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# Federal Courts and Procedure--Concurrent and Conflicting Jurisdiction--The Abstention Doctrine [*Zwickler v. Koota*, 389 U.S. 241 (1967)]

James L. Hildebrand

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## *Recent Decisions*

### FEDERAL COURTS AND PROCEDURE — CONCURRENT AND CONFLICTING JURISDICTION — THE ABSTENTION DOCTRINE

*Zwickler v. Koota*, 389 U.S. 241 (1967).

Under the federal abstention doctrine, a litigant who is properly before a federal district court seeking relief on the ground that a State statute violates his federally protected constitutional rights may be denied a federal forum and shunted off to the State courts for a decision on the issues in question. Before the United States Supreme Court's recent decision in *Zwickler v. Koota*<sup>1</sup> it was unclear when a federal court might abstain from deciding a case, involving federal and State questions of law,<sup>2</sup> to allow the State courts a reasonable opportunity to pass judgment upon the case.<sup>3</sup> It was apparent, however, that if the federal questions were not litigated on the State court level the plaintiff could go back to the federal forum for a determination of these issues if the federal court had only stayed its proceedings and not dismissed the case.<sup>4</sup>

Sanford Zwickler was convicted under a New York law prohibiting dissemination of anonymous political leaflets.<sup>5</sup> (Similar statutes are presently in effect in 36 other States.)<sup>6</sup> Zwickler had

<sup>1</sup> 389 U.S. 241 (1967).

<sup>2</sup> Once a federal court's jurisdiction has been properly invoked, the court has the power to decide the case before it even on purely State questions of law. *Siler v. Louisville & N.R.R.*, 213 U.S. 175 (1909). For a discussion of *Siler*, see Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528, 598-99 (1968).

<sup>3</sup> See cases cited in note 51 *infra*. It should be emphasized that the *Zwickler* decision applies only to cases in the area of free expression and first amendment rights. The Court has refused to clarify the role of the abstention doctrine in other areas of constitutional rights. See *Fenster v. Leary*, 386 U.S. 10 (1967) (mem.). In this decision the Court affirmed a federal district court's application of the abstention doctrine where a State vagrancy statute was challenged as violating the eighth, 13th, and 14th amendments. For a discussion of the effect of this per curiam decision, see Lewis, *supra* note 2, at 633. See also note 54 *infra*.

<sup>4</sup> *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) (discussed in note 57 *infra*). Concerning dismissal, see note 10 *infra*.

<sup>5</sup> N.Y. PEN. LAW § 781-b (McKinney 1954), as amended, N.Y. ELEC. LAW § 457 (McKinney Supp. 1967). This statute makes it a crime to distribute *in quantity*, among other things, any handbill for [anyone] which contains any statement concerning any candidate in connection with any election of public officers, without also printing thereon the name and post office address of the printer thereof and of the person at whose instance such handbill is so distributed. 389 U.S. at 242 (emphasis added).

<sup>6</sup> ALA. CODE tit. 17, § 282 (1958); ARK. STAT. ANN. § 3-1412 (1947); CAL.

violated the statute by passing out anonymous handbills that were critical of the record of a United States Congressman seeking reelection. His conviction was reversed on State law grounds by a New York Supreme Court, because the prosecution failed to show that Zwickler had distributed leaflets "in quantity" as required by the statute.<sup>7</sup> The New York Court of Appeals affirmed this reversal without opinion.<sup>8</sup> Fearing future arrests for distribution "in quantity," Zwickler invoked the jurisdiction of a three-judge federal district court<sup>9</sup> and sought declaratory and injunctive relief on the ground that due to "overbreadth" the New York statute was repugnant to the constitutional guarantees of free expression. The three-judge court, with one judge dissenting, applied the doctrine of abstention and dismissed<sup>10</sup> the case because Zwickler had not

