains a predisposition toward the law of the forum.

c. In Personam Jurisdiction and Forum Bias

Just as many states have shifted to the more heavily forum-biased modern approaches to choice of law, the evolution of another legal doctrine has exacerbated the effect of forum bias in the modern learning—the doctrine of in personam jurisdiction, which has experienced notable expansion in American courts in the last forty years.

Beginning with the Supreme Court's decision in *International Shoe Co. v. Washington*,¹²³ and subsequent decisions, state courts and federal courts sitting in diversity cases have extended their ability to obtain in personam jurisdiction over nonresident defendants. While important considerations of constitutional fairness still prevent unlimited assertions of jurisdiction,¹²⁴ the post-*International Shoe* period of in personam jurisdiction has been one in which plaintiffs have had choices among fora for which American legal history provides no precedent. That expansion of jurisdiction has had a catalytic effect on forum bias, creating opportunities for choice-of-law shopping about which nineteenth-century lawyers could not even have dreamed.

A modification of the facts of *McGee v. International Life Insurance Co.*¹²⁵ demonstrates how the symbiosis between jurisdiction and forum bias can work to the plaintiff's advantage. The plaintiff in *McGee* was a California resident who sued a Texas insurance company to obtain the proceeds of a life insurance policy. Beyond matters relating to the single policy at issue in *McGee*, the Texas company had no contacts with California. Prior to *International Shoe*, those facts probably would have forced the plaintiff to initiate the action somewhere other than in California, for California courts could not have extended their in personam jurisdiction to reach the defendant. After *International Shoe*, however, the California courts could entertain the suit and enter a judgment for the plaintiff that Texas courts would have to enforce.¹²⁶ Although *McGee* did not involve any insurance contract choice-of-law issues, injecting a choice-of-law issue into its facts will demonstrate how expansive notions of in personam jurisdiction may play into the hands of plaintiffs who know how to exploit forum bias.

123. 326 U.S. 310 (1945).

124. See, e.g., *Kulko v. California Superior Court*, 436 U.S. 84 (1978) (contacts with forum initiated by plaintiff do not create in personam jurisdiction over defendant).

125. 355 U.S. 220 (1957).

126. *Id.* at 221.

An issue that the California courts had to address in *McGee* was whether the insured had committed suicide.¹²⁷ The choice-of-law problem, and opportunity, presented by expanded in personam jurisdiction becomes clearer by changing the facts of *McGee* to assume, first, that under California law the company still would have to pay on the policy notwithstanding a suicide, and, second, that Texas law would discharge the company from its obligation to pay if death was caused by suicide. Recall that, prior to *International Shoe*, the plaintiff in *McGee* may have been able to sue in only the one state in which the defendant company would certainly be found—Texas. After *International Shoe*, however, the plaintiff had the choice of suing in either California or Texas.

If forum bias plays the role in choice of law that Currie wanted it to play (and Sedler reported that it actually does play), the plaintiff's choice of forum becomes the controlling decision in the case. On the altered facts of *McGee*, a California court using California's version of modern learning as influenced by forum bias would likely apply California law, and the plaintiff would collect under the policy even if the insured had committed suicide. If, on the other hand, the plaintiff chose to sue in Texas, the risk is substantial that forum bias would induce a Texas court to apply Texas law, and the plaintiff would lose if the insured did in fact commit suicide. It is clear where any conscientious attorney representing the plaintiff should file suit. Equally clear is that the plaintiff's choice of forum effectively controls the outcome of the case. Thus, the expansion of in personam jurisdiction inadvertently has created a situation in which resourceful plaintiffs may: first, pick and choose among constitutionally eligible fora; second, select the jurisdiction with the law most favorable to plaintiffs; and, third, with forum bias in mind, likely gain an important advantage over the defendant (if not outright victory) even before the court begins to address the merits.

The traditional learning is a bit less favorable to plaintiffs, ironically because of the intervention of the "manipulative techniques" so derided by commentators and advocates of the modern approaches.¹²⁸ Commentators generally acknowledge that, in the traditional learning, judges often use some manipulative technique to introduce forum bias, which enables the judge, in an individual case, to achieve justice by introducing some factor that alters the outcome from that which would have been reached using only territorial rules.¹²⁹ Of course, the motive for manipulation may often be forum bias, but judges bound by traditional approaches apparently use manipulative techniques substantially

127. *Id.* at 222.

128. See *supra* notes 120-21 and accompanying text.

129. *Id.*

to reach just results.¹³⁰ Thus, when a court using traditional analysis reaches for the law of the forum by manipulative techniques, it may well be more than just a case of bias toward local law. The court may indeed desire to achieve justice in a particular case, irrespective of whether the forum law or foreign law is more likely to achieve that result.

The difference between modern and traditional learning on the application of forum bias is in who makes the decision to use forum law. Under the modern systems, the commentators acknowledge candidly that the preference for forum law is sufficiently strong to be almost part of the choice-of-law system itself—as Currie wanted.¹³¹ In such circumstances, any capable plaintiff's attorney can make the system work for the client, since forum law essentially becomes the law that the plaintiff—hardly a disinterested party—wishes to have applied to the case. In traditional learning, a different forum bias exists that commentators have regularly unearthed. In many cases in which courts apply forum law through use of a manipulative technique, the commentators acknowledge that the motive for manipulation may be the desire of a disinterested judge to achieve justice, however defined, in an individual case.¹³²

Forum bias remains undesirable in both traditional and modern learning, and the ability to exploit forum bias through expanded principles of in personam jurisdiction makes such bias an effective tool for disadvantaging defendants. Forum bias, however, is apparently less an intrinsic part of the traditional system; and within the traditional system judges do not seem to apply forum bias more or less automatically (as in the modern learning), but only with discretion that is influenced more by a judge's desire to do justice based on the merits of a particular case than by favoritism toward forum law. Although difficult to defend on this basis alone, the traditional learning at least may be preferable to letting the plaintiff choose the applicable law through the almost routinized forum bias of modern systems.

In any event, under either modern or traditional approaches, forum bias clearly has received an unintended boost from expanded principles of in personam jurisdiction, and has effectively permitted resourceful plaintiffs to enjoy an undeserved, but often decisive, advantage in their maneuvers against defendants. One solution to this disturbing phenomenon might be to reduce the scope of in personam jurisdiction. The his-

130. See, e.g., R. LEFLAR, L. McDOUGAL & R. FELIX, *supra* note 100, at 257 (manipulative technique of “[c]haracterization can be employed as a result-selective device”).

