COMMENTS

RECENT DEVELOPMENTS IN THE DOCTRINE OF ABSTENTION

THE doctrine of abstention is a "judge-fashioned vehicle"[1] of equitable origin[2] whereby a federal court, motivated by principles of comity or by a desire to avoid premature constitutional adjudication,[3] declines to proceed in a case over which it has jurisdiction and remits all or part of the controversy to a state court. In the interests of comity federal courts have been directed not to interfere with state criminal prosecutions,[4] collection of state revenues,[5] and, in certain instances, actions of state administrative agencies[6] and officials.[7] The desire to avoid premature[8] and perhaps unnecessary constitutional adjudication has prompted federal courts to abstain when federal constitutional issues might be rendered moot[9] by a state court's determination of uncertain state law.[10] This comment

[1] England v. Board of Medical Examiners, 375 U.S. 411, 415 (1964).

[2] Baggett v. Bullitt, 377 U.S. 360, 375 (1964); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941). The Court has held that abstention is equally appropriate in actions traditionally at law. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (eminent domain).

[3] *E.g.*, United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962); Harrison v. NAACP, 360 U.S. 167, 176-78 (1959); Albertson v. Millard, 345 U.S. 242 (1953); Alabama State Fed. of Labor v. McAdory, 325 U.S. 450, 459-62, 470-71 (1945); City of Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 172-73 (1942).

[4] *E.g.*, Beal v. Missouri Pac. R.R., 312 U.S. 45 (1940).

[5] *E.g.*, Great Lakes Co. v. Huffman, 319 U.S. 293 (1943).

[6] *E.g.*, Burford v. Sun Oil Co., 319 U.S. 315 (1943).

[7] *E.g.*, Alabama Comm'n v. Southern Ry., 341 U.S. 341 (1951).

[8] A federal determination that a state law is unconstitutional *if* applied to a certain set of facts, or *if* construed in a certain way is but a tentative "forecast" which might be rendered moot by a subsequent state court decision. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941) (Frankfurter, J.).

[9] Abstention has never been invoked to avoid a potentially premature adjudication of non-organic (*i.e.*, non-constitutional) federal law. See Propper v. Clark, 337 U.S. 472 (1949).

[10] See Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885). The most famous exposition of the doctrine is found in Mr. Justice Brandeis' concurring opinion in Ashwander v. TVA, 297 U.S. 288, 347-48 (1936).

Mr. Justice Black has challenged categorical obedience to the doctrine: "I believe that there are times when a constitutional question is so important that it should be decided even though judicial ingenuity would find a way to escape it." Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 214 (1960) (dissent).

On the other hand, Mr. Justice Frankfurter in Spector Motor Serv., Inc. v. Mc-

focuses upon recent developments in the abstention doctrine in both diversity and federal question cases.[11]

DIVERSITY OF CITIZENSHIP CASES

Traditionally, abstention has been hailed as a narrow exception to the duty incumbent upon federal courts to accept and adjudicate cases falling within jurisdictional categories established by Congress.[12] Diversity cases are those where district courts have original jurisdiction to hear and decide civil actions, where the matter in controversy exceeds ten thousand dollars, between citizens of different states or between citizens of a state and a foreign state.[13] Two decades ago the Supreme Court in *Meredith v. City of Winter Haven*[14] stated that:

> [I]n the absence of some *recognized public policy* or *defined principle* guiding the exercise of . . . [diversity] jurisdiction . . . which would *in exceptional cases* warrant its non-exercise, it has been from the first deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, *to decide questions of state law whenever necessary* to the rendition of judgment. . . . When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are *difficult or uncertain or have not yet been given* by the highest court of the state, would thwart the purpose of the jurisdictional act.[15]

Under this standard, the existence of uncertain state law was a ground for abstention only if such action were required by principles

Laughlin, 323 U.S. 101 (1944) referred to the doctrine of avoidance as "more deeply rooted than any other in the process of constitutional adjudication." *Id.* at 105. See Cardozo, *Choosing and Declaring State Law: Deference to State Courts Versus Federal Responsibility,* 55 NW. U.L. REV. 419, 423 (1960).

[11] 28 U.S.C. §§ 1331-32 (1958).

[12] *Ibid.* The original justification for the creation of diversity jurisdiction in § 1332 seems to have been that "the availability of a federal forum away from home for litigation with strangers served to provide a guarantee of efficient, competent and disinterested justice which, by its reassurance to one considering movement or business in another State, contributed to the expansion of trade and intercourse throughout the nation." ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS at 51 (Tent. Draft No. 2, 1964).

[13] 28 U.S.C. § 1332 (1958).

[14] 320 U.S. 228 (1943). *Meredith* was a diversity action in which plaintiffs sought to enjoin the city from redeeming certain bonds without the payment of deferred interest charges. The controversy hinged upon whether the city was authorized under the Florida constitution and applicable statutes to issue the bonds without a referendum, and what recovery, if any, the bondholders were entitled to receive if the bonds were invalidly issued.

