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David M. Liebenthal

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# A Dialogue on England: The England Case, Its Effect on the Abstention Doctrine, and Some Suggested Solutions

David M. Liebenthal

*In this fictitious dialogue, between two students of the law, on the abstention doctrine and its effect upon federal jurisdiction, Mr. Liebenthal examines relevant Supreme Court decisions and explains how they have been affected by the England case. First, the author demonstrates that apparent inconsistencies between England and earlier decisions arise from the fact that several of the latter did not involve "true" abstention situations. Second, it is shown that the conflict generated by the simultaneous applicability of the abstention doctrine, the principles of res judicata, and the rule of Erie v. Tompkins to a particular case precludes strict adherence to any one of them and necessitates flexibility if the ends of federal jurisdiction are to be attained. Finally, Mr. Liebenthal suggests that many of the problems caused by the invocation of the abstention doctrine in cases involving diversity of citizenship or a federal question could be eliminated by the use of inter-jurisdictional certification by federal courts of appeal.*

"I AM STILL NOT SURE that I understand exactly when a court should or should not, or must or must not abstain. Could we go over that subject in greater detail?"

"I do not think reexamining that here would be of much help.

The law reviews have done an excellent job on the subject, and a reading of a few of them should suffice to answer your questions.<sup>1</sup> Let me say, however, that the courts themselves also appear to be in your position;

THE AUTHOR (B.B.A., Western Reserve University, J.D., University of Chicago) is a practicing attorney in Cleveland, Ohio, and is a member of the Ohio State Bar Association.

they are not very clear on the matter either.<sup>2</sup>

"For our present purposes let us examine some of the facets of *England v. Louisiana State Bd. of Medical Examiners*<sup>3</sup> and the problems it presents."

<sup>1</sup> See generally Gowen & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEXAS L. REV. 194 (1964); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, *Judicial Abstention From the Exercise of Federal Jurisdiction*, 59 COLUM. L. REV. 749 (1959); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960); Note, *Federal Abstention*

## I. *Burford* AND *Alabama*: CASES NOT REPRESENTING APPLICATION OF THE ABSTENTION DOCTRINE

"Very well, for *England* certainly does present some problems. First, why did Mr. Justice Brennan immediately make an exception for cases like *Burford v. Sun Oil Co.*<sup>4</sup> and *Alabama Pub. Serv. Comm'n v. Southern Ry.*<sup>5</sup> from his sweeping statement of a litigant's

and Its Relation to the Erie Doctrine, 38 TEMP. L.Q. 72 (1964); Note, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226 (1959); Note, *The Abstention Doctrine: A Problem of Federalism*, 17 VAND. L. REV. 1246 (1964); Note, *Judicial Abstention in the Federal Courts — Its Origin, Purposes and Application*, 65 W. VA. L. REV. 209 (1963); Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 YALE L.J. 850 (1964); Note, *Louisiana Power & Light v. Thibodaux: The Abstention Doctrine Expanded*, 69 YALE L.J. 643 (1960).

<sup>2</sup> See *American Universal Ins. Co. v. Chauvin*, 329 F.2d 174, 179 (5th Cir. 1964), where the court stated that "when to abstain and how we are to go about it is certainly no easy matter"; *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483 (5th Cir. 1964). See also *Commerce Oil Ref. Corp. v. Miner*, 303 F.2d 125 (1st Cir. 1962); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962), *rev'd on rehearing*, 325 F.2d 673 (5th Cir. 1963); *B-W Acceptance Corp. v. Torgerson*, 234 F. Supp. 214 (D. Mont. 1964); *A.F.L. Motors, Inc. v. Chrysler Motors Corp.*, 183 F. Supp. 56 (E.D. Wis. 1960). These cases involved abstention in diversity situations and where only a doubtful state law question existed. Abstention was granted in *Green*, *Delaney*, *Miner*, and *Torgerson*; approved but not ordered in *A.F.L. Motors* because the court felt that there was sufficient time to reach the merits after a decision was rendered in the state court; and denied in *Chauvin*. There is a consensus that abstention is improper in such situations. See articles cited note 1 *supra* and text accompanying notes 95-152 *infra*. See also *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820 (9th Cir. 1963) and *Beiersdorf & Co. v. McGohey*, 187 F.2d 14 (2d Cir. 1951). These cases involve the propriety of abstention where jurisdiction is based upon a federal question.

<sup>3</sup> 375 U.S. 411 (1964). In *England*, the appellants were chiropractors who sought to practice in Louisiana without complying with the educational requirements of the Louisiana Medical Practice Act, LA. REV. STAT. §§ 1261-90 (1950). They contended that the act was unconstitutional as applied to them because of the nature of their profession. The district court abstained and remitted the parties to the state courts on the ground that a decision that the act does not apply to chiropractors might end the controversy. The Louisiana Supreme Court ruled adversely to appellants, and the district court dismissed their appeal on the ground that the supreme court's decision was *res judicata*. The Court reversed and ordered the district court to decide the constitutional questions involved. 375 U.S. at 411-12.

<sup>4</sup> 319 U.S. 315 (1943). This case involved an attempt by the Sun Oil Company to enjoin as a violation of due process the execution of an order of the Railroad Commission of Texas by which *Burford* and others had been granted permission to drill and operate four oil wells. The district court dismissed the complaint, the court of appeals reversed, and the Supreme Court vacated the reversal and affirmed the dismissal on the ground that the Texas courts should have an opportunity to first decide the questions involved. *Id.* at 316-18.

<sup>5</sup> 341 U.S. 341 (1951). In *Alabama*, the Railway Company applied to the Alabama Public Service Commission for permission to discontinue service on two of its trains because they were operating at a substantial loss. The application was denied. Instead of appealing the Commission's order to the state courts as provided by statute, the appellee Railway Company filed a complaint in the federal district court alleging that enforcement of the order would result in irreparable injury. The court granted the injunction, but the Supreme Court reversed because of appellee's failure to show that the established procedure for reviewing commission orders was inadequate.

right to have a federal court pass on his properly presented federal questions?"<sup>6</sup>

"The simple answer to your question is that *Burford, Alabama*, and their progenies can be distinguished from what may be termed 'true' abstention cases such as *Railroad Comm'n v. Pullman Co.*<sup>7</sup> In fact, it may be said that cases of the former type are not — let me repeat, are not — really abstention cases at all."

"If *Alabama* and *Burford* are not abstention cases at all, then have we been wasting our time?"

"No, it certainly is useful to examine and schematize these cases carefully in order to attempt to ascertain in what situations the courts should follow these decisions. I merely contend that such schematization is not strictly pertinent to an analysis of cases like *Pullman* — 'true' abstention cases, if you will. This will demonstrate why Mr. Justice Brennan made the exception he did and, further, why such an exception is justified. Let me explain."

"Proceed."

"You will recall that the abstention doctrine, as it was established in *Pullman* and as we have considered it, is based on the following considerations. First, by awaiting a state court determination of the state law question, state law will be authoritatively determined, and, second, a decision on federal constitutional questions may be obviated.<sup>8</sup> In *Burford*, while noting that jurisdiction was based on diversity and the presence of a federal question,<sup>9</sup> the Court said nothing about avoiding the constitutional question nor made any further reference to its existence and placed only

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<sup>6</sup> 375 U.S. at 415 n.5.

<sup>7</sup> 312 U.S. 496 (1941). In *Pullman*, the Railroad Commission of Texas issued an order which required all sleeping cars operated in that state to be in the continuous charge of an employee having the rank and position of pullman conductor. The Pullman Company and other railroads sought to enjoin enforcement of the order in a federal district court as unauthorized by Texas law and violative of the due process, equal protection, and commerce clauses of the federal constitution. The court granted the injunction, but the Supreme Court reversed on the ground that the complainants had not shown that the remedies available to them in the Texas courts were inadequate for the purpose of deciding the constitutional questions presented. *Id.* at 496-98.

<sup>8</sup> Whether both factors are necessary for abstention, or the existence of a doubtful state law question alone is sufficient is unclear. See cases cited note 2 *supra*.

<sup>9</sup> 319 U.S. at 317.

minimal reliance on the uncertainty of state law.<sup>10</sup> Rather, the Court stressed the deference due the formation of state policies in relation to the complexities of the oil industry and relied on three basic factors: the non-legal complexities involved in the Commission's orders; the fact that review of such orders had been concentrated in one state court to avoid the confusion inherent in multi-court review; and the history of disruption of the state's regulatory scheme by federal equitable interference. Thus the decision was based on the undesirability of a federal court's interfering in a unified state scheme relative to a highly complex industry and regulated by an expert administrative agency."

"But the fact that equitable considerations were stressed does not distinguish *Burford* from *Pullman*, for equitable considerations were also stressed in *Pullman*. In fact, such considerations were emphasized in *Pullman* even more than the two basic abstention factors mentioned previously. Furthermore, does not the existence of doubtful state law issues as well as a constitutional question in *Burford*, even if not stressed by the Court, make the decision easily explainable in terms of the *Pullman* 'true' abstention rule?"

"Yes, but the fact that the Court did not stress these 'true' abstention factors cannot be so easily put aside. The Court had twice before dealt with the Commission and the Texas oil industry. The *Burford* decision and the rationale used by the majority follow quite realistically from the prior decisions in *Railroad Comm'n v. Rowan & Nichols Oil Co.*,<sup>11</sup> both of which involved the same parties and the scope of review a federal court should exercise in passing on the validity of an oil proration order of the Commission challenged as violative of due process. In reversing the two lower courts which had enjoined the orders, the Court, speaking through Mr. Justice Frankfurter, took the position that all doubts were to be resolved in favor of the expert administrative agency in a federal court action to enjoin its orders as violating the fourteenth amendment and that such orders were not to be enjoined if there was any reasonable basis for them. The Court in *Burford* cited the decisions in *Rowan & Nichols* a number of times<sup>12</sup> and, of special importance, noted that

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<sup>10</sup> *Id.* at 331.

<sup>11</sup> These decisions can be found at 310 U.S. 573 (1940) and 311 U.S. 570 (1941).

<sup>12</sup> 319 U.S. at 318-19, 323, 330-32.

the federal-state conflict which had been lessened appreciably by those decisions should not be permitted to begin again."<sup>18</sup>

"But Mr. Justice Frankfurter wrote a strong dissent in *Burford* on the basis that the Court was abrogating diversity jurisdiction. Does not this factor, that is, that the *Rowan & Nichols* cases were based on federal question jurisdiction and *Burford*, at least partially, was based on diversity jurisdiction, make the cases clearly distinguishable? Moreover, does not the fact that Mr. Justice Frankfurter wrote for the Court in one case and against it in the other make your argument that *Burford* was based on the *Rowan & Nichols* cases somewhat tenuous?"

"I cannot answer for Mr. Justice Frankfurter's inconsistencies, of course, but it does seem that, given his position in the *Rowan & Nichols* cases, his position in *Burford* is somewhat difficult to understand, much less justify. The *Rowan & Nichols* cases certainly indicate that the federal courts were not to interfere with the Commission's orders as they related to the oil industry when jurisdiction was based upon a federal question. The *Burford* case simply advances this 'hands-off' policy by enunciating the same principle for cases in which federal jurisdiction is predicated on diversity."

"I see that if it is undesirable for a federal court to interfere with the Commission's expert administrative control when jurisdiction is based on the existence of a federal question, it certainly would seem *a fortiori* that it would be undesirable to do so when jurisdiction is predicated on the accident of diversity. I understand now the differences between *Burford* and *Pullman*, but I still fail to see why such an action should be dismissed. What general principle makes the *England* rule inapplicable to a case like *Burford*? And what about *Alabama*? It was not based on any prior cases, nor did it contain the factors on which *Burford* was based."

"For now let me state that *Burford* may be said to be simply an example of the broad equitable principle of comity — leaving to a state the determination of its own policies. Let us examine *Alabama* before attempting to answer your questions more thoroughly, and I think my last statement will become clearer."

"Fine. More clarity would certainly be appreciated, for I am

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<sup>18</sup> *Id.* at 331-32.

not yet convinced that cases like *Burford* and *Alabama* are really any different from what you call 'true' abstention cases."

"*Alabama* was not, and as a matter of fact, could not have been based on the *Pullman*-type abstention cases, for there was involved no doubtful state law question and no means of avoiding the constitutional question. This was explicitly recognized by the lower court when it refused to apply the doctrine, pointing out that the case involved no undecided state law question requiring an authoritative determination and that since neither the authority of the Commission nor the statute under which it acted was being challenged, no state court decision could eliminate the necessity for the court to pass on the constitutional question.<sup>14</sup> My conclusion is further supported by the fact that the Supreme Court itself expressly disclaimed the applicability of traditional *Pullman*-type abstention cases.<sup>15</sup> This pretty well does away with any basis for supporting *Alabama* on 'true' abstention grounds."

"Well, I will have to grant you that. But then, since *Alabama* involved none of the factors underlying *Burford* such as a unified scheme for regulation of a complex industry (the regulation of the oil industry being more complex than that imposed on the railroad industry) or a history of confusion arising from federal review of administrative orders of the type challenged, upon what does the case rest and how can it be equated with *Burford*?"

"My answer to both questions is the traditional equity principle of comity stated before. Let us examine the two opinions and decisions and see what they *did* have in common. Two factors stand out as fundamentally stressed in both opinions. The first is the relationship established between the state court and the state agency in the statutory provisions for review by that court of the agency's orders. In *Burford* the state court and agency were spoken of as 'working partners,'<sup>16</sup> and in *Alabama* the state judicial review procedure was called an 'integral part of the regulatory process.'<sup>17</sup> In both cases, the Court felt that this relationship was an important enough aspect of the state legislative determination to leave to the

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<sup>14</sup> *Southern Ry. v. Alabama Pub. Serv. Comm'n*, 91 F. Supp. 980, 985-86 (M.D. Ala. 1950).

<sup>15</sup> 341 U.S. at 344.

<sup>16</sup> 319 U.S. at 326.

<sup>17</sup> 341 U.S. at 348.

agency the task of formulating the state's regulatory scheme and that for a federal court to interfere with this process would obstruct the state's formulation of its own policies.