131. See *supra* notes 108-17 and accompanying text (discussing Currie's advocacy of forum preference and its reception among scholars and the courts).

132. See *supra* notes 120-21 and accompanying text.

tory of the last forty years, however, and the experience prior to 1945 with jurisdictional principles articulated in *Pennoyer v. Neff*,¹³³ suggest that a return to old ways of obtaining in personam jurisdiction is neither practical nor desirable. The other alternative, therefore, is to search for techniques that help curb forum bias. At this point, certification is a particularly promising technique.

C. Certification as an Antidote for Forum Bias

Forum bias exists in part because the modern approaches to choice of law have justified its existence.¹³⁴ The existence of forum bias in the traditional learning¹³⁵ suggests, however, that something beyond the persuasive advocacy of Brainerd Currie—advocacy opposed by other proponents of modern learning¹³⁶—also accounts for courts' strong predisposition toward their own law. In the absence of empirical evidence, reason suggests that the other possible explanation of forum bias concerns judges' familiarity with forum law and corresponding unfamiliarity with the law of other jurisdictions.¹³⁷ To understand why this explanation is probably accurate, one must appreciate a difference between the need of federal judges to use certification to compensate for their lack of knowledge of foreign law and the countervailing desire of state judges to use their own familiar law.

Lack of familiarity with state law among federal judges sitting in diversity has pushed at least some federal courts to take advantage of certification statutes. But there is a difference between the context in which federal courts under *Erie* principles deal with state law and the circumstances in which state courts make state-to-state choice-of-law decisions. The *Erie* doctrine constrains federal courts sitting in diver-

133. 95 U.S. 714 (1878). *Pennoyer's* territorial principles of in personam jurisdiction were abandoned because the United States had become a much more mobile society. See R. LEFLAR, L. McDOUGAL & R. FELIX, *supra* note 100, at 43. The United States has continued its trend toward greater mobility at an accelerated rate in the last forty years, which suggests that territorial rules would be even less appropriate now than they were at the end of World War II, when *International Shoe* was decided.

134. See *supra* notes 108-17 and accompanying text.

135. See *supra* notes 120-21 and accompanying text.

136. See *supra* note 113 and accompanying text.

137. See R. LEFLAR, L. McDOUGAL & R. FELIX, *supra* note 100, at 264. Forum bias can be "that 'counsel of despair' which is said to be the last resource of puzzled critics who ignore true choice-of-law considerations, give up the effort to effectuate them, and merely seek an easy way out, as when forum law is applied without reasoned justification." *Id.*

Apart from the predisposition toward forum law that familiarity with local law would breed, forum bias might also be in some measure a product of mindless parochialism that might, for example, incline a judge in New York to apply New York law because he or she could not seriously contemplate that non-New York law could ever be as good. If a parochial source of forum bias exists, the availability of certification or any other judicial technique is unlikely to expunge it. The only realistic hope is that such prejudice plays only a very minor role in choice-of-law decisions.

sity in their federal/state choice-of-law decisions.¹³⁸ As a result, when directed by *Erie* principles to employ state law, as they frequently are, federal courts have already been forced to forego the temptation of turning to familiar federal law for solutions. By contrast, the systems governing choice-of-law decisions in state-to-state situations afford state courts greater opportunity to manipulate the results; certainly the institutionalization of forum bias that is characteristic of the modern approaches to choice of law encourages state courts to use their own law in derogation of the law of other states.

The choice-of-law system at work in diversity cases thus forces federal judges to contemplate what unresolved state law might be, but the different choice-of-law systems employed in state courts typically allow or encourage judges unfamiliar with non-forum law simply to apply their own law. In such circumstances, it should not be surprising that certification is rarely, if ever, employed even by state courts that may be eligible to take advantage of certification statutes.¹³⁹ Nevertheless, state courts may use certification to cut through the forum bias that currently hampers proper choice-of-law decisions.

If forum bias is something to be discouraged, rather than systematized, and if reasons of easy familiarity and applicability as much as any theoretical justification emanating from the mind of Brainerd Currie explain the existence of forum bias, then certification can help to ease the problem of forum bias in state-to-state choice-of-law situations. As currently employed in federal courts obligated to apply state law, certification offers an avenue to the definitive resolution of difficult or unresolved questions of state law. When the same uncertainties affect state courts deciding cases with multistate implications, there is no reason why certification could not achieve similar results. To the extent that certification proved a satisfactory tool in the hands of state courts, it would provide judges who were inclined to escape forum bias with a means of determining accurately the law of another state. Assuming, therefore, that judges almost always would prefer to achieve proper results rather than merely rely on forum law, the question that remains is how well certification has actually operated in the context of federal-state certification.

138. For a discussion of the *Erie* doctrine, see *supra* notes 6-11 and accompanying text.

139. See *supra* notes 1-7 and accompanying text. For a discussion of the utility of certification based on responses from judges and justices who have worked with the process, see *infra* notes 140-77 and accompanying text.

V. EMPIRICAL STUDY AND ANALYSIS

A. *Methodology and Scope of Empirical Study*

To determine the usefulness and effectiveness of the certification process as it has operated between federal and state courts, we conducted an empirical study of state and federal judges and state clerks of court.¹⁴⁰ In seeking to determine judicial responses to the many arguments and complaints surrounding the certification process, questionnaires were sent to federal and state judges experienced with certification.¹⁴¹ The questionnaires sought candid responses from federal and state judges on the practical and theoretical workings of the certification procedure.¹⁴² The questionnaire asked the judges to respond in light of the cases in which they participated. When applicable, a list of certification cases authored by the judge was sent to the judge with the questionnaire.

State questionnaires were sent to sixty-six judges or justices of the various state supreme courts, or the equivalent highest court of the state; thirty-one judges responded.¹⁴³ The questionnaires were sent to judges in state courts that actively use the certification process and are statutorily permitted to engage in state-to-state certification. LEXIS was employed to identify state court opinions responding to certified questions. Of these cases, the survey focused on those certification cases occurring after 1982 to ensure that the case and record would be available to the judges surveyed.

