Vanderbilt Law Review

Volume 17
Issue 3 *Issue 3 - June 1964*

Article 30

6-1964

The Abstention Doctrine: A Problem of Federalism

Joyce Britt

The Abstention Doctrine: A Problem of Federalism

Equitable abstention refers to the deference a federal court will give a state tribunal to determine the rights of the litigants, even though technically, a federal court could entertain the action, whether by means of diversity of citizenship or because of a federal issue involved. Because of comity, or convenience, or a sense of balance in the federal system, or better handling of the problem, or some other reason of policy, federal courts at times have required a litigant to proceed in the state courts before invoking federal court jurisdiction. How this doctrine arose, its extensions and limitations form the subject of this note.

I. HISTORY

The term itself, equitable abstention, carries with it the seeds of its history, for the traditional discretion of the chancellor in equity proceedings is said to be its source.[1] In practice, however, the doctrine appears responsive to the practical problems of avoiding unnecessary state-federal conflict.

In 1908 the Supreme Court held in *Ex Parte Young*[2] that the eleventh amendment did not prohibit suit against a state official if he were acting in violation of the Constitution. Five years later the Court held that acts of state officials, though contrary to state law, may come within the prohibition of the fourteenth amendment.[3] Thus, enforcement of a state statute may be state action for purposes of the fourteenth, but only individual action for purposes of the eleventh amendment. Despite this illogic, the Supreme Court expanded federal jurisdiction and increased the possibility of federal interference with state governments. This imbalance was noted by Congress, which took the following steps to correct the situation: in 1910 a requirement of a three judge court in certain injunction proceedings;[4] in 1913 a stay of federal injunction proceedings upon the institution of state court enforcement proceedings accompanied by a suspension of the statute or order;[5] the Johnson Act of 1934 which deprived federal district courts of jurisdiction to enjoin state utility rate orders;[6] and the Tax Injunction Act of 1937 limiting the jurisdiction of federal courts to enjoin the collection of state taxes.[7]

1. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 500-01 (1941).
2. 209 U.S. 123 (1908).
3. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).
4. 28 U.S.C. § 2281 (1958).
5. 28 U.S.C. § 1342 (1958).
6. 28 U.S.C. § 1342 (1958).
7. 28 U.S.C. § 1341 (1958). The habeas corpus statute also requires exhaustion of state remedies. 28 U.S.C. § 2254 (1958). See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 854-55 (1953).

Meanwhile the federal judiciary itself was firmly at work, developing a doctrine of judicial restraint based on considerations of comity and a regard for the proper balance in the federal system. Nevertheless, abstention from jurisdiction specifically conferred has created its own problems, both because of diverse views on its constitutionality and because of the practical questions of its desirability in terms of expense, confusion, and delay.

II. Federal Judicial Restraint—Exhaustion of State Remedies

A. *Administrative*

Distinct from the doctrine of equitable abstention but nevertheless important in understanding its development and policies is the requirement that a plaintiff exhaust his administrative remedies before invoking the court's jurisdiction.[8] The reasons are obvious. First, the plaintiff may not need to seek a judicial determination, for he may prevail in the proceedings before the agency.[9] Second, the administrative agency is regarded as a kind of expert in the certain field to which it pertains.[10] Being more intensely involved with the particular area, it is more likely to be able to determine the facts. Third, exhaustion may be demanded simply because of comity.[11] If a state has gone to the trouble of providing a special agency to handle particular cases, the policy thus attempted to be established might be thwarted by premature judicial proceedings.

The rule has its limitations however. Where the statute establishing an agency or commission is invalid on its face,[12] or where the agency is bound by the decision of a higher agency[13] or by a state court decision,[14] where the existence of an administrative remedy is doubtful,[15] or the remedy inadequate,[16] exhaustion will not be re-

8. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908). See generally *Exhaustion of Administrative Remedies*, 2 Rac. Rel. L. Rep. 561 (1957).

9. "The very purpose of providing . . . administrative determination . . . is to make unnecessary later judicial proceedings." Aircraft & Diesel Equip. Corp. v. Hirsh, 331 U.S. 752, 767 (1947). Further, if the complainant does not succeed in the administrative proceedings, he may resort to the court "without fear of being met by a plea of *res judicata*." Prentis v. Atlantic Coast Line, *supra* note 8, at 230.

10. Aircraft & Diesel Equip. Corp. v. Hirsh, *supra* note 9, at 768.

11. "And as applied to Federal interference with state acts, the observance of this rule of comity should be regarded as an obligation." Prentis v. Atlantic Coast Line, *supra* note 8, at 237. See also Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937). But see McNeese v. Board of Educ., 373 U.S. 668 (1963), note 76 *infra* and accompanying text.

12. Engineers Pub. Serv. Co. v. SEC, 138 F.2d 936 (D.C. Cir. 1943).

13. Waite v. Macy, 246 U.S. 606 (1918).

14. Montana Nat'l Bank v. Yellowstone County, 276 U.S. 499 (1928).

15. Union Pacific R.R. v. Board of County Comm'rs, 247 U.S. 282 (1918).

16. Kelly v. Board of Educ., 159 F. Supp. 272 (M.D. Tenn. 1958).

quired. There is, however, a presumption that the administrative body will act legally.[17]

B. *Judicial*

If the remedy which the plaintiff seeks is judicial and could be entertained by either state or federal court, the plaintiff is generally able to proceed directly in the federal court without first seeking relief in the state court system, unless there is a federal statute[18] which provides for exhaustion of judicial remedies. In other words, there is no requirement for exhaustion of judicial remedies.[19] But for the doctrine of equitable abstention, this statement could be made unqualifiedly. The abstention doctrine herein discussed presupposes that the requirements for federal jurisdiction are met in every way, *i.e.*, that the statutory jurisdictional requirements are met, that there are no special statutory mandates against assuming jurisdiction and that administrative remedies, if there are any, have been exhausted.