"The second factor has two aspects: the scrupulous regard which the federal courts should maintain in reference to the independence of the states and the states' right to determine their own policies and the need to guard the overall public interest against the extraordinary relief of an injunction when private interests will not suffer by so withholding it.<sup>18</sup> Thus *Burford* and *Alabama* are merely examples of the traditional equity cases concerned primarily with the propriety of equitable relief in a given situation in which the Court places great emphasis on the factor of federal-state harmony. The confusion with 'true' abstention arises from the fact that the Court in cases like *Burford* and *Alabama* declines to exercise jurisdiction on equitable grounds because there is another system available to afford the requested relief; and although it may appear that the federal court is abstaining, actually it is simply deciding that it will not grant the relief requested."

"You do not mean, do you, that *Burford* and *Alabama* authorize a federal court to decline jurisdiction in equity matters whenever there is adequate state relief available? Surely Mr. Justice Frankfurter was correct, was he not, in saying in *Alabama* that the grant of federal jurisdiction is in itself evidence that Congress felt that the availability of adequate state relief is not sufficient to protect the interests that federal jurisdiction is supposed to protect and that to hold otherwise would be to destroy federal jurisdiction in equity cases?"<sup>19</sup>

"I certainly did not mean to imply that the availability of adequate state relief alone is sufficient to justify a federal court in declining to exercise its equity jurisdiction, nor do I think the majority in *Alabama* or *Burford* meant to either. Rather, the Court was saying that other factors — such as the importance of state independence in formulating policies of state regulatory schemes and establishment of special review procedures to ensure consistent formulation of such policies — in connection with the factor of the available state relief being adequate to protect the private interests

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<sup>18</sup> 319 U.S. at 317-18; 341 U.S. at 349-51. In both cases, the Court was quite careful to point out that review adequate to protect the petitioners' federal rights was clearly available in the state courts.

<sup>19</sup> 341 U.S. at 360-62 (concurring opinion).



involved in the particular case outweigh the need for federal jurisdiction in that particular case and that equity has always had the power to decline jurisdiction under such circumstances. In short, adequate state relief is a necessary but not a sufficient precondition for declining jurisdiction. Mr. Justice Frankfurter was certainly correct in his statement, but his statement arose only because he disagreed with the Court on the existence in *Alabama* of these other factors.<sup>20</sup> And even though I tend to agree with him that these other factors did not exist in the case to the extent necessary in order to justify the majority's position, its action was, nonetheless, based on finding that these other factors did exist.<sup>21</sup> Thus *Burford* and *Alabama*, like abstention itself, are based on the idea that other factors can, in a given situation, make a state remedy adequate. The point is that the factors which make the state remedy adequate are different in *Burford* and *Alabama*-type cases from those in abstention cases."

"I think I am beginning to see your point. You are saying, are you not, that the Court in *Burford* and *Alabama* felt that comity required the federal courts, within their equity discretion, to decline to interfere with state policies or the system established by the state for the formulation of its policies when adequate relief is afforded through the state courts?"

"Exactly. The doctrine used in *Burford* and *Alabama* is no more than the doctrine which the Court had used before: No equity court will unnecessarily give extraordinary equitable relief, even though that court has jurisdiction to do so.<sup>22</sup> Once you understand that this is the position the Court took, the reason for dismissal is easily explained."

"Once the Court has decided to deny the relief requested, having decided that such relief would be extraordinary and unnecessary under the circumstances, there is no *reason* for jurisdiction to be retained."

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<sup>20</sup> *Id.* at 360.

<sup>21</sup> *Id.* at 344-48.

<sup>22</sup> See *Pennsylvania v. Williams*, 294 U.S. 176 (1935), cited by Mr. Justice Douglas, concurring in *Burford*, 319 U.S. at 334-35, in which the Court declined jurisdiction in a case involving an insolvent building and loan association where the state court procedure for supervision of liquidations was deemed adequate. See also *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), from which the Court quoted in *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, 350-51 (1951), a case turning on the federal court's withholding of extraordinary equitable relief and where the Court sanctioned dismissal of the complaint.

"Exactly right again. And this further highlights the difference between these cases and *Pullman*. In *Pullman*-type cases the relief requested is not the controlling factor. Rather, in such cases, the plaintiff is required to justify the granting of relief by first having preliminary questions answered in the state courts in order to establish the necessity for the federal court to decide the question or questions on which depend the granting of the federal relief in the first place. *Burford* and *Alabama*, on the other hand, hold that contextually the requested relief cannot be justified in the circumstances presented, and thus will not be granted at all."

"Well, you have almost convinced me. But there is one more item with which you must deal to convince me completely. First, will you concede that *Stainback v. Mo Hock Ke Lok Po*<sup>23</sup> and *Martin v. Creasy*<sup>24</sup> are *Pullman*-type abstention cases?"

"Yes."

"Now, remember I said I had a question concerning the disposition point, and here it is: if one of the factors distinguishing *Burford* and *Alabama* from 'true' abstention cases is that the former result in dismissal, whereas cases like *Pullman* result in retention, how can you justify the dismissals in *Stainback* and *Martin*, both of which you concede to be *Pullman*-type cases?"

"Unfortunately, I cannot justify the dismissals in those cases. I simply think that dismissal was incorrect in *Stainback*<sup>25</sup> and *Martin* and that this is especially so in light of the *England* rule."

"Then you think *England* overrules *Martin* and *Stainback*?"

"To the extent that they can be read to justify dismissal in 'true' abstention cases, yes. Both cases presented abstention situa-

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<sup>23</sup> 336 U.S. 368 (1949).

<sup>24</sup> 360 U.S. 219 (1959).

<sup>25</sup> Perhaps the exception which proves the rule, that the doctrine of abstention involves merely a postponement and not an abdication of federal jurisdiction, is *Stainback v. Mo Hock Ke Lock [sic] Po*, 336 U.S. 368 (1949). There dismissal of the complaint was ordered, rather than retention of jurisdiction pending a state construction of the statute. The Court did not explain why it ordered this different treatment of the case, and it seems quite inconsistent with the theory which underlies abstention in this class of cases. *Probably*

tions identical to that in *England*, that is, the challenge to a statute found to present a doubtful state law question on federal constitutional grounds.<sup>26</sup> Thus there is no reason why the 'fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims,'<sup>27</sup> were not equally applicable to the parties in *Stainback* and *Martin* as they were to those in *England*. Furthermore, the statement in *Martin* that Supreme Court review is always available if the petitioners feel that the state courts have deprived them of their constitutional rights<sup>28</sup> is directly contrary to the *England* declaration that such review is not an adequate substitute for an initial district court determination.<sup>29</sup>

"Your point is well taken, and my question has been sufficiently answered. May I commend you: I have been convinced."

## II. THE *England* RULE AND RES JUDICATA

"So, in a true abstention case, the federal court will retain jurisdiction, pending the state court's determination of the state law questions. And it would appear that *England* commands this result, given the emphasis on the litigant's right to a federal determination of his federal question. But suppose the state court *does* decide the federal question, even though the plaintiff has properly reserved it. What good does retention do then?"

"Before answering your question, perhaps I should say a word about the purposes of retention. Obviously, the primary purpose is to enable the federal court to proceed with the action if the state court decision on state law does not avoid the necessity of answering

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*the decision should be regarded as a sport.* Wright, *supra* note 1, at 816-17 n.8. (Emphasis added.)

<sup>26</sup> In *Stainback*, the Court equated the right of a territorial court to authoritatively interpret a territorial law with that of a state court to do so with a state law. 336 U.S. at 383.

<sup>27</sup> *England v. State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964).

<sup>28</sup> "If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the Commonwealth has deprived them of their property without due process of law, this Court will be here." 360 U.S. at 225.

<sup>29</sup> "[S]uch review [in the Supreme Court], even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts." 375 U.S. at 416.

the constitutional questions. But retention also serves another function, and that is to protect the plaintiff against irreparable injury from unreasonable delay in state court relief. Abstaining courts have often spoken of this latter factor.<sup>30</sup>

"As to your question, *England* itself answers it. The only way a litigant can lose his right to return to the federal court is by voluntarily litigating his federal claim in the state court.<sup>31</sup> If the state court compels him to litigate his federal claim there, then of course such litigation would not be voluntary, and thus the litigant would not have lost his right to return to the federal court."<sup>32</sup>

"But suppose one of the parties fully litigates the federal question and the state court answers it?"

"Mr Justice Brennan dealt with this also by saying that the other party can refuse to argue the question or argue it with the proper reservation.<sup>33</sup> Another possibility would be for the federal court to enjoin the parties from litigating the federal question in the state court. Since the basic purpose of retention is to maintain jurisdiction over federal issues, it seems that the federal court could invoke its statutory power to enjoin parties from proceeding in state courts 'where necessary in aid of its jurisdiction.'<sup>34</sup>

"But it seems to me that a state court might object to being denied the right to decide the constitutional question, especially where it concerns one of the state's own statutes. I recognize, of course, that as Mr. Justice Brennan asserts, should the state court agree to answer the state law question *only if* the plaintiff agrees to *fully* litigate his constitutional question, the district court would have to vacate its abstention order and answer both questions itself.<sup>35</sup> Nevertheless, based upon my initial assumption it does not seem unreasonable to conclude that a state court would take this attitude.

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<sup>30</sup> *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 29 (1959); *Shipman v. DuPre*, 339 U.S. 321, 322 (1950); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 502 (1941).

<sup>31</sup> 375 U.S. at 421-22.

<sup>32</sup> *Id.* at 421 n.12.

<sup>33</sup> *Id.* at 422 n.13.

<sup>34</sup> 28 U.S.C. § 2283 (1964). See *Propper v. Clark*, 337 U.S. 472, 491-92 (1949), so intimating in dictum. However, the power has never been exercised in this context. For a discussion of the scope of the statute see Note, *Federal Power To Enjoin State Court Proceedings*, 74 HARV. L. REV. 726 (1961).

<sup>35</sup> 375 U.S. at 421 n.12.

Now, in light of the fact that abstention is designed not only to serve the states in reserving to them the authoritative interpretation of their own laws but also to enable the federal courts to avoid constitutional questions, is there any way the federal court can force the state court to answer only the state questions?"

"This is difficult to answer and involves a great deal more than we have time for here, so my response must be somewhat inadequate. Suffice to say that it has been argued that the federal courts lack power to prevent the state courts from deciding the federal issues;<sup>36</sup> therefore, in light of these authorities, I would have to answer your question in the negative."

"Suppose, then, that the parties have been enjoined from raising the federal question and have merely presented it with proper reservation as *England* requires, but the state court nevertheless answers the question. What would be the result?"

"Mr. Justice Brennan conceded this possibility and indicated that the district court would be permitted to redetermine the federal issues."<sup>37</sup>

"Oh, I see. What about res judicata and section 1738?"<sup>38</sup>

"You have made my reply much easier by the way you posed your original question. As was noted in *Propper v. Clark*,<sup>39</sup> the use of an injunction against the parties would be for the very purpose of preventing the operation of res judicata. It certainly would be inappropriate to apply res judicata where the parties never *had* the opportunity to raise their federal questions because of the injunction. And once the state court has ignored the injunction, thus itself violating the principle of comity which was one of the factors which fostered the abstention in the first place, the federal court certainly need not be constrained further by such notions which might have weighed against violating the normal rules of res judicata."

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<sup>36</sup> See 68 HARV. L. REV. 544 (1955); 1 STAN. L. REV. 551 (1949).

<sup>37</sup> 375 U.S. at 421. Cf. *NAACP v. Button*, 371 U.S. 415, 427-28 (1963).

<sup>38</sup> 28 U.S.C. § 1738 (1964) requires a federal court to give the same effect to a state court judgment that it would receive in another court in that state. Basically, it is a codification of the common law doctrine of res judicata.

<sup>39</sup> 337 U.S. 472, 491-92 (1949).

"All right, suppose that there were no injunction, that the parties properly reserved the federal question, and that the state court still answers it. Now what?"

"Very well — Let us see what the courts have done with this problem. Although *Propper* suggested that res judicata would apply in abstention situations in the absence of an injunction,<sup>40</sup> it seems that this view was rejected in the *Tribune Publishing Co. v. Thomas*<sup>41</sup> decisions. After the federal court had abstained, the parties presented and argued all their claims, state and federal, to the state court, which rejected them.<sup>42</sup> After the Supreme Court denied certiorari,<sup>43</sup> the plaintiffs returned to the district court, again asserting their federal claims, which were reexamined by that court. It assumed the state decision and held that the denial of certiorari — since it did not purport to be an adjudication on the merits — was not res judicata as to the federal issues.<sup>44</sup> The court of appeals affirmed,<sup>45</sup> declaring that the state determination 'settles the question so far as concerns . . . state law,'<sup>46</sup> but apparently agreed that the state courts could not settle the federal issues, and thus their decision on them was not to be given res judicata effect."

"Am I right in assuming the *Tribune* decisions would be over-

<sup>40</sup> *Ibid.*

<sup>41</sup> These decisions can be found at 153 F. Supp. 486 (W.D. Pa. 1957), *aff'd*, 254 F.2d 883 (3d Cir. 1958) and at 120 F. Supp. 362 (W.D. Pa. 1954).

<sup>42</sup> *In re Mack*, 386 Pa. 251, 126 A.2d 679 (1956), *cert. denied*, 352 U.S. 1002 (1957). Prior to this action, which was an appeal from a contempt conviction for a violation of the court rule which the plaintiffs were challenging as unconstitutional, the state supreme court had denied the plaintiffs' petition for a writ of prohibition against the lower court's enforcement of the rule. Application of Tribune Review Publishing Co., 379 Pa. 92, 113 A.2d 861 (1954) (per curiam).

A by-product of this decision became a *cause célèbre* in Pennsylvania. The decision, unanimous when rendered, came at the end of the court's term. After the justices had all gone home, Mr. Justice Musmanno wrote and filed a dissenting opinion, without informing his brethren. When the State Reporter refused to publish the opinion, the justice brought a mandamus action to compel publication. He lost the case, but only after demanding that the entire supreme court disqualify itself for bias, and arguing before that court *in propria persona*. *Musmanno v. Eldredge*, 1 Pa. D. & C.2d 535 (C.P. Dauphin County) (per curiam), *aff'd per curiam*, 382 Pa. 167, 114 A.2d 511 (1955). Note, 73 HARV. L. REV. 1358, 1366 n.51 (1960).