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ELEC. CODE ANN. § 12,047 (West Supp. 1967); COLO. REV. STAT. ANN. § 49-21-50 (1963); FLA. STAT. ANN. § 104.37 (Supp. 1967); IDAHO CODE ANN. § 34-104 (1963); ILL. ANN. STAT. ch. 46, § 26-1 (Smith-Hurd 1965); IOWA CODE ANN. § 738.22 (1950); KAN. STAT. ANN. § 25-1714 (1964); KY. REV. STAT. §§ 123.095, 123.130 (Supp. 1967); LA. REV. STAT. § 18:1531 (1950); ME. REV. STAT. ANN. tit. 21, § 1575 (1964); MD. ANN. CODE art. 33, § 221 (1957); MASS. ANN. LAWS ch. 56, §§ 39, 41 (1952); MICH. STAT. ANN. § 6.1914 (1956); MINN. STAT. § 211.08 (Supp. 1967); MISS. CODE ANN. § 1341 (1956); MO. ANN. STAT. § 129.300 (1966); MONT. REV. CODES ANN. § 94-1475 (Supp. 1967); NEB. REV. STAT. § 32-1131 (Supp. 1965); N.H. REV. STAT. ANN. § 70.14 (Supp. 1967); N.J. STAT. ANN. §§ 19.34-38.1-4 (1964); N.D. CENT. CODE § 16-20-17.1 (Supp. 1967); OHIO REV. CODE § 3599.09 (Page Supp. 1966); ORE. REV. STAT. § 260.360 (1967); PA. STAT. ANN. tit. 25, § 3546 (1963); R.I. GEN. LAWS ANN. § 17-23-2 (Supp. 1967); S.D. CODE § 16.9930 (Supp. 1960); TENN. CODE ANN. § 2-2238 (1955); TEX. ELEC. CODE art. 14.10 (1967); UTAH CODE ANN. § 20-14-24 (1953); VT. STAT. ANN. tit. 17, § 2022 (Supp. 1967); VA. CODE ANN. § 24-456 (1950); WASH. REV. CODE ANN. § 29.85.270 (1965); W. VA. CODE ANN. § 3-8-12 (1966); WIS. STAT. ANN. § 12.16 (1967). See also 18 U.S.C. § 612 (1964).

<sup>7</sup> *People v. Zwickler*, 16 N.Y.2d 1069, 213 N.E.2d 467, 266 N.Y.S.2d 140 (1965).

<sup>8</sup> *Id.*

<sup>9</sup> Jurisdiction was obtained under the Civil Rights Act of 1957, 28 U.S.C. § 1343 (1964), which gives original jurisdiction to federal district courts for civil actions to redress the deprivation, under State laws, of rights, privileges or immunities secured by the Federal Constitution, and under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1964).

<sup>10</sup> It should be noted that on appeal, the United States Supreme Court in *Zwickler* stated:

It is better practice, in a case raising a federal constitutional or statutory claim, to retain jurisdiction, rather than to dismiss, see Note, Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604 (1967), but other courts have also ordered dismissal. Compare *Government & Civic Employees Organizing Committee, CIO v. Windsor*, 353 U.S. 364 [(1957)]; *Shipman v. DuPre*, 339 U.S. 321 [(1950)], with *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 [(1949)]; *Local 333B, United Marine Div., Int'l Longshoremen's Assn. v. Battle*, 101 F. Supp. 650 (D.C.E.D.Va.), *aff'd per curiam*, 342 U.S. 880 [(1951)]. See generally Note, Judicial Abstention From the Exercise of Federal Jurisdiction, 59 Col. L. Rev. 749, 772-774 (1959). *Zwickler v. Koota*, 389 U.S. 241, 244-45 n.4 (1967).

Dismissal is the rule, however, in cases where abstention is ordered to avoid interference

exhausted the State declaratory judgment remedy.<sup>11</sup> The majority of the three judges noted that Zwickler could assert his constitutional challenge in defense of any criminal prosecution for future violations of the statute.<sup>12</sup> The court held that it was within its *equitable discretion* to abstain and that *federal-State friction* would be avoided by letting a State court have the first opportunity to resolve questions of State law even though questions concerning the Federal Constitution were involved.<sup>13</sup> The court reasoned that a dispositive State court decision might eliminate the necessity of deciding the federal constitutional question.<sup>14</sup>

The Supreme Court reversed the three-judge federal district court and, in an important clarification and reaffirmation of the first amendment exception to the federal-question abstention doctrine,<sup>15</sup> held that a federal district court has no discretion to abstain from deciding the merits of a declaratory request when the State statute is claimed to violate the first amendment right of free expression.<sup>16</sup>

The abstention doctrine, applied by the district court in *Zwickler*, was first enunciated in a 1941 opinion by Justice Frankfurter in *Railroad Commission v. Pullman Co.*<sup>17</sup> In the *Pullman* case, the Court upheld a federal district court's refusal to issue an injunction

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with a comprehensive State regulatory system. *E.g.*, *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). For a discussion of *Burford*-type abstention cases, see Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 *COL. L. REV.* 749, 757-62 (1959). The Court has also affirmed lower courts' decisions to abstain and dismiss where the administration of State criminal laws were in question. *E.g.*, *Fenster v. Leary*, 386 U.S. 10 (1967) (mem.); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

<sup>11</sup> In New York the action for declaratory judgment (N.Y. CIV. PRAC. § 3001 (McKinney 1954)) has been recognized as the remedy available to a defendant seeking to test the constitutionality of a State criminal statute under which prosecution is threatened. See *De Veau v. Braisted*, 5 App. Div. 2d 603, 174 N.Y.S.2d 596 (1958), *aff'd*, 5 N.Y.2d 236, 157 N.E.2d 165, 183 N.Y.S.2d 793 (1959), *aff'd*, 363 U.S. 144 (1960). This position may have been affirmed in *Fenster v. Leary*, 386 U.S. 10 (1967) (mem.), *aff'g* 264 F. Supp. 153 (S.D.N.Y. 1966), where the Court upheld a three-judge federal court's abstention which was based on the fact that the petitioner had not exhausted his State declaratory judgment remedy. For a similar holding in Ohio, see *Peltz v. City of South Euclid*, 11 Ohio St. 2d 128, 228 N.E.2d 320 (1967).

