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Doctrine of Abstention: Need of Reappraisal

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I. The Nature of Abstention

The judicially created doctrine of abstention permits a federal court to abstain from hearing a given case in order to let a state court clarify uncertain state law.[1] The abstention doctrine, which has its foundation in equity,[2] is most often used to avoid constitutional issues and to promote comity within the federal system.[3] Avoidance of constitutional questions has always been an implicit requirement of prudent judicial restraint. For example, if a case arises in which state law is uncertain and there is a federal constitutional question, the federal courts will refrain from making a constitutional determination, pending a state court interpretation of the statute's applicability which could moot the constitutional issue.[4]

Abstention is also implicitly required by the nature of our federal system. Within that system, state and federal courts have overlapping jurisdiction. State courts often decide federal law and federal courts decide state law. Inevitable friction between the two sovereigns requires a conscious effort on the part of the judiciary to achieve some sort of comity. In this attempt at comity, the abstention doctrine is a valuable tool in the hands of federal courts. A workable accommodation is achieved by allowing the state courts to decide issues of state law when a clash with state policy appears imminent and the state law needs interpretation.[5]

The doctrine of abstention was first fully expressed in the fairly recent case of *Railroad Comm'n of Texas v. Pullman Co.*[6] In that case, an attack was made in federal court on the constitutionality of a state regulation prescribing certain requirements for the operation of Pullman sleeping cars. The court held that resolution of the question of unconstitutional discrimination should be withheld pending initiation of state court proceedings leading to a definitive construction of the state statute under which the state commission acted. This decision was predicated on the traditional discretion of a chancellor in issuing an injunction. If the chancellor deemed that issuing an injunction in a certain situation was contrary to public policy, he could deny the request. The Supreme Court reasoned that granting an injunction prior to a state court determination of the statute's validity would be violative of a public policy that favors refraining from decisions on constitutional questions when a case can be decided on other grounds.[7]

The area of abstention has broadened in scope since the *Pullman* decision. It is now employed in the area of state administrative action,[8] of taxation,[9] and of

1 See generally Wright, Federal Courts § 52 (1st ed. 1963); 1 Barron & Holtzoff, Federal Practice and Procedure § 64 (Wright ed. 1960); 1A Moore, Federal Practice ¶ 0.203 (2nd ed. 1961). There are a number of law review articles that give general treatment to the doctrine of abstention. See generally Wright, *The Abstention Doctrine Reconsidered,* 37 Texas L. Rev. 815 (1959); Note, 73 Harv. L. Rev. 1358 (1960); Note, 59 Colum. L. Rev. 749 (1959); Note, 108 U. Pa. L. Rev. 226 (1959).

2 Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941).

3 Wright, Federal Courts § 52 at 169 (1st ed. 1963) gives four reasons:

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

The latter two reasons, however, have never been explicitly approved by the United States Supreme Court.

4 Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941). For a list of Pullman type cases see Wright, Federal Courts § 52 n. 6 (1st ed. 1963).

5 See Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 363 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

6 312 U.S. 496 (1941).

7 *Id.* at 501.

8 Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 363 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943). These cases brought into the abstention area the federal-state comity consideration as a basis for exercising the doctrine.

9 See Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).

eminent domain.[10] Even prior to *Pullman,* abstention had been used in a receivership appointment case[11] and in a bankruptcy case.[12] The *sine qua non* for the exercise of the abstention doctrine is that the state law for which the federal court is seeking an interpretation be of an uncertain nature. A distinction should be made between "difficult" or "unclear" areas of state law and those of an "uncertain" nature. The former terms may be used when there is some sort of state law interpretation available to the federal courts, while the latter implies that there is an absence of state authority. The United States Supreme Court has never held that mere "difficulty" of state law is a sufficient reason for abstention.[13] The general test employed has been the "uncertain state law plus" test which had been taken to mean uncertain state law plus exceptional circumstances.[14]

Those who espouse the abstention doctrine have recognized that the doctrine should have certain limitations. It should not be merely an instrument of judicial convenience.[15] Thus, the test of "exceptional circumstances" was established in *Meredith v. Winter Haven.*[16] The court in *Meredith* said that, in order to apply the abstention doctrine, state law must be of an uncertain nature and a question of constitutionality or federal-state comity must be present. However, where the state procedure is inadequate, the federal courts generally refuse to abstain.[17] Similarly, there is a reluctance to use the doctrine when civil rights are involved.[18] This reluctance extends to any actions involving private parties and not involving either state action or constitutional questions.[19] Finally, the federal courts have traditionally employed the doctrine to equitable issues only since the discretion of the chancellor was so limited.[20]