<sup>43</sup> *Mack v. Pennsylvania*, 352 U.S. 1002 (1957).

<sup>44</sup> *Tribune Review Publishing Co. v. Thomas*, 153 F. Supp. 486 (W.D. Pa. 1957), *aff'd*, 254 F.2d 883 (3d Cir. 1958).

<sup>45</sup> *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883 (3d Cir. 1958).

<sup>46</sup> *Id.* at 885.

ruled by *England*, the plaintiff having presented and fully litigated his federal question in the state courts and that you are using the case only to demonstrate court reaction to the problem of res judicata and abstention?"

"Yes."

"Well, as an aside, do you think the Pennsylvania district court's reasoning as to the effect of the denial of certiorari is sound? And what happens if Supreme Court review is by appeal rather than by certiorari, as I would think it usually would be in these cases?"<sup>47</sup>

"As to the effect of the denial of certiorari, the decision clearly indicates that such a denial is not sufficient to protect the litigant's right to federal jurisdiction for his federal question. This view seems quite sound, being based on the ground that denial of certiorari imports no decision or consideration of the merits of a case,<sup>48</sup> and it certainly is in accord with *England*.<sup>49</sup> As to appeals, they too may be insufficient to protect the plaintiff's right to a federal court decision, since they are often dismissed for want of a substantial federal question or disposed of by summary affirmance."<sup>50</sup>

"But is not the dismissal of an appeal, unlike the denial of certiorari, a formal adjudication?"

"Yes, but in recent years the Supreme Court has increasingly narrowed the differences between the two procedures, even to the point of apparently introducing discretionary factors into the grant or denial of review.<sup>51</sup> And given the fact that the Court has only a small amount of time to consider each appeal,<sup>52</sup> it would simply be unrealistic to hold that without full argument the litigant's federal

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<sup>47</sup> See 28 U.S.C. § 1257 (1964). In the usual abstention case where review is sought in the Supreme Court, a state court will have upheld the constitutionality of a state statute. Such cases are unlike the *Tribune* decisions, in which a court rule was being challenged as unconstitutional.

<sup>48</sup> See *Brown v. Allen*, 344 U.S. 443 (1953); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950).

<sup>49</sup> See note 29 *supra*.

<sup>50</sup> See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 572-74 (1953).

<sup>51</sup> *Id.* at 574-76.

<sup>52</sup> See Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 88-89 (1959).

claims are barred. Again, this would be in accord with *England*.<sup>53</sup> Of course, if the litigant does fully argue his appeal and the Court rejects his constitutional claims, he would not be allowed to relitigate them in the lower federal court. This was the situation as to some of the litigant's constitutional claims in *Lassiter v. Northampton County Bd. of Elections*.<sup>54</sup>

"*Lassiter?*"

"Yes, that is our next case in considering the res judicata problem. In *Lassiter v. Taylor*,<sup>55</sup> the federal court abstained. The plaintiff, feeling compelled to do so by *Government & Civic Employees Organizing Comm. v. Windsor*,<sup>56</sup> then presented her federal as well as her state claims to the state courts, which ruled against her on all issues. She then appealed to the Supreme Court. The defendants moved to dismiss on the ground that there was no final judgment so as to permit Supreme Court appeal<sup>57</sup> because the lower federal court still retained jurisdiction and that therefore the state court's answer to the federal constitutional question constituted mere dictum. The Court rejected this argument, overruled the motion, and affirmed the state supreme court on the merits without referring to the jurisdictional question. But — and this is the rub! — the Court said that since the plaintiff had only attacked the state statute in the state court as unconstitutional on its face, she could still argue that the statute was discriminatorily applied in 'the federal proceedings which await the termination of this state court litigation.'<sup>58</sup> Thus *Lassiter* would seem to sanction an exception to the res judicata principle against splitting causes of action."

"That is somewhat astounding! Do you really think that *Lassiter* would be valid today in light of *England's* voluntary litigation rule and the Court's decision in *NAACP v. Button*?"<sup>59</sup>

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<sup>53</sup> See note 29 *supra*.

<sup>54</sup> 360 U.S. 45 (1959).

<sup>55</sup> 152 F. Supp. 295 (E.D.N.C. 1957).

<sup>56</sup> 353 U.S. 364 (1957). The Court held that the litigant must present his state issues to the state court *in light of* his federal constitutional claims, in order that the state court can make its decision with the knowledge that constitutional issues are involved.

<sup>57</sup> See 28 U.S.C. § 1257 (1964).

<sup>58</sup> *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959).

<sup>59</sup> 371 U.S. 415 (1963).



"I cannot answer that directly. *Button* was based on the finding that the plaintiffs had completely and fully litigated their federal questions in the state courts,<sup>60</sup> and *England* requires voluntary *full* litigation of the federal claims in the state courts in order to find a waiver of the right to federal jurisdiction. But *England* established no criteria for full litigation. I do think it somewhat anomalous to allow the plaintiff to have the state court pass on some of his federal issues and not others. The litigant should be made to choose between the federal and state court, and to this extent it is impossible for me to approve of *Lassiter*. Nevertheless, the decision does have some points in its favor: it may present a way of handling the difficult problem of abstention in civil rights cases, which we shall discuss later.<sup>61</sup> The result of the decision is that the state court answers only the abstract legal question, and it is left for the federal court to decide the complex issues of discrimination on which freedom from prejudice, however slight, is essential. Thus the risk of biased fact-finding and record distortion is obviated, while unnecessary<sup>62</sup> federal interference in state concerns is minimized. Then, by pursuing the direct route to the Supreme Court, available via immediate review of an adverse state court holding on the federal claim,<sup>63</sup> a decision on the issue involved can be reached much sooner than if the plaintiff were forced to return to the district court for its findings before appeal. Also, the state court will be able to construe its statute in a perceived constitutional context, and the danger of federal invalidation of a state statute which, if submitted to a state court, might be saved through limited construction, is avoided.<sup>64</sup> Thus would be achieved both the most effective disposition of the plaintiff's case, a maximum of protection, and a greater certainty that decisions will be rendered by appropriate tribunals."

"But *Windsor* itself required presentation of all constitutional issues to the state courts."

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<sup>60</sup> *Id.* at 427-28.

<sup>61</sup> See text accompanying notes 162-70 *infra*.

<sup>62</sup> Of course, the scope of the term "necessary" in the use of abstention is the subject of much dispute in civil rights cases. However, if the plaintiff is protected under the state procedures from unwarranted delay, expense, and risk of unfair treatment, action on the part of the lower federal court would not seem to be required.

<sup>63</sup> See 28 U.S.C. § 1257 (1964).

<sup>64</sup> The Court ordered abstention a second time in *Windsor* because the state court had not interpreted the statute in light of the *specific* federal constitutional objections raised against it in the district court.

"That is true, but only so as to permit the decision of the state law question to be made in light of the constitutional question. As long as the federal court is to make the fact-findings on which will depend the finding of discrimination, and in light of the fact that discriminatory application of the statute has little to do with the constitutional validity of the statute on its face, presentation of the latter question would seem to be sufficient to meet the *Windsor* requirements."

"Well, that may be a valid point, but if *Lassiter* can or will be used in the way you have suggested, not only does it allow the litigant to split his cause of action but also it imposes quite a hardship on him: there is an obvious difficulty in maintaining the distinction between issues going to the validity of a statute on its face and those going to its discriminatory application; the litigant will suffer the risk of an erroneous interpretation of such a vague distinction, with the chance of losing the federal jurisdiction resting on that interpretation. In light of *England's* emphasis on the litigant's right to federal jurisdiction for his federal claims and the necessity of voluntary waiver of this right in order to lose it, does it not seem that your distinction cannot be maintained?"

"That is a good point, and the opinion in *Lassiter* did not deal with the problems we are discussing. The decision did not *require* the party to litigate the face validity of the statute in the state court, nor did it imply that the state court could not have decided the issue of discriminatory application; the Court simply observed that the plaintiff had not raised the latter issue before the state courts. The opinion is hard to reconcile with the language of either *Windsor* or *England*, and it is just impossible to say anything definite regarding its present status as far as the res judicata issue is concerned. However, given the fact that the suggested distinction which *Lassiter* presents as to a solution to the problem of abstention in civil rights cases has not been followed, as we shall see later,<sup>65</sup> my personal feeling is that there is not much else to recommend it, and the plaintiff should have to choose between the federal and state courts as to all his federal questions. If the plaintiff chooses the state court, he should have to litigate all his federal claims there, and the *England* requirement of full litigation should be met whether he does so or not. Once he has made his choice of the state court, he

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<sup>65</sup> See text accompanying notes 162-70 *infra*.

should be required to abide by it all the way and not have another chance after losing on his first choice."

"I am glad we agree on that. Now, to get back to our main point, what is your final proposition as to *res judicata*? Do you think *England* commands violation of *res judicata* principles, and, if so, how can you justify judicially writing section 1738 of the United States Code, volume twenty-eight, off the books?"

"As to section 1738, the state rules dictating the effect to be given a state court judgment by another court of that state, which section 1738 requires the federal courts to follow, surely do not contemplate an abstention context. Furthermore, because section 1738 is in essence no more than a statutory embodiment of *res judicata* principles,<sup>66</sup> if we find these principles to be inapplicable in the abstention situation, there is no reason to believe section 1738 should be any more applicable than those principles it embodies. It is not very realistic to call non-application of a statutory provision to situations in which it is not applicable 'judicially writing' the statute off the books! So let's see if all the *res judicata* principles are really applicable in abstention situations.

"Given *England's* recognition of the litigant's right to federal court determination of his properly presented federal questions, it is obviously necessary, in order to preserve this right, to prevent application of *res judicata* to a state court determination of these issues over the objection of the parties and with the knowledge of the abstention circumstances. Thus I presume your objection is not to the need for the non-application of *res judicata*, given *England*, but to the appearance of being so radical in departing this way from usual judicial principles."

"If you presume that, as you so glibly seem to, then you are presuming the answer to the problem! Our problem, at least mine, is the non-application of *res judicata* in the first place. If it is so necessary to do away with it, perhaps there is something wrong with abstention, and we should do away with that instead."

"*England* guarantees the litigant the right to have the federal court pass on his federal question. If the state court answers this question over the litigant's objection, you will agree, will you not,

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<sup>66</sup> See note 38 *supra*.

that the federal court *must* be allowed to reexamine the federal question to preserve the *England* right and that in this way res judicata *cannot* apply to the state court's determination of the federal question?"

"Yes."

"That is all I am presuming. Let us leave to one side for now any discussion of the value of abstention and the costs to litigate in terms of delay and so forth. We shall discuss that shortly.<sup>67</sup> Abstention is with us, and seemingly to stay, for it is unlikely that the Court will overrule all the abstention cases. For now, let us simply accept abstention and concern ourselves with its demand, which is made clear in *England*, that res judicata not be applied to federal questions answered in the state courts over the parties' objections."

"Fine. Then proceed to explain why the non-application of res judicata in abstention situations is not as radical as it seems to me."

"First, that aspect of res judicata requiring the raising of all issues to prevent splitting the cause of action is not at all applicable to abstention situations.<sup>68</sup> The action is already split into a federal question and a state question; and where the parties do not raise the federal issues in the state courts — either because of an injunction or simply because they know that to do so would constitute a waiver of the right to federal court determination of these issues — they cannot be said to ever have had the opportunity to raise such issues in the state courts. As a matter of practical reality, under such circumstances, the parties do *not* have that opportunity."

"I will agree that it does not seem realistic to say that a party has an opportunity to raise an issue when he knows that to do so will force him to forgo a right he has otherwise been guaranteed. I will therefore agree that res judicata principles should be modified to the extent necessary to allow a party not to raise all issues in the state

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<sup>67</sup> See text accompanying notes 141-43, 153-62, 174-78 *infra*.

<sup>68</sup> This is true in reference to consideration of the abstention situation as constituting, in a sense, two causes of action: one involving the state law issue, the other involving the federal law issue. It is not true that more than one cause of action may arise out of the federal issue or the state issue, and it is not meant to imply approval of allowing a litigant to raise only a part of his federal question in the state court. See the discussion of the *Lassiter* litigation accompanying notes 54-65 *supra*.

court without losing the right to raise them (that is, the federal issues) later in the federal court. But does this sanction relitigation of an issue already litigated, even if it had been done over the party's objections? Once the party has fairly litigated his issue, it seems to me he should not be allowed to litigate it again."

"Now *you* are doing the presuming. The whole point is summed up in your word 'fairly.' *England* determined that because the litigant has a *right* to have the federal issues determined in the federal court, he *cannot* have them fairly determined in the state court over his objection."

"But why can he not have the federal issues fairly determined in the state court?"

"Now you are asking me why we need federal question jurisdiction at all, which is just a little beyond the scope of our discussion and also completely beside the point here. Regardless of why federal question jurisdiction exists, *England* simply holds that once it is properly invoked the litigant cannot be deprived of his right to it. Irrespective of the fairness possible in the state court in any abstract sense, it would not be 'fair' — if you will — to deprive the litigant of his right. No matter what may be said for the quality of a state court judgment on the issue, the litigant has made the decision that only a federal court determination will be satisfactory to him, and he cannot be deprived of the right to make this choice."

"Yes, but other important rights are subject to being lost through application of *res judicata*. For example, in *Fauntleroy v. Lum*,<sup>69</sup> the *res judicata* principle against relitigation was held to outweigh the litigant's right to have Mississippi law applied. What makes this *England* right so different?"