III. ABSTENTION GENERALLY

A few years after the decision in *Erie R.R. v. Tompkins*[20] imposed a new regard for state law upon the federal courts, the Supreme Court fashioned a rule dealing with uncertain state law and thus created the abstention doctrine. In *Railroad Commission of Texas v. Pullman Co.*,[21] a suit to enjoin orders of the commission as being violative of the fourteenth amendment and the commerce clause, the Court noted the "sensitive area of social policy upon which the federal court ought not to enter unless no alternative to its adjudication is open."[22] Since the constitutional question might be circumvented by an adjudication of the commission's authority under state law, the state law would have to be interpreted. It was at this point that the Court departed from earlier practices.[23] Remanding the case to the district court with directions to stay the proceedings until the Texas court could determine the state law, the Court said, "no matter how

17. "Until there has been a failure of the administrative process, it should be assumed in a federal court that state officials will obey the law when their official action is properly invoked." Jeffers v. Whitley, 309 F.2d 621, 627 (4th Cir. 1962).

18. Notes 5-7 *supra*.

19. "Barring only exceptional circumstances, . . . or explicit statutory requirements . . . resort to a federal court may be had without first exhausting the judicial remedies of state courts." Lane v. Wilson, 307 U.S. 268, 274 (1939).

20. 304 U.S. 64 (1938).

21. *Supra* note 1.

22. 312 U.S. 496, 498 (1941).

23. In deciding state law questions in a diversity suit, Mr. Justice Cardozo, writing for the Court, added to the decree "that the parties . . . may apply at any time to the court below . . . for a further order or decree, in case it shall appear that the statute has been then construed by the highest court of Florida as applicable to the transactions in controversy here." Lee v. Bickell, 292 U.S. 415, 426 (1934).

seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination."[24]

The *Pullman* technique has since been followed and alternately approved and criticized.[25] While the federal courts have abstained in cases involving uncertain or unconstrued state law, in order to avoid constitutional issues and unnecessary friction, the Court held in *Meredith v. City of Winter Haven*[26] that uncertain state law is by itself no ground for abstention. In that case, the plaintiffs sought in a federal district court an injunction prohibiting the city from redeeming certain bonds without paying deferred interest charges on them. The only issue before the court concerned state law as no federal question was raised. In reviewing an order dismissing the case, the Supreme Court reversed and ordered the district court to take jurisdiction, saying, "when such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."[27] There are other limitations. Where a federal question would persist,[28] or where the action is essentially federal,[29] the federal courts have exer-

24. Railroad Comm'n of Texas v. Pullman, *supra* note 1, at 499.

25. See, *e.g.*, Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959); Harrison v. NAACP, 360 U.S. 167 (1959); Martin v. Creasy, 360 U.S. 219 (1959); Shipman v. DuPre, 339 U.S. 321 (1950); AFL v. Watson, 327 U.S. 582 (1946); Spector Motor Serv. v. McLaughlin, 323 U.S. 101 (1944); Chicago v. Fieldcrest Dairies, 316 U.S. 168 (1942); Chicago, B & O. R.R. v. City of North Kansas City, 276 F.2d 932 (8th Cir. 1960). For the latest criticism, see England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 423 (1964) (Douglas, J., concurring). Professor Moore, while pointing out that *Pullman* makes necessary two actions instead of the one, says, "it is possible that this price is not too high if necessary to promote good federal-state relations." 1a MOORE, FEDERAL PRACTICE 2114 (1961).

26. 320 U.S. 228 (1943). But see, Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940), a case which involved a dispute between the trustee under the Bankruptcy Act and claimants as to certain property rights under uncertain state law. The Supreme Court held that the district court should have ordered the trustee to proceed in a state court. The case seems to have had no influence beyond the area of bankruptcy. See also, Cramil Weaving Corp. v. Ramdeer Fabrics, 185 F.2d 537 (2d Cir. 1950); *In re* Central R.R. of N.J., 163 F.2d 44 (3d Cir.), *cert. denied*, 332 U.S. 810 (1947).

27. Meredith v. City of Winter Haven, *supra* note 26, at 235.

28. Public Util. Comm'n v. United Fuel Gas Co., 317 U.S. 456, 462-63 (1943).

29. Propper v. Clark, 337 U.S. 472, 489-93 (1949); All Am. Airways v. Cedarhurst, 201 F.2d 273, 276-77 (2d Cir. 1953). But see the Civil Rights cases discussed *infra*, note 62. In Stapleton v. Mitchell, 60 F. Supp. 51 (D. Kan. 1945), *appeal dismissed sub nom.*, McElroy v. Mitchell, 316 U.S. 690 (1945), a three judge court asked to enjoin a state statute on grounds of violations of the first through the fourteenth amendments, noted that the *Pullman* doctrine evolved in cases determining "property rights under the Fourteenth Amendment and not personal rights under the First . . . . We yet like to believe that wherever Federal courts sit, human rights under the Federal Constitu-

cised jurisdiction. On the other hand, the avoidance of constitutional questions is not exhaustive of the policy behind abstention, as there are cases where the courts abstained without this motivation.