The federal questionnaire was sent to sixty-four federal judges; eighteen judges responded.¹⁴⁴ To identify federal certifying judges not mentioned in published state certification opinions, assistance was sought from federal and state clerks of court. In most instances, the federal opinions were unpublished and only the action numbers of the

140. This section of the Article reports the findings of our survey of federal and state judges. The survey was conducted from July to October 1985. We extend our thanks to Dr. Carroll Seron and the Federal Judicial Center for their assistance in the formulation of the questionnaire. In 1983 the Federal Judicial Center conducted a survey of federal judges concerning the certification process. C. SERON, *CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES* (Federal Judicial Center 1983). With the permission of Carroll Seron, author of the report, Part III of that survey was incorporated into our questionnaire of state and federal judges.

141. Judges responsible for certification cases were identified using LEXIS, and, when not cited in the state certification decision, the federal court and judges involved were identified by contacting the appropriate state court.

142. See *infra* Appendix C (state judges' questionnaire and responses); Appendix D (federal judges' questionnaire and responses).

143. See *infra* Appendix A (listing state judges asked to respond and indicating those who did respond to the questionnaire).

144. See *infra* Appendix B (listing federal judges asked to respond and indicating those who did respond to the questionnaire).

certified cases were available for research.

The federal and state questionnaires were drafted to provide responsive answers to the many complaints made about certification.¹⁴⁵ In an attempt to compile the information in a manner conducive to comparison between the federal and state judges' responses, three of the four sections of the questionnaire sent to the federal and state judges were identical.¹⁴⁶ Part One of the federal and state questionnaires dealt explicitly with the unique problems and procedures of an answering or certifying court.¹⁴⁷

Part Two of both questionnaires sought to obtain objective responses from the federal and state judges on highly debated certification issues. The twenty-one questions in this section of the questionnaires each contained four possible responses to the declarative statements posed: (1) strongly agree; (2) agree; (3) disagree; and (4) strongly disagree. Each answer was tabulated independently and in conjunction with its federal or state counterpart for comparison.¹⁴⁸

Part Three of the questionnaires, originally drafted for the Federal Judicial Center's 1983 survey of federal judges, sought to determine the process employed by judges when determining whether to certify or answer a certified question of law. The judges were asked to evaluate the weight afforded particular factual or procedural situations. The judges were given four possible responses to the twelve statements posed: (1) great weight; (2) some weight; (3) little weight; and (4) not applicable. Each answer here, too, was tabulated independently and in conjunction with its federal or state counterpart for comparison.¹⁴⁹

Part Four of the questionnaires was an open-ended question, seeking to elicit comments or concerns that were incapable of being expressed in the former, more restricted sections of the questionnaire. The judges were asked whether, in their opinion, the advantages of certification outweighed its disadvantages.¹⁵⁰

The questionnaires sent to the state clerks of court were designed to compile information concerning the extent of certification's use and the procedural requirements pertaining to its use. Although more technical than the judges' questionnaire, the survey of the clerks provided important information concerning the burden that the certification pro-

145. See *supra* notes 28-102 and accompanying text (discussing potential problems with certification).

146. The complete state and federal questionnaires are reproduced in Appendices C and D.

147. See *infra* Appendices C & D (noting responses to individual questions in survey).

148. *Id.*

149. *Id.*

150. *Id.*

cess imposes on litigants.¹⁵¹

B. Summary of Findings

1. Summary of Responses to Questionnaires Sent to Judges

a. Part One

In responding to questions focusing on their unique role as judges on the court answering certified questions, the state judges surveyed overwhelmingly agreed that the federal court (or federal parties) had clearly formulated the certified questions. Almost two-thirds of the responding judges noted that both the questions and the statement of facts were adequate to decide the certified questions, which made it unnecessary to reformulate the questions posed. While only three judges felt that the questions certified were not sufficiently clear, six judges found it necessary to reformulate the questions. Although one Iowa judge considered the certified questions unclear and the statement of facts inadequate to decide the issues, the same judge did not find it necessary to reformulate the certified questions.¹⁵²

In a more consistent response, twenty-three judges declared that they would use the certified answers as precedent. While no state judge would decline to use the certified answers as precedent, four judges voiced uncertainty over the precedential value of certified answers. One state judge remarked that the precedential weight of the certified answer would depend on whether the opinion was published.¹⁵³

Responding to questions focusing on their roles as judges on the certifying court, a majority of the federal judges indicated that they had granted certification of an issue after the issue had been briefed and argued. Only one federal judge certified an issue of law before the issue was briefed, while four of the sixteen federal judges responding to these questions invoked certification after disposition.

Sixteen of the federal judges granted certification because the questions involved were issues of first impression. Nine judges found it difficult or very difficult to determine if state court precedent controlled the issue, while seven judges did not consider determining the state court precedent a difficult task.¹⁵⁴

151. *Id.*

152. *See supra* notes 53-75 and accompanying text (discussing abstractness and difficulties in formulating certified questions).

153. *See infra* Appendix C (reporting Justice James Carter's response to the state certification questionnaire); *see supra* notes 34-52 and accompanying text (discussing advisory opinions).

154. This response is consistent with Part Three of the questionnaire, in which 12 of the 19 responding judges noted that they were more likely to certify issues dealing with previously unconstituted state statutes. Also responding to Part Three, a majority of the federal judges accorded "little weight" to the identity of the answering court as a factor in making their decisions to certify

While all of the responding judges noted that they would not have abstained from deciding the case if the certification procedure were not available, a majority of the judges said that the state answer resolved the case.¹⁵⁵

b. Part Two

The federal and the state judges' responses to the first question of Part Two of the questionnaire—concerning the identity of the moving party in certification cases—were inconsistent. On the state level, a majority of the responding judges "strongly agreed" that courts should allow certification only by motion of the court. The federal judges were split on the issue of who may move for certification. Both the federal and state judges strongly disagreed with the proposition that certification should be allowed only by motion of the parties. A majority of federal judges and a near majority of the state judges responding to the survey, however, felt that the identity of the moving party in certification cases made no difference.

The federal or state identity of the judges proved to be an important factor concerning a number of issues. While the federal judges agreed that the receiving court should accord certified questions priority status, the state courts were split on the issue. Similarly, the state courts overwhelmingly agreed that courts should certify only determinative issues, while the federal judges were almost evenly split on the issue.

Deviating from this normal response pattern, state judges indicated that state courts should not be offended when a federal court decides issues of state law. The federal judges, on the other hand, expressed mixed views on the issue. Similarly, both the federal and state judges overwhelmingly agreed that certification allows the federal court to resolve the issues in a case while respecting the state court's authority.