Three alternatives are available to a court deciding to abstain. First, the federal court may decide that it should retain jurisdiction while submitting all the issues in the case for state court determination. By retaining jurisdiction pending a state court decision "to be brought with reasonable promptness," the federal court may protect the parties against unreasonable delay.[21] This method of dis-

10 See Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1960).

11 See Pennsylvania v. Williams, 294 U.S. 176 (1935).

12 See Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940).

13 See, *e.g.,* Propper v. Clark, 337 U.S. 472, 492 (1949).

14 Meredith v. City of Winter Haven, 320 U.S. 228 (1943) is the case most often cited for this proposition. "Exceptional circumstances" has been generally taken by the United States Supreme Court to mean the existence of a federal constitutional question or a serious threat to federal-state comity. *But see,* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

15 While *Meredith* appears to preclude federal courts from employing abstention in the name of judicial convenience, two lower federal court cases seem to have based their decision to abstain on just such a ground. In Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1940) the court abstained pending determination of a state suit where similar actions were consolidated. In Beiersodorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951) abstention was applied on the ground of an overcrowded docket.

16 320 U.S. 228, 237 (1943) where the court said that:

> To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any *special circumstances* which would warrant refusal to exercise it. [emphasis added]

17 *E.g.,* In Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943) the court said that "Texas courts can give full as great relief, including temporary restraining orders, as federal courts." In Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 501 (1941) the court declared: "The law of Texas appears to furnish easy means for determining the Commission's authority."

18 See Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964); *But see* Harrison v. NAACP, 360 U.S. 167 (1959).

19 *But see* United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (1964).

20 Two recent United States Supreme Court cases suggest that the legal-equitable distinction may no longer be determinative. See Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

21 See Railroad Comm'n of Texas v. Pullman, 312 U.S. 496, 502 (1941).

position may save one of the parties from irreparable injury during the course of the litigation in the state courts.[22] Further, it allows federal courts to decide any unresolved federal issues that may remain after the state court acts.[23]

The second method is excision of a single issue to the state court for its determination. Such a state determination is limited to the issue submitted — in contrast to retention, where the federal court submits all the issues for state determination.[24]

Finally, the court may order an outright dismissal of the suit when there appears to be no need of a federal forum for the determination of subsequent federal issues. The theory is that outright dismissal under these circumstances prevents any possibility of federal interference with state action.

The United States Supreme Court has never set forth a criterion as to what method of disposition should be used in a given situation. Therefore, lacking guidelines, we can only use hindsight to discover why, in a given case, the Supreme Court felt that a particular method was preferable.[25]

The doctrine of abstention has not been immune from criticism. It has been argued that rightful invocation of a federal court's jurisdiction imposes a duty upon the court to assume jurisdiction.[26] In the diversity area, the *Guaranty Trust Co. v. York*[27] interpretation of *Erie R.R. v. Tompkins*[28] posited the view that a federal court should hear state issues as if they were courts of the state in which the controversy arose.[29] However, the federal court still has a statutory duty to hear that case. The policy behind federal diversity of citizenship jurisdiction is to assure a nonresident of an unbiased hearing. It can be argued that abstention in diversity cases is an abnegation of the responsibility to provide an unbiased and neutral forum. Further, it has been alleged that the doctrine needlessly causes delay and expense by relegating a party to a state court even though there is a possibility of having to come back into federal court for the determination of federal issues.[30] In many situations, the federal court's abstention as to certain issues divides the case into parts: the state court deciding state issues and then the federal court the federal questions.[31] This frequently results in inefficiency, burdening an already overburdened state and federal judiciary.

Abstention is defended as a mere "postponement" of decision until the state law has been ascertained, as distinguished from neglect of duty.[32] Thus, if the

22 See AFL v. Watson, 327 U.S. 582, 599 (1946) (threat of wholesale prosecution under state law by zealous law enforcement officials); Chicago, D. & G.B. Transit Co. v. Nims, 252 F.2d 317, 320-21 (6th Cir. 1958) (continuing jurisdiction to prevent prosecution by the Commission of Revenue of the State of Michigan).

23 Note, 73 HARV. L. REV. 1358, 1359-61 (1960).

24 This method has been sparingly used by the United States Supreme Court. *E.g.*, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1960); Leiter, Inc. v. United States, 352 U.S. 220 (1957); Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940).

25 For a more complete discussion of the methods of disposition see Note, 59 COLUM. L. REV. 749, 771-76 (1959).

26 *E.g.*, Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943). For a discussion of the concept of duty see Note, 59 COLUM. L. REV. 749, 776-78 (1959).