In *Burford v. Sun Oil Co.*,[30] a suit to enjoin the execution of an order of the Texas Railroad Commission, the Supreme Court affirmed the district court's dismissal, relying upon the special system of regulation and procedure provided by Texas law. The Court cited a history of confusion resulting from federal court interference. "Delay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double system of review."[31] In that case the emphasis was on avoidance of conflict, not on avoidance of constitutional issues or clarification of state law, although both these issues were before the Court. In *Alabama Public Service Comm'n v. Southern R.R.*,[32] a suit to enjoin a state administrative order denying the railroad permission to discontinue service, the Court stated first that the issue presented did "not involve construction of a state statute . . . *e.g., Railroad Comm'n of Texas v. Pullman Co.*" nor "constitutionality of a state statute."[33] The decision of the Court to dismiss rested on grounds of comity—the proper regard for the independence of state government. Thus while *Burford* may be read as following *Pullman*, the *Alabama* decision clearly does not depend on construction of state law or avoidance of constitutional issues, but on avoidance of state-federal conflict. Professor Moore has criticized the *Alabama* decision as a "judicial Johnson Act of doubtful wisdom and propriety."[34]

By 1951 the Court had evolved two "abstention doctrines," the policy being to (1) avoid constitutional questions and to (2) avoid unnecessary conflict with a state's administration of its affairs. One day in 1959 the Supreme Court handed down four cases dealing with the abstention doctrine.[35] These cases merit reading, not only because of the legal issues involved, but because of the various opinions expressed by the judges. Two of the cases involving eminent domain proceedings contain such conflicting language, it is not difficult to see what confusion besets district judges when confronted with the abstention issue. In *Allegheny County v. Frank Mashuda Co.*,[36] the

tion are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." 60 F. Supp. at 54-55.

30. 319 U.S. 315 (1943).

31. *Id.* at 327.

32. 341 U.S. 341 (1951).

33. *Id.* at 344.

34. 1a MOORE, FEDERAL PRACTICE 2114 (1961).

35. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Harrison v. NAACP, 360 U.S. 167 (1959); Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959); Martin v. Creasy, 360 U.S. 219 (1959).

36. *Supra* note 35.

plaintiff landowners brought an action of ouster in the district court, alleging that the county had taken their property under eminent domain, for private use in violation of settled Pennsylvania law. The district court dismissed on the ground that it would be interfering with a state's administrative affairs. The Supreme Court reversed, holding that in such a case, the district court would only be acting as another state court. There were no exceptional circumstances, no federal questions, no danger of disrupting federal-state relationships. In *Louisiana Power & Light Co. v. City of Thibodaux*,[37] an eminent domain proceeding brought by the city in the state court and removed to the district court on the basis of diversity of citizenship, the district judge ordered abstention pending determination of the uncertain state law. The Supreme Court had previously held in *Meredith*[38] that uncertain state law was, by itself, no ground for abstention. The *Allegheny* opinion had stated that "eminent domain is no more mystically involved with 'sovereign prerogative' than . . . a host of other governmental activities carried on by the States and their subdivisions which have been brought into question"[39] in the federal courts without state court determination of state law. Yet the majority of the Court in *Thibodaux* ordered abstention, declaring that eminent domain is of a "special and peculiar nature . . . . [I]t is intimately involved with sovereign prerogative."[40]

The Court distinguished the *Meredith* case in a footnote,[41] stating that the issue there was whether jurisdiction must be surrendered to the state court; the court of appeals had dismissed. In *Thibodaux* the court of appeals had denied the district judge his discretionary power to stay disposition of a retained case until he could get a controlling decision from the state court. The dissenters did not see the distinction and pointed out in a footnote[42] that the Court in *Meredith* ordered the district court to adjudicate the issues, rather than retain jurisdiction and abstain from deciding the state law issues. They offered two grounds for the Court's decision: (1) the difficulty of interpreting state law (the Court "should frankly announce that *Meredith v. City of Winter Haven* is overruled, for no other conclusion is reasonable.")[43] and (2) a distaste for diversity jurisdiction.[44]

Professor Wright, however, has offered different reasons for the

37. *Supra* note 35.
38. *Supra* note 26.
39. 360 U.S. 185, 192 (1959).
40. 360 U.S. 25, 28 (1959).
41. *Id.* at 27, n.2.
42. *Id.* at 38, n.4 (Brennan, J., dissenting).
43. *Id.* at 38.
44. *Id.* at 41.

case. "[T]he special nature of eminent domain proceedings, combined with difficulties of state law, will permit abstention though neither of the circumstances individually would."[45] Second, he accepts Justice Frankfurter's footnote, that "the grant of a stay in an eminent domain case is a matter of discretion for the trial court."[46] This matter of discretion is an interesting one, Professor Wright points out, for in the *Burford* type case, dismissal is appropriate, rather than abstention with retention of jurisdiction—the procedure in the *Pullman,* or avoidance of constitutional questions, type abstention cases.[47] In both *Allegheny* and *Thibodaux,* the Court spoke of the trial judge's discretion, something which the earlier abstention cases had not mentioned. Later the Court in *NAACP v. Bennett*[48] remanded a *Pullman* type case to the district court in order that the judge, who had automatically referred the case to the state court, would exercise discretion in deciding whether to refer to the state court for construction of state law.