[15] *Id.* at 234-35. (Emphasis added.)

of comity or would enable a federal court to avoid determination of a constitutional question. The bases for refusing to exercise jurisdiction, however, was extended by a 1959 decision of the United States Supreme Court.[16] This and subsequent lower court opinions have cast considerable doubt upon the continuing vitality of the policy enunciated in *Meredith.*

The "Sovereign Prerogative" Theory

In *Louisiana Power & Light Co. v. City of Thibodaux,*[17] the plaintiff commenced an action in the Louisiana state courts to expropriate property pursuant to its power of eminent domain. The case was then removed by the defendant to a federal district court where jurisdiction was predicated on diversity of citizenship. Although a Louisiana statute apparently granted the expropriation power sought by the city, the statute had never been interpreted by the Louisiana courts, and in a similar case, the state's attorney general had concluded that the statute did not grant such power. The district court abstained, *sua sponte,* and remitted the controversy to the state courts. In a six to three decision, the Supreme Court sustained the district court's abstention as a proper exercise of discretion even though no substantial constitutional questions were presented[18] and ordinary principles of comity were apparently inapplicable.

The majority in *Thibodaux* held that abstention was justified in the trial court's discretion[19] because the eminent domain question was "intimately involved with the sovereign prerogative."[20] Since "the issues normally turn on legislation with much local variation

[16] Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

[17] 360 U.S. 25 (1959).

[18] The majority avoided mention of the alleged constitutional questions presented. The dissenters argued that merely frivolous constitutional questions would not justify abstention on the ground of avoidance. *Id.* at 33.

[19] In County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959), decided upon the same day as *Thibodaux,* the Court affirmed 5-4 the Third Circuit's reversal of a district court abstention and dismissal order. In *Mashuda* plaintiff sought the ouster of the county and its lessee from certain lands previously taken from the plaintiff in eminent domain proceedings. The sole question presented was whether the land had been taken for a public purpose as required by Pennsylvania law. The Court held abstention inappropriate since state law was "clear," and no questions of avoidance or comity were presented.

The Justices in the majority in *Thibodaux* dissented in *Mashuda,* with the exception of Mr. Justice Stewart who joined the former dissenters. Stewart professed to distinguish the two cases on the ground that *Mashuda* presented a question of disputed fact, which a federal court could dispose of as competently as a state court.

[20] 360 U.S. 25, 28 (1959).

interpreted in local settings,"[21] the federal courts should have deferred to the state tribunals "in a matter close to the political interests of a State"[22] in order to promote "harmonious federal-state relations."[23] Furthermore, the exercise of federal jurisdiction was not abdicated but merely "postponed," as the district court was to retain jurisdiction and the litigation might return there following a declaratory judgment of the state law by the Louisiana court.[24]

Mr. Justice Brennan, vigorously dissenting, was unable to discern a correlation between eminent domain and the sovereign prerogative so compelling as to distinguish expropriation proceedings from many other state functions.[25] He asserted that the majority rationale was a subterfuge designed to disguise a desire to avoid determination of difficult state law questions and a distaste for the congressional mandate to exercise diversity jurisdiction.[26] The Justice warned that the majority was fashioning "an opening wedge for District Courts to refer hard cases of state law to state courts in even the routine diversity negligence and contract actions."[27] Wholesale invocation of abstention in such cases, he warned, would result in "unnecessary delay, waste, and added expense for the parties."[28] In two recent cases decided by the Fifth Circuit Court of Appeals,[29] these fears have been realized.

The "Effective State Remedy" Qualification

In *Green v. American Tobacco Co.*,[30] a decedent's widow and estate brought a diversity action to recover damages for his death from lung cancer allegedly caused by smoking cigarettes manufactured by the defendant. The court of appeals affirmed judgment for the defendant, holding that in the absence of negligence, a manu-

[21] *Ibid.*

[22] *Id.* at 29.

[23] *Ibid.*

[24] *Ibid.*

[25] Mr. Justice Brennan pointed out that the federal courts had previously refused to abstain on matters of uncertain state law involving the licensing of motor vehicles, the regulation of fishing in state waters, the regulation of intrastate trucking rates and "a host of other governmental activities carried on by the States and their subdivisions." *Id.* at 37.

[26] *Id.* at 39-42.

[27] *Id.* at 44.

[28] *Id.* at 42.

[29] United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir.), *cert. denied*, 377 U.S. 935 (1964); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), *upon subsequent proceedings*, 325 F.2d 673, *cert. denied*, 377 U.S. 943 (1964).

[30] *Supra* note 29.

facturer could not be liable under Florida law as an absolute insurer of its product. On rehearing, however, the court certified the question[31] of absolute liability for breach of implied warranty[32] to the Florida Supreme Court under a novel statutory provision.[33] Without discussing the propriety of certification solely on the basis of the uncertainty of state law,[34] the Fifth Circuit stressed the importance of the question and the inability of the federal judges to agree on the position which Florida courts would adopt.[35]

By themselves, *Thibodaux* and *Green* might have been viewed merely as narrow exceptions to the general rule that federal courts will not abstain unless prompted by principles of comity or the presence of a federal constitutional question.[36] *Thibodaux* might

[31] The parties were directed, if possible, to stipulate the questions to be certified. In the event that the parties could not agree upon stipulation, the court ordered them to file a report, accompanied by relevant briefs. 304 F.2d at 86.

[32] The Supreme Court of Florida replied to the certification in Green v. American Tobacco Co., 154 So. 2d 169 (1962). Contrary to the original federal determination, the state court found that "a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty." 154 So. 2d at 170. Upon subsequent proceedings, the court of appeals remanded the case to the federal district court for a new trial upon the specific question of whether defendant's cigarettes were reasonably fit for human consumption. However, the parties were bound by the answers to other specific interrogatories submitted to the jury in the first trial. Green v. American Tobacco Co., 325 F.2d 673, 678 (5th Cir. 1963).