27 326 U.S. 99 (1945).

28 304 U.S. 64 (1938).

29 A paradox in the diversity area is that federal courts are asked to decide difficult questions of state law and yet these decisions do not make state law. An argument for the use of the abstention doctrine when "difficult" questions of state law arise is that those who make the law should decide it.

30 See Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 490 (1959).

31 See Government and Civil Employees Organizing Comm'n v. Windsor, 116 F. Supp. 354 (N.D. Ala. 1953), *aff'd*, 347 U.S. 901 (1954), 262 Ala. 285, 78 So.2d 646 (1955), 146 F. Supp. 214 (N.D. Ala. 1956), 353 U.S. 364 (1957). This case involved five years of litigation which included two trips to the United States Supreme Court and two visits to the state Supreme Court.

32 In Harrison v. NAACP, 360 U.S. 167, 177 (1959) the court said: "This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its

method of disposition is retention of the suit and federal questions remain after the state determination of the suit, a party is not thereby precluded from a federal court hearing. Similarly, if after a party has exhausted his state remedies and the case is dismissed in federal court on the ground of "res judicata," a party has recourse to the United States Supreme Court. Under this view, the delay and increased expense from abstention might be considered incidents of having a federal system.

II. The 1959 Supreme Court Decisions

A "re-evaluation" of the doctrine of abstention took place in 1959 when the United States Supreme Court decided four abstention cases.[33] In *Martin v. Creasy*,[34] landowners abutting a certain highway attempted to enjoin the State from designating the highway as one of "limited access." The basis of their suit was the unconstitutionality of the state law which allegedly failed to provide compensation for their loss of access to the highway. The Supreme Court held that the case, which had been reopened in the Federal District Court,[35] should be stayed pending state proceedings since the Pennsylvania courts had already held that there was a state forum available for the appropriate resolution of this case and the case was awaiting state court determination.[36] This case is within the tradition of previous abstention cases. It is a further exemplification of the fact that the Supreme Court recognizes the use of abstention to avoid constitutional issues when state law is uncertain.

The second case, *Alleghany County v. Frank Mashuda Co.*,[37] had been commenced in federal district court by certain landowners who had had their land condemned by the county. They sought to obtain ejectment and an injunction on the ground that the land condemned was not going to be used for a public purpose. The Federal District Court had dismissed for the reason that the entire problem could be resolved in the proceedings already before the state supreme court.[38] This decision was reversed by the Court of Appeals for the Third Circuit.[39] The Supreme Court, in holding that the District Court judge had abused his discretion in abstaining, said that: "Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."[40] The Court went on to point out that:

> The only question for decision is the purely factual question whether the County expropriated the respondent's land for private rather than for public use. The District Court would simply be acting as would a court of the State in applying to the facts of this case the settled state policy that a County may not take a private citizen's land under the State's power of eminent domain except for public use.[41]

Mr. Justice Brennan's majority opinion emphasized that "a State's power of eminent domain no more justifies abstention than the fact that it involved any other issue related to sovereignty."[42] Mr. Justice Clark wrote a dissenting opinion in

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exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication."

33 Martin v. Creasy, 360 U.S. 219 (1959); County of Alleghany v. Frank Mashuda Co., 360 U.S. 185 (1959); Harrison v. NAACP, 360 U.S. 167 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). For detailed analyses, see Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1959); WRIGHT, FEDERAL COURTS, § 64 (1st ed. 1963); Note, 108 U. PA. L. REV. 226, 234-51 (1959).

34 360 U.S. 219 (1959).

35 160 F. Supp. 404 (W.D. Pa. 1958).

36 Creasy v. Lawler. 8 Pa. D. & C.2d 535 (1956), *aff'd* 389 Pa. 635, 133 A.2d 178 (1957).

37 360 U.S. 185 (1959).

38 154 F. Supp. 628, 629 (W.D. Pa. 1957).

39 256 F.2d 241 (3d Cir. 1958).

40 360 U.S. 185, 188-89 (1959).

41 *Id.* at 190.