Though the Court did not "frankly overrule" *Meredith*—indeed it distinguished the case and adhered to it as authority for the proposition that unclear state law by itself is no ground for abstention[49]—the lower courts have since been in conflict over the question of unclear state law. In a bankruptcy proceeding involving determination of the validity of a chattel mortgage under state law, the Sixth Circuit has recently declared, citing *Meredith,* that the "mere difficulty of ascertaining what the state courts may hereafter determine the state law to be is not in itself a sufficient ground" for abstaining from the exercise of its jurisdiction.[50] A few days earlier the Fifth Circuit, in a 5-4 decision, had required abstention, quoting *Thibodaux,* and awaited the interpretation of Texas contracts according to Texas law by the Texas courts.[51] The concurring opinion in that case was bothered by the problem of equality within the circuit. "If 'we guess it off' for Texas, what happens to equality of treatment within the six States of this circuit when, for like questions, either initially or under Supreme Court mandate, we certify to the Florida Supreme Court?"[52]

45. Wright, *The Abstention Doctrine Reconsidered,* 37 TEXAS L. REV. 815, 821 (1960).
46. *Ibid.*
47. *Id.* at 821-22.
48. 360 U.S. 471 (1959).
49. See McNeese v. Board of Educ., 373 U.S. 668, 673, n.5 (1963): "we hold that difficulties and perplexities of state law are no reason for referral of the problem to the state court."
50. *In Re* Mohammed, 327 F.2d 616 (6th Cir. 1964).
51. United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964).
52. *Id.* at 489 (Brown, J., concurring). In Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960), the Supreme Court utilized a device provided by a Florida statute, which allowed the certification of questions of state law to the Florida Supreme Court for

The dissenting opinion took the view that this was no exceptional case and came within the *Meredith* rule, and further that "Texas, unlike Florida, has made no provision for the certification by federal courts of doubtful questions to its supreme court for resolution."[53] The concurring opinion's position on the question of equality seems untenable, since it is the state of Texas which has deprived its litigants of the certification procedure. Perhaps this conflict[54] will be resolved by a restatement of the *Meredith* rule by the Supreme Court and a clarification of the *Thibodaux* case and the narrow ground of its holding.

IV. Exhaustion of State Remedies and Civil Rights

A. *Abstention*

Though the abstention doctrine evolved from *Pullman,* a civil rights case, it has been said to be misapplied in civil rights actions, because of the evil at which they aim, *i.e.,* deprivation of rights federal in nature, and because of the "futility of seeking relief in state courts."[55] Professor Wechsler has observed that "application of the federal authority to invalidate the action of a state is best accomplished when the issue finds its way to the Supreme Court after it has had examination in the state courts," the exceptions being state remedies which are too "uncertain, slow, or ineffective."[56] In the area of civil liberties, he makes a major qualification to this statement, "within this precious area . . . there is to be no slightest risk of nullification by state process."[57]

The policies behind abstention, when it is used such that it becomes a delaying tactic,[58] an obstruction to a speedy determination of one's

determination upon request by a federal appellate court. Fla. Stat. Ann. § 25.031 (1961). But the problem of equality within the circuit is not for the federal court; it seems to be one for the other state legislatures. If they wish a certification device such as that of Florida, they may enact it.

53. 328 F.2d at 485 (Tuttle, C.J., Hutcheson, Wisdom and Bell, J.J., dissenting).

54. See also, Commerce Oil Refining Corp. v. Miner, 303 F.2d 125, 128-29 (1st Cir. 1962) (District court improperly enjoined defendant from proceeding in state court for declaratory judgment. If parties could not get a state court judgment by the time the federal action went to trial, the abstention doctrine would be applied on ground of unclear state law.); Green v. American Tobacco Co., 304 F.2d 70, 86 (5th Cir. 1962) (certifying question of state law to state court); A.F.L. Motors v. Chrysler Motors Corp., 183 F. Supp. 56, 60 (E.D. Wis. 1960).

55. Note, 14 Rut. L. Rev. 145, 187 (1959). See generally, Comment, 2 Rac. Rel. L. Rep. 1228 (1958).

56. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 Law & Contemp. Prob. 216, 229 (1943).

57. *Id.* at 230.

58. "This is a delaying tactic that may involve years of time and that inevitably doubles the cost of litigation. When used widespread, it dilutes the stature of the Federal District Courts, making them secondary tribunals in the administration of justice under the Federal Constitution." Harrison v. NAACP, *supra* note 35, at 180 (Douglas, J., dissenting). For a review of the problems of delay in desegrega-

constitutional rights, have been thought to be outweighed by the larger policy of providing a federal forum for determination of federal rights.[59] In a number of cases following *Brown v. Board of Education,*[60] however, the federal courts abstained in order that the state courts might interpret state statutes[61] or refused to exercise jurisdiction in the first instance because the plaintiff had not exhausted his administrative remedies.[62] The Supreme Court cut back on the abstention doctrine in some cases. In *Turner v. City of Memphis,*[63] the district court had abstained, pending interpretation by the state courts of state statutes relied upon by the defendants. The Court held that there was no occasion for abstention since the unconstitutionality of state statutes requiring segregation in publically operated facilities had been foreclosed as a litigable issue. But where the state statutes were unclear and a constitutional question might be averted, a divided Court held otherwise. In *Harrison v. NAACP,*[64] the Court ordered abstention while the state courts interpreted five Virginia statutes allegedly unconstitutional under the fourteenth amendment. It is to be remembered that abstention in such cases is postponement of jurisdiction pending construction of state statutes; the federal court usually retains jurisdiction pending the outcome of the state court proceedings. If the constitutional question persists, the federal court will still have jurisdiction of it. Nevertheless there remains the problem of expense and delay. *Harrison* made another

tion, see Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification,* 63 COLUM. L. REV. 1163, 1183 (1963). The author submits proposals for federal legislation, among which is the abolition of the abstention doctrine in civil rights cases. "Whatever value the doctrine may have in other cases, it only provides an occasion for disastrous delay in racial discrimination and racial protest cases."