Both the federal and state judges responded positively to the possible precedential value, *stare decisis*, and *res judicata* effects of certified questions. On the state level, while a large majority of the state judges supported these propositions, two Kentucky Supreme Court judges strongly disagreed with all of the propositions. One Minnesota state judge and one Kansas state judge disagreed with the proposition that certified questions should have the same *stare decisis* and *res judicata* effects as other court opinions, while three Minnesota and Kansas judges either agreed or strongly agreed that the answers to certified questions should have standard *stare decisis* and *res judicata* effects. On

the question of law.

155. See *supra* notes 12-20 and accompanying text (discussing abstention doctrine).

the federal level, every federal judge who responded to the survey agreed that certified questions should receive the same precedential value, *stare decisis*, and *res judicata* effects as other court opinions.

The federal and state judges were almost in complete agreement on several controversial issues surrounding certification. Regarding the delay and expense of the certification process, an overwhelming majority of both the federal and state judges disagreed with the statement that these factors make certification an impractical procedure for litigants.¹⁵⁶ Similarly, both the federal and state judges disagreed with the propositions that state courts should be required to answer questions certified and that courts should allow certification only when a federal constitutional question would be avoided by a state response. Most importantly, neither the federal nor the state judges felt that certified questions were too abstract for judicial resolution. On a closer issue, five of the eighteen federal judges and ten of the twenty-eight state judges stated that certified questions seek advisory opinions.¹⁵⁷

c. *Part Three*

Part Three of the questionnaire sought to determine the process used in making certification decisions and the weight afforded certain factual situations. Although one Iowa state judge did not answer Part Three, stating that “[w]e have no choice,”¹⁵⁸ both the federal and state judges agreed on the number one determinative factor involving certification and were in close agreement on the top four factors that have an impact on certification decisions. Table 1 sets out the factors that judges consider most important in their decision to certify a question.

The factors considered least important in the certification decision varied between the federal and state judges. Only one of the eleven factual situations—“concerns about forum shopping”—obtained a consis-

156. See *supra* notes 76-93 and accompanying text (discussing problems of expense and delay).

157. See *supra* notes 34-61 and accompanying text (discussing issues of advisory opinions and abstractness in certification).

158. Larson, Response to State Questionnaire on Certification (on file with Author).

Table 1

Top Four Factors Obtaining a "Great Weight" Response
from State and Federal Judges

Factor	Number of Federal Judges Responding	Number of State Judges Responding
Question refers to new or previously unconstrued state statute	12	15
Closeness of state law question	10	9
Strength of foreign court's interest in area of law	8	10
Avoiding inconsistency with later foreign court decisions	8	9

tent "least weight" response from the federal and state judges. Table 2 and Table 3 list the factors that the state and federal judges considered least important in their decision to certify a question.

Table 2

Top Five Factors Obtaining a "Little Weight" Response
from State Judges

Factor	Number of Judges choosing "Little Weight" Response
Extent of delay of disposition with certification	11
Concern about forum shopping	10
Identity of certifying court	9
Experience with the usefulness of certification	8
Attractiveness as an alternative to complete abstention	8

Table 3

Top Five Factors Obtaining a "Little Weight" Response
from Federal Judges

Factor	Number of Judges choosing "Little Weight" Response
Concern about forum shopping	8
Attractiveness as an alternative to complete abstention	7
Identity of certifying or answering court	6
Extent of delay of disposition with certification	5
If not certified, the forum court would have to apply the law of the non- forum state	5

d. Part Four

In responding to Part Four of the questionnaire, which asked whether the advantages of certification outweigh its disadvantages, responding judges approved of the certification process by a solid margin. Many judges, however, expressed concern that the process may be used too liberally.

On the state level, Justice Herbert Wilkins of the Supreme Judicial Court of Massachusetts noted certification's potential for abuse. In voicing some of the complaints directed at certification, Justice Wilkins stated that "[t]here are times when the facts are important and not certified (or perhaps even found). We have had some where the certification came too early in the case."¹⁵⁹ Another state justice noted, however, that his court's "experience has been that only advisory opinions have been rendered."¹⁶⁰

Of those federal judges responding to this part of the questionnaire, only Judge John Reynolds of the Eastern District of Wisconsin flatly rejected the usefulness of the certification process. Judge Reynolds wrote that certification "places too heavy a burden on little litigants. It is OK for institutional litigants that are represented by

159. See *infra* Appendix C, Part IV (reporting Justice Herbert Wilkins' response to the state certification questionnaire). For a detailed discussion of the dangers surrounding the formulation of certified questions, see *supra* notes 62-75 and accompanying text.

160. See *infra* Appendix C, Part IV (reporting Justice Donald Wintersheimer's response to the state certification questionnaire). For a detailed discussion of the advisory opinion question, see *supra* notes 34-52 and accompanying text.

institutional type law firms."¹⁶¹ Judge William Stuart of the Southern District of Iowa noted that "[w]e have been selective on the issues certified. I don't think the Iowa Supreme Court feels we have abused the procedure."¹⁶²

2. Summary of Responses to Questionnaires Sent to Clerks of State Courts

The questionnaire sent to the clerks of court focused on the procedural aspects of certification. This information proves useful in evaluating the merit of many of the arguments against certification. Most importantly, the clerks of court from Iowa, Kansas, Maryland, North Dakota, West Virginia, and Wisconsin stated that certification increases the highest state court's caseload by less than five percent a year. In responding to a question concerning the number of certified questions denied by the individual state courts in the last three years, only West Virginia denied more than ten certified questions.

The clerks' responses to the controversial issue of the cost that certification imposes on litigants were more consistent than anticipated. The costs indicated in Table 4, however, include only the filing fees established by the individual state courts and in no way represent the total cost of the certification process. Attorney's fees, always the top expense in any litigation, cannot be estimated due to the uncertainty of the amount of work required to certify issues to particular state courts.

Table 4

Court Costs of Certification in Responding States

<u>State</u>	<u>Cost</u>
Wisconsin	\$150
Kansas	55
Iowa	50
Maryland	50
North Dakota	50

The procedures by which the individual states handle certified questions, which procedures are outlined in Table 5, have a substantial impact on the total cost imposed on litigants. By allowing counsel for the parties to present briefs and oral argument on the certified issue, the state courts ease many of the arguments raised against certification,

161. See *infra* Appendix D, Part IV (reporting Judge John Reynolds' response to the federal certification questionnaire).

162. See *id.* (reporting Judge William Stuart's response to the federal certification questionnaire).

particularly the abstractness and advisory opinion arguments, while enhancing the argument that certification imposes a heavy burden on litigants.