"The situation in cases like *Lum* differs substantially from abstention cases and thus calls for different considerations. In a case

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<sup>69</sup> 210 U.S. 230 (1908). In this case an appeal was taken from a Mississippi Supreme Court decision denying full faith and credit to a Missouri judgment on a "futures" contract between two Mississippi citizens on the basis that the Missouri court had misconstrued the Mississippi law, which was conceded to govern the case. The Court held that since the judgment was *res judicata* in Missouri, the defendant having failed to directly attack the judgment by appeal to the Supreme Court, the judgment could not be collaterally attacked and was due full faith and credit in Mississippi even though it was found that the Missouri court *had* misconstrued the Mississippi law.

like *Lum*, the litigant is held to have voluntarily waived his right because of his failure to take the necessary steps available to him to protect his right by appealing to the Supreme Court to have the error corrected.<sup>70</sup> In abstention cases, as we are considering them here, the litigant has not voluntarily waived his right.”

“But could not the litigant in an abstention case appeal to the Supreme Court and if he failed to do so be held to have thereby waived his right to federal determination of the federal question?”

“Yes, the litigant in the abstention case could appeal to the Supreme Court, but there is this basic distinction between the two situations. In situations similar to that in *Lum*, the appeal will be on the merits, and if the Supreme Court reverses, that is the end of the case; there is no need for further decision by any lower courts.<sup>71</sup> In abstention cases, however, the appeal would not be on the merits but instead would be an attack on the power of the state court to answer the federal question (which, of course, *England* holds the state court does not have if the litigant properly reserves that question<sup>72</sup>). If the Court reverses here — as it is bound to do because of *England* — nothing is settled, for the case must be returned to the district court for decision of the federal question. But the district court itself can hold that the state had no power to answer the federal question, so the appeal to the Supreme Court solves nothing and is a great waste of time. Further, this extra delay might very well be enough to frighten litigants away from returning to the district court. Thus, in *Lum* situations, there is no ‘cost’ in requiring appeal, while in abstention situations the cost of requiring appeal would be rather severe in terms of the delay it would cause with no corresponding benefit. In the former situations, then, it is held that there being no cost in taking the appeal, the litigant loses his right if he voluntarily fails to take it in order to preserve that right. In the latter situations, on the other hand, it is held that the cost of requiring appeal is too high, in light of the fact that it accomplishes nothing, to justify finding that failure to take it is a voluntary waiver of the litigant’s right.”

“All right, I apologize for diverting you. I see your point.”

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<sup>70</sup> See 28 U.S.C. § 1257 (1964).

<sup>71</sup> The only further action necessary would be a remand to the state court to enter judgment “not inconsistent with the Court’s opinion.”

<sup>72</sup> See notes 27, 29 *supra* and accompanying text.

"That is perfectly all right, your questions were good ones."

"Thank you. Go on with what you were saying."

"Well, once you have admitted that *res judicata* principles are to be modified to the extent of not barring the litigant from presenting the federal issues in the federal court after having failed to raise them in the state court any further than was necessary to fulfill the *Windsor*<sup>73</sup> requirements, then the further modification of those principles so as not to bar relitigation of the federal issues in the federal court after their state court determination over the parties' reservations follows quite naturally. The basis we found for not applying the rules of bar and merger was the litigant's right to the federal court determination. If this right is to mean anything, it must be protected, for, as the old saying goes, 'a right without a remedy is no right at all.'<sup>74</sup> The remedy given is simply the non-application of *res judicata* if the state court attempts to infringe upon the right."

"Your logic is fine, but the conclusion still seems radical."

"It really is not so radical. Much the same solution has been developed in the area of federal habeas corpus to ensure federal court determination of federal rights,<sup>75</sup> and the policy of *res judicata* — that there be an end to litigation — is not an inflexible rule; it may be varied to accommodate other policies.<sup>76</sup> In the abstention situation we have the policies of avoidance of constitutional questions and of deference to the right of a state to declare what its law is to be, and it is these policies which the use of *res judicata* in this situation would operate to defeat; for if *res judicata* did apply and abstention could thus result in defeating a litigant's right to federal jurisdiction, it is likely that the use of abstention itself could no longer be

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<sup>73</sup> *Government & Civic Employees Organizing Comm., CIO v. Windsor*, 353 U.S. 364 (1957).

<sup>74</sup> This quotation is derived from a statement by Coke: "Want of right and want of remedy are in one equipage." 6 Rep. 58b. The first reported use of it in a case was by Holt, C.J.: "[I]t is a vain thing to imagine a right without a remedy . . . [because] want of right and want of remedy are reciprocal." *Ashby v. White*, 2 Raym. 938, 953 (1703). The first American judge to make use of it was Mr. Justice Johnson in *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 684, 693 (1813): "To assert that he has a right, and yet that he has no remedy, appears to me rather paradoxical."

<sup>75</sup> See *Fay v. Noia*, 372 U.S. 391 (1963).

<sup>76</sup> See *Spilker v. Hankin*, 188 F.2d 35 (D.C. Cir. 1951). See also *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952).

justified. The result of *England's* holding insofar as it necessitates modification of res judicata principles is no more than an accommodation of the basic abstention policies and those of res judicata so as to prevent abstention from expanding beyond its justifying rationale to the point of denying the litigant his statutory right to a federal adjudication of his federal issues and thus jeopardizing the use of abstention. Furthermore, any comity argument in support of res judicata disappears in light of the state court's disregard of the parties' declared rights in the abstention situation."

"But are you not urging a complete destruction of res judicata rather than a mere variance or modification of its principles?"

"Not at all. First, there never seems to have been any indication that res judicata would not apply to the state court determination of the state issues."<sup>77</sup>

"What about the indication by Judge Rives in *Leiter Minerals, Inc. v. United States*<sup>78</sup> that the federal court is not necessarily bound to follow the state court's decision on the state law?"

"I do not think Judge Rives meant to imply that the court could refuse to accept the state supreme court's interpretation of the state law. If he did, I must respectfully suggest that he is in error. Certainly *Erie R.R. v. Tompkins*<sup>79</sup> commands a federal court to accept a state supreme court's interpretation of state law, and, for reasons we shall see later, the state court's answer to the state law question in an abstention situation is in essence no different from its answer to any other state law question in any case it decides, for in both circumstances the state court decision will be given stare decisis effect within the state."<sup>80</sup>

"But does not the federal court have to be able to refuse to follow the state decision in abstention situations in order to ensure that the state court does not exert bias against the litigant by distorting its law?"

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<sup>77</sup> "[The state court determination] settles the question so far as concerns . . . state law." *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 885 (3d Cir. 1958); "[T]he state courts . . . can decide definitively . . . questions of state law . . ." *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229-30 (1957).

<sup>78</sup> 329 F.2d 85, 91 (5th Cir. 1964).

<sup>79</sup> 304 U.S. 64 (1938).

<sup>80</sup> See text accompanying notes 183-85 *infra*.



"No, because the fear of distortion is too remote in these situations and is thus an insufficient reason to allow the federal court to deny *res judicata* effect to the state court's decision. In a case based solely on a federal question, if the state court distorts its law, the plaintiff will nonetheless prevail, so the distortion would serve no purpose.<sup>81</sup> In a diversity case, the chance that the state court will distort its law is quite remote. Use of abstention presupposes uncertain state law; therefore the state court will be formulating the state's law for the first time. Since this is likely to be *stare decisis* on the question, and since the law is designed primarily for the benefit of the citizens of that state who will rely on the decision, it surely is improbable that the state will distort its law, thus doing injury to its own citizens who will rely on it, just to prejudice an out-of-state litigant in the particular case. Of course the decision can be reversed later, but this is not so easily done and does not contribute much to stability in the law. In addition, it may take some time before it is reversed, and, in the meantime, citizens of the state will have relied on the first interpretation. Thus, because the factors which might induce a state court to distort the law for a particular case are heavily outweighed by the reasons for not doing so, it is unrealistic to expect any deliberate distortion. The remote possibility of such an occurrence is an insufficient reason to allow the federal court to deny *res judicata* effect to state decisions in diversity cases involving abstention. Moreover, the integrity of state supreme court justices, perhaps more than any other single factor, is sufficient to keep the state courts from distorting their law simply to prejudice an out-of-state litigant."

"That sounds reasonable. Are there any further examples of *res judicata* being applied?"

"Certainly. Full *res judicata* effect is also given state court determination of federal issues when the litigant voluntarily and fully litigates those issues there. Mr. Justice Brennan makes this clear in

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<sup>81</sup> For example, suppose the plaintiff is challenging an agency order as unauthorized by the state statute and, if authorized, as unconstitutional. If the order is authorized by the state statute, and the state court so holds, the case returns to the federal court for determination of the federal constitutional question. If the state court distorts its law by so holding, the case still returns to the federal court. On the other hand, if the state court holds the order to be unauthorized by the state statute, the case is over and the plaintiff wins.

*England*.<sup>82</sup> And, finally, we have already noted that the litigant should not be allowed to divide his federal claim."<sup>83</sup>

"I am reluctant to concede so easily, but you *have* made your point."

"Actually, the problem is probably more academic than practical. I am confident, along with Mr. Justice Brennan, that 'state courts, sharing the abstention doctrine's purpose of "furthering the harmonious relation between state and federal authority," [citing *Pullman*<sup>84</sup>] . . . will respect a litigant's reservation of his federal claims for decision by the federal courts.'<sup>85</sup> One state supreme court has even reversed the lower state court for deciding both the state and federal constitutional issues, reasoning that 'the function we are to perform is limited in its scope. The case brought in the District Court, with its basic issues concerning the constitutionality of the tax as applied to the plaintiff, is still pending there; and it is not for us to trench upon its right to decide those issues.'<sup>86</sup> Another state supreme court, after admitting that it was not following precedent, exercised jurisdiction, although a justiciable controversy did not exist under prior state law standards, 'out of respect for, and as a courtesy to, that court . . . in the hope that our opinion will be of some assistance to the United States Supreme Court in its solution of the fundamental question raised in the litigation pending in the federal courts.'<sup>87</sup>

"Although it may not be justifiable to overrule precedent simply because the Supreme Court asks a favor of a state<sup>88</sup> and, admittedly, no other case outside of *Spector Motor Serv., Inc. v. McLaughlin*<sup>89</sup> has been found in which a state court has refused to adjudicate fed-

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<sup>82</sup> 375 U.S. 411, 417-19 (1964).

<sup>83</sup> See text accompanying note 65 *supra*.

<sup>84</sup> *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

<sup>85</sup> 375 U.S. at 421 n.12.

<sup>86</sup> *Spector Motor Serv., Inc. v. Walsh*, 135 Conn. 37, 40-41, 61 A.2d 89, 92 (1948), reversing 15 Conn. Supp. 205 (Super. Ct. 1947). The superior court rendered its opinion pursuant to the Court's instructions on remand in *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944).

<sup>87</sup> *Leiter Minerals, Inc. v. California Co.*, 241 La. 915, 927-28, 132 So. 2d 845, 850 (1961). This case was a sequel to *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957).

<sup>88</sup> See Note, 40 TEXAS L. REV. 1041, 1045 (1962). But precedent holding such cases to present non-justiciable issues may be overruled on better grounds. See text accompanying notes 181-85 *infra*.

<sup>89</sup> 323 U.S. 101 (1944).

eral constitutional issues because a federal court had retained jurisdiction, these cases represent the reciprocal attitude of comity on the part of the federal court in abstaining and the state court in accepting the limitations of its role following abstention. Surely it is not unlikely that similar considerations will lead to similar attitudes elsewhere. Even in a case where the state supreme court felt that its law forbade it to answer the state question alone, finding that under its law to do so would constitute a forbidden advisory opinion, it was moved to remark that 'we can readily understand the desirability of a decision of the Supreme Court of a State, on the part of the Circuit Court [ the Fifth Circuit], where it is required to follow the law of the State deciding such questions as we have here . . . .'<sup>90</sup>

"Abstention, in light of the *England* rule, makes good sense: federal courts are authoritative as to federal questions and state courts are authoritative as to state questions — let both remain in their own province. As long as the courts find, as we have, that these policies are of considerable value and that *res judicata* policies can be reasonably modified so as to accommodate them, there is no reason to expect that the *England* commands will not be respected."

"In light of your explanation, I am convinced that the departure from *res judicata* principles is not so radical after all."

"Good. Do you also see how our discussion disposes of any contention that abstention in federal question cases is an abrogation of federal question jurisdiction?"

"I am not sure. I can see that the federal court will answer the federal questions, but does federal question jurisdiction not give the litigant a right to federal determination of the facts too?"

"It certainly does, and Mr. Justice Brennan so stated in *England*.<sup>91</sup> Under *England*, the *only* thing a state court decides is the state questions."

"Oh, I see — the state court will merely issue an advisory opinion to the federal court. What about the Texas Supreme Court in

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<sup>90</sup> *United Servs. Life Ins. Co. v. Delaney*, 386 S.W.2d 648, 650 (Tex. Civ. App.), *aff'd*, 396 S.W.2d 855 (Tex. 1965).

<sup>91</sup> "[I]n cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination." 375 U.S. at 417.

*United Servs. Life Ins. Co. v. Delaney*<sup>92</sup> and all the other state courts which are likely to agree?"

"There is an answer to the 'advisory opinion' problem, but again I ask your indulgence for a short time.<sup>93</sup> For now, assume the federal court performs the fact-finding function. Assuming this to be so, can you then see how our discussion of the *res judicata* problem answers the contention that abstaining in federal question jurisdiction cases amounts to abnegation of the statutory right<sup>94</sup> to such jurisdiction?"

"Certainly, as long as we make that assumption. The federal court having determined the facts, if the litigant is guaranteed the right to return to the federal court, that court *will* answer his federal question. However, if the state court's answer to the state question does away with the federal question, then there is no further need for federal jurisdiction; that is to say, if no federal question remains, then obviously there is no further need for federal question jurisdiction."

"Very good."

### III. DIVERSITY — *Erie* AND ABSTENTION

"Not so fast. The way you posed your question leads directly into an area which I believe presents considerably more difficult problems.<sup>95</sup> First, can I assume that *England* can be read as implying preservation of all federal jurisdiction statutorily guaranteed to a litigant, so as to include — as well as federal question jurisdiction cases — those cases in which the only basis for federal jurisdiction is diversity of citizenship?"

"Even though *England* was a federal question case, I certainly think your assumption is justifiable in light of the language used in the opinion."