42 *Id.* at 192. *But see* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 26 (1959).

which Justices Black, Frankfurter, and Harlan joined. Agreeing with the district court, the dissenting judges believed that there were exceptional circumstances justifying the employment of abstention. They recognized that while the question of "taking" was before the federal court in this condemnation action, both the question of "taking" and also the issue of damages was to come before the state courts. They concluded that the "orderly and businesslike administration of justice, as well as the comity due Pennsylvania courts" would be served by abstaining.[43]

The third case to be decided was *Harrison v. NAACP*.[44] This suit involved an appeal from the decision of a three-judge court which had declared three Virginia statutes unconstitutional as violative of the Fourteenth Amendment.[45] The Supreme Court held that the District Court should have abstained from deciding the constitutional question, as the state statutes left room for a construction by the Virginia courts "which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem."[46]

Mr. Justice Douglas, joined by Chief Justice Warren and Mr. Justice Brennan, dissented on the theory that the District Court was under a duty to hear the case since its jurdisdiction was invoked pursuant to the civil rights statutes.[47] Further, he declared that this was "a delaying tactic that may involve years of time and that inevitably doubles the cost of litigation. When used widespread, [the abstention doctrine] . . . dilutes the stature of the Federal District Courts, making them secondary tribunals in the administration of justice under the Federal Constitution."[48]

The fourth 1959 case, and the one prompting the most comment, was *Louisiana Power & Light Co. v. City of Thibodaux*.[49] The municipality filed a petition in state courts for expropriation of certain property owned by the company. The defendant removed the case to the Federal District Court. The District Court ordered that the case be stayed until the Supreme Court of Louisiana had been given an opportunity to interpret the state law that purportedly gave the city authority to expropriate the property.[50] The Court of Appeals for the Fifth Circuit reversed.[51] In upholding the District Court's abstention, Mr. Justice Frankfurter, writing for the majority of the Court, said that the doctrine of abstention did not involve the jurisdiction of a federal court but was a matter of judicial administration. Therefore, he concluded, employment of the doctrine was not a shirking of responsibility, but a "postponement" of the court's decision. The Court attempted to distinguish *Meredith v. Winter Haven*[52] on the ground that it involved dismissal.[53] Justice Frankfurter further argued that eminent domain with "its basis in the roots of sovereign power"[54] was especially appropriate for state court determination. Mr. Justice Stewart in his concurring opinion noted that in the *Alleghany County* case,[55] unlike *Thibodaux,* dismissal of the suit was involved, the state law was clear, and factual questions were the only ones left for the federal court to decide.

The dissenters argued that, when the jurisdiction of a federal court is properly

43 360 U.S. 185, 201 (1959) (dissenting opinion).
44 360 U.S. 167 (1959).
45 159 F. Supp. 503 (E.D. Va. 1958).
46 Harrison v. NAACP, 360 U.S. 167, 177 (1959). This case suggests that abstention is not precluded when federal jurisdiction is invoked pursuant to the civil rights statutes, even though the supremacy of the federal law, violations of personal freedom and the possibility of delaying tactics are involved. *But see* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964); McNeese v. Board of Educ., 373 U.S. 668 (1963).
47 16 Stat. 144 (1870), 42 U.S.C. § 1981 (1957).
48 360 U.S. 167, 180 (1959).
49 360 U.S. 25 (1959).
50 153 F. Supp. 515 (E.D. La. 1957).
51 255 F.2d 774 (5th Cir. 1958).
52 320 U.S. 228 (1943).
53 Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27 n.2 (1959).
54 *Id.* at 29.
55 360 U.S. 185 (1959).

invoked, the duty to decide the case then and there cannot be ignored except to avoid constitutional issues or to preserve the delicate balance between state and federal governments endangered by a federal decision. They emphasized that: (1) this was not an equitable action to which the doctrine of abstention had been traditionally limited; (2) conflict with paramount federal law was absent; (3) there was no interference with the state administrative process. They concluded that such an act of abstention was merely for the convenience of the federal court and was in part based upon the majority's antipathy for diversity jurisdiction. They also noted that the eminent domain situation was no more related to sovereignty than other factual situations where abstention was denied. The dissent admonished the majority, saying that if the court was overruling *Meredith* it should say so.

Analysis of the 1959 decisions and their impact on the abstention doctrine reveal that these decisions left a number of unsolved problems. Did the court in the *Thibodaux* case intend to confer upon the district courts discretionary power to abstain whenever they deemed state law uncertain or unclear, or was the holding to be limited to eminent domain situations? Assuming discretionary power to abstain in situations where state law is uncertain, what is the test of uncertainty that federal judges are to employ so they might avoid abusing their discretion? In distinguishing *Meredith* on the ground that the court dismissed rather than retained jurisdiction did the Court impliedly give instructions to the district courts that they should retain jurisdiction when abstaining? Did the *Harrison* decision imply that the Supreme Court would ignore the invocation of federal jurisdiction under the Civil Rights Act when a party was proceeding under an uncertain state law and order abstention pending a state court determination of state law? What weight is to be given the factor of delaying tactics in civil rights cases when the doctrine of abstention is under consideration? Did the Supreme Court in the *Thibodaux* case extend the use of the abstention doctrine to actions at law as well as suits in equity? At least some of these questions have been answered by subsequent Supreme Court decisions.