[33] FLA. STAT. ANN. § 25.031, implemented by FLA. APP. R. 4.61. The Florida certification statute permits courts of appeal and the Supreme Court to certify questions of Florida law to the state supreme court. The provision was first utilized in Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1963). See 5 AM. JUR. 2D *Appeal and Error* §§ 1025-28 (1962); BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE—RULES EDITION § 64 (Wright ed. 1960); Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and Its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413, 431 (1962). Certification is frequently attacked upon the grounds that questions certified are "abstract" or "academic" and will not insure a meaningful rendition of state law. See, *e.g.*, 21 LA. L. REV. 777, 780-82 (1961).

[34] The Supreme Court has upon its own motion ordered certification to the Florida Supreme Court in two recent cases: Dresner v. City of Tallahassee, 375 U.S. 136 (1963); Aldrich v. Aldrich, 375 U.S. 75 (1963). In both cases, however, substantial constitutional questions were presented.

[35] Green v. American Tobacco Co., 304 F.2d 70, 86 (5th Cir. 1962).

[36] A few other cases may be regarded as signifying erosion of *Meredith*. In A.F.L. Motors, Inc. v. Chrysler Motors Corp., 183 F. Supp. 56 (E.D. Wis. 1960), plaintiff sought to enjoin cancellation of his dealer's franchise as an alleged violation of a Wisconsin statute. Plaintiff was granted a temporary restraining order in the state courts, but the defendant removed. The federal court dissolved the restraining order and abstained. No questions of comity or avoidance were presented, but relevant state law was unclear. The case might be viewed as falling within the sovereign prerogative exception of *Thibodaux*. See Comment, 1961 WIS. L. REV. 450, 456. However, Professor Wright contends that the only basis for abstention was the uncertainty of state law. WRIGHT, FEDERAL COURTS § 52, at 175, n.42 (1963).

An even stronger case is Commerce Oil Ref. Corp. v. Miner, 303 F.2d 125 (1st

have been confined to the somewhat vague theory of "sovereign prerogative," whereas *Green* could have been restricted to the presence of an unusually expeditious and effective state court remedy. Both of these cases, moreover, accord with precedent which requires the existence of an adequate state court remedy as a prerequisite to abstention.[37]

A New Application of Erie

United Services Life Ins. Co. v. Delaney,[38] however, represents a direct assault upon the *Meredith* policy that federal courts must decide state law in the absence of some compelling reason of policy or defined principle. The *Delaney* case involved separate actions on life insurance policies, with the defendant insurers claiming nonliability under certain aircraft travel provisions.[39] Two district courts held the insurers liable and appeals were taken. By a five to

Cir. 1962). That case involved the question of whether a two year Rhode Island statute of limitations for personal injury actions applied to a suit for malicious use of process, a question that had not previously been considered by the state courts. During the course of the controversy in the federal district court, the defendant brought a declaratory judgment proceeding in a Rhode Island state court and moved for the federal court to stay its proceedings. Instead, at plaintiff's request, the district court enjoined the state proceedings. The court of appeals vacated the injunction, stating: "No one could seriously suggest that an 'informed prophecy' as to the meaning of a state statute is to be preferred to an 'authoritative decision,' let alone that the former is to be protected from the latter." 303 F.2d at 128.

The court limited its holding to instances where "facts are undisputed" and indicated that where the parties and issues are substantially identical in the state court proceedings, it is proper for a district court in its discretion to stay its proceedings pending the forthcoming state determination. *Accord*, Lear Siegler Inc. v. Adkins, 330 F.2d 595, 599 (9th Cir. 1964); Ballantine Books, Inc. v. Capital Distributing Co., 302 F.2d 17, 19 (2d Cir. 1962); P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951) (by implication); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949). *But see In re* Pres. & Fellows of Harvard College, 149 F.2d 69 (1st Cir. 1945). Thus, the forthcoming state court adjudication would be controlling according to res judicata principles. 303 F.2d at 128. See 28 U.S.C. § 2283 (1958).

A much earlier case allowing abstention on the basis of uncertain state law is Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940), in which a trustee in federal bankruptcy proceedings was permitted to enter the state courts to secure an adjudication of an uncertain state law question.

[37] See Lucas v. 44th General Assembly, 377 U.S. 713, 716 n.2 (1964); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1940); DiGiovanni v. Camden Ins. Ann., 296 U.S. 64, 73 (1935); Lee v. Bickell, 292 U.S. 415 (1933); Embassy Pictures Corp. v. Hudson, 226 F. Supp. 421, 426 (W.D. Tenn. 1964). See also England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 423 (1959) (Douglas, J., concurring). *But cf.* Southern Bell Tel. & Tel. Co. v. City of Meridian, 358 U.S. 639 (1959).

[38] 328 F.2d 483 (5th Cir.), *cert. denied*, 377 U.S. 935 (1964).