<sup>12</sup> *Zwickler v. Koota*, 261 F. Supp. 985, 992 (E.D.N.Y. 1966).

<sup>13</sup> For a discussion of these policy arguments, see notes 17-19, 37-47 *infra* & accompanying text.

<sup>14</sup> See text accompanying note 18 *infra*.

<sup>15</sup> This exception and its reaffirmation in *Zwickler* is discussed in text accompanying notes 42-52 *infra*.

<sup>16</sup> 389 U.S. at 254.

<sup>17</sup> 312 U.S. 496 (1941). In *Pullman* Negro porters alleged that a State railroad commission denied them their jobs on racial grounds by requiring conductors to be put in charge of all sleeping cars.

against the Texas Railroad Commission until the State courts had an opportunity to void the commission's action on State law grounds. Mr. Justice Frankfurter noted that it was within the *equitable discretion* of the federal court to abstain and that "[t]he resources of equity are equal to an adjustment that will avoid the *waste of a tentative [federal] decision* as well as the [*federal-State*] *friction* of a premature constitutional adjudication."<sup>18</sup> The Court stressed that it was "important considerations of *policy* in the administration of federal equity jurisdiction [that are] decisive here"<sup>19</sup> and that the alleged racial discrimination "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."<sup>20</sup>

The *Pullman* abstention doctrine can be viewed as a latent reaction to the problems engendered by the famous case of *Ex parte Young*.<sup>21</sup> In *Ex parte Young* the power of a federal court to enjoin a prosecution by a State official under a State statute found unconstitutional on its face was upheld.<sup>22</sup> The Court characterized the federal injunction power and its proper exercise in broad terms, stating that an injunction was justified where State officials threatened and were about to commence proceedings, either of a civil or criminal nature, against individuals for acts which were protected by the Federal Constitution.<sup>23</sup> Considerations of federalism have tempered the exercise of federal injunctive relief,<sup>24</sup> and the Court has

<sup>18</sup> *Id.* at 500 (emphasis added).

<sup>19</sup> *Id.* at 501 (emphasis added). Professor Charles Wright has listed four such policy considerations: Abstention may (1) avoid the necessity of deciding a federal constitutional question if the case may be disposed of on questions of State law, (2) avoid needless conflict with State administration, (3) let States resolve unsettled questions of State law, and (4) ease the burden of the federal court docket. C. WRIGHT, FEDERAL COURTS § 52, at 169 (1963). The fourth policy consideration has been rejected. *See Lankenau v. Coggeshall & Hicks*, 350 F.2d 61 (2d Cir. 1965); *Liberty Mut. Ins. Co. v. Pennsylvania R.R.*, 322 F.2d 963 (7th Cir. 1963).

<sup>20</sup> 312 U.S. at 498. Although still sensitive, racial discrimination cases are the least likely candidates for abstention today. *See, e.g., McNeese v. Board of Educ.*, 373 U.S. 668 (1963). For a discussion of the civil rights cases and the abstention doctrine, see Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604, 607-11 (1967).

<sup>21</sup> 209 U.S. 123 (1908). *See* Note, *supra* note 20, at 605 n.12.

<sup>22</sup> 209 U.S. at 155-56.

<sup>23</sup> *Id.* at 156.

<sup>24</sup> *See, e.g., 28 U.S.C. § 2283* (1964). This statute and its predecessors do not preclude the issuance of injunctions against the institution of State court proceedings, but only bar stays of suits already instituted. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965). *See* Note, *Federal Power To Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 728-29 (1961); Note, *The Dombrowski Remedy — Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92,

stated that "federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework."<sup>25</sup> Accordingly, the rule has been established that federal injunctive relief will be granted only in exceptional cases "to prevent irreparable injury which is clear and imminent."<sup>26</sup> In *Zwickler v. Koota*,<sup>27</sup> the district court did not find the "special circumstances" necessary to justify the exercise of the federal injunctive power.<sup>28</sup> Furthermore, in abstaining, the three-judge court refused to consider the merits of the declaratory judgment which was also sought.