III Resolution of Problems After 1959

A. Law-Equity Distinction

Whether *Thibodaux* evidenced an end to the law-equity distinction in the abstention area was answered by the Supreme Court in *Clay v. Sun Insurance Office Ltd.*[56] The plaintiff, a citizen and resident of Illinois, bought an insurance policy in Illinois from the defendant insurance company licensed to do business in both Illinois and Florida. Subsequently the plaintiff moved to Florida and there brought suit on the insurance policy in Federal District Court. The defendant claimed that application of Florida law to the instant case would be unconstitutional. The Supreme Court said that the federal court should not pass on the constitutional question without a prior state court determination of the applicability of the local law. Under this view, the defendant's objection was premature and abstention was proper since it was not clear that the Florida courts would apply Florida law.

Since the *Clay* case concerned purely legal issues the application of the abstention doctrine arguably means an end to the traditional reservation of the doctrine to equity. Although the Florida certification procedure facilitated abstention, the Court implied that it would have reached the same determination even in the absence of this procedure.[57]

B. Civil Rights

In *Harrison v. NAACP*[58] the majority of the Supreme Court failed to single out civil rights cases as deserving special treatment when the question of abstention

56 363 U.S. 207 (1960), certified question answered affirmatively, 133 So.2d 735 (Fla. 1961), 319 F.2d 505 (5th Cir. 1963), *rev'd*, 377 U.S. 179 (1964).

57 Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960).

58 360 U.S. 167 (1959).

arose. But the Supreme Court was again confronted with the question of abstaining in civil rights cases in two recent decisions. In *McNeese v. Board of Educ.*,[59] Negro public school students brought suit in Federal District Court pursuant to the Civil Rights Act seeking to enjoin discrimination in an Illinois public school.[60] The Seventh Circuit affirmed[61] the district court's dismissal of the case on the ground that the plaintiffs had not exhausted their remedies under state administrative procedures. The Supreme Court, however, reversed, noting that there was "no underlying issue of state law controlling the litigation" and no state law that had to be untangled before the case could proceed. For this reason, it is submitted, *McNeese* can be reconciled with *Harrison* in which case the Supreme Court required abstention because an underlying issue of state law controlled the Civil Rights Act litigation.

Similarly, the recent case of *Griffin v. County School Bd. of Prince Edward County*[62] is consistent with both *McNeese* and *Harrison* in that the presence or absence of controlling state law is decisive. The Virginia school segregation laws allegedly denied the "equal protection of the law" guaranteed by the Fourteenth Amendment. In reversing the Fourth Circuit,[63] the Supreme Court denied abstention, firstly, because the highest court of the state had passed on all the state issues involved in the case[64] and, secondly — and "quite independently," because of the long delay resulting from state and county resistance.[65]

While the *Griffin* case is reconcilable with *Harrison* and *McNeese* in that the authoritative state court had passed on the state law issues thus leaving no uncertain state law, still the Supreme Court recognized an independent consideration. It is this willingness to consider the element of delay in enforcing constitutional rights that significantly distinguishes *Griffin* from *Harrison*.[66] How far is the Court willing to go in considering this factor? Is the mere possibility of delay in the state court system a sufficient reason for refusing to abstain in the civil rights area? The spirit of the *Griffin* decision clearly points in this direction. Certainly it was never intended that abstention delay the enforcement of civil rights under federal law. If this is attempted there is no reason why the federal courts should abstain.

C. Submission of Federal Issues To State Courts

The 1959 cases failed to answer the question of whether a party, once abstention was authorized, had to submit his federal issues to the state courts for their determination. A dilemma arose because the language of *Government Employees Organizing Comm. v. Windsor*[67] implied that the litigant was required to submit his federal issues to the state court in order to aid that tribunal in construing

59 373 U.S. 668 (1963).
60 199 F. Supp. 403, 407 (E.D. Ill. 1961).
61 305 F.2d 783 (7th Cir. 1962).
62 377 U.S. 218 (1964) (abstention denied).
63 322 F.2d 332 (4th Cir. 1963).
64 204 Va. 650, 133 S.E.2d 565 (1963) where the state Supreme Court upheld the validity under state law of the closing of the Prince Edward County public school system and gave each county the option to pay for and operate, or not pay for and not operate, a public school system.
65 Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 229 (1964), where the Supreme Court said that:

> In the first place, the Supreme Court of Appeals of Virginia has already passed upon the state law with respect to all the issues here. . . . But quite independently of this, we hold that the issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by law suits. . . . There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown v. Board of Education* . ... had been denied Prince Edward County Negro children.