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<sup>92</sup> 386 S.W.2d 648, 650 (Tex. Civ. App.), *aff'd*, 396 S.W.2d 855 (Tex. 1965). See text accompanying note 90 *supra*.

<sup>93</sup> See text accompanying notes 181-85 *infra*.

<sup>94</sup> 28 U.S.C. § 1331 (1964).

<sup>95</sup> For an excellent article concerning the problems discussed herein and on which much of the discussion is based, see Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 YALE L.J. 850 (1964).

"Fine. And yet subsequent to abstention in a diversity case, no matter what the state court decision on the state law is, there is nothing to come back to the federal court; and for the federal court to find just the facts in such a situation would be an advisory opinion, since the state law question — and thus the state court — will decide the case. Therefore, does not the contention that abstention in diversity cases destroys federal diversity jurisdiction seem a valid one?"

"It certainly does, and this leads us into one of the most basic problems with the use of the abstention doctrine: the conflict it presents and represents in federal jurisdictional doctrines. We have been assuming that the policies behind abstention are good ones, and this is not the place to question these policies. But your question raises the basic issue of whether it is possible — and if so, how — to reconcile those policies with other policies considered to be of equal importance and validity."

"Do you mean we will do the same thing here as we did with the *res judicata* problem: balance the policies and see if they can be accommodated?"

"That is correct, but our problem here is more difficult because the policies are even more basic, going to the root of our federal system."

"Our purpose then, should be not to judge abstention in the abstract but rather, taking its policies as valid ones, to see if the price we pay for them may weigh too heavily in terms of the sacrifice of other policies. In short, should we not determine whether Mr. Justice Douglas was correct in stating that abstention may be 'an unnecessary price to pay for our federalism?'"<sup>96</sup>

"Precisely."

"I can see the problem generally as abstention in diversity cases definitely being an abnegation of diversity jurisdiction, but the exact scope of the problem and just why it goes to the root of our federalism is still a little hazy. Would you mind expressing it more specifically for me?"

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<sup>96</sup> Mr. Justice Douglas, concurring in *England*, 375 U.S. at 426.

"Not at all, and I believe that to do so will enable us to focus on some of the particular facets of the problems of abstention.

"The basic problem stems from the conflict between federal diversity jurisdiction and the doctrine which has been said to serve as a cornerstone for the foundation of our federalism:<sup>97</sup> that set forth in *Erie R.R. v. Tompkins*.<sup>98</sup> The doctrine of *Erie* may be seen as a strong generating force of the abstention doctrine itself,<sup>99</sup> and, in turn, abstention, while reinforcing the *Erie* principle, heightens the conflict between that principle and the principle of federal diversity jurisdiction.

"Although we do not wish to get into a detailed discussion of *Erie*, in basic terms the conflict is simply between the scope of the federal judicial function in diversity cases as interpreted before *Erie* and the degree to which the premises of *Erie* limit that scope. *Erie* made it clear that a federal court with diversity jurisdiction was to decide the state law questions on which the case turned by applying the rules and principles established in the state courts and not by fashioning 'federal general common law.'<sup>100</sup> The federal courts' jurisdiction in diversity cases, resting on the theory that they were simply alternative forums provided to ensure the potential 'foreign' litigant against possibly biased fact-finding and uneven application of state law, did not exist for the purpose of defining that law."<sup>101</sup>

"Are you saying then that the conflict basically arises from the fact that under *Erie* the federal courts' functions were curtailed and that in this way the scope of federal diversity jurisdiction was also curtailed?"

"Yes."<sup>102</sup>

"Fine. Now please explain how abstention relates to *Erie* so as to heighten this conflict?"

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<sup>97</sup> See generally Hill, *The Erie Doctrine and the Constitution* (pts. 1-2), 53 NW. U.L. REV. 427, 541 (1958).

<sup>98</sup> 304 U.S. 64 (1938).

<sup>99</sup> Cf. Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 645 (1951).

<sup>100</sup> 304 U.S. at 78.

<sup>101</sup> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State." *Id.* at 74. See also Note, 59 COLUM. L. REV. 504 (1959) and cases cited therein.

<sup>102</sup> Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946) and Corbin, *The Laws of the Several States*,

"Well, the federal court is required by *Erie* to apply the state law as declared by the state courts, preferably the state supreme court, as this will be the most authoritative declaration of the meaning of the state law.<sup>103</sup> But the federal court may be unable to do this either because the state law has not yet received an authoritative interpretation or because the state law is unsettled, uncertain, or difficult.<sup>104</sup> When one or both of these unfortunate circumstances develop, *Erie* would require the federal court to apply what it *thinks* the state courts *will* decide the state law to be and not what the federal court thinks the state law *should* be, thus requiring a prediction as to what the ultimate determination by the state supreme court will be on the particular question. Abstention enables the federal court to avoid this forecasting and makes possible an authoritative resolution of the state law question."

"But since the lower state court will normally get the case following abstention, it too will have to make a prediction as to the meaning of the state law. Could not the federal judge, who will undoubtedly be a member of the bar of the state in which he sits, make as good a forecast of the state law as could the state judge?"

"Even assuming the district judge is a member of the state bar and granting he could do as good a job of forecasting, the federal judge's forecast is unreviewable in the state courts; this eliminates the possibility of an authoritative resolution. By allowing the state judge to do the forecasting, an authoritative resolution can be achieved by review of that forecast in the state supreme court."

"I see. Abstention thereby enhances the *Erie* principle of having federal diversity courts apply state law. Nevertheless, how does this heighten the conflict between diversity jurisdiction and the *Erie* principle?"

"The conflict is intensified because the use of abstention in diversity cases drives the *Erie* rule almost to the limit of its logic. If *Erie* demands that a federal court in a diversity suit reach the same result

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50 YALE L.J. 762 (1941), both criticize *Erie* for depriving federal judges of their "traditional" law-declaring functions.

<sup>103</sup> Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499-500 (1941).

<sup>104</sup> For a discussion of the meaning of these terms, see Note, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226, 228 n.19 (1959). For a discussion of the problem of a federal court finding state law in diversity suits, see generally Note, *supra* note 101.

that would be reached if the case were decided in a state court,<sup>105</sup> abstention is practically the only way this result can be assured where state law is uncertain. However, if the diversity court abstains where the decision on the state law is dispositive of the case, then diversity jurisdiction is destroyed."

"May I interrupt? Allow me to quote from *Meredith v. Winter Haven*,<sup>106</sup> where the Court held that *Erie* did not justify abstention: '[D]ifficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction . . . .'<sup>107</sup> How do you reconcile *Meredith* with your assertion that *Erie* demands abstention in cases where state law is uncertain?"

"Please recall that a more recent diversity case, *Louisiana Power & Light Co. v. Thibodaux*<sup>108</sup> sanctioned abstention where there was no constitutional question and only a doubtful state law question."

"But I thought we decided that the consensus was that *Thibodaux* did not overrule *Meredith*?"<sup>109</sup>

"That is true, but the Fifth Circuit, as well as other federal courts,<sup>110</sup> have read *Thibodaux* as authorizing abstention in diversity cases where the only problem is a doubtful state law question, and there are some writers who agree with this.<sup>111</sup> Furthermore, the Fifth Circuit's decisions to abstain in *Green v. American Tobacco Co.*<sup>112</sup> and in *Delaney*<sup>113</sup> can be easily understood in terms of *Erie*.

<sup>105</sup> This so-called "outcome-determinative" test was announced in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), which held that *Erie* required that a federal court should not reach a substantially different result than would a state court if the action had been brought there.

<sup>106</sup> 320 U.S. 228 (1943).

<sup>107</sup> *Id.* at 234.

<sup>108</sup> 360 U.S. 25 (1959).

<sup>109</sup> See note 2 *supra*. See also Gowen & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEXAS L. REV. 194, 203-05 (1964); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815, 823 (1959); Note, *Judicial Abstention From the Exercise of Federal Jurisdiction*, 59 COLUM. L. REV. 749, 764-65 (1959); Note, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226, 247-50 (1959).

<sup>110</sup> See note 2 *supra*.

<sup>111</sup> See Note, *Federal Abstention and Its Relation to the Erie Doctrine*, 38 TEMP. L.Q. 72, 78 (1964).

<sup>112</sup> 304 F.2d 70 (5th Cir. 1962), *rev'd on rehearing*, 325 F.2d 673 (5th Cir. 1963). This was a diversity action brought by a Florida resident in the Florida district court seeking damages for wrongful death allegedly due to lung cancer caused by the defendant's cigarettes. There being no Florida decision, the circuit court itself first at-



Once abstention was introduced in *Pullman*, the idea that the technique might very well be justified where the only real problem was a doubtful state law question coincides rather well with Mr. Justice Frankfurter's emphasis in that initial case on the problems of forecasting and the evils thereby engendered.<sup>114</sup> This strong emphasis on the forecasting problem, in turn, fits rather well with the view that *Erie* demands something of an identity of outcome, whether the suit be brought in the federal or state court. Judge Brown, concurring in *Delaney*, clearly saw an intimate relation between abstention and *Erie*; and the frustration, futility, and weariness which the Fifth Circuit must have felt (and with which one can easily sympathize) in having their forecasts of state law consistently rejected by the state courts<sup>115</sup> can be seen as a strong basis for his position.<sup>116</sup>

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tempted to answer the controlling state law question of whether absolute liability was imposed on the cigarette manufacturer for breach of implied warranty. On rehearing, however, the court reversed itself and — even though there was no constitutional question, no ambiguous state statute, and no state regulation involved — in an unreasoned per curiam opinion, ordered certification of the controlling question under Florida's certification statute, FLA. STAT. § 25.031 (1961).

<sup>118</sup> *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483 (5th Cir. 1964). This was a diversity case brought by the beneficiary of a life insurance policy which turned on the Texas common law of insurance. Confused about the meaning of state decisions, a sharply divided court sitting en banc ordered abstention.

<sup>114</sup> "[N]o matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of [the state law] . . . belongs neither to us nor to the district court but to the supreme court of Texas. In this situation a federal court . . . is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499-500 (1941).

<sup>115</sup> Judge Brown sets forth cases of rejection by the courts of Texas, Alabama, and Florida: *Truck Ins. Exch. v. Seelbach*, 161 Tex. 250, 339 S.W.2d 521 (1960), *rejecting* *National Sur. Corp. v. Bellah*, 245 F.2d 936 (5th Cir. 1957); *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), *rejecting* *New York Times Co. v. Connor*, 291 F.2d 492 (5th Cir. 1961); *Food Fair Stores, Inc. v. Trusell*, 131 So. 2d 730 (Fla. 1961), *rejecting* *Pogue v. Great Atl. & Pac. Tea Co.*, 242 F.2d 575 (5th Cir. 1957). See also *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486 (5th Cir. 1964).

<sup>116</sup> This concern [the impact of the federal system on local litigants and jurisprudence] is, for example, reflected by the "outcome determinative" test likewise [as abstention] judge-fashioned to meet the needs of *Erie*, only few of which had emerged when Meredith . . . was announced in 1943. This approach recognizes that it is basically unfair for decision [*sic*] to turn on irrelevant accidents such as state citizenship, residence, geography, or the case being filed in one courthouse, rather than in the one a block down the street.

If in like cases diverse results are unfair when precipitated by quasi-procedural rules . . . how much more unfair is it when the diverse result flows from diverse holdings on substantive law. This is a factor of growing importance as our own recent experience graphically demonstrates. Though our decisions survive the discretionary review of certiorari, most of the time because they are really not "certworthy," . . . many of them do not fare so well

"But given the Court's decisions in cases akin to *Byrd v. Blue Ridge Rural Elec. Co-op.*,<sup>117</sup> is it necessary or even justifiable to read *Erie* so broadly as to demand an identity of result?"

"Possibly not, but it is difficult to tell. Without getting into an involved discussion of *Erie* at this time,<sup>118</sup> let me just point out that some feel that the doctrine should be interpreted narrowly so as to apply only to prevent a federal court from simply ignoring existing state decisional law<sup>119</sup> and that it should not extend to cases where no state law exists at all.<sup>120</sup> On the other hand, there are those who agree with Judge Brown that *Erie* should be broadly construed so as to compel an identity of result.<sup>121</sup> The former view was supported by the Court in 1949 when it said, referring to *Erie*, that it 'is itself a precedent against any general ruling that cases properly in the federal courts that depend upon state law should have that issue submitted to state courts for decision.'<sup>122</sup> Whether the Court would say the same today is difficult to determine, given the decisions in *Byrd* and the other similar cases you have mentioned.<sup>123</sup> Undoubtedly, the exact position lies somewhere between the two extremes; yet it has been said that the line is closer to the broader view,<sup>124</sup> and the Court's extension of the abstention doctrine in cases like *Thibodaux* supports this position."

"Well, if we assume that *Erie* does compel an identity of result, then abstention is definitely a desirable end where state law is unclear, is it not?"

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when they are tested in the place that really counts — the highest . . . court, of the State concerned. *Id.* at 486 (concurring opinion). (Footnote omitted.)

<sup>117</sup> 356 U.S. 525 (1958). See cases cited in Note, *supra* note 111, at 74 n.11.

<sup>118</sup> For an excellent discourse on the meaning of *Erie*, see Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 *YALE L.J.* 187 (1957).

<sup>119</sup> See, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

<sup>120</sup> See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 619 (1953). See also Parker, *Dual Sovereignty and the Federal Courts*, 51 *NW. U.L. REV.* 407, 411 (1956).

<sup>121</sup> See note 116 *supra*. See also Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 *TEXAS L. REV.* 211, 220 (1961); Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 *TUL. L. REV.* 443, 466 (1962).

<sup>122</sup> *Propper v. Clark*, 337 U.S. 472, 490-91 (1949).

<sup>123</sup> See cases cited in Note, *supra* note 111, at 74 n.11.

<sup>124</sup> See Note, *supra* note 95, at 857-58, citing Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 *TEXAS L. REV.* 211 (1961) and Smith,

"Not definitely, no. As *Erie* must bend for other policies — as in *Byrd* — and is desirable only as long as its ends can be achieved in accord with other policies, so too with abstention. It *is* desirable, but only to the extent that it 'can be implemented in a manner consonant with other policies.'<sup>125</sup> In short, abstention is desirable only so long as its achievements outweigh the harms it creates in terms of hindrance to other policies. Thus, even though abstention does provide advantages in furthering desired policies,<sup>126</sup> it is necessary for us to examine the problems it creates with respect to other desired policies and to see if solutions are available which will alleviate these problems, at least to the extent that we can feel that the doctrine is being implemented consistently with other desired ends."