The development of a "special circumstances" test has created an exception to the federal abstention doctrine. The first "special circumstance" was established in 1943 in the case of *Douglas v. City of Jeannette*,<sup>29</sup> where the Court said that abstention would not be applied if there were clear and imminent danger of irreparable injury.<sup>30</sup>

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95-97 (1966). See also 42 U.S.C. § 1983 (1964); *Cameron v. Johnson*, 88 S. Ct. 1335 (1968).

<sup>25</sup> *Dombrowski v. Pfister*, 380 U.S. 479, 484 (1965), cited in *Zwickler v. Koota*, 261 F. Supp. 985, 989 (E.D.N.Y. 1966), *rev'd*, 389 U.S. 241 (1967).

<sup>26</sup> *Douglas v. City of Jeannette*, 319 U.S. 157, 163 (1943). In this case the Court upheld a federal district court's refusal to enjoin the application of a city ordinance to religious solicitation, even though the ordinance was that very day held unconstitutional by the Court in reviewing a criminal conviction under it. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). The Court later explained its actions by stating: "Since injunctive relief looks to the future, and it was not alleged that Pennsylvania courts and prosecutors would fail to respect the *Murdock* ruling, the Court found nothing to justify an injunction." *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965). The presumption that State courts will apply federal constitutional law in cases pending before them has been firmly established in the area of removal of cases from a State court to a federal court. *Rachel v. Georgia*, 384 U.S. 780 (1966), *aff'g* 342 F.2d 336 (5th Cir. 1965); *Peacock v. City of Greenwood*, 384 U.S. 808 (1966), *rev'g* 347 F.2d 679 (5th Cir. 1965); *Cox v. Louisiana*, 348 F.2d 750 (5th Cir. 1965).

<sup>27</sup> 261 F. Supp. 985 (E.D.N.Y. 1966).

<sup>28</sup> *Id.* at 992.

<sup>29</sup> 319 U.S. 157 (1943) (discussed in note 26 *supra*).

<sup>30</sup> *Id.* at 163-64. The Court has discussed considerations which are *not* within the "special circumstances" test in certain diversity cases. In *Meredith v. Winter Haven*, 320 U.S. 228 (1943), a diversity action in which equitable relief was sought in a federal district court, the Supreme Court held that mere difficulty of State law did not justify abstention in favor of a State court action. In this case Chief Justice Stone announced broadly that

the difficulties 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 to decide a case which is properly brought to it for decision. *Id.* at 234, cited in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27 (1959).

"The Court has frequently applied the *Meredith* principle, and refused to order abstention though a case involved difficult questions of state law." C. WRIGHT, *supra* note 19, § 52, at 175. See cases cited *id.* n.39. But in *Chicago v. Fieldcrest Dairies, Inc.*, 316

The abstention doctrine reached its broadest definition in a quartet of decisions on June 8, 1959.<sup>31</sup> These cases reiterated the policy that the State courts should have the first opportunity to adjudicate the constitutionality of State enactments.<sup>32</sup> More important however, these cases also established the groundwork for a second "special circumstance": that the State court remedies must be inadequate, or conversely, the litigant must have exhausted his State court remedies.<sup>33</sup> In one of these cases, *Louisiana Power & Light Co. v. City of Thibodaux*,<sup>34</sup> a diversity case involving condemnation pro-

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U.S. 168 (1942), and *Leiter Minerals, Inc. v. United States*, 352 U.S. 200, 229 (1957), the Supreme Court required the federal courts "to stay their proceedings pending the submission of state law questions to state determination." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27-28 (1959) (discussed in text accompanying notes 34-40 *infra*). See also *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960) (discussed in text accompanying note 61 *infra*). See generally Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 YALE L.J. 850 (1964), cited in *Zwickler v. Koota*, 389 U.S. 241, 249 n.11 (1967).

<sup>31</sup> *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Harrison v. NAACP*, 360 U.S. 167 (1959); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959); *Martin v. Creasy*, 360 U.S. 219 (1959).

<sup>32</sup> In the service of this [abstention] doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. *Harrison v. NAACP*, 360 U.S. 167, 176 (1959), cited in *Zwickler v. Koota*, 261 F. Supp. 985, 990 (E.D.N.Y. 1966), *rev'd*, 389 U.S. 241 (1967) and *Fenster v. Leary*, 264 F. Supp. 153, 155 (S.D.N.Y. 1966), *aff'd mem.*, 386 U.S. 10 (1967).

The Court in *Zwickler* quoted the following analysis from *United States v. Livingston*, 179 F. Supp. 9, 12-13 (E.D.S.C. 1959), *aff'd*, 364 U.S. 281 (1960), as a "guide to decision":

The decision in *Harrison*, however, is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes. . . . Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. 389 U.S. at 250-51.