[39] Delaney v. United Services Life Ins. Co., 201 F. Supp. 25 (W.D. Tex. 1961). The companion case, Paul Revere Life Ins. Co. v. First Nat'l Bank (N.D. Tex.), was unreported.

four majority[40] the Fifth Circuit held per curiam that Texas law left the meaning of the disputed clauses obscure and stayed decision pending clarification by the Texas courts.[41]

In a concurring opinion[42] Judge Brown defended the invocation of abstention on the sole ground that the applicable state law was uncertain. Without attempting to fit *Delaney* into the area of "sovereign prerogative," he explicitly rejected the notion that abstention was proper only in the presence of an "unusually effective state remedy" such as the certification statute utilized in *Green*.[43] Judge Brown contended that abstention in ordinary diversity cases reflects no antagonism to diversity jurisdiction, but simply evinces respect for the requirements of *Erie R.R. v. Tompkins*[44] and the outcome-determination test of *Guaranty Trust Co. v. York*.[45] The theory of these decisions is that substantially different results should not ensue simply because an action is filed in "a federal court instead of in a State court a block away."[46] Citing the Fifth Circuit's recent experience, Judge Brown stressed the likelihood of decisional disparity where a federal court is compelled to conjecture as to uncertain state law. He noted that when *Meredith* was decided in 1943 this problem was just beginning to emerge.[47]

To argne that abstention is required by the dictates of *Erie* in those cases where federal courts are faced with uncertain questions of state law is to propose a novel limitation upon the exercise of diversity jurisdiction.[48] Although the majority of the Fifth Circuit ordered abstention in *Delaney,* only Judge Brown articulated this rationale. The result, however, is not surprising in view of the fre-

[40] The court sat en banc, in accordance with 28 U.S.C. § 46 (1958).

[41] The majority opinion was entered per curiam. 328 F.2d at 483-85. The dissent rested squarely on the authority of *Meredith* that the congressional mandate to decide diversity cases required the court to decide the uncertain state law questions. *Id.* at 485.

[42] *Id.* at 485-89.

[43] It has been suggested that the dissenters in *Delaney* might have been willing to abstain had a certification procedure been available. Note, 73 YALE L.J. 850, 856 (1964). *But see* note 41 *supra.*

[44] 304 U.S. 64 (1938).

[45] 326 U.S. 99 (1945).

[46] *Id.* at 109.

[47] 328 F.2d at 486.

[48] Before *Thibodaux,* the congressional mandate to decide diversity cases was deemed to outweigh the advantages of uniformity and certainty incumbent upon remission. See, *e.g.,* Sutton v. Leib, 342 U.S. 402, 410 (1952); Propper v. Clark, 337 U.S. 472, 490-91 (1949); Williams v. Green Bay & W.R.R., 326 U.S. 549, 558 (1946); Markham v. Allen, 326 U.S. 490, 494 (1946); Meredith v. City of Winter Haven, 320 U.S. 228, 237 (1943). See also McNeese v. Board of Educ. 373 U.S. 668, 673 n.5 (1963) (dictum).

quent decisional disparity between state courts and the Fifth Circuit.[49] Such disparity is often explained in terms of the expertise in state law possessed by local judges.[50] Moreover, federal judges may be excessively conservative when confronted with sensitive policy questions of local concern;[51] they may tend to rely too heavily upon only dimly analogous or outworn state precedent instead of inquiring into "what reasonably ought to be the state court's interpretation, given this body of law."[52] The existence of this propensity, as well as the superior expertise of state courts in matters of state law, tends to support Judge Brown's application of *Erie*.[52a]

Support may also be claimed in the debatable assertion that the *Erie* rationale is required by the federal constitution, and does not represent merely a policy decision to apply state law in lieu of a federal common law.[53] If this assertion is correct, the congressional mandate to decide diversity cases would arguably yield when federal courts are faced with the risk of erroneous interpretation of state law. Although the Supreme Court has never expressly decided whether the *Erie* formula is a constitutional mandate, at least one decision of that Court has held that "affirmative countervailing con-

[49] *Compare* New York Times Co. v. Conner, 291 F.2d 492 (5th Cir. 1961), *with* New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd on other grounds*, 376 U.S. 254 (1963). *Compare* National Sur. Corp. v. Bellah, 245 F.2d 936 (5th Cir. 1957), *with* Truck Ins. Exch. v. Seelbach, 161 Tex. 250, 339 S.W.2d 521 (1960). *Compare* Pogue v. Great Atl. & Pac. Tea Co., 242 F.2d 575 (5th Cir. 1957), *with* Food Fair Stores, Inc. v. Trusell, 131 So. 2d 730 (Fla. 1961).

[50] *E.g.*, Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 30 (1959) (Frankfurter, J.).

[51] See American Universal Ins. Co. v. Chauvin, 329 F.2d 174 (5th Cir. 1964); Colbrese v. National Farmers Union Property & Cas. Co., 227 F. Supp. 978 (D. Mont. 1964).

[52] Recognition of the existence of this problem may be inferred from language in American Universal Ins. Co. v. Chauvin, *supra* note 51, where the court declared itself bound under *Erie* to a 1951 state court precedent of questionable modern stature. "The Insurer recognizes that it has the laboring oar in demonstrating a shift in the currents by some recognizable, objectively legal-hydrographic data transcending a mere psychoanalysis of Louisiana Courts in terms of personal changes or developments in socio-legal outlook. . . . This argument, somewhat involved, and approaching juridical psychoanalysis, rests finally on an assertion that the judicial 'climate' or 'atmosphere' has changed since DeRoode." *Id.* at 177-78.