"Perhaps an example would clarify your reasoning."

"That is a good suggestion. We have already seen the problem of possible abnegation of federal question jurisdiction by the use of abstention in such cases, and we have also determined that the policies behind abstention could be achieved while still preserving the policies behind federal question jurisdiction.<sup>127</sup> Let us now consider a diversity case, such as *Green* or *Delaney*, and see if under existing methods — that is, without considering possible solutions — abstention *is* usable in such cases without destroying the policies behind diversity jurisdiction."

"Might we not be faced with a real problem here, given the disagreement on exactly what policies do lie behind diversity jurisdiction<sup>128</sup> and the persistent arguments that today there is no justifiable rationale for such jurisdiction<sup>129</sup> and that it should therefore be abolished?"

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*Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962).

<sup>125</sup> Note, *supra* note 95, at 858.

<sup>126</sup> *I.e.*, enhancement of *Erie* and the authoritative determination of state law as well as the avoidance of constitutional questions. *Cf.* *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). As throughout this discussion, the values of these ends are accepted at desirable.

<sup>127</sup> See text accompanying notes 93-94 *supra*.

<sup>128</sup> On the history and purposes of diversity jurisdiction, see Note, *supra* note 95, at 858-59 & nn.39-40, 44-46, including articles cited therein.

<sup>129</sup> For arguments against diversity jurisdiction, see Note, *supra* note 111, at 82 & n.63, including articles cited therein.

"This is obviously not the place to deal with the overwhelming issues of the value of diversity jurisdiction. In some form or another, there does seem to be agreement that it exists to prevent one or more kinds of bias against out-of-state litigants, and the plain fact is that Congress, obviously feeling the dangers to be real, has provided for diversity jurisdiction since 1789.<sup>130</sup> Further, Congress has shown with the Three-Judge District Court Act,<sup>131</sup> the Johnson Act of 1934,<sup>132</sup> and the Tax Injunction Act of 1937<sup>133</sup> that it will curtail federal jurisdiction in limited areas when it feels that such action is appropriate. Congress has altered diversity jurisdiction when it has felt the need to do so<sup>134</sup> but has been unwilling to abolish it.<sup>135</sup> Obviously, such an abolition should come from Congress and not from the courts,<sup>136</sup> and *England's* emphasis on preservation of congressionally granted federal jurisdiction indicates that the Court agrees. As we are dealing with abstention, we can, for our purposes here, accept diversity jurisdiction as given and simply see if the use of abstention in such cases amounts to judicial destruction of that jurisdiction and its policies."

"Very well, then, is there any way abstention can be used in diversity cases while protecting the out-of-state litigant against local bias?"

"Given the existing system — that is, the way abstention is presently used, as in *Green* and *Delaney* — the answer, I believe, must

<sup>130</sup> 1 Stat. 73 (1789). The present statute is 28 U.S.C. § 1332 (1964).

<sup>131</sup> 28 U.S.C. §§ 2281-84 (1964). See HART & WECHSLER, *op. cit. supra* note 120, at 846-55.

<sup>132</sup> 28 U.S.C. § 1342 (1964). See HART & WECHSLER, *op. cit. supra* note 120, at 855-56.

<sup>133</sup> 28 U.S.C. § 1341 (1964). See HART & WECHSLER, *op. cit. supra* note 120, at 856-57.

<sup>134</sup> *Id.* at 898-900. In 1958, the jurisdictional amount was raised to ten thousand dollars, and other restrictions were added. 28 U.S.C. § 1332(a) (1964).

<sup>135</sup> In 1930 Senator Norris introduced S. 4357, 71st Cong., 2d Sess. (1930), abolishing diversity jurisdiction. The bill, although favorably reported by the Judiciary Committee, never came up for debate. In 1932 Senator Norris introduced the same bill as S. 939, 72d Cong., 1st Sess. (1932); Representative La Guardia introduced it in the House as H.R. 11508, 72d Cong., 1st Sess. (1932). The Senate Judiciary Committee held hearings on the bill and again reported it favorably, but it never came to a vote; the House Committee made no report. Note, *supra* note 111, at 82 n.64.

<sup>136</sup> See Mr. Justice Frankfurter's dissent in *Burford v. Sun Oil Co.*, 319 U.S. 315, 344-45, 348 (1943).

be no. It seems impossible to escape the result of the process you described so well previously."<sup>137</sup>

"I think it would help if you explained precisely why that is so. Do you mind?"

"Not at all. The considerations are somewhat different at the trial level from those at the appellate level, so we should examine these separately. No depth of analysis is required to see that a dismissal at the trial level would deprive the litigant who chose the federal court<sup>138</sup> of any federal protection against bias. The Court's holding in *Meredith*, which it has been careful not to question,<sup>139</sup> bears this out and should remain unimpaired. And retention is really no better, for in a case like *Delaney*, it too would seem to effectively result in a dismissal. As you pointed out, even if the federal court performed the fact-finding function — where it is possible to isolate questions of fact from questions of law — this would merely be an advisory opinion to the state court, forbidden by article III of the Constitution as interpreted by the Court.<sup>140</sup> Further, and as you also pointed out earlier, the state courts will very likely wish to do their own fact-finding, and there is seemingly nothing binding them to follow the federal court's findings of fact. All of this is likely to frighten litigants away from the federal courts because they are faced at this early stage with the possibility of two law suits instead of one.<sup>141</sup> Thus, the benefits to be derived from abstention in obtaining an authoritative declaration of state law would not be justified in terms of the results of its use in depriving the litigant of his congressionally granted right to be in the federal court, especially where preservation of this right is most relevant; and given *Eng-*

<sup>137</sup> See text accompanying note 95 *supra*.

<sup>138</sup> Either the plaintiff, invoking federal jurisdiction under 28 U.S.C. § 1332 (1964) or the defendant on removal from the state court under 28 U.S.C. § 1441 (1964).

<sup>139</sup> *Meredith* was cited with approval in *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 27 (1959). This has been the basis of the argument that *Thibodaux* does not overrule *Meredith*. See *McNeese v. Board of Educ.*, 373 U.S. 668, 673 n.5 (1963) (*dictum*).

<sup>140</sup> *Muskrat v. United States*, 219 U.S. 346 (1911).

<sup>141</sup> As was said in another context:

The King of Brobdingnag gave it for his opinion that, 'whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together.' In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before. Chafee, *Bills of Peace With Multiple Parties*, 45 HARV. L. REV. 1297 (1932).

*land's* emphasis on the preservation of statutory federal jurisdictional rights, the Court is likely to find the cost of using abstention here too high."

"I see now why the considerations would be different at the appellate level. It does not seem that abstention at the appellate level would deprive a litigant of the benefits of federal jurisdiction, because he will already have had a full federal trial on the merits. If the appellate court abstains so as to ascertain what the correct state law is — in compliance with *Erie* which requires the federal courts to follow the state law — it should not concern the litigant that this law is interpreted by the state court. So perhaps abstaining at this stage of litigation would not be as harmful. Is this correct?"

"Unfortunately, no. First, the parties will already have spent a good deal of time and money in the case, and abstention imposed here would create a considerable additional burden, making two suits where only one existed before, which is a result unwanted by at least one of the parties. Indeed, the imposition of such additional burdens may be the motive behind the assertion of the doctrine by the other party.<sup>142</sup> Furthermore, the individual litigant is likely to be unconcerned about disparity in the legal order and, having had his 'day in court,' would value much more a present decision rather than a 'more perfect' one sometime in the indefinite future. To him, abstention — at least in the absence of some more compelling reason than doubtful state law, which he is likely to have known about when he brought suit — may seem a senseless, and possibly an intolerable, burden."<sup>143</sup>

"Is not this delay problem equally applicable in federal question cases?"

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<sup>142</sup> *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 42-44 (1959); *Harrison v. NAACP*, 360 U.S. 167, 180 (1950) (Douglas, J., dissenting).

<sup>143</sup> Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled — absent unique and rare situations — to adjudication of their rights in the tribunals which Congress has empowered to act. *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 228 (1960) (Douglas, J., dissenting), quoted by Mr. Justice Douglas, concurring in *England v. State Bd. of Medical Examiners*, 375 U.S. 411, 425 (1964).

"Yes, but at least in those cases there is something substantial to come back to the federal court. Let us put aside that problem for the present,<sup>144</sup> however, and finish our discussion of why abstention is not justified in a diversity case even if limited to the appellate level."

"Very well. From your point concerning the burden to the litigants in the case, it seems to me that without abstention there may be an equal burden imposed on others. The federal decision is likely either to induce people to follow it and order their affairs accordingly or, at the least, to put in doubt prior arrangements. Legitimate private ordering would then certainly be sharply affected when the state court declared the 'true' state rule to be exactly the opposite.<sup>145</sup> Also, are not federal judges, who have experienced consistent rejection by the state courts of their forecasts, as probably did the Fifth Circuit court,<sup>146</sup> thereby discouraged from exerting a real effort to answer difficult state law questions in favor of making more concentrated efforts elsewhere?"

"Your points are valid, but I think there may be a tendency to exaggerate the possibilities of disparity. Respective decisions of the two court systems may *not* be different, or the variance may be due more to differences in factual situations than in the interpretation of the law.<sup>147</sup> And the federal decision may very well give the state courts some experience with a rule, from which they may be able to determine its advantages and thus follow the federal court's interpretation or see its disadvantages and thus reach a contrary result.<sup>148</sup> Furthermore, counsel responsible for private ordering will know the general requirements of *Erie* and that the federal decision is not the ultimate word on the status of the state law. Most importantly, abstention itself will not guarantee a definitive state ruling, for the parties may take the case no further than the lowest state court; and, while the decision is the law of that case, it is clear that under *Erie* today such a decision, not necessarily binding on a state court

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<sup>144</sup> See text accompanying notes 153-62 *infra*.

<sup>145</sup> "No attorney could conscientiously advise a client as to what contract provisions would be valid," given the uncertain state of the law. *A.F.L. Motors, Inc. v. Chrysler Motors Corp.*, 183 F. Supp. 56, 59-60 (E.D. Wis. 1960).

<sup>146</sup> See notes 115-16 *supra* and accompanying text.

<sup>147</sup> See *Johnson v. Luhman*, 330 Ill. App. 598, 71 N.E.2d 810 (1947), which followed *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945), both of which are noted as especially interesting cases in Note, 73 *YALE L.J.* 850, 864 n.72 (1964).

<sup>148</sup> See *id.* at 864 n.75.

in another case, is equally not binding on a federal court in another case.<sup>149</sup> In fact, in order to solve this dilemma, the Fifth Circuit in *Delaney* ordered the parties to carry the declaratory judgment proceedings to the highest Texas court.<sup>150</sup> But at what additional cost and delay such assurance is purchased! It certainly is highly questionable to force the litigants, who have brought the suit in order to have their legal rights settled as quickly as possible, to pay so heavily in behalf of others with whom they are not concerned for imperfections and inadequacies in our legal system."

"It is certainly difficult to argue with that. Now I think I *do* understand what you were intimating. Under *Erie*, and in the absence of abstention, federal judges had to follow state law where it existed but were still left with the vital role of discerning state law where there was no clear answer. On the other hand, combining the use of abstention with *Erie* and carrying this avoidance of disparity idea to its logical and ultimate conclusion, federal judges would be left with practically nothing to do: they would have to follow state law not only where it existed but also where it did not. All they could do would be to assign the question to the state courts. Thus, for all intents and purposes, diversity jurisdiction would become meaningless."

"That is exactly correct. As one writer has so well expressed it, 'federal judges would be reduced to little more than sterile monitors shuttling traffic between a dual system of courts at appropriate stages of the litigation.'"<sup>151</sup>

"Yes, and as judges felt more and more obligated to use abstention, litigants would be more and more discouraged to use the diversity jurisdiction which Congress had granted them. Therefore, the price we would be paying for the use of abstention here would amount to the judicial destruction of diversity jurisdiction, which, as we have seen should not and likely will not<sup>152</sup> be done: in terms of other policies it is a price too high to be paid for the benefits derived from the doctrine's use."

<sup>149</sup> See 1A MOORE, FEDERAL PRACTICE ¶ 0.307[2], at 3305-10 (2d ed. 1965), discussing this rule derived from *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948), which conflicted sharply with *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940).

<sup>150</sup> *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 484-85 (5th Cir. 1964).

<sup>151</sup> Note, *supra* note 147, at 866.

<sup>152</sup> See note 136 *supra* and accompanying text.



"Precisely so. I would say that you understand this point perfectly."

"Thank you. May we return now to the problem of delay in federal question cases?"

"Certainly."

"Given somewhat spectacular examples such as the decisions in the *Spector Motor Serv., Inc.*<sup>153</sup> cases and the decisions in the *Leiter Minerals*<sup>154</sup> cases, it would seem that delay and expense are equally costly — if not more so — to the litigants in such cases as in diversity cases. Then why does not this factor of extended delay in federal question cases outweigh the use of abstention here, as it does in diversity cases, as an imposition of an unjust burden on the parties?"

"While it is admitted that it may be somewhat of an understatement to say that the 'Brobdingnagian'<sup>155</sup> approach did not work very well in those cases, the answer to your question is that use of abstention in federal question cases provides benefits which are not provided by its use in diversity cases, namely, avoidance of constitutional questions.<sup>156</sup> In addition, we found that use of abstention in diversity cases destroys the policies behind diversity jurisdiction, while its use in federal question cases does not destroy the policies behind federal question jurisdiction. In the former, there was nothing left after abstention to come back to the federal court, while this was not true of the latter. In short, it was again a matter of balancing, with the benefits to be derived from abstention outweighing its detri-

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<sup>153</sup> Decisions in the *Spector* cases, starting as *Spector Motor Serv., Inc. v. McLaughlin* and ending as *Spector Motor Serv., Inc. v. O'Connor*: 47 F. Supp. 671 (D. Conn. 1942), *rev'd*, 139 F.2d 809 (2d Cir.), *vacated*, 323 U.S. 101 (1944); 15 Conn. Supp. 205 (Super. Ct. 1947), *remanded*, 135 Conn. 37, 61 A.2d 89 (1948); 88 F. Supp. 711 (D. Conn. 1949), *rev'd*, 181 F.2d 150 (2d Cir. 1950), *rev'd*, 340 U.S. 602 (1951).