<sup>33</sup> The requirement of exhausting State remedies provided a rationale for the federal district courts' abstention in *Zwickler v. Koota*, 261 F. Supp. 985, 993 (E.D.N.Y. 1966), *rev'd*, 389 U.S. 241 (1967), and in *Fenster v. Leary*, 264 F. Supp. 153, 158 (S.D.N.Y. 1966), *aff'd mem.*, 386 U.S. 10 (1967). But see *Turner v. City of Memphis*, 369 U.S. 350 (1962) (abstention vacated which had been ordered only because State declaratory judgment remedy had not been exhausted). The first exception to the *Ex parte Young* federal injunction doctrine (discussed in text accompanying notes 21-25 *supra*) was that a litigant must have first exhausted his State remedies. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). The rationale for this exception was that it would avoid federal-State friction. *Id.* at 230. This same rationale was applied in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941) (discussed in text accompanying notes 17-20 *supra*). Similarly, in certain cases, litigants attempting to remove from a State court to a federal court were not allowed to show that the State court remedies were inadequate. See removal cases cited in note 26 *supra*; Note, *The Dombrowski Remedy*, *supra* note 24, at 118-20.

<sup>34</sup> 360 U.S. 25 (1959).

ceedings under a State eminent domain statute, the Court gave the appearance of removing the equity limitation on abstention.<sup>35</sup> In *Thibodaux*, Justice Frankfurter, speaking for the Court, said that prior abstention cases "did not apply a technical rule of equity procedure . . . [but] reflect[ed] a deeper *policy* derived from our federalism."<sup>36</sup> In this case the State law was unclear, and although an eminent domain proceeding had been deemed a "suit at common law,"<sup>37</sup> the Court upheld abstention to avoid federal-State friction.<sup>38</sup> Nevertheless, the Court in *Thibodaux* emphasized the "special nature of eminent domain," analogized condemnation cases to equitable proceedings, and stressed the State's inherent interest in the subject matter of eminent domain.<sup>39</sup>

*Thibodaux* was the high watermark for the abstention doctrine, and in *Zwickler v. Koota*<sup>40</sup> the judicial tide has receded to the point where the federal courts' equitable discretion to abstain is entirely removed in the area of free expression and first amendment rights.

After Justice Frankfurter's retirement in 1962 the abstention doctrine became an orphan of the Court.<sup>41</sup> In 1964 and 1965 two cases were decided by the Court which provided an exception to the traditional *Pullman* abstention doctrine. *Baggett v. Bullitt*<sup>42</sup> and

<sup>35</sup> This limitation was established by *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941), *see text* accompanying note 18 *supra*.

<sup>36</sup> 360 U.S. at 28 (emphasis added). *See* note 19 *supra* & accompanying text.

<sup>37</sup> 360 U.S. at 28, *citing* *Kohl v. United States*, 91 U.S. 367, 375-76 (1875).

<sup>38</sup> "The justification for this [abstention] power . . . lies in regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations . . ." 360 U.S. at 29.

<sup>39</sup> *Id.* at 28-29; *see* C. WRIGHT, *supra* note 19, § 52, at 174. On the same day that *Thibodaux* was handed down, the Court also decided *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959), which was also a diversity case involving condemnation proceedings. The Court in *Allegheny* refused to allow abstention because the State statute had been clearly construed and there was little "hazard of friction in federal-state relations." *Id.* at 187, 192.

<sup>40</sup> 389 U.S. 241 (1967).

<sup>41</sup> *See* Note, *supra* note 20, at 604. In the nine cases concerning the propriety of abstention which have reached the Court since 1962, in all but one abstention has been held improper. *Zwickler v. Koota*, 389 U.S. 241 (1967); *Fenster v. Leary*, 386 U.S. 10 (1967) (federal court's abstention affirmed in a memorandum decision; discussed in note 3 *supra*); *Harman v. Forssenius*, 380 U.S. 528 (1965); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Davis v. Mann*, 377 U.S. 678 (1964); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Hostetter v. Idelwild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964); *Griffin v. County School Bd.*, 377 U.S. 218 (1964); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963). The Court also refused to permit abstention in *Turner v. City of Memphis*, 369 U.S. 350 (1962) (*per curiam*). In six of these cases — all except *Fenster*, *Harman*, *Davis*, and *Hostetter* — the Court overruled lower court decisions to abstain. These cases made it apparent that civil rights and void for vagueness were two types of cases where abstention was improper.

<sup>42</sup> 377 U.S. 360 (1964).