66 See Harrison v. NAACP, 360 U.S. 167, 180 (1959) (Douglas dissenting).
67 353 U.S. 364 (1959).

the state statute; and yet, if he did submit his federal issues, the principle of "res judicata" would bar him from returning to federal court.

In *England v. Louisiana State Bd. of Medical Examiners,*[68] the United States Supreme Court resolved this dilemma. A number of chiropractors brought suit in Federal District Court seeking injunctive relief from certain educational requirements for "medical practice" imposed by a Louisiana statute. They alleged that the statute was inapplicable to them as chiropractors, and that in any event the act was violative of the Fourteenth Amendment. The Federal District Court stayed further proceedings until the state courts had an opportunity to rule on the reach of the statute.[69] In the Louisiana court the plaintiffs, following *Windsor,* "unreservedly submitted for decision, and briefed and argued their contention that the act was unconstitutional."[70] After an unfavorable decision,[71] the plaintiffs sought to return to the Federal District Court to have the constitutional question resolved there. The suit was dismissed on the grounds that the Louisiana courts had already ruled on the constitutionality of the act and that the federal district courts do not sit as forums of appeal from state court decisions.[72]

The Supreme Court sympathized with the plaintiff's plight and clarified its holding in *Windsor:* "The case does not mean that a party must litigate his federal claims in the state courts, but only that he must inform those courts what his federal claims are, so that the state statute may be construed 'in light of' those claims."[73] The Court defined the consequences when a party without reservation submits his federal issues for state court determination: "We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then — whether or not he seeks direct review of the state decision in this court — he has elected to forego his right to return to the District Court."[74]

In order for a party to have a hearing on his federal issues, he must reserve them for federal court determination when he enters the state court. He may make this reservation on the state court record or by a later showing that he did not voluntarily fully litigate his federal claims in the state court.[75] However, this rule was to have prospective effect only since the chiropractors' misreading of *Windsor* was not unreasonable.

Mr. Justice Douglas, while concurring in the judgment as to the plaintiffs, could not agree with the majority holding as to future cases. He felt that the new rule created a treacherous presumption in favor of state court determination of federal issues which would trap the unwary.[76]

The *England* holding would appear to be an adequate solution to a very vexing problem. Many times it is necessary for a state court to have an understanding of an entire case before deciding a state law question. This includes an understanding of the federal issues involved. Yet before *England,* contrary to the spirit of a federal court system, a party could be deprived of a federal forum for his federal issues if he submitted his federal claims to a state court. Although

68 375 U.S. 411 (1964). There have been a number of recent law review articles on this case: 50 A.B.A. J. 375 (1964); 64 COLUM. L. REV. 766 (1964); 52 ILL. B. J. 701 (1964); 35 MISS. L. J. 454 (1964); 38 ST. JOHN'S L. REV. 359 (1964); 25 U. PITT. L. REV. 606 (1964).

69 180 F. Supp. 121, 124 (E.D. La. 1960).

70 375 U.S. 411, 413 (1964).

71 126 So.2d 51 (La. App. 1961).

72 194 F. Supp. 521, 522 (E.D. La. 1961).

73 England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 420 (1964).

74 *Id.* at 419.

75 The *England* court states that an explicit reservation, such as making the reservation on the state court record is not always necessary. The Court said: "Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it appears that he voluntarily did more than *Windsor* required and fully litigated his federal claims in the state courts." *Id.* at 421.

76 *Id.* at 435.

England's reservation requirement could in some cases trap the unwary, it does go far toward assuring a federal forum for those who would be otherwise estopped by the state court's determination of federal as well as state issues.

D. Uncertain State Law

The post-*Thibodaux* Supreme Court cases leave unanswered the very crucial question of whether or not uncertainty of state law, without exceptional circumstances, is in itself justification for using the doctrine of abstention. In the recent case of *McNeese v. Board of Educ.*[77] the Supreme Court declared: "Yet where congress creates a head of federal jurisdiction which entails a responsibility to adjudicate the claim on the basis of state law, *viz.*, diversity of citizenship . . . we hold that *difficulties* and *perplexities* of state law are no reason for referral of the problem to the state court."[78] (Emphasis added) This comment is consistent with the traditional view that the diversity statute imposes upon the federal courts a duty to hear and determine the case before it when its jurisdiction has been properly invoked. But the Court makes no mention of the situation in which state law is not merely "difficult" but "uncertain," namely, where there is absolutely no state authority upon which to base a federal court interpretation of state law.