59. Stapleton v. Mitchell, *supra* note 29.

60. 347 U.S. 483 (1954).

61. *E.g.,* Harrison v. NAACP, *supra* note 35; Griffin v. Board of Supervisors of Prince Edward County, 322 F.2d 332 (4th Cir. 1963), *cert. granted,* 375 U.S. 391 (1964); Lassiter v. Taylor, 152 F. Supp. 295 (E.D.N.C. 1957). Bryan v. Austin, 148 F. Supp. 563 (E.D.S.C. 1956), *vacated as moot,* 354 U.S. 933 (1957) (repeal of South Carolina law); Romero v. Weakley, 131 F. Supp. 818 (S.D. Calif.), *rev'd,* 226 F.2d 399 (9th Cir., 1955) (no dispute as to the state law). Wilson v. Beebe, 99 F. Supp. 418 (D. Del. 1951) (applied the *Pullman* doctrine in a pre-*Brown* decision concerning school segregation).

62. *E.g.,* Parham v. Dove, 271 F.2d 132 (8th Cir. 1959); Baron v. O'Sullivan, 258 F.2d 336 (3d Cir. 1958); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910 (1956). For a discussion of the Fourth Circuit cases, see Armstrong v. Board of Educ., 323 F.2d 333 (5th Cir. 1963), following the Supreme Court decision in McNeese v. Board of Educ., 373 U.S. 668 (1963), which pushed aside the exhaustion requirement. For a discussion of cases prior to *McNeese,* see the Sixth Circuit's opinion in Northcross v. Board of Educ., 302 F.2d 819 (1962). Most of the cases which do not require exhaustion turn on the inadequacy of the state procedures, *e.g.,* Jeffers v. Whitley, *supra* note 17.

63. 369 U.S. 350 (1962); *accord,* Bailey v. Patterson, 369 U.S. 31 (1962). See also NAACP v. Gallion, 290 F.2d 337 (5th Cir. 1961), *rev'd,* 368 U.S. 16 (1961).

64. *Supra* note 29.

trip to the Supreme Court as *NAACP v. Button*.[65] On its way back, the plaintiff had had all its claims adjudicated by the state courts and petitioned the Supreme Court for review. Although the district court had reserved jurisdiction of the case, the Supreme Court held that this reservation did not impair the Supreme Court's jurisdiction to review a final determination of the state court. The case was in the courts for almost seven years before the statutes in question were finally adjudged unconstitutional.

Other decisions from the Supreme Court have made inroads on the doctrine. *Monroe v. Pape*,[66] was a suit against state officials under the Civil Rights Act.[67] A negro family charged that Chicago police officers invaded their home, subjected them to humiliation, arrested the father of the family, then released him without taking him before a magistrate, allowing him to call his family or attorney or charging him. Although the state constitution and statutes provided a remedy for this type of illegal action, the Court held that the plaintiffs were not required to proceed under state law. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[68] The Court, through Mr. Justice Douglas, discussed extensively the history and purposes of the legislation, concluding that the acts, though contrary to state law, were "under color of state law" and therefore within the prohibitions of section 1983.

Mr. Justice Frankfurter, dissenting, was of the opinion that section 1983 created a civil liability enforceable in the federal courts only when redress for the injury was barred in the state courts because some "statute, ordinance, regulation, custom or usage" sanctioned the action complained of.[69] He further stated: "Permitting such actions necessitates the immediate decision of federal constitutional issues despite the admitted availability of state law remedies which would avoid those issues. This would make inroads, throughout a large area, upon the principal of federal judicial self-limitation which has become a significant instrument in the efficient functioning of the national judiciary,"[70] citing *Pullman*.

---

65. 371 U.S. 415 (1963).

66. 365 U.S. 167 (1961), 15 VAND. L. REV. 267 (1961).

67. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958).

68. 365 U.S. at 183.

69. 365 U.S. 167, 237 (Frankfurter, J., dissenting).

70. *Id.* at 240.

At one time, one would have expected a significant decision on the abstention doctrine in *Griffin v. County School Board of Prince Edward County*.[71] A district court judgment which, in effect, would require the reopening of Prince Edward County's tax-supported public schools on an integrated basis, was reversed by the Court of Appeals for the Fourth Circuit. The court of appeals indicated the district court should abstain until the state courts had ruled on the meaning and validity of the state laws involved, basically statutes providing for tuition grants to students attending private schools, if their county chose not to operate a school system. Before the Supreme Court ruled on the case, however, the Virginia Supreme Court of Appeals ruled on the statutes involved, finding them valid.[72] Thus, the abstention problem became moot. Nonetheless, the Court's opinion states that even lacking the decision by the state courts, it was proper for the district court to proceed. The Court's opinion notes the continued delaying tactics employed by the defendants and the state government, and goes on to say "there has been entirely too much deliberation and not enough speed" in enforcing the rights of Prince Edward County's Negro children.[73] The significance of this pronouncement by the court cannot be fully determined as yet. The statement occupies but a paragraph in a moderately long opinion;[74] It was not essential to the decision. But it probably indicates an increasing hostility to employ the abstention doctrine in civil rights cases.

B. *McNeese and the Exhaustion Requirement*

McNeese v. Board of Education,[75] while not an abstention case, merits examination because it signals a relaxation of the exhaustion requirement in civil liberties cases.

The *Monroe* case was a basis for the later decision in *McNeese*. Again an action was brought under the Civil Rights Act[76] by Negro plaintiffs alleging segregation within a public school. The lower court dismissed the complaint on the ground that the plaintiffs had not exhausted the administrative remedies provided by the Illinois School Code,[77] saying, "it is generally accepted in the cases

71. 84 Sup. Ct. 1226 (1964).