[52a] Note, 73 YALE L.J. 850 (1964) suggests that a deleterious effect of a disparate federal decision may be its impact upon "legitimate private ordering." Parties may misplace their reliance upon the federal decision as an accurate expression of state law. Nevertheless, counsel should be presumed to appreciate the stature of the federal determination. *Id.* at 863-64.

[53] Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 437-38 (1958); see Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 509-10 (1954).

siderations,"[54] such as federal policies favoring jury trials, supersede the *Erie* requirement of decisional uniformity.[55] Likewise, it might be argued that the necessity of avoiding added expense[56] and appreciable delay,[57] when attendant upon remission of a case to the state courts, justifies deciding a diversity case whenever abstention can be avoided.

Moreover, the majority of commentators have asserted that *Erie* is not constitutionally required, but merely reflects an expression of policy governing the disposition of cases in federal courts.[58] In this context, it is relatively easy to discover countervailing considerations mitigating against the invocation of abstention purely for purposes of deciding uncertain state law. Aside from the additional expense involved, in some cases there is the danger that further delay will irreparably injure certain litigants, particularly those who bear burdens of proof. Futhermore, Judge Brown's opinion fails to appreciate the difficulty in determining exactly when federal courts are faced with "uncertain state law."[59] Established precedent may be subject to change or modification merely by lapse of time or presentation of a new factual situation. *Erie* logic, if carried to extremes,

[54] Byrd v. Blue Ridge Elec. Co-op., 356 U.S. 525, 537 (1958). The decision is not dispositive of the question whether *Erie* is a Constitutional decision because the state rule was "not bound up with rights and obligations" of the parties. Nevertheless, it is significant that the Court continually referred to the *Erie* requirement of uniformity as a *policy*. *Ibid.* Guaranty Trust Co. v. York, 326 U.S. 99 (1945) also lends support to the theory that *Erie* is not Constitutionally required: *"Erie* . . . was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts." *Id.* at 109.

[55] 356 U.S. at 537-39. The Court did not base its decision on the ground that jury trial was required by the Constitution. *Id.* at 537 n.10.

[56] See Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 228 (1960) (Douglas, J., dissenting).

[57] Note, 73 YALE L.J. 850 (1964) argues that the involved litigants may not be primarily concerned with eventual disparities between federal and state courts on matters of state law. "[L]itigants do have the right to an impartial, uniform and prompt decision by judges doing their best, not their worst. And they receive that exactly when non-abstaining federal judges decide their claims. *The litigants have had their 'day in court' and their claims are resolved. Such a decision in the present may be more highly valued than some 'more perfect' decision in the future.*" *Id.* at 863. (Emphasis added.)

[58] Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 278-79 (1946); Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 468-69 (1955); Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 188-204 (1957); see notes 48 & 54 *supra*.

[59] Judge Brown did suggest the need for limits on the doctrine "lest each and every diversity case on its initial filing be immediately turned out to graze in the state pasture." 328 F.2d at 488.

could result in a total abdication of diversity jurisdiction.[60] Were uniformity of result the categorical imperative,[60a] federal courts

[60] The federal obligation to adjudicate diversity cases is conferred by statute. 28 U.S.C. § 1332 (1958); see Note, 73 YALE L.J. 850, 858-61 (1964). The justifications advanced for diversity jurisdiction today are: (1) the existence of bias in various regions of the country against persons from other regions—more dramatically reflected in state than federal proceedings; (2) localization of place of trial by state venue provisions and subsequent "machinations [against outsiders] of the 'local court house gang' "; (3) inadequacies in state court procedures; (4) congestion in the state courts in great metropolitan areas; (5) the avoidance of friction between the citizens of the several states that might be caused by state litigation favorable to the in-stater; (6) the need to provide the best possible forums for aliens to satisfy the demands of world opinion. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS at 52-56 (Tent. Draft No. 2, 1964).

Illustrative of the potentially expanionist drift of *Delaney* is a subsequent Fifth Circuit case, St. Paul Mercury Ins. Co. v. Price, 329 F.2d 687 (5th Cir. 1964). The district court in *St. Paul* awarded summary judgment of the benefits of certain life insurance policies to representatives of the insured. Insured had been killed, along with a companion, during a business trip when the airplane in which they were flying crashed. The insurer refused to make payment and asserted the following provision of the policy as a defense: "The insurance under this policy shall not cover loss directly or indirectly caused or contributed to by: . . . riding in or on any aircraft being used for any purpose such as crop dusting, seeding, sky-riding, racing, testing, exploration, *or any other purpose except the sole purpose of transportation, or while the insured is operating, learning to operate or serving as a member of a crew of an aircraft.*" *Id.* at 687. (Emphasis added.) Plaintiffs disputed the insurer's contention that the insured was a member of the crew. The district court concluded that the contract was ambiguous, and that according to state law ambiguities should be resolved in the favor of the insured.

The court of appeals reversed and abstained, arguing that whether the contract was ambiguous was a matter of state law. Since the consolidated cases in *Delaney* also involved airplane travel exclusions in life insurance policies, *St. Paul* might be viewed as controlled by those cases which were still pending before the state courts. The court, however, indicated that the case would have justified abstention in its own right: See *id.* at 689.