The United States Courts of Appeals since 1959 have generally used the "exceptional circumstances" test as a vehicle for determining when abstention ought be employed.[79] A pending suit before a state court involving the same subject matter continued to be viewed as an insufficient reason for abstention.[80] Where state law was not obscure the Second and Fifth Circuits would not abstain.[81] Where a mere contract between two parties was in question, and not federal-state comity, the doctrine was not used;[82] but if comity were involved and state law obscure, abstention would be employed.[83]

A few federal appellate decisions might be characterized as "liberal." In *Chicago, Burlington & Quincy R.R. v. City of North Kansas City, Mo.*,[84] the court held that *Thibodaux* was authority for abstention in actions at law. Further, abstention could be initially requested on appeal. However, in doubtful cases this delay may be a consideration in refusing to use the doctrine. This court also recognized the merit of retaining jurisdiction as a method of disposition once the determination has been made to abstain.

Two recent Fifth Circuit decisions have strikingly expanded the uses of the abstention doctrine. The first was *Green v. American Tobacco Co.*[85] This diversity case involved the liability of a cigarette manufacturer for the death of plaintiff's decedent caused by lung cancer. The court abstained in order to ascertain, through Florida's certification procedure,[86] the manufacturer's liability under Florida law. This procedure had already received the warm approval of the Supreme Court in *Clay v. Sun Ins. Office Ltd.*[87] — an enthusiasm not shared by all the commen-

77 373 U.S. 668 (1963).

78 *Id.* at 673, n. 5.

79 *E.g.*, Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 824 (9th Cir. 1963); Lutes v. United States District Court For West. Dist. of Okla., 306 F.2d 948, 950 (10th Cir. 1962); Beach v. Rome Trust Co., 269 F.2d 367, 374 (2d Cir. 1959).

80 See Banco Nacional De Cuba v. Sabbatino, 307 F.2d 845, 854 (2d Cir.), *rev'd*, 376 U.S. 398 (1964).

81 *E.g.*, Beach v. Rome Trust Co., 269 F.2d 367, 374 (2d Cir. 1959); Orleans Parish School Bd. v. Bush, 268 F.2d 78, 80 (5th Cir. 1959).

82 See Lutes v. United States District Court For West. Dist. of Okla., 306 F.2d 948 (10th Cir. 1962).

83 See American Airlines, Inc. v. Louisville & Jefferson C.A.B., 269 F.2d 811 (6th Cir. 1959).

84 276 F.2d 932 (8th Cir. 1960).

85 304 F.2d 70 (5th Cir. 1962).

86 1 A FLA. STAT. ANN. § 25.031 (1961) declares:

> The Supreme Court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any

tators.[88] The Supreme Court's implied invitation to make greater use of the certification procedure was not lost on the Fifth Circuit.

In *Green* there was uncertain state law but no constitutional issue nor question of state comity. Since uncertainty, heretofore an inadequate basis, is the only reason for abstention, one suspects that the circuit court must have been relying on the Florida certification procedure. A federal court may feel that in having a certification procedure available the evil of a long delay in state courts has been eliminated and, thus, it may choose to abstain. But the Florida legislature does not invest the federal court with authority to abstain. The decision to abstain must be predicated upon the power of the federal judiciary to do so. It follows that if a federal court has authority to abstain in this case where certification procedure is available, then it also has that authority in the ordinary case involving uncertain state law.

The second decision *United Services Life Ins. Co. v. Delaney,*[89] involved the interpretation of an insurance contract. The court noted that the law of Texas was obscure and directed the parties to initiate declaratory judgment proceedings in the state court. The court declared that:

> The guidance of the dim light of the Texas decision leaves the meaning of the questioned decisions obscure. Without further enlightenment any judgment we might pronounce would be "a forecast rather than a determination." [Citation Omitted] The Supreme Court has "increasingly recognized the wisdom of staying action in the federal courts pending determination by a state court of decisive issues of state law." [Citing *Louisiana Power & Light Co.* v. *City of Thibodaux*] It is appropriate that this Court stay its hand until the Courts of the State of Texas shall have declared the law of the State of Texas which is applicable to and controlling in the disposition of these appeals.[90]

Two alarmed judges dissented on the ground that diversity jurisdiction was not made discretionary by the statute. Rather, the legislative mandate leaves room for deviation only in "exceptional circumstances" within which, they believed, the instant case did not fall.