Table 5

Responding States' Process for Certification Cases

Procedure	State
Certified questions set for briefing?	Yes: Iowa Kansas Maryland North Dakota West Virginia Wisconsin
Certified questions set for oral argument?	Yes: Same, except in Iowa, where it varied among courts
Certified opinions published?	Yes: Same, except in Iowa, where it varied among courts

The extensive process employed by the responding states in resolving certified questions of law has increased the amount of time from filing to disposition of the original case.¹⁶³ Table 6 lists the amount of time that the responding states require to resolve certified questions of law.

Table 6

Responding States' Amount of Time from Filing
Certified Questions to Disposition

State	Months
Iowa	9-12
Maryland	6-9
Kansas, North Dakota, West Virginia, Wisconsin	3-6

C. Analysis of Findings

Because many of the questions in the survey closely relate to one another, the questionnaires may be broken down into a few distinct issue-oriented categories. These categories include: first, issues concern-

163. See *infra* Appendix D, Part I, Question 6.

ing the certification procedure (who can invoke certification and at what stage certification should be invoked); second, the similarity of a certified answer to an advisory opinion, which encompasses issues of question formulation, determinative nature of the issue, and the *stare decisis* and *res judicata* effects of the state opinion; and, third, the impact of the certification process on the litigants, which encompasses issues of expense and delay.

1. Procedural Concerns

The questions of who may seek certification and at what stage certification should be granted have always been at the heart of the certification debate. While commentators and some courts urge that certification procedures should prohibit federal defendants who remove a case to the federal court from invoking certification,¹⁶⁴ the federal and state judges responding to our survey disagreed. Similarly, the judges expressed little apprehension that certification might promote forum shopping.

Some commentators and judges support the enactment of certification statutes that would allow the state court to accept only questions certified by appellate courts.¹⁶⁵ The federal judges overwhelmingly rejected this circumscribed approach to certification. Only one federal judge expressed any support for this limitation on certification.

164. See *Seaboard Sur. Co. v. Garrison, Webb & Stanaland, P.A.*, 823 F.2d 434, 438 (11th Cir. 1987) (denying request for certification, court remarked: "Having sought a Federal forum, [plaintiff] must abide by federal determination as to the present state of Florida law"); *Cantwell v. University of Mass.*, 551 F.2d 879, 880 (1st Cir. 1977) (suggesting that "[t]he bar should take notice that one who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification"); AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 296 (1969) (indicating that "[i]t is ordinarily undesirable to allow a defendant a federal determination of facts and a state determination of state law at the cost or delay to a plaintiff who was content to have the whole case promptly determined in the state courts"). In *Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. 988, 666 P.2d 711 (1983), the Kansas Supreme Court noted that the defendant in the case had removed the case to the federal court system. The court, however, did not mention whether this fact had any bearing on the ability of the defendant to move for certification of state law questions. *Id.* at 989, 666 P.2d at 713.

Timing of the certification request may often be as important as whether the party making the request is the same party who invoked federal jurisdiction. In *Perkins v. Clark Equipment Co.*, 823 F.2d 207 (8th Cir. 1987), the plaintiffs moved for certification after the district court had entered summary judgment against them. Affirming a denial of the certification motion, the United States Court of Appeals for the Eighth Circuit held that, "[o]nce a question is submitted for decision in the district court, the parties should be bound by the outcome unless other grounds for reversal are present." *Id.* at 210. The court indicated that "[o]nly in limited circumstances should certification be granted after a case has been decided." *Id.* The court did not identify circumstances in which post-judgment certification might be appropriate.

165. See *supra* note 77.

2. Similarity of Certified Answers to Advisory Opinions

Only one-third of the federal and state judges surveyed agreed with the proposition that certified questions seek advisory opinions. This response rebuts in some measure the argument that state answers to certified questions are advisory opinions.¹⁶⁶ In addition, both the federal and state judges flatly rejected the contention that certified questions are too abstract for judicial resolution.¹⁶⁷

In rejecting "advisory opinion" and "abstractness" charges against certification, courts have relied on a number of procedural devices. In particular, courts use the "determinative" language of certification statutes to guard against the charge that certified issues do not present answering courts with actual cases and controversies.¹⁶⁸ While the state judges overwhelmingly agreed that only issues determinative of the case should be certified, the federal judges expressed mixed opinions on the issue.

The U.L.A. instructs the certifying court to send a statement of facts to the answering court.¹⁶⁹ Although the clarity of the certified questions and the statement of facts has remained a central issue in the certification debate, the state judges responding to the survey found the certified questions sufficiently clear.¹⁷⁰ The clarity of the issues and statement of facts may be due to the fact that federal courts, either on their own or in conjunction with the parties, formulate a majority of the certification memoranda.¹⁷¹

Another consideration that minimizes concern about advisory opinions is the federal courts' tendency to treat state court responses as the "final, decisive answer" on the issue posed.¹⁷² Every federal judge and all but four of the state judges agreed that answers to certified ques-

166. Comment, *supra* note 34, at 172; *see supra* notes 34-52 and accompanying text (discussing advisory opinions).

167. *See supra* notes 53-61 and accompanying text (discussing issue of abstractness).

168. *See, e.g., In re Richards*, 223 A.2d 827 (Me. 1966) (refusing to answer certified questions not determinative of federal case); *Hanchey v. Steighner*, 549 P.2d 1310, 1311 (Wyo. 1976) (noting that court will not decide issue unless it is dispositive of federal case).

169. U.L.A. § 3 directs that "[a] certification order shall set forth . . . a statement of all facts." U.L.A. § 3, 12 U.L.A., *supra* note 31, at 53 (emphasis added).

170. For a discussion of problems in formulating certification questions properly, *see supra* notes 62-75 and accompanying text.

171. Examples of the practice of a federal court formulating the certification memorandum may readily be found in opinions of the United States Court of Appeals for the Fifth Circuit. *See, e.g., Cesary v. Second Nat'l Bank of N. Miami*, 567 F.2d 283 (5th Cir. 1978); *Ward v. State Farm Mut. Auto. Ins. Co.*, 539 F.2d 1044, 1050 n.3 (5th Cir. 1976); *Nardone v. Reynolds*, 508 F.2d 660, 664 n.7 (5th Cir. 1975); *Allen v. Estate of Carman*, 446 F.2d 1276, 1277 (5th Cir. 1971).