72. County School Bd. v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963). "The refusal of the highest court of this State to recognize here the rights of the citizens of Prince Edward County, guaranteed to them under the Constitution of the United States, is a clear invitation to the federal courts to step in and enforce such rights. I am sure that that invitation will be promptly accepted. We shall see!" *Id.* at 584 (Eggleston, C.J., dissenting).

73. 84 Sup. Ct. at 1232.

74. *Ibid.*

75. 373 U.S. 668 (1963).

76. REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958).

77. ILL. REV. STAT. ch. 122, § 22-19 (1962). According to the Court, "By that Code 50 residents of a school district or 10%, whichever is lesser, can file a complaint with

that Federal Courts should not interfere with a State's operation and administration of its schools, nor with the performance of administrative duties in the absence of necessity, until administrative remedies have been exhausted."[78] The Supreme Court reversed, citing *Monroe v. Pape* and enumerating the purposes of section 1983, "to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice' . . . and to provide a remedy in the federal courts supplementary to any remedy the State might have."[79] Although the administrative procedure might not have been adequate since the Superintendent himself had no power to order corrective action, but was to "request" the Attorney General for relief,[80] the Court determined that federal rights need not be first examined in a state proceeding. The question may be asked whether the Court was referring to all federal rights or only those civil liberties for which there is protective congressional legislation. Precisely how far *McNeese* goes in cutting back on the doctrine of abstention where there is adequate state administrative procedure is a question which remains unanswered. It is a likely guess that *McNeese* will not be used to make inroads on the requirement of exhaustion of administrative remedies other than in the field of civil rights.

V. Procedure

As before noted, apart from the academics of the abstention doctrine, there is the question of its value in terms of fairness to litigants, *i.e.*, expense, confusion, and delay. The expense of piecemeal litigation is obvious. The problem of procedural confusion has recently been clarified, at least to some extent.[81] The question of delay, which has been referred to in one Supreme Court decision as a "relatively minor inconvenience"[82] is an inquiry which is perhaps most appropriately directed to the abstention doctrine in the area of civil rights, where delay may prove to be defeat.

If the court has refused to exercise jurisdiction because the state has provided administrative remedies, the state administrative pro-

---

the Superintendent of Public Instruction alleging that a pupil has been segregated in a school on account of race. . . . After hearing the Superintendent notifies the parties of his decision and, if he decides that the allegations in the complaint are "substantially correct," requests the Attorney General to bring suit to rectify the practice." 373 U.S. at 670.

78. McNeese v. Board of Educ., 305 F.2d 783, 786-87 (7th Cir. 1962), *rev'd*, 373 U.S. 668 (1963).

79. McNeese v. Board of Educ., *supra* note 75, at 672.

80. *Supra* note 77.

81. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

82. Clay v. Sun Ins. Office Ltd., *supra* note 52, at 212.

ceedings are not res judicata and may be adjudicated in the federal forum.[83] But what about the case where the federal court retains jurisdiction while local law problems are being clarified by a state court? The problem of res judicata then arises, for the plaintiff may not know whether to litigate all his issues, both state and federal, or only those state issues which are unclear. If all issues are litigated, will his only recourse be to the Supreme Court? Until recently these questions have plagued attorneys and courts in abstention cases.[84] In *Government and Civic Employees Organizing Comm'n v. Windsor*,[85] the plaintiff union sought to enjoin enforcement of a state statute and a declaratory judgment that the union did not come within the meaning of the statute, on the ground that as so applied, the statute would violate the fourteenth amendment. In the case's first trip to the Supreme Court,[86] the federal district court was ordered to abstain while the plaintiff went to the state court where the state issues were litigated. Losing there, the union appealed to the state supreme court, which held that the statute applied to the plaintiff union, with no mention of the statute's alleged unconstitutionality. The federal court then held the statute constitutional and dismissed. Appealed once more to the Supreme Court, the case was reversed in order that the state courts could hear plaintiff's constitutional objections, the Supreme Court saying, "the bare adjudication by the Alabama Supreme Court that the union is subject to this act does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court."[87] After two more trips to the lower courts, both state and federal, the plaintiff gave up.

Windsor has been criticized by the opponents of abstention as an example of the confusion and delay which the doctrine fosters.[88] The Court, however, did enunciate a rule of procedure. This rule of procedure was finally clarified this year by the Supreme Court in *England*

83. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).

84. See Note, 73 HARV. L. REV. 1358, 1364-65 (1960); Note, 59 COLUM. L. REV. 749, 773 (1959).

85. 353 U.S. 364 (1957).

86. 347 U.S. 901 (1954).

87. 353 U.S. at 366.

88. See, *e.g.*, Wright, *supra* note 45, at 818; Note, 59 COLUM. L. REV. 749, 773 (1959); Note, 73 HARV. L. REV. 1358, 1364 (1960). A comparable case was in and out of state and federal courts for over nine years, pursuing a circuitous route through the federal system. Spector Motor Serv., Inc. v. McLaughlin, 47 F. Supp. 671 (D. Conn. 1942); Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809 (2d Cir. 1943); Spector Motor Serv., Inc. v. Walsh, 15 Conn. Supp. 205 (Super. Ct. Hartford County 1947); Spector Motor Serv., Inc. v. Walsh, 135 Conn. 37, 61 A.2d 89 (1948); Spector Motor Serv., Inc. v. O'Connor, 181 F.2d 150 (2d Cir. 1950); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1957).