The pressure of increased workloads upon federal courts in general and the Fifth Circuit Court of Appeals in particular may have been an underlying stimulus for the position taken in *Delaney*. See Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949 (1964), and accompanying note, 42 TEXAS L. REV. 1049 (1964). Diversity jurisdiction has recently been the object of proposals that would effect a reduction in the number of diversity actions brought in the federal courts. See ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 2, 1964), which concludes that while "diversity jurisdiction continues to serve an important function in our federal system . . . it presently extends to substantial classes of cases which have no valid justification for being in the national courts . . . ." *Id.* at 1-2.

[60a] One case in which obeisance to *Erie* is reflected is Maryland Cas. Co. v. Hallatt, 326 F.2d 275 (5th Cir.), *cert. denied*, 377 U.S. 932 (1964). There plaintiff was awarded a judgment against the defendant insurance company in the lower federal court. The court of appeals found error in the first trial and remanded the case. On retrial the jury found for the defendant. While that finding was pending before the court of appeals upon review, the state courts expressly rejected the federal interpretation of state law that found error in the first trial. Consequently, the court of appeals reinstated the initial verdict and judgment. Ordinarily, the prior finding of the court of appeals

might be incapable of declaring state law.[61] Uncertainty of state law should not, by itself, preclude the competence of federal courts to decide the controversy.[62]

Although Judge Brown contended that federal jurisdiction was not abandoned in *Delaney* because the district court retained jurisdiction over the controversy, once the state court has declared the law the parties' rights will be established where facts are undisputed.[63] Moreover, where the facts are disputed, the parties would have to submit these factual issues to state adjudication in the event a declaratory judgment or certification procedure is unavailable. In these situations, diversity jurisdiction might be altogether nullified by a plea of res judicata upon return to the district court.[64]

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would be considered "law of the case" and govern the subsequent disposition of the controversy. See United States v. Ohio Power Co., 353 U.S. 98 (1956). The court of appeals refused to follow this res judicata principle, however, stating that "this rule is not an inexorable command, and must not be used to accomplish an obvious injustice." 326 F.2d at 276.

[61] For example, the cases provided by Judge Brown as examples of erroneous application of state law did not involve unduly complicated or significant issues. Maryland Casualty Co. v. Hallatt, 326 F.2d 275 (5th Cir. 1964) (whether failure of insured to attend trial was prejudicial to the insurer); New York Times v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd on other grounds*, 376 U.S. 254 (1963) (contravening New York Times v. Conner, 291 F.2d 492 (5th Cir. 1961)) (whether writing, editing, printing and distribution of a magazine is only one libel); Food Fair Store, Inc. v. Trussell, 131 So. 2d 730, 733 (Fla. Sup. Ct. 1961) (contravening Pogue v. Great Atl. & Pac. Tea Co., 242 F.2d 575 (5th Cir. 1957)) (whether personal injury plaintiff had to introduce proof that debris on floor of supermarket was present long enough to be discovered); Truck Ins. Exch. v. Sellbach, 161 Tex. 250, 339 S.W.2d 521 (1960) (contravening National Surety Corp. v. Bellah, 245 F.2d 936 (5th Cir. 1957)) (whether an exception should be imposed upon the rule that a workman's compensation insurer may not introduce evidence that claimant's disability may be reduced by an operation).

[62] Akin v. Louisiana Nat'l Bank, 322 F.2d 749 (5th Cir. 1963) (status of child adopted outside the state as forced heir under Louisiana law) is an excellent example of a federal court unsnarling a complicated area of state law. *But cf.* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 2, 1964): "It would be preferable to see the use of the federal courts concentrated upon the adjudication of rights created by federal substantive law. In such adjudication the federal courts *speak with the authority which they lack in diversity cases* since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and *can thus exercise the creative function which is essential to their dignity and prestige.*" *Id.* at 49. (Emphasis added.)

[63] This apparently would have been the case in *Delaney*.

[64] The state courts may conclude that the action is barred by res judicata if the parties seek to relitigate the entire controversy in the state courts. Moreover, although abstention may be ordered at the district court level, if the parties attempt to obtain only a determination of the uncertain state law questions by declaratory judgment or certification, the state courts may decline on the ground that the parties seek an illegal advisory opinion. See WRIGHT § 52, at 169. Note, 73 YALE L.J. 850, 861-66 (1964) suggests that abstention should be invoked in uncertain state law cases only *after* trial of the factual issues in the federal district courts. This approach would insure that the forthcoming state determination was grounded on the established facts of

A Return to Meredith

Assuming, therefore, that Judge Brown's application of *Erie* is an unwarranted extension of the increasing tendency to abstain in diversity cases, some standards must be reached to determine when uncertain questions of state law should be remitted to state courts. Certainly, a primary consideration should be whether an effective remedy is available to the parties in the state courts. Judge Brown's statement to the contrary[65] was mere dictum, as the parties in *Delaney* could have employed a declaratory judgment procedure in the Texas courts.[66]

Since abstention is a judicially-created encroachment upon the congressional mandate to decide diversity cases, the doctrine should be applied only when the advantages to be gained from abstaining

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the controversy. The state court's determination of state law may well pose the need for additional findings of fact, but this problem can be resolved by remanding those specific questions for new trial. See Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1964).