172. *See, e.g., Hopkins v. Lockheed Aircraft Corp.*, 394 F.2d 656, 657 (5th Cir. 1968); *see also supra* notes 41-44 and accompanying text (discussing Fifth Circuit's increasing respect for answers to certified questions).

tions should be afforded the same precedential, stare decisis, and res judicata effects as other court opinions.

3. Time and Expense of Certification

The federal judges' response to the issue of time delay created by certification was unexpectedly inconsistent. While eight federal judges conceded that certified questions delayed the final decision in the case substantially longer than would otherwise have been the case, nine judges responded that they reached the final decision in cases involving certified questions in about the same amount of time or faster than in other, non-certification, cases.

In Part Two of the questionnaire, both the federal and state judges overwhelmingly disagreed with the proposition that the expense and delay created by certification made the procedure impractical for litigants.¹⁷³ When deciding to certify or answer a certified question, federal and state judges gave only little or some weight to the likelihood that certification would impose significant additional delay on litigants. Unlike their state counterparts, however, federal judges did not feel that the regular use of the certification procedure would diminish time delays.

Upon reviewing the responses from the clerks of courts, however, a different perception of the delay factor may arise. The state clerks reported that the time from filing to disposition of answers to certified questions requires, in most cases, from three to six months, and, in some cases, from six to twelve months. Even allowing for delay that might have occurred if the federal court had pondered and decided the difficult question without certification, the clerks' responses support the use of certification only in cases in which the court is confident that certification will not unreasonably burden the litigants.

Both the federal and state judges surveyed rejected the proposition that state courts should be required to answer questions certified to them. This sentiment is consistent with the basic theory supporting the use of certification: state courts should interpret state law when and in what manner they deem appropriate.¹⁷⁴ Under the U.L.A.'s certification statute, however, state courts' power to answer questions certified to them is mandatory. Although the State of Washington uses mandatory language in its certification statute's "Power to Answer" provision, this

173. For a general discussion of certification's impact on litigants, see *supra* notes 76-93 and accompanying text.

174. See Vestal, *supra* note 1, at 635 (decision to answer normally discretionary in state court).

position has little support among federal or state judges.¹⁷⁵

Finally, federal and state judges responding to the survey concluded that the federal courts' use of certification improves federal-state comity.

VI. CONCLUSION

A. *Certification at Work*

When federal courts must decide questions of state law, the use of certification unquestionably resolves many of the complaints directed at its predecessor, abstention. While both processes allow the appropriate state court to decide issues of state law, certification avoids the unnecessary delay created by routine court procedures. Certification requires the litigants to ascertain the appropriate state court response to an issue of state law, but allows the litigants to bypass lower state courts in obtaining that decision.

Certification not only achieves the objectives of abstention with less impact on the parties, but it also provides litigants with a clear precedent that courts may follow in future cases. As both the federal and state judges agreed, if the state court is not ready to decide the certified issue of law, the court is under no obligation to do so.¹⁷⁶

The results of our empirical study rebut some of the major arguments surrounding the certification process, and outline the many factors that judges weigh when determining whether to certify or answer a question of law. Although the responses to the questionnaires contain some internal inconsistencies, these instances were insubstantial and therefore do not impact on the results of the survey.

The federal and state judges who responded to the survey generally indicated overwhelming judicial support for the certification process. A large majority of the federal judges found the process to be a convenient and appropriate method for ascertaining controlling state law. The state judges agreed that certification affords the state courts their appropriate decisionmaking role. Although both federal and state judges acknowledged the burden that certification may impose on litigants, the burden proved to be much less important than commentators had initially anticipated when measured against the benefits of certification.

The empirical study demonstrated, in short, that problems associated with certification probably have been overstated, while the prom-

175. Telephone interview with Assistant Clerk of Courts of Massachusetts (July 16, 1985); telephone interview with Clerk of Courts of Kansas (July 16, 1985).

176. Federal judges responding to the survey, however, indicated that, if certification were unavailable because state courts would not respond to certified questions posed, federal judges would generally not abstain from deciding the issue of state law.

ised benefit of the process in a federal-state context has been substantially achieved in those cases in which certification was tried.

B. Certification in State-to-State Situations

The question remaining is what the empirical study indicates about the potential use of certification in cases in which one state seeks to apply the law of another. As has been discussed previously,¹⁷⁷ there is no inherent impediment to the use of certification in such a context. In fact, when a state court's choice-of-law rules might normally direct the court to apply the law of another state, certification can discover what the foreign law is and thus can be a strong and useful disincentive to the inappropriate application of forum law—*i.e.*, forum bias. In light of the strongly positive results of the empirical study, certification probably merits greater use in the federal-state context. Given certification's potential in state-to-state cases, its non-use between state courts may be an unfortunate example of a heretofore lost opportunity. Clearly, however, the current situation need not continue. We can end the period of certification's potential whenever we choose and begin to enjoy its benefits, especially in state-to-state situations.

177. See *supra* notes 5-7 & 94-139 and accompanying text.

Appendix AState Judges

(asterisk indicates those judges who responded to the survey)

Iowa

W.W. Reynoldson (CJ)*
Harvey Uhlenhopp
David Harris*
Mark McCormick*
Arthur A. McGiverin
Jerry L. Larson*
Louis W. Schultz
James H. Carter*
Charles R. Wolle*

Kansas

Alfred G. Schroeder (CJ)*
David Prager*
Robert H. Miller
Richard W. Holmes
Kay McFarland
Harold S. Herd
Tyler C. Lockett*

Kentucky

Robert F. Stephens (CJ)*
Roy N. Vance*
William M. Gant*
J. Calvin Aker
Charles M. Leibson
Donald C. Wintersheimer*
James B. Stephenson

Maryland

Robert C. Murphy (CJ)
Marvin H. Smith*
John C. Eldridge
Harry A. Cole
Lawrence F. Rodowsky*
James F. Couch, Jr.*
John F. McAuliffe*

Massachusetts

Edward F. Hennessey (CJ)*
Herbert P. Wilkins*

Minnesota

Douglas K. Amdahl (CJ)*
C. Donald Peterson
Lawrence Yetka*
George M. Scott*
Rosalie E. Wahl
John E. Simonett*
Glenn E. Kelley
M. Jeanne Coyne

North Dakota

Ralph J. Erickstad (CJ)*
Gerald W. Vandewalle*
H.F. Gierke III
Herbert L. Meschke*
Beryl J. Levine*

Oklahoma

Robert D. Simms (CJ)*
John B. Doolin*
Ralph B. Hodges
Robert E. Lavender
Rudolph Hargrave*
Marian P. Opala*
Alma D. Wilson
Yvonne Kauger
H. Summers

West Virginia

Richard Neely (CJ)
Thomas B. Miller
Darrell V. McGraw, Jr.
Thomas E. McHugh
William T. Brotherton, Jr.