v. Louisiana State Board of Medical Examiners.[89] Plaintiffs, graduates of schools of chiropractice, sought to practice in Louisiana without complying with the educational requirements of the Louisiana Medical Practice Act.[90] Bringing an action against the Board in the federal district court, they sought an injunction and a declaration that the statute, as applied to them, violated the fourteenth amendment. The court abstained on the ground that it was not clear whether the statute applied to chiropractors and stayed the action while the plaintiffs proceeded in a state court. There the plaintiffs did not restrict the question to be determined to whether the statute applied to them but, relying on the *Windsor* decision, argued all issues, including the constitutional ones. The Louisiana court held that the statute applied to chiropractors and did not violate the fourteenth amendment. Returning to the federal court, the plaintiffs' action was dismissed on the ground that since the Louisiana Court had considered all the issues and since the district court had no power of review, the proper remedy was appeal to the Supreme Court.[91]

The Supreme Court reversed and remanded the case to the district court for a determination of the federal issues, because the plaintiffs and the lower court had misunderstood *Windsor*. *Windsor*, the Court said, only required that the state court be informed of the federal claims so that the state statute might be construed "in light of" those claims. To avoid res judicata as to those claims, a party need only inform the state court of his intention to return to the federal court should the state issue be decided against him. In any event, a party may not be precluded from litigating his claims in a federal court "unless it clearly appears that he voluntarily did more than *Windsor* required and fully litigated his federal claims in the state courts."[92]

Mr. Justice Douglas, concurring in the result, was of the opinion that the *Pullman* doctrine needed reappraisal; and if *Pullman* were to be preserved, the party forced to go to the state court should not be considered to have given up his federal suit, unless he so elects. In other words, Justice Douglas thought the "presumption should work the other way,"[93] just in case attorneys and litigants should overlook this "exotic" rule of procedure and neglect to reserve the right of recourse to a federal district court. The delay in the case (the complaint having been filed seven years before), he thought, was "an unnecessary price to pay for our federalism."[94] Furthermore,

89. *Supra* note 81.
90. 37 LA. REV. STAT. §§ 1261-1290 (1950).
91. 194 F. Supp. 521, 522 (E.D. La. 1961).
92. 375 U.S. at 421.
93. *Id.* at 429 (Douglas, J., concurring).
94. *Id.* at 426 (Douglas, J., concurring).

this kind of delay would prove especially serious in the field of civil rights, where the road to a determination of federal questions would prove long and expensive.

> Delay which the Pullman doctrine sponsors, keeps the *status quo* entrenched and renders 'a defendant's judgment' even in the face of constitutional requirements. These evils are all compounded by what we do today, making it likely that litigants seeking the protection of the federal courts for assertion of their civil rights will be ground down slowly by the passage of time and the expenditure of money in state proceedings, leaving the ultimate remedy here, at least in many cases, an illusory one.[95]

VI. CONCLUSION

While the abstention doctrine has as its function the utilization of a sound policy of our federalism, the hazy lines of its applications and limitations, as drawn by the Supreme Court, have deprived it of much of its usefulness. Indeed in some cases, it is demonstrably a liability in the quest for justice and expedience. If applied as a rigid jurisdictional rule, requiring reversal and either a stay or dismissal after the case has been decided in the federal court on its merits, it is a wasteful and unnecesssary course, justified possibly by the policy behind it, but not at all by the lack of guidance given by the Supreme Court or Congress. As seen in many of the opinions handed down by a divided Court, the doctrine presents puzzling problems, both because of questions as to its constitutionality and the hazards of procedure.

The argument that abstention is in disregard of Congress' jurisdictional mandate is met by those cases of the *Pullman* variety, where the court retains jurisdiction. However, it cannot be questioned that the federal court does surrender jurisdiction as to state law determination. This argument may be further met by the discretionary role inherent in the function of the chancellor in equity proceedings. But as one Supreme Court decision has pointed out, the policy of abstention does not depend upon the unnecessary distinction between law and equity.[96] The real answer to the argument of abnegation of original jurisdiction is a provision in the Judicial Code which would clarify the application of the doctrine, set out the exceptions and limitations, and satisfy the need for Congressional authorization.[97]

The argument that the Judicial Code has already outlined the areas in which state remedies are to be exhausted, *e.g.*, utility rate orders and collection of state taxes,[98] and that in any other area the federal court must assume jurisdiction is met by the counter applica-

95. *Id.* at 436 (Douglas, J., concurring).
96. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959).
97. See Kurland, *Toward a Cooperative Judicial Federalism*, 24 F.R.D. 481, 489 (1959).
98. Notes 5-7 *supra*.

tion of the policy behind the enactment of the statute—the policy of noninterference in state matters. Again, the real answer lies in further provisions in the Judicial Code. The judge-made requirement that a plaintiff be required to exhaust his state administrative remedies might also be incorporated into the Code, for it is a sound rule and despite *McNeese,* will surely be retained.

If the answer to these constitutional arguments does lie in further provisions in the Judicial Code, the answer is only as sound as a realistic evaluation of what the Code should say. As previously pointed out, abstention cases run the gamut of factual situations. Furthermore, it is impossible to predict in what future areas the doctrine may appear. Professor Wright has suggested that a solution to the problem of drawing clear jurisdictional limits "may lie in a meaningful grant of discretion to the trial judges, leaving their decision either to hear a case, or to stay it pending a state court decision, or to dismiss it altogether in favor of the states, virtually unreviewable,"[99] although technically reviewable either by appeal in the case of dismissal or mandamus if stayed, and appeal upon final judgment in case of refusal to stay or to dismiss. "Setting the boundaries of this discretion"[100] is the task—from the positive approach to the line of *Pullman* cases to the negative one in cases of dismissal because of inconvenience.[101] Abstention must be made to serve the purposes of federalism.