Judge Brown wrote an interesting concurring opinion in which he emphasized the concept of judicial discretion in the abstention area.[91] The doctrine of abstention was to be used when in the exercise of judicial discretion a federal judge deemed it appropriate. He viewed the difficulty or complexity of state law as a consideration in the exercise of this discretion. This complexity of state law was not to be determined by a superfluous inquiry but by a close analysis of the given case.

> circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

87 363 U.S. 207 (1960).

88 WRIGHT, FEDERAL COURTS, § 52 at 176 (1st ed. 1963) says:

> The certification procedure has been regarded with quite an extraordinary enthusiasm by the commentators. Quite aside from the expense and delay this procedure causes, the constitutional difficulty in many states in giving what is inevitably no more than an advisory opinion, and the unsatisfactory experience courts in general have had with certified questions, necessarily abstract and divorced from a concrete factual setting suggest that certification is an undesirable innovation if it will lead to abrogation of the *Meredith* doctrine.

89 328 F.2d 483 (5th Cir.), *cert. denied,* 377 U.S. 935 (1964) (Mr. Justice Douglas of the opinion that certiorari should be granted).

90 *Id.* at 484-85.

91 "Abstention is neither abandonment of duty, on the one hand, nor a problem of raw power, on the other. It is judge-fashioned and being such, the cloth should be cut to pattern." *Id.* at 485.

What does the majority of the court in *Delaney* mean when they say that the law of Texas is "obscure"? If "obscure" is taken to mean that the interpretation of state law is "difficult," then the *Delaney* holding is directly opposed to the teaching of *Meredith v. City of Winter Haven*,[92] as recently reaffirmed in *McNeese*[93] which states the orthodox view that mere difficulty is insufficient.

Delaney used the abstention doctrine in a private contract suit involving uncertain state law without the presence of a constitutional issue or question of federal-state comity. If Judge Brown's concurring opinion were accepted as rationale for this decision, the new test would be one resting in the discretionary power of a federal judge to determine when abstention is proper. Such a rationale without qualification is an extreme approach in light of the *Meredith* holding and the traditional mandate theory of jurisdiction.

The Fifth Circuit cases of *Clay* and *Delaney* suggest the need for a re-evaluation of the abstention doctrine as to "when" and under "what circumstances" it should be invoked. *Thibodaux,* at least as interpreted by the Fifth Circuit, has cast doubt upon the current status of *Meredith* and the "exceptional circumstances doctrine." A failure to re-evaluate the doctrine by the Supreme Court may be taken to mean a tacit approval of the Fifth Circuit's interpretation and may open the door for cases of the *Delaney* variety in other circuits.

The problem remains that in many cases the federal courts must merely guess at state law only to later find their decision overruled by the state supreme court. "The reign of law is hardly promoted if an unnecessary ruling of federal court is thus supplanted by a controlling decision of a state court."[94] Thus if state law is uncertain, the federal courts may have a valid reason for abstaining; yet if it is only difficult they may be shirking a responsibility in the face of a troublesome decision. But when is state law to be characterized as "uncertain"? Is it "uncertain" when there is no state authority directly on point or when the federal court is called upon to analyze state authorities in an analogous area of state law? What is an analogous area of state law? If "uncertain" state law is to be allowed as a reason for abstaining, it becomes imperative for the Supreme Court clearly to define what is "uncertain" and what is "difficult." Such a definition could qualify Judge Brown's discretion test and thus reconcile it with the traditional abstention approach. In any event, if the Supreme Court has in effect overruled *Meredith* by its decision in *Thibodaux* it should say so[95] and then proceed to define "uncertain" state law.

IV. Conclusion

The abstention doctrine has undergone some notable changes since 1959. The demise of the law-equity distinction and the *England* reservation of one's right to a federal forum are two such changes. In the civil rights area the trend appears to be away from abstention because of its abuse as a delaying tactic. The unsolved problem area centers around "uncertain" state law. Some Fifth Circuit decisions suggest that "uncertainty" of state law is itself a reason for abstaining. However, the Supreme Court has not yet given explicit recognition to such an approach. Whether it will do so or reiterate traditional abstention principles is at best conjectural.

James T. Heimbuch

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92 320 U.S. 228 (1943).

93 373 U.S. 668 (1963).

94 Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 500 (1941).

95 In England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 423 (1964), Mr. Justice Douglas said in his concurring opinion:

> The judge-made rule we announce today promises to have such a serious impact on litigants who are properly in the federal courts that I think a reappraisal of *Railroad Comm'n v. Pullman Co.*, . . . from which today's decision stems is necessary. Although the propriety of the *Pullman* doctrine, either as originally decided or as it has evolved, has not been raised by the parties, I think it is time for the Court, "sua sponte" to reevaluate it.