Wisconsin

Nathan Heffernan (CJ)

Roland B. Day

Shirley S. Abrahamson

William G. Callow*

Donald W. Steinmetz

Louis J. Ceci

William A. Bablitch

Appendix BFederal Judges

(asterisk indicates those judges who responded to the survey)

Iowa

Edward J. McManus*
William C. Stuart*
Harold D. Vietor
William C. Hanson
Donald E. O'Brien*

Kansas

Frank G. Theis
Earl E. O'Connor*
Richard D. Rogers
Dale E. Saffels
Patrick F. Kelly*
Arthur J. Stanley, Jr.
Wesley E. Brown
George Templar

Kentucky

Bernard T. Moynahan, Jr.
Howard D. Hermansdorfer
Eugene E. Silver, Jr.
Scott Reed
William O. Bertelsman
G. Wix Unthank
Charles M. Allen
Eugene E. Siler, Jr.*
Edward H. Johnstone
Thomas A. Ballantine, Jr.
James F. Gordon

Maryland

Edward S. Northrop
Frank A. Kaufman*
Alexander Harvey II
James R. Miller
Joseph H. Young*
Herbert F. Murray*
Joseph C. Howard
Shirley B. Jones
Roszel C. Thomsen
R. Dorsey Watkins

Minnesota

Edward J. Devitt
Miles W. Lord
Robert G. Renner*
Donald D. Alsop*
Harry H. MacLaughlin*
Diana E. Murphy*
Earl R. Larson

North Dakota

Paul Benson
Bruce M. Van Sickle*
Ronald N. Davies

Oklahoma

James O. Ellison
Frederick A. Daugherty
H. Dale Cook*
Luther L. Bohanon*
Frank H. Seay
Luther B. Eubanks
Ralph G. Thompson*
Lee R. West
Stephen S. Chandler, Jr.

West Virginia

Robert E. Maxwell
Charles H. Haden II
Dennis R. Knapp
John T. Copenhaver, Jr.
Robert J. Staker
William M. Kidd

Wisconsin

Barbara B. Crabb
James E. Doyle
John W. Reynolds*
Robert W. Warren
Terence T. Evans

Appendix CState Court Responses to Certification QuestionnairePart I

1. Did you feel that the certified questions were sufficiently clear?
yes (19) no (3)
2. Did you find it necessary to reformulate the question(s) or have the certifying court reformulate the question(s)?
yes (6) no (15)
3. Was the statement of facts adequate to decide the issue(s)?
yes (22) no (4)
4. Did you (or will you) use the certified opinions as precedent?
yes (23) no (0) uncertain (4)

Part II

	<u>strongly agree</u>	<u>agree</u>	<u>disagree</u>	<u>strongly disagree</u>
1. Certified questions should be allowed by motion				
a. of the court.	13	1	8	0
b. of the parties.	1	0	8	10
c. makes no difference.	5	5	4	8
2. Certified questions should receive priority status by the receiving court.	3	9	13	2
3. Certification should only be allowed when the issue is determinative of the case.	9	13	5	0
4. Certification should not be allowed after a decision on the merits has been made.	12	10	3	2
5. Certification should only be allowed after the case has been appealed in the certifying court system.	5	3	15	6
6. State courts are not offended when another court decides issues of state law.	3	15	6	2

	<u>strongly agree</u>	<u>agree</u>	<u>disagree</u>	<u>strongly disagree</u>
7. A litigant who chose, or removed a case to, the federal courts should not be allowed to seek certification of questions.	3	3	15	5
8. Certification should only be allowed when a federal constitutional issue would be avoided by state response.	0	3	16	7
9. Certification allows the court to resolve the issues in the case, while respecting the foreign court's authority.	6	19	1	0
10. Certification improves federal-state comity.	8	16	2	1
11. All states should have the same certification procedure.	4	9	10	1
12. Certification improves state-state comity.	4	16	4	1
13. Courts should be required to answer questions certified to them.	1	3	15	8
14. Certification creates piecemeal litigation.	3	4	17	2
15. The delay and expense of certification make it an impractical procedure for litigants.	1	3	19	3
16. Time delays involved in certifying questions will diminish as the procedure becomes more regularly used.	2	9	12	3
17. Answers to certified questions should have the same precedential value as other court opinions.	9	16	0	2
18. Answers to certified questions should have the same res judicata effect as other cases.	6	14	2	2
19. Answers to certified questions should have the same stare decisis effect as other cases.	9	14	2	2
20. Certification questions seek advisory opinions.	4	6	14	3
21. Certified questions are too abstract for judicial resolution.	1	3	16	7

Part III

	<u>great</u> <u>weight</u>	<u>some</u> <u>weight</u>	<u>little</u> <u>weight</u>	<u>not</u> <u>applicable</u>
1. Strength of foreign court's interest in the area of the law.	10	6	7	1
2. If not certified, the forum court would have to apply the law of the non-forum state.	4	11	4	5
3. Closeness of question of state law.	9	9	5	1
4. Availability of sources to determine foreign court's law, such as decisions in related areas.	3	10	7	4
5. Attractiveness as an alternative to complete abstention.	3	8	8	4
6. Question refers to new or previously unconstrued state statute.	15	5	2	2
7. Concern about forum shopping.	3	9	10	3
8. Avoiding inconsistency with later foreign court decisions.	9	8	4	4
9. Identity of certifying or answering court.	4	9	9	2
10. Experience with the usefulness of certification.	6	8	8	3
11. Extent of delay of disposition with certification.	1	7	11	5
12. Other.	2	1	0	0

Part IV

Do you feel that the advantages of certification outweigh its disadvantages?

Iowa

MCCORMICK: "It is no advantage to us as answering court, but I have enjoyed working on the questions. They are usually, although not always, substantial, interesting, and close."

HARRIS: "Greatly. It is relatively new, in one sense. Litigants had a de facto method previously, but never used it. A statute adopted 5 to 10 years ago has greatly expanded its use by federal courts in Iowa. It has worked very well."