99. Wright, *supra* note 45, at 825. Wright, *The Doubtful Omniscience of Appellate Courts,* 41 MINN. L. REV. 751 (1957).

100. Wright, *supra* note 88, at 825.

101. Generally, an action pending in a state court is no ground for federal court refusal to hear the case. Both actions go forward concurrently until one may be asserted as res judicata in the other. The Second Circuit, however, has gone beyond the doctrine of abstention as utilized by the Supreme Court. In Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949), the court stayed a shareholder's action pending proceedings in a state court in which nine similar actions were consolidated. In upholding the stay, the court relied upon Supreme Court cases authorizing a plea of *forum non conveniens,* a doctrine which usually means dismissal in favor of another federal court. In P. Briersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951), the district judge had ordered a stay of a trademark infringement action pending determination of a state court declaratory judgment action which raised the same issues. Kurland, *supra* note 97, at 490-91, who has approved these cases in the name of judicial economy, has pointed out that the second court in time, whether state or federal, should stay proceedings in order to avoid unnecessary duplication of result. This seems a practical answer to the problem of state court-federal court competition in the rush to res judicata, but it neglects the constitutional command and also the oftentimes superior procedural and discovery provisions accessible in the federal courts. The lower courts which have rejected the discretionary power to stay a case which is pending in a state court have relied upon a 1910 decision of the Supreme Court. "The rule is well-recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." McClellan v. Carland, 217 U.S. 268, 282 (1910). The case, however, may be distinguished on its facts, and as yet there seems to be no Supreme Court decision precisely applicable. These stay-for-convenience cases are not abstention-policy cases and go beyond any of the Supreme Court decisions

The *Meredith* rule is a wise one and should be preserved. Although federal courts no longer make state law in diversity cases, they must remain free to resolve uncertain state law, if there are no "exceptional circumstances" which demand otherwise. The jurisdiction of federal courts would indeed be "diluted" if this were not so.[102] The difficulty of interpreting state law, says Professor Wright, should be a factor to be weighed, along with other factors such as interfering with a state's administration of its own affairs, in the exercise of discretion by the trial judge.[103] Professor Moore also takes the position that diversity jurisdiction must remain intact, but that "there is a need for common sense accommodation . . . . [I]n exceptional circumstances it is more important that the state law be correctly applied and hence the diversity action should be stayed or dismissed, as the circumstances warrant, until the unsettled local issues are adjudicated by the state courts."[104]

In *Clay v. Sun Insurance Office Ltd.*,[105] a recent case which makes clear that abstention is proper in *legal* actions between *private* parties, the Supreme Court ordered the court of appeals to certify the question of state law to the Florida Supreme Court—a procedure provided for by a Florida statute. While this procedure has been praised by writers[106] and by the Court in that opinion as an answer to the problems of delay and as an example of "cooperative federalism," Professor Wright has pointed out that advisory opinions, "necessarily abstract and divorced from a concrete factual setting" may prove unsatisfactory, especially if their use would lead to abrogation of the *Meredith* doctrine.[107] Mr. Justice Douglas, while approving the cer-

---

and possibly beyond Supreme Court sanction. See generally, Note, 60 COLUM. L. REV. 684 (1960); Note, 59 YALE L.J. 978 (1950).

102. Harrison v. NAACP, *supra* note 35.

103. Wright, *supra* note 45, at 827. Compare Commerce Oil Refining Corp. v. Miner, 303 F.2d 125 (1st Cir. 1962), where the court said, "whether in a particular instance a federal court should stay its hand pending state court action seems to us a highly individual question in which all factors should be considered, the possibly [sic] delay, the relative difficulty of estimating what the state court would decide, the importance to the case of a state court determination, the relative burden on the parties of a possibly long case in the federal court as against a short one in the state court, and perhaps other matters." 303 F.2d at 128-29.

104. 1a MOORE, FEDERAL PRACTICE 2120 (1961).

105. 363 U.S. 207 (1960).

106. See, *e.g.*, Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and Its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413 (1962); Kurland, *supra* note 97; Note, 111 U. PA. L. REV. 344 (1963) (suggesting that inter-jurisdictional certification might be extended to the conflict of laws area with state courts certifying questions of the forcign law to the foreign state court). However, for a discussion criticizing the certification process see Comment, *Inter-Sovereign Certification as an Answer to the Abstention Problem*, 21 LA. L. REV. 777 (1961).

107. Wright, *supra* note 45.

tification procedure, has stated that the Court "cannot require the states to provide such a procedure; but by asserting the independence of the federal courts and insisting on prompt adjudications we will encourage its use."[108] Possibly only the use of such a procedure over a period of time will prove its effectiveness.

Abstention has been demonstrated to be a misplaced doctrine in the field of civil rights, both because of the nature of the rights asserted, the federal legislation on the subject, the essentially federal nature of the problem, and because of the need for prompt adjudication. And while the trend is unmistakable in the federal judiciary, as to this area, Congress should make clear the exception to the abstention policy; "its measure is the rights of action given by the Civil Rights Laws."[109]

JOYCE BRITT

108. England v. Louisiana State Bd. of Medical Examiners, *supra* note 81, at 434 (Douglas, J., concurring).

109. Wechsler, *supra* note 56, at 230. See also the right to vote statute, 42 U.S.C. § 1971(d), which provides: "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law." REV. STAT. § 2004 (1875), 42 U.S.C. § 1971(d) (1958).