On the other hand, any res judicata question presented to an abstaining federal court in these circumstances may have been negated by the Supreme Court's decision in England v. Board of Medical Examiners, 375 U.S. 411 (1964). According to *England*, even if the parties were forced to litigate the entire controversy in the state courts in order to obtain an authoritative determination of state law, their right to return to the federal forum might be preserved by entering a formal reservation on the records of the state proceedings. Although *England* was a federal question case and involved principles of avoiding a constitutional decision, the language and philosophy of the majority rationale suggest the holding might be applicable to diversity actions involving uncertain state law.

[65] Judge Brown contended that abstention is proper even though an effective means of determining state law is not readily available to the parties. "If one is not readily available, then one must either be devised within permissible limits, or the parties must be left to their own resourceful imaginative devices." 328 F.2d at 488.

Cited as an example of desired ingenuity was City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959). In that case the Supreme Court ordered the district court to abstain while the parties repaired to the courts of Mississippi, where no declaratory judgment procedure was available. A state court determination was obtained only after the two parties switched sides, with the defendant in the federal action suing the federal plaintiff for non-compliance with the statute which the latter had alleged was unconstitutional. Southern Bell Tel. & Tel. Co. v. City of Meridian, 241 Miss. 678, 131 So. 2d 666 (1961).

Remission under these circumstances may be appropriate where both the parties are willing to cooperate to enable a state court determination to be rendered. However, a hostile litigant can sabotage subsequent state court proceedings. Therefore, it is submitted that in the absence of an agreement between the parties, remission to the state courts in such cases is unjustifiable. See cases cited note 37 *supra*. Even though the federal court retains jurisdiction and can recall the case if either party becomes recalcitrant, the opportunity for dilatory maneuvers seems too great. Furthermore, failure of a party to secure the authoritative state determination because of lack of a proper remedy or technical procedural defects should not be deemed as forfeiting the right of the litigant to return to the federal courts.

[66] 328 F.2d at 485. See TEX. REV. CIV. STAT art. 2524-1 (1951).

clearly outweigh the delay and expense attendant upon even the most sophisticated procedural devices available upon remission.[67] The lower federal courts should heed the language of *Meredith v. Winter Haven*[68] and confine abstention to the exceptional case in which it is justified by a full consideration of all the relevant factors.

Having ascertained that a state remedy is available, courts should proceed to determine the magnitude of local concern with the particular questions presented,[69] the degree to which determination necessarily involves a fundamental choice between valid conflicting policies,[70] the probability of an erroneous evaluation of state law,[71] the impact of additional delay,[72] the ability of the parties to assume

[67] For example, there was an interval of approximately one year between certification in Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962) and the return of the case following state court action in Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963).

[68] 320 U.S. at 234-35. See text accompanying note 15 *supra*.

[69] A "hierarchy of values" was proposed in Note, 73 YALE L.J. 850, 867 (1964) as a guide for determining when a given area of state law is sufficiently important to the state to justify abstention. State constitutional and statutory law would be given highest priority. State courts would be presumed to be more expert in interpreting this body of law than their federal counterparts. State common law would generally be of less significance; federal competence in this area is probably not significantly less than that of state tribunals. Nevertheless, it seems readily evident that any categorical analysis is doomed to failure. The important question is not the particular variety of state law, but rather its impact upon state policy.

[70] This consideration may be distingnished from the importance of the decision to the state in that it revolves around the nature of the judicial function. In some cases more than others, the issues seem to be definable in terms of "pure" policy-making. Only the courts charged with political responsibility for making such policy evaluations appear to be able to render meaningful decisions, simply because no other court possesses the unique sovereign authority to choose between policy alternatives. For example, plaintiff brings a diversity action in a federal district court in state *X* for wrongful death arising out of an airplane crash in state *Y*. Plaintiff claims that under state *X* choice-of-law rules, the courts of that state would apply its own wrongful death act. Defendant claims that state *X* courts would apply state *Y*'s wrongful death act. There have been no recent decisions on the point by the state *X* courts, but the older state *X* cases hold that the law of the place of injury [state *Y*] controls. More recent decisions in other jurisdictions cast doubt on the continued predominance of the early view. The necessity for this type of policy determination would seem to call for abstention by the federal district court. See Van Dusen v. Barrack, 376 U.S. 612, 628-29 (1964) and the related case of Griffith v. United Airlines, 203 A.2d 796 (Pa. Sup. Ct. 1964).

[71] Questions in this respect would involve the difficulty of the state law issues presented, the res judicata ramifications of abstention versus federal determination, and the number and extent of the interests of both sides to the litigation. As an additional consideration, state courts with crowded dockets may be unwilling to consider the controversy—particularly if the influx of cases is viewed as a shirking of responsibility by federal courts.

[72] "We also cannot ignore that abstention operates to require piecemeal adjudication in many courts, . . . thereby delaying ultimate adjudication on the merits for an undue length of time. . . ." Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964). The examination would include an inquiry into the effect of delay upon the introduction

the added financial burden,[73] and the importance to the parties of adjudication by state courts as evidenced by their conduct of the litigation.[74] Under the presumption against abstention espoused in *Meredith,* a diversity case should not be remitted unless an application of these standards indicate remission is necessary to protect an important state policy without imposing undue hardship upon the litigants.[75]

According to *Meredith,* abstention should not be used to encroach upon the duty of federal courts to decide diversity cases except in exceptional circumstances. *Thibodaux, Green* and *Delaney,* however, have obviated the necessity of exceptional circumstances both by failing to articulate an evaluation of the above standards and by failing to weigh them against one another. Unfortunately, these precedents may prompt wholesale abnegation of diversity jurisdiction in cases which might not involve significant state policies or a substantial risk of error.[76] It may be argued that

of necessary evidence and the effectiveness of the relief sought if rendered at some future date. The Supreme Court has become aware of this latter problem in civil rights cases. See, *e.g.,* Griffith v. School Bd. of Prince Edward County, 377 U.S. 218, 229 (1964), 1964 DUKE L.J. 155.