CARTER: "All the advantages are to the court doing the certifying. There are no advantages to the answering court, yet that court must risk unanticipated consequences from deciding an abstract question."

WOLLE: "Yes. In appropriate cases, advantages clearly outweigh disadvantages."

Kansas

LOCKETT: "Yes—since the federal courts have [impaired?] a minimum amount on each member of class, in a class action, for federal jurisdiction, certification is important for state courts."

Kentucky

WINTERSHEIMER: "No. Our experience has been that only advisory opinions have been rendered."

VANCE: "I do not believe the advantages outweigh the disadvantages."

Maryland

RODOWSKY: "Yes—federal courts, in diversity cases particularly, should not have to guess in the first instance on the answer to a question of state law which is unsettled."

SMITH: "I have been on the Court during the entire period that the statute relative to certified questions has been in effect. My own view is that the system has worked well."

Massachusetts

WILKINS: "Yes. The system can be abused. There are times when the facts are important and not certified (or perhaps even found). We have had some where the certification came too early in the case."

Minnesota

SCOTT: "Yes. Prevents later inconsistencies in the legal community between state and federal holdings."

SIMONETT: "Used in proper instances, yes."

North Dakota

ERICKSTAD: "Yes, under appropriate circumstances."

VANDEWALLE: "We have a certification process within our jurisdiction which is more of a problem than certification from without the system."

Oklahoma

DOOLIN: "Yes—definitely."

Appendix DFederal Court Responses to Certification QuestionnairePart I

1. At what stage was certification invoked?

before
briefed
(1)

before
argued
(4)

after
argued
(7)

after
disposition
(4)

2. Who moved for certification?

parties
(5)

court
(6)

mutual
decision
(6)

3. Why was the certification advanced and granted?

competing
lines of
authority
(1)

issue(s) of
first
impression
(16)

respect
for the
foreign court
(3)

4. Was it difficult to determine if the issue was controlled by case precedent in the foreign court?

very
difficult
(4)

difficult
(5)

not
difficult
(7)

5. When drafting the certified question(s), who formulated the statement of facts?

parties
(4)

court
(8)

both
(7)

6. Relative to other cases, did the certified questions delay the final decision substantially longer than would otherwise have been the case?

yes
(8)

it was about
the same
(5)

it was
faster
(4)

7. If the state answer did not completely resolve the case(s), what was the effect of the state answer on the remaining issues?

remaining issues
were made more
complicated
(0)

remaining issues
were made more
simple
(5)

remaining issues
were unaffected
(2)

state answer
resolved case
(8)

8. If the certification procedure were not available, would you have abstained from deciding the case?

yes
(0)

no
(17)

uncertain
(0)

Part II

	<u>strongly agree</u>	<u>agree</u>	<u>disagree</u>	<u>strongly disagree</u>
1. Certified questions should be allowed by motion				
a. of the court.	5	1	1	7
b. of the parties.	1	0	4	8
c. makes no difference.	7	2	1	4
2. Certified questions should receive priority status by the receiving court.	8	6	3	0
3. Certification should only be allowed when the issue is determinative of the case.	2	7	8	1
4. Certification should not be allowed after a decision on the merits has been made.	4	4	6	3
5. Certification should only be allowed after the case has been appealed in the certifying court system.	1	0	3	14
6. State courts are not offended when another court decides issues of state law.	1	7	7	2
7. A litigant who chose, or removed a case to, the federal courts should not be allowed to seek certification of questions.	1	1	8	8
8. Certification should only be allowed when a federal constitutional issue would be avoided by state response.	0	0	5	13
9. Certification allows the court to resolve the issues in the case, while respecting the foreign court's authority.	9	9	0	0
10. Certification improves federal-state comity.	10	7	0	1
11. All states should have the same certification procedure.	3	7	5	3
12. Certification improves state-state comity.	4	8	1	1

	<u>strongly agree</u>	<u>agree</u>	<u>disagree</u>	<u>strongly disagree</u>
13. Courts should be required to answer questions certified to them.	1	3	10	4
14. Certification creates piecemeal litigation.	1	2	10	4
15. The delay and expense of certification make it an impractical procedure for litigants.	1	0	11	5
16. Time delays involved in certifying questions will diminish as the procedure becomes more regularly used.	3	8	4	1
17. Answers to certified questions should have the same precedential value as other court opinions.	10	8	0	0
18. Answers to certified questions should have the same res judicata effect as other cases.	8	10	0	0
19. Answers to certified questions should have the same stare decisis effect as other cases.	8	10	0	0
20. Certification questions seek advisory opinions.	0	5	5	8
21. Certified questions are too abstract for judicial resolution.	0	0	6	12

Part III

	<u>great weight</u>	<u>some weight</u>	<u>little weight</u>	<u>not applicable</u>
1. Strength of foreign court's interest in the area of the law.	8	6	2	1
2. If not certified, the forum court would have to apply the law of the non-forum state.	4	4	5	3
3. Closeness of question of state law.	10	6	1	0
4. Availability of sources to determine foreign court's law, such as decisions in related areas.	6	6	3	2
5. Attractiveness as an alternative to complete abstention.	2	5	7	3

	<u>great</u> <u>weight</u>	<u>some</u> <u>weight</u>	<u>little</u> <u>weight</u>	<u>not</u> <u>applicable</u>
6. Question refers to new or previously unconstrued state statute.	12	5	1	1
7. Concern about forum shopping.	0	2	8	7
8. Avoiding inconsistency with later foreign court decisions.	8	7	2	1
9. Identity of certifying or answering court.	3	4	6	4
10. Experience with the usefulness of certification.	6	10	0	1
11. Extent of delay of disposition with certification.	2	7	5	4
12. Other.	0	0	0	0

Part IV

Do you feel that the advantages of certification outweigh its disadvantages?

Iowa

STUART: "Yes—certification has worked well in Iowa. We have been selective on the issues certified. I don't think the Iowa Supreme Court feels we have abused the procedure."

Kansas

KELLY: "Yes. As where the issue is [sic] or unclear by our State Supreme Ct."

O'CONNOR: "Yes, definitely."

Kentucky

SILER: "Absolutely—I've used it a few times, but I've been pleased with the results."

Minnesota

MACLAUGHLIN: "Yes—if used carefully and infrequently."

Oklahoma

COOK: "Absolutely—yes!"

Wisconsin

REYNOLDS: "No. It places too heavy a burden on little litigants. It is OK for institutional litigants that are represented by institutional type law firms."