<sup>154</sup> Decisions in the *Leiter Minerals* cases, appearing as *Leiter Minerals, Inc. v. United States* in the federal courts, and *Leiter Minerals, Inc. v. California* in the state courts: 127 F. Supp. 439 (E.D. La. 1954), *aff'd*, 224 F.2d 381 (5th Cir. 1955), *modified*, 352 U.S. 220 (1957); 239 La. 116, 118 So. 2d 124 (1960), *transferring to* 126 So. 2d 76 (La. Ct. App. 1961), *rehearing denied*, 241 La. 915, 132 So. 2d 845 (1961); 204 F. Supp. 560 (E.D. La. 1962), *rev'd*, 329 F.2d 85 (5th Cir. 1964).

<sup>155</sup> See note 156 *infra* and accompanying text.

<sup>156</sup> "[T]he controlling policy, that a federal court will not decide a constitutional question where decision can go on other grounds, is of sufficient importance to the whole institution of judicial review that such expense and delay seem justifiable." Wright, *supra* note 109, at 818. No opinion of either agreement or disagreement with this statement is expressed here, since for purposes of this discussion the policies underlying abstention are assumed to be valid.

ments to other policies in federal question cases but being outweighed by such detriments in diversity cases.”

“Then it does not matter how much delay is caused by abstention in federal question cases?”

“I did not intend to imply that at all. While cases like *Spector* demonstrate that the policy of speedy adjudication was not felt to outweigh the policies behind abstention,<sup>157</sup> one of the points that troubled Mr. Justice Douglas in *England* about the use of abstention was the hardship to the litigants caused by the delay engendered by the use of the doctrine;<sup>158</sup> and the Court has recently shown that it shares at least in part Mr. Justice Douglas’ concern, for in refusing to order abstention in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,<sup>159</sup> *Griffin v. County School Bd.*,<sup>160</sup> and *Baggett v. Bullitt*,<sup>161</sup> the Court placed special emphasis on the fact that the litigants had suffered in the first two cases or were likely to suffer in the latter case long delays in securing final adjudication of their rights. Thus the balance may be shifting, with the Court feeling that the policy of fast adjudication outweighs the policies behind abstention in some cases. In other words, the Court may be reaching the point where it feels that the benefits to be gained from abstention are outweighed by the detriment its use causes to the policy of speedy adjudication.

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<sup>157</sup> See text accompanying note 156 *supra*.

<sup>158</sup> 375 U.S. at 475-76.

<sup>159</sup> 377 U.S. 324, 328-29 (1964). This was an action in a federal court by a New York seller of tax-free bottled liquors and wines for export to passengers departing at New York’s airport to enjoin New York State Liquor Authority from interfering with his business. The Court, stating that the doctrine of abstention should not be automatically applied even though constitutional issues were involved, held that the doctrine was unwarranted in this case because neither party requested its application, litigation had already been long delayed, and disruption of an entire scheme of legislative regulation was not involved.

<sup>160</sup> 377 U.S. 218, 228-29 (1964). This was a suit by Negro school children to enjoin the School Board of Prince Edward County, Virginia from refusing to operate an efficient system of free public schools in the county. The Court held that abstention was properly denied because the issue imperatively called for immediate decision and there had already been too much delay.

<sup>161</sup> 377 U.S. 360, 375-79 (1964). This was a class action by the faculty, staff, and students of the University of Washington for a declaratory judgment and injunctive relief against the enforcement of a 1931 Washington statute requiring the taking of an oath as a condition for employment and a 1951 Washington “loyalty oath” statute. The Court held that there were no special circumstances in the case justifying abstention, and the fact that abstention would require piecemeal adjudication — thereby causing considerable delay — was a factor to be considered in determining whether to apply the doctrine.

"However, as we shall see shortly,<sup>162</sup> this delay problem can be solved. This is likely to remove objection to use of abstention in cases like *Hostetter* but is not likely to remove objection to its use in civil rights cases like *Griffin* and *Baggett*."

"If the delay problem is removed, what is so special about civil rights cases?"

"You know that such an attitude towards civil rights today might well be considered by some as blasphemous!"

"I am willing to assume that risk! If we can solve the delay problem, what policy factor or factors will remain in such cases to outweigh the policies behind abstention?"

"Your question is certainly a valid one, so I will assume the risk with you by attempting to formulate an answer.<sup>163</sup> The courts have for a long time been either reluctant to use abstention or confused about its use in civil rights cases.<sup>164</sup> Then, in 1959, when the Court ordered abstention in *Harrison v. NAACP*<sup>165</sup> where declaratory and injunctive relief was sought before a three-judge district court on constitutional challenges to five Virginia segregation laws, it was felt by many that the question had been cleared up in favor of abstention's use in civil rights cases.<sup>166</sup> However, subsequent cases may be read to dispel that notion.<sup>167</sup> I do not believe that the reasons for non-application of abstention to these cases can be stated any more cogently than Mr. Justice Black stated them in *Griffin*:

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<sup>162</sup> See text accompanying notes 174-76, 186-87 *infra*.

<sup>163</sup> For a recent discussion of the problem of abstention in civil rights cases and the probable direction of the courts, see Note, *The Abstention Doctrine: A Problem of Federalism*, 17 VAND. L. REV. 1246 (1964). See also 1A MOORE, *op. cit. supra* note 149, § 0.203[1].

<sup>164</sup> See Note, *Federal Jurisdiction — Doctrine of Equitable Abstention Applied to Civil Rights Cases*, 20 LA. L. REV. 614, 616-17 & nn.12-15 (1960), including cases cited therein.

<sup>165</sup> 360 U.S. 167 (1959).

<sup>166</sup> *E.g.*, Note, *supra* note 164, at 617-18. *But cf. id.* at 619.

<sup>167</sup> See *Davis v. Mann*, 377 U.S. 678 (1964); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Forsenius v. Harman*, 235 F. Supp. 66 (E.D. Va.), *prob. juris. noted*, 379 U.S. 810 (1964), *aff'd*, 380 U.S. 528 (1965); *Gray v. Johnson*, 234 F. Supp. 743 (S.D. Miss. 1964); *Embassy Pictures Corp. v. Hudson*, 226 F. Supp. 421 (W.D. Tenn. 1964); Note, *supra* note 163.

[W]e 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 lawsuits*. The original plaintiffs have doubtless all passed high school age. *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*. We accordingly reverse the Court of Appeals' judgment remanding the case to the District Court for abstention, and we proceed to the merits.<sup>168</sup>

"But *Griffin* does not stand for the proposition that abstention is inappropriate in civil rights cases, since there had actually been great delay in the case — a factor stressed by Black, and *Hostetter* shows that this delay factor goes beyond civil rights cases. Thus I am not sure I understand your point."

"Although *Griffin* can be explained on grounds of delay and *Davis v. Mann*<sup>169</sup> on grounds that the state law was not unclear, *Baggett* did involve unclear state law, there had been no inordinate delay involved, and yet the Court reversed the lower court's abstention order and decided the merits of the case.<sup>170</sup> The point is that civil rights cases inherently involve areas of much greater sensitivity to the states than do areas of economic regulation. In such cases involving, for example, school integration (*Griffin*), loyalty oaths (*Baggett*), and legislative reapportionment (*Davis*), the Court has felt that the states will exhibit great resistance to change, and the circumstances of the cases indicate that this is true. Solving the delay problem in terms of a method to enable a more rapid determination of the state law question will not overcome the states' resistance through their ability to protract delay by further legislation and more law suits. The obvious indication — 'the issues imperatively call for decision now' — is that if the constitutional issues in the civil rights area are to be solved, the federal courts are going to solve them alone. Especially today, I think no citation of authority is needed to state that there exists an almost overwhelming policy to solve these problems as rapidly as possible. Given this policy, it surely is not surprising that the Court will not let abstention stand in its way. While it may not be exactly proper to say that such cases

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<sup>168</sup> 377 U.S. at 229. (Emphasis added.)

<sup>169</sup> 377 U.S. 678, 690 (1964).

<sup>170</sup> The three-judge district court decision was rendered on February 9, 1963, 215 F. Supp. 439 (W.D. Wash. 1963), and the Supreme Court case was decided on June 1, 1964, 377 U.S. 360 (1964).

as *Griffin, Davis*, and *Baggett* assert a rule that abstention is improper in civil rights cases, it seems reasonable to read them as so indicating. And for the reasons I have stated, it is appropriate that abstention be denied in this area."

"I think I understand. The benefits to be derived from abstention are outweighed by the policy of rapid solution to the issues inherently involved in civil rights cases."

"That is exactly correct. May I commend you again."

"Thank you. There is one more problem I would like to raise now, if I may, and that is what would happen if jurisdiction were based on both diversity and a federal question? Would abstention be appropriate then?"

"In such a situation, there would still be something to come back to the federal court after the state decision; therefore, abstention would be as justified here as it would be in a case based on a federal question alone. As to any fear of state distortion of its own law, about which Mr. Justice Frankfurter seemed to be concerned in *Burford* and *Alabama*,<sup>171</sup> we have previously shown why this is not really a problem."<sup>172</sup>

"There seems to be only one general problem with which we have not yet dealt, and that is the reaction of the state courts to abstention in light of the fact that they will very likely be asked to issue advisory opinions."

"I believe we can sufficiently cover that problem in the discussion of the solution which I shall tender, and which I have been putting off, to some of the problems of abstention. Let us proceed to that now."<sup>173</sup>

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<sup>171</sup> See *Burford v. Sun Oil Co.*, 319 U.S. 315, 336-48 (1943) (dissenting opinion); *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, 351-62 (1951) (concurring opinion).

<sup>172</sup> See text accompanying note 81 *supra*.

<sup>173</sup> For an excellent article on the solution proposed and the problems involved therein, and on which much of this discussion is based, see Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344 (1963). See also Note, *supra* note 147, at 866-72.

## IV. A POSSIBLE SOLUTION

"Fine. For the sake of clarity, does this mean that you will try to outline a method to justifiably use abstention in diversity cases as well as to provide solutions to the delay and advisory opinion problems?"

"Yes, although I realize it is an ambitious undertaking."

"Indeed it is! I anxiously await your revelations."

"My suggested solution is really rather simple: there should be a more widespread use of inter-jurisdictional certification, as provided for in Florida,<sup>174</sup> or some similar procedure.<sup>175</sup> Such a procedure would for all practical purposes solve the delay problem by permitting the litigant to by-pass the lower state courts and present directly to the highest state court propounded questions of state law.<sup>176</sup> If limited to use by federal appellate courts, as it is suggested it should be, this procedure clearly preserves to the litigant his right to have the facts found by the federal court.<sup>177</sup> In addition, the state courts would be limited to consideration of matters of direct concern to the federal court. And, finally, the federal court would not be reduced, in a diversity case, to a 'sterile monitor,'<sup>178</sup> for it would be the basic instrument of the resolution of the entire case in specifying the state law question within the framework of the relevant facts and legal issues to the state's highest authority. Given the speed, economy, and authority of the certification device, most of the problems involved with use of abstention in both federal question cases and diversity cases can be considerably diminished, if not solved altogether."

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<sup>174</sup> FLA. STAT. § 25.031 (1961), authorizing the Florida Supreme Court to provide by rule for the answering of questions concerning state law certified to it by federal courts. See FLA. APP. R. 4.61.

<sup>175</sup> Although certification will be referred to in this discussion, it is assumed that similar results could be achieved by a more expeditious declaratory judgment process. Only seventeen states have intra-jurisdictional certification devices (see Note, *supra* note 173, at 349 n.40), and in these states an alteration to provide for inter-jurisdictional certification should not be difficult to implement. In the remaining jurisdictions, where it might be felt that adoption of such a procedure would be a radical change, alteration of existing declaratory judgment procedures should be able to accomplish substantially the same results.

<sup>176</sup> The Florida rule provides for this. FLA. APP. R. 4.61 (b).

<sup>177</sup> The Florida rule also requires this. FLA. APP. R. 4.61 (a).

<sup>178</sup> See note 151 *supra* and accompanying text.

"That was quite a dissertation, and, needless to say, I have some questions concerning it. Given the facts that only eleven states provide for advisory opinions,<sup>179</sup> that the Supreme Court of Texas refused to answer a question following abstention on advisory-opinion grounds<sup>180</sup> under its Uniform Declaratory Judgments Act,<sup>181</sup> and that it is not unlikely that the other forty states which have adopted that act will follow suit, it seems to me that the most serious objection to a certification procedure is that it seems to call for advisory opinions. So can we finally discuss that issue now?"

"I am pleased to be able to say yes."

"At last! Well, it seems to me that the issue divides itself into two facets. The first is the problem of abstractness due to the severing of the legal question from the factual situation out of which it arose. Would you begin with that?"

"Surely, and the answer is fairly simple: make findings of fact an indispensable part of the certificate, thereby necessitating the posing of the question in its detailed factual setting and also provide for inclusion of as much of the record as is necessary for a complete understanding of the question to be answered. This will eliminate the tendency towards giving a generalized answer, which tendency would exist if the questions were presented without a specific focus, absent the requirement of non-abstractness."

"But what if the record is so complicated as to make it impossible to isolate particular questions and the facts particularly relevant thereto?"

"In such instances the entire record should be sent to the state court, including all legal issues and findings of fact. If this is necessary for a complete understanding of the issues involved and in order to give a concrete setting to the interrelated issues, then this should be done."

"Even with a record, might not a court feel that it is not settling

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<sup>179</sup> Note, *supra* note 173, at 356 n.81; Note, 40 TEXAS L. REV. 1041, 1045 (1962). For a discussion and evaluation of the use of advisory opinions in these states, see Stevens, *Advisory Opinions — Present Status and an Evaluation*, 34 WASH. L. REV. 1 (1959).