*Dombrowski v. Pfister*<sup>43</sup> were cases involving rights of free expression. Both cases involved *overly broad* or *void for vagueness* State statutes. In *Baggett v. Bullitt*, where a loyalty oath was required as a condition of employment at a State university, the Court held that there were no "special circumstances" present that would justify abstention by the three-judge federal court.<sup>44</sup> The Court noted that abstention might "require piecemeal adjudication in many courts . . . thereby delaying ultimate adjudication on the merits for an undue length of time . . ." and that these should be important considerations in determining whether or not to abstain.<sup>45</sup>

In *Dombrowski v. Pfister*,<sup>46</sup> a civil rights case brought to enjoin enforcement of a subversive activities control law, the Court held abstention improper because the statute was attacked as an unconstitutionally vague regulation of expression.<sup>47</sup> Justice Brennan reasoned that abstention would subject Dombrowski to the "uncertainties and vagaries" of a criminal trial in a situation where "the fact of the prosecution, unaffected by the prospects of its success or failure" inevitably had a "*chilling effect* upon the exercise of First Amendment rights" and that in such a situation abstention would serve "no legitimate purpose."<sup>48</sup> The Court further declared that "where . . . prosecutions are actually threatened, this challenge, if not clearly frivolous, will establish the threat of *irreparable injury* required by traditional doctrines of equity."<sup>49</sup>

Together, *Baggett v. Bullitt* and *Dombrowski v. Pfister* estab-

<sup>43</sup> 380 U.S. 479 (1965).

<sup>44</sup> "Ascertainment of whether there exist the 'special circumstances' . . . prerequisite to [the abstention doctrine's] application must be made on a case-by-case basis. . . . Those special circumstances are not present here." 377 U.S. at 375. See also *Whitehill v. Elkins*, 389 U.S. 54 (1967) (loyalty oath invalid for vagueness, federal district court's dismissal of case reversed); *Douglas v. City of Jeannette*, 380 U.S. 157 (1943) (discussed in note 26 *supra*).

<sup>45</sup> 377 U.S. at 378-79, citing *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964); *Government & Civic Employees Organizing Comm., CIO v. Windsor*, 353 U.S. 364 (1957); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101 (1944).

<sup>46</sup> 380 U.S. 479 (1965).

<sup>47</sup> *Id.* at 497.

<sup>48</sup> *Id.* at 487, 491-92 (emphasis added).

<sup>49</sup> *Id.* at 490 (emphasis added). *Dombrowski*, therefore, demanded a reconsideration of the policy of avoiding federal-State friction, under which federal courts had declined to interfere with State judicial proceedings. To a large extent the validity of *Douglas v. City of Jeannette*, 319 U.S. 157 (1943) (discussed in note 26 *supra*), the leading case on federal-State comity, was removed by *Dombrowski*. See Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions in Civil Rights Cases — A New Trend in Federal-State Judicial Relations*, 34 *FORDHAM L. REV.* 71, 86 (1965).

lished a first amendment exception to the federal-question abstention doctrine. The exception made undue delay, irreparable injury, and limitations on free expression three explicit factors to be considered before abstention is ordered. This exception was thought to have wide implications.<sup>50</sup> However, as seen in *Zwickler*, the "special circumstances" tests were too indefinite and vague for effectuating the requisite judicial certitude, at least in the area of first amendment rights.<sup>51</sup>

In *Zwickler* the Court extended and clarified the first amendment exception to the abstention doctrine by holding that a federal court has the *duty* to decide the appropriateness and the merits of a declaratory request if a State statute is constitutionally attacked as void for overbreadth.<sup>52</sup> In such a case a federal court does not have the discretion to abstain,<sup>53</sup> since to do so would delay consideration of the statute's constitutionality. In *Zwickler* the Court declared that in a case involving first amendment rights "to force the plaintiff who has commenced a federal action to suffer the *delay* of state court proceedings might itself effect the impermissible *chilling* of the very constitutional right he seeks to protect."<sup>54</sup>

<sup>50</sup> "The void-for-vagueness doctrine can be used in many different ways, and depending upon the purposes for which it is employed, widely varying implications can be seen in *Dombrowski*." Note, *supra* note 20, at 612. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 149-52 (1962); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

<sup>51</sup> "A continued policy of creating vague judge-made exceptions to a judge-made rule can only compound the confusion." Note, *supra* note 20, at 611. Compare *Fenster v. Leary*, 264 F. Supp. 153 (S.D.N.Y. 1966), *aff'd mem.*, 386 U.S. 10 (1967), with *Zwickler v. Koota*, 261 F. Supp. 985 (E.D.N.Y. 1966), *rev'd*, 389 U.S. 241 (1967) and *Baker v. Bindner*, 274 F. Supp. 658 (W.D. Ky. 1967).

<sup>52</sup> The Court stated that a statute is void for overbreadth when it "offends the constitutional principle that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms,'" specifically first amendment freedoms. 389 U.S. at 250, *citing* *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). Compare with *Fenster v. Leary*, 386 U.S. 10 (1967) (*mem.*). In *Zwickler* the Court distinguished void for overbreadth from void for vagueness, stating that the latter entails "a statute 'which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" 389 U.S. at 249, *citing* *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). In a concurring opinion, Justice Harlan stated that the propriety of abstention should not depend upon whether the complaint has alleged overbreadth, or only vagueness, because "[1] neither principle has ever been definitively delimited by this court . . . [2] there is no reason to suppose that a case involving allegations of overbreadth would inevitably be inappropriate for abstention . . . [3] such a standard might in effect reduce the abstention doctrine to a pleader's option . . ." *Id.* at 257. For the different constitutional considerations involved in attacks for "vagueness" and for "overbreadth," see *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04, 608-10 (1967), *cited in* 389 U.S. at 250 n.13.

<sup>53</sup> 389 U.S. at 254.

<sup>54</sup> *Id.* at 252 (emphasis added). In *Fenster v. Leary*, the Court may have held for

Prejudicial delay, caused when the federal and State courts send the parties shuttling back and forth in an attempt to get someone to reach a binding decision,<sup>55</sup> and the resulting increase in cost of litigation are the most serious drawbacks to abstention proceedings. While in theory true abstention does not deny access to the federal courts, it merely postpones access;<sup>56</sup> nevertheless, the postponing of a federal remedy until after a dispositive State decision has been reached seems antithetical to a right that may be prejudiced by delay. A third problem of abstention is that the State court may reach a dispositive decision on the merits without deciding the constitutional question, thus leaving the litigant open to future prosecutions under the same untested statute. A fourth criticism of the doctrine is that the litigant may be precluded, because of *res judicata*, from later appealing the federal constitutional questions to a federal district court.<sup>57</sup> Finally, there may be other special and peculiar circumstances attendant when the "abstained" litigant arrives in the State courts.<sup>58</sup>

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the first time that the chilling-effect-of-delay argument is not available to a plaintiff unless a "delay in adjudication on the merits could be 'costly where the vagueness of a state statute may inhibit the exercise of *First Amendment freedoms*.'" Fenster v. Leary, 264 F. Supp. 153, 156 (S.D.N.Y. 1966) (emphasis added), *aff'd mem.*, 386 U.S. 10 (1967), quoting from Baggett v. Bullitt, 377 U.S. 360, 379 (1964); see Lewis, *The High Court: Final . . . But Fallible*, 19 CASE W. RES. L. REV. 528, 633 (1968).

<sup>55</sup> E.g., Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951) (final decision on the merits delayed 7 years); England v. Louisiana State Bd. of Medical Examiners, 384 U.S. 885 (1966) (9 years); Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957) (8 years after abstention ordered, issue declared moot in United States v. Leiter Minerals, Inc., 381 U.S. 413 (1965)); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (7 years). See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, proposed 28 U.S.C. § 1371(d) (Tent. Draft No. 4, 1966); W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 64, at 241-42 n.52.5 (C. Wright ed. Supp. 1967); Liebenthal, *A Dialogue on England: The England Case, Its Effect on the Abstention Doctrine, and Some Suggested Solutions*, 18 W. RES. L. REV. 157, 158-65 (1966).

<sup>56</sup> See Harrison v. NAACP, 360 U.S. 167, 177 (1959).

<sup>57</sup> In England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), the Court established the rule that where the requirements for abstention are met the parties must be sent to the State courts. The Court further stated, however, that "the litigant is in no event to be denied his right to return to the District Court *unless* it clearly appears that he voluntarily . . . fully litigated his federal claims in the state courts." *Id.* at 421 (emphasis added). It was also stated that the plaintiff

may inform the state courts that he is exposing his federal claims there only for the purpose of complying . . . and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable . . . . When the reservation has been made, however, his right to return will in all events be preserved. *Id.* at 421-22.

See Government & Civic Organizing Comm., CIO v. Windsor, 353 U.S. 364 (1957).

<sup>58</sup> For example, while the right to a jury trial is guaranteed in the federal courts, this right might not be guaranteed by a State constitution for a State declaratory judgment

A possible solution to the problems inherent in abstention is interjurisdictional certification. Under this technique, State law questions arising in federal courts are certified directly to the highest State court for decision.<sup>59</sup> This procedure minimizes the delay on the appellate level present in regular abstention and should avoid the waste of a tentative federal decision as well as the friction of a premature constitutional adjudication.<sup>60</sup> Certification does not forfeit the parties' rights to the advantages of a federal forum, and it affords the highest State court an opportunity to clarify the State law aspects in question. This procedure has been used in Florida<sup>61</sup> and other States, but not with complete success.<sup>62</sup> The obvious difficulty with certification is that it is tantamount to asking for an advisory opinion — the State court not being allowed to base its decision upon a real case or controversy.<sup>63</sup>

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action. See *Renee v. Sanders*, 160 Ohio St. 279, 116 N.E.2d 420 (1953). There may also be State constitutional provisions which circumvent uniformity and lend credence to the argument that the litigant should not be forced into the State courts when a federal question is involved. E.g., OHIO CONST. art. IV, § 2 provides that: "No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void. . . ." This provision fosters the paradox whereby a law may be constitutional and valid in certain districts, and unconstitutional and void in others. This provision has also been criticised for permitting judicial control over important constitutional questions by a minority Ohio Supreme Court vote and for allowing the court of appeals to become the final arbitrator of constitutional questions. See *Village of Brewster v. Hill*, 128 Ohio St. 354, 191 N.E. 366 (1934). See generally Meier, *The Power of the Ohio Supreme Court To Declare Laws Unconstitutional*, 5 U. CIN. L. REV. 293 (1931). Although not recently, the Supreme Court of the United States has held that this provision is not violative of the due process or equal protection clauses of the Federal Constitution. *Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74 (1930).

<sup>59</sup> See Liebenthal, *supra* note 55, at 201-09; Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344 (1963). See also C. WRIGHT, *supra* note 19, § 52, at 176; Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 325-26 (1967); Note, *supra* note 30, at 866-72.

<sup>60</sup> See text accompanying note 18 *supra*.

<sup>61</sup> See *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960); FLA. STAT. § 25.031 (1961).

<sup>62</sup> See 7A J. MOORE, FEDERAL PRACTICE § 1254(3), at 361 (2d ed. 1966), discussing 28 U.S.C. § 1254(3) (1964).

<sup>63</sup> Some State court rules provide for advisory opinions, e.g., Massachusetts and Maine. However, the reasons why federal courts should *not* issue advisory opinions, as stated by the Supreme Court in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937), seem equally applicable to State courts. Compare *id.*, with *United Pub. Workers of America v. Mitchell*, 330 U.S. 75 (1947). The Court in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) (discussed in note 57 *supra*), stated: "It has been suggested that state courts may 'take no more pleasure than do federal courts in deciding cases piecemeal . . .' and 'probably prefer to determine their questions of law with complete records of cases in which they can enter final judgment before them.'" *Id.*, at 421 n.12, citing *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 227 (1960) (dissenting opinion).

Two other alternative solutions to the problems of abstention are that the Supreme Court abolish the doctrine entirely,<sup>64</sup> or, in Justice Harlan's words, "definitively delimit" the tests for applying the abstention doctrine.<sup>65</sup> The Court has refused to do the latter,<sup>66</sup> but *Zwickler* can be viewed as virtually abolishing the federal-question abstention doctrine in cases involving freedom of expression. An inherent fault of the Court-made abstention rule is that the rule *itself* sweeps too broadly in other areas of constitutional rights and may in effect deny personal liberties of more importance than the policy reasons for applying the doctrine.<sup>67</sup> In light of *Zwickler*, therefore, the sagacious lawyer who does not want to risk being sent from the federal forum to the State courts, will seek to protect his client's claim by challenging the State statute on grounds of "overbreadth" and by relating the claim to the preferred<sup>68</sup> first amendment freedoms.<sup>69</sup>

JAMES L. HILDEBRAND

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<sup>64</sup> See Clark, *Federal Procedural Reform and States' Rights: To a More Perfect Union*, 40 TEX. L. REV. 211, 224, 229 (1961).

<sup>65</sup> *Zwickler v. Koota*, 389 U.S. 241, 257 (1967) (concurring opinion). See also note 52 *supra*.

<sup>66</sup> *Fenster v. Leary*, 386 U.S. 10 (1967) (mem.); see notes 3, 54 *supra*.

<sup>67</sup> See notes 51, 54-58 *supra* & accompanying text.

<sup>68</sup> See *Speiser v. Randall*, 357 U.S. 513 (1958); Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 & 226 (1958).

<sup>69</sup> Compare *Baker v. Bindner*, 274 F. Supp. 658 (W.D. Ky. 1967), where Kentucky's vagrancy statute was successfully attacked on first amendment grounds, *with Fenster v. Leary*, 264 F. Supp. 153 (S.D.N.Y. 1966), *aff'd mem.*, 386 U.S. 10 (1967). In the latter case a similar New York vagrancy statute was unsuccessfully attacked on eighth, 13th, and 14th amendment grounds. Neither the majority nor the dissenting opinions in *Baker v. Bindner* showed an awareness of the Supreme Court's per curiam affirmance of *Fenster v. Leary*.