[73] Corporate and institutional litigants might more readily be expected to bear the costs of extended litigation than individuals.

[74] That a defendant who has removed the controversy from the state courts attaches little significance to a state determination of uncertain state law questions is probable, but not necessarily true. The defendant may desire access to federal discovery procedures or prefer federal fact-finding, even though he desires a state court determination of the relevant law. *But see* American Universal Ins. Co. v. Chauvin, 329 F.2d 174 (5th Cir. 1964), where the court declined to abstain because the party urging the lack of clarity of state law had chosen to litigate in the federal forum and had failed to institute a declaratory judgment proceeding within the state courts. A motion to stay the district court proceedings pending institution of a suit in the state courts had been overruled by the district court. The court of appeals concluded that this factor was of "little significance," since permission from the district court was not required for institution of a state action. 329 F.2d at 179-80. See also Colbrese v. National Farmers Union Property & Cas. Co., 227 F. Supp. 978 (D. Mont. 1964). There the court, after citing *Delaney* with approval, refused to abstain in a diversity action involving uncertain state law, stating: "It is difficult to understand why the defendant has not sought a declaratory judgment from the Supreme Court of Montana." *Id.* at 982.

[75] The fact that a thorough evaluation requires a balancing of many factors should not, in and of itself, invest the trial court with discretion or suggest that the trial court's analysis would be free from appellate review. Note, 108 U. PA. L. REV. 226, 237 n.80 (1959). See St. Paul Mercury Ins. Co. v. Price, 329 F.2d 687 (5th Cir. 1964); United States Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir.), *cert. denied,* 377 U.S. 935 (1964). The scope of allowable judicial review of the lower court's determination upon the abstention question, however, should probably be minimized in order to prevent dilatory maneuvering and consequent delay by frequent reversals of such orders after the trial court has entered a judgment upon the merits.

[76] See, *e.g.,* St. Paul Mercury Ins. Co. v. Price, 329 F.2d 687 (5th Cir. 1964), dis-

federal courts would be able to manipulate the suggested standards for purposes of unnecessarily avoiding decision of a state law question. Yet it would be anomolous to accord federal courts the duty of deciding such cases without entrusting them with the discretion of determining when an application of the above standards truly poses a case of exceptional circumstances justifying abstention.[76a]

FEDERAL QUESTION CASES

In federal question cases, district courts have original jurisdiction of all civil actions where the matter in controversy exceeds ten thousand dollars and arises under the Constitution, laws or treaties of the United States.[76b] The invocation of abstention to avoid premature *constitutional adjudication*[77] has persistently posed the problem of how the parties are to conduct the litigation in state courts. If either party has failed to exhaust adequate remedies available by virtue of a state administrative agency, the federal court will dismiss the action.[78] Then the parties must urge and request binding action

cussed in note 60 *supra*. The sweeping implications of recent decisions may also be demonstrated by a case in which abstention was invoked for novel and apparently erroneous reasons. In B-W Acceptance Corp. v. Torgenson, 234 F. Supp. 214 (D. Mont. 1964), a district court abstained to avoid decision of certain *state* constitutional questions. There the defendants contended that provisions of the Montana Retail Sales Installment Act permitting interest rates in excess of 10% were repugnant to the Montana constitution. The use of abstention to avoid a constitutional question has previously been invoked only in cases involving questions under the federal constitution. Furthermore, the court did not evaluate factors justifying remission in cases involving uncertain state law.

[76a] "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of State law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the 'special circumstances,' . . . prerequisite to its application must be made on a case-by-case basis." Baggett v. Bullitt, 377 U.S. 360, 375 (1964) (White, J.).

[76b] 28 U.S.C. § 1331 (1958).

[77] See notes 8-9 *supra*.

[78] *E.g.*, Burford v. Sun Oil Co., 319 U.S. 315 (1943); Embassy Pictures Corp. v. Hudson, 226 F. Supp. 421 (W.D. Tenn. 1964). See also Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 n.2 (1964) (approving district court's refusal to abstain because the parties lacked "an adequate, speedy and complete remedy" in the state courts); McNeese v. Board of Educ., 373 U.S. 668, 675-76 (1963) (exhaustion of available administrative remedy not required if obviously ineffective).

Federal determination of the case is regarded as anathema, because a forthcoming federal decision reviewing the disposition of a controversy before administrative remedies are exhausted may disrupt the regulatory scheme of a state and generate federal-state friction. Abstention by a federal district court is justified because: (1) respect for the administrative process dictates that it should be allowed to culminate before outside intervention; (2) the likelihood that an eventual disruption will occur is diminished because of the high attrition rate upon the road to Supreme Court review.

upon both state and federal issues on the state level.[79] A different situation is presented where