<sup>180</sup> See note 90 *supra* and accompanying text.

<sup>181</sup> 9A UNIFORM LAWS ANN. 1 (1965).

an actual dispute and thus feel that the question is still abstract?"

"It might, but the court could have the parties file briefs, and, if the question is complex enough, they can be allowed oral arguments."<sup>182</sup>

"Then your point is that as long as the question is presented in its factual setting, and by the parties as well as the certifying court, it is not abstract?"

"Exactly. The question will have arisen out of a given state of facts which the state court will have before it. How *could* it be abstract under these circumstances?"

"I am convinced that it could not. But there still is the second facet of the issue, that is, the advisory opinion concept itself: the requirement of a real case or controversy. How do we dispose of this problem?"

"An advisory opinion is one which lacks responsiveness to particular parties and does not directly affect the parties' rights because it is unessential to the disposition of the case and is thus neither binding upon the parties nor determinative of an actual dispute.<sup>183</sup> It is difficult to see how the state's answer to a certified question fails in any of these respects. First of all, the answer is responsive to a question which is presented in actual litigation and which is presumably posed non-abstractly. Second, and most important, the decision will finally determine and be res judicata to the rights of real litigants as to the state law question answered.<sup>184</sup> And, third, since the answer will bind and be res judicata as to the state rights of specific parties, there is no reason why it should not be given stare decisis effect. Thus it is extremely difficult to understand why such an opinion would be advisory.

"Of course if the state opinion were an advisory one, incorporation of it into the federal court decision would seem to make that decision a forbidden advisory opinion too. This would be especially true in diversity cases. But as long as the state's opinion is not advi-

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<sup>182</sup> Florida's rules require the filing of briefs, (FLA. APP. R. 4.61 (g)) and provide that the parties may be granted oral argument. (FLA. APP. R. 4.61 (h)). See note 174 *supra*.

<sup>183</sup> See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 77-79 (1953).

<sup>184</sup> See note 77 *supra* and accompanying text.



sory, as I have suggested, and provided that it is a final adjudication of the federal litigants' state rights and will be given stare decisis effect in the state, the federal court would seem to no more violate the case or controversy requirement by incorporation of such a decision than it does when it incorporates under *Erie* any other final state adjudication of parties' state rights."<sup>185</sup>

"Well, although I must say you disposed of that issue rather well, I do have a few more questions as to your initial statement concerning the use of certification as a solution to some of the abstention problems. First, why would you limit certification to use by the appellate courts? If at an early stage of the trial, or even at pre-trial, it becomes apparent that there is a doubtful state law question which the state court will eventually have to answer, would it not cause undue delay — the elimination of which is itself a prime reason for the use of certification — to have an entire trial before the question can be answered authoritatively?"

"The certification procedure is not perfect and will not remove all of the problems abstention creates. Rather, it is hoped that those which remain will be substantially reduced by the use of certification, at least to the point at which they do not outweigh the advantages to be gained from the use of abstention. Taking a balancing approach, then, the advantages of limiting certification to use by appellate courts more than outweigh the disadvantage of possible unnecessary delay. First, this device assures the litigant his federal fact-finding forum and gives him a chance to sharpen his legal issues before the federal court. Questions which may appear early in a trial may disappear before the end of it;<sup>186</sup> other questions may not become clear or appear at all until the trial is nearly over. By demanding a complete trial, not only will there be a full opportunity for the litigant to have all relevant issues developed and irrelevant ones disposed of but in addition he will be saved the considerable expense and delay of having another question appropriate for the state court, and thus for abstention, emerge after he has already been to the state court on an initial question and has returned to the district court. Second, a district court record will give the court of

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<sup>185</sup> *But see* Note, 40 TEXAS L. REV. 1041 (1962).

<sup>186</sup> In *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962), *rev'd on rehearing*, 325 F.2d 673 (5th Cir. 1963), the certified question would have been rendered moot by a jury finding of a lack of causal connection between the deceased's cancer and his smoking of the defendant's cigarettes.

appeals, whose judges are not likely to be as familiar with the state law as the district judge, something from which to work in order to enable them to more easily determine the existence of a truly doubtful state law question necessary to a disposition of the case; and if they find such a question, the record will be of great aid in drawing a certificate containing only relevant issues and facts in a non-abstract manner. This will also assure the state court of a complete record as to the issues and facts relevant to the question it is asked to answer — elements we found basic to answering the advisory opinion issue. A third factor in favor of this device is that assuring the litigant of a complete trial in the district court considerably removes the risk that the litigant might be discouraged from invoking federal jurisdiction at all, in the belief that he could get speedier relief in the state courts. Finally, the state courts will more readily accept certification if their workload is expanded by getting questions only from federal appellate courts rather than from the numerous district courts.”

“Those are good points. It does seem that the possibilities of delay would be greater if the district courts were also allowed to certify. And I just thought of another point! Do you recall my asking you about the equal ability of the state court judge and the federal district court judge to predict state law, and your answer that there was an inherent inequality because the federal judge was not subject to state court review?”<sup>187</sup>

“Yes.”

“Well, does it not seem that your objection is practically removed when certification is utilized and limited to use by appellate courts? With certification, the district judge will be under similar circumstances as the state judge, for he will know his decision is subject to review in the highest state court through use of the certification procedure by the appellate court. Would it not seem, then, that since abstention is at least in part designed to prevent decisions of unsettled state law questions by federal courts not subject to state court review and because certification does in effect make such decisions subject to such review, under a certification procedure abstention is no longer needed at the district court level?”

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<sup>187</sup> See text accompanying notes 104-05 *supra*.

"That is a very interesting point, and your argument surely seems valid. Let me add that the lack of any need for abstention, at the district court level, given the certification procedure, surely makes any added delay at that level due to abstention even more of an unnecessary burden to the litigants."

"Would the considerations be any different if the district court were a three-judge court?"<sup>188</sup>

"The considerations are not different, but because the decisions of such courts are appealable only to the Supreme Court<sup>189</sup> it would seem that three-judge district courts should be allowed to certify questions to the state courts. However, since the reasons given above for the need of a district court record apply and are equally compelling here, certification should be limited to questions which the three-judge court had already decided."

"Could not the Supreme Court certify questions arising in cases being appealed from three-judge courts?"

"Yes, it could, and the Court has itself used the Florida certification procedure to obtain answers to questions of Florida law.<sup>190</sup> However, since the Court is already overloaded, it would be an unwarranted additional burden to have it determine whether to certify as well as to draft certificates in all three-judge cases. This is especially so since it seems a reasonable alternative to allow the three-judge district court to certify as long as it previously decides the questions, given the facts that, first, such courts have a special interest in having unsettled state law questions determined because their jurisdiction is limited to cases seeking injunctive relief against state statutes challenged on federal constitutional grounds<sup>191</sup> and, second, since their jurisdiction is limited, they are not convened so often that allowing them to certify will constitute an unreasonable burden on the state courts from which answers are sought."

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<sup>188</sup> See 28 U.S.C. §§ 2281-84 (1964); HART & WECHSLER, *op. cit. supra* note 183, at 846-55.

<sup>189</sup> 28 U.S.C. § 1253 (1964).

<sup>190</sup> See, *e.g.*, *Dresner v. City of Tallahassee*, 375 U.S. 136 (1963); *Aldrich v. Aldrich*, 375 U.S. 75 (1963).

<sup>191</sup> See 28 U.S.C. §§ 2281-84 (1964); HART & WECHSLER, *op. cit. supra* note 183, at 846-55.

"I would like to pose a question regarding the ability of a district court to abstain if there is no certification procedure, inasmuch as only one state has such a procedure now. Under such circumstances, would you still deny the district court the right to initiate abstention? And, if so, will this not cause considerable delay where a district court is reversed by a court of appeals for not abstaining in a case which clearly calls for application of the doctrine?"

"As to your first question, the answer is yes — for the same reasons we do not want to allow a district court to use certification.<sup>192</sup> As to your second question, the same reasons which compel our willingness to assume this risk of extra delay in certification situations are equally applicable to abstention without certification."<sup>193</sup>

"But if the district court is not permitted to abstain, what will happen in federal question cases to the policy of avoiding constitutional questions? Is not this policy equally applicable to district courts as well as to other courts?"

"Yes it is, but it is simply outweighed here by other policies, such as the need for complete district court records in order to avoid the advisory opinion problem and the understandable reluctance of state courts to accept certification if it would result in their being deluged through its use by questions coming from the numerous district courts. In addition, with final determination of the use of certification being reposed in the appellate courts, constitutional questions may still be ultimately avoided, so the policy would be maintained."

"Well, we seem to have exhausted our discussion of the reasons for limiting certification and abstention to initiation by appellate courts. One final question now. Given the fact that certification would seem to make abstention much less objectionable and thus increase the benefits derivable from its use, it would surely seem to be desirable that it be made generally available.<sup>194</sup> How could we accomplish this, and should it be done at the federal or the state level?"

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<sup>192</sup> See text accompanying notes 186-88 *supra*.

<sup>193</sup> *Ibid.*

<sup>194</sup> See Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960).

"It is doubtful whether this could be accomplished through the federal government. Mr. Justice Douglas indicated in *England* his doubt of the Court's power to compel a state to accept the certification procedure,<sup>195</sup> and the case law is far from persuasive that Congress could do it.<sup>196</sup> Given the fact that certification might require drastic changes in a state's judicial procedures, even to the extent of necessitating constitutional amendments,<sup>197</sup> and that a state might prefer (and be more willing to accept!) some type of procedure which would not constitute such a drastic change,<sup>198</sup> the states themselves are more likely to be in a better position to establish workable mechanisms. But, most important, even if certification could be forced on the states, it would be much the wiser course<sup>199</sup> to leave to the states the task of developing it. The entire procedure being designed to enhance federal-state cooperation, coercing the states to accept certification is not likely to further such cooperation."<sup>200</sup>

"I certainly agree with that. Yet how are we to get the states to take the necessary steps to initiate the procedure?"

"I think we already learned the best answer to that when it was pointed out that the states are not likely to be overly disturbed about the non-application of *res judicata*, because they are likely to share, along with the federal judiciary, the desire for 'furthering the harmonious relation between state and federal authority,'<sup>201</sup> which

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<sup>195</sup> "We cannot require the States to provide . . . a [certification] procedure . . ." *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 434 (1964) (concurring opinion).

<sup>196</sup> Certification poses considerably different problems than did the provisions involved in cases like *Testa v. Katt*, 330 U.S. 386 (1947), where the Court upheld the power of Congress to require state courts to entertain suits under the Emergency Price Control Act, 58 Stat. 645 (1945), on grounds that the existing judicial machinery of the state provided the means to answer the questions posed and to grant the remedies afforded by the federal act. Certification, on the other hand, may necessitate that an entirely new procedural framework be provided within the state.

<sup>197</sup> See Note, *supra* note 173, at 351-57.

<sup>198</sup> See note 175 *supra*.

<sup>199</sup> Certainly politically more desirable!

<sup>200</sup> Even though certification is considerably more efficient than declaratory judgment actions, lack of cooperation between the two judicial systems could produce considerable delay even with the use of certification. This lack of cooperation was undoubtedly a factor contributing to the delay experienced with the use of the Florida certification procedure in *Clay v. Sun Ins. Office, Ltd.*, which began on May 20, 1957. The Fifth Circuit reversed the jury verdict of the district court, 265 F.2d 522 (5th Cir. 1959), which was in turn reversed by the Supreme Court, ordering certification on June 13, 1960, 363 U.S. 207 (1960). The Fifth Circuit Court of Appeals certified questions to the Florida Supreme Court on August 12, 1960, which answered the certificate on October 18, 1961, 133 So. 2d 735 (Fla. 1961). The Fifth Circuit decided the case

is, after all, the very basic purpose behind the abstention doctrine.<sup>202</sup> As Mr. Justice Douglas pointed out in *England*,<sup>203</sup> federalism has always presented basic problems arising out of the clash between our two systems of government, and there has been a constant attempt to keep these conflicts at a minimum. *Erie* is a good example, and the abstention doctrine is another. But, as is inevitable in such situations, it is found that solutions we develop for a particular problem often produce other problems, and so it was with abstention:<sup>204</sup> it had advantages in easing conflicts in federalism, but it created other problems in that area. We have found a way to implement the doctrine so as to solve some of these latter problems. Even further implementation can be achieved through cooperation, such as discretionary use of certification on the part of both the state courts asked to answer questions and the federal courts in using the procedure.<sup>205</sup> All this can only work to increase the advantages and decrease the disadvantages to both federal and state systems in the use of the abstention doctrine and thus make cooperative judicial federalism even more of a reality.<sup>206</sup> In short, it is a device which will lower the price of our federalism instead of, as Mr. Justice Douglas fears, making abstention an unnecessary price to pay for it<sup>207</sup> and 'something of a Frankenstein.'<sup>208</sup> This being the case, there is no reason to expect that every effort will not be taken — on both sides — to achieve this goal."

"There is not much more one can say, except that I hope you are right! After so 'smoothly' doing away with the problems of abstention, I suppose there is not much more to discuss."

"As you know, the law will *never* leave you with *nothing* to discuss! Nonetheless, I think we have done enough for one session."

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again on June 19, 1963, 319 F.2d 505 (5th Cir. 1963), and the final decision was reached on May 18, 1964, where the Supreme Court again reversed the Fifth Circuit, 377 U.S. 179 (1964).

<sup>201</sup> *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941).

<sup>202</sup> See text accompanying notes 84-90 *supra*.

<sup>203</sup> 375 U.S. 411, 431-32 (1964) (concurring opinion).

<sup>204</sup> "I was a member of the Court that launched *Pullman* and sent it on its way. But if I had realized the creature it was to become, my doubts would have been far deeper than they were." *Id.* at 425.

<sup>205</sup> See Note, *supra* note 173, at 359-60.

<sup>206</sup> See Kurland, *supra* note 194.

<sup>207</sup> *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 426 (1964) (concurring opinion).

<sup>208</sup> *Id.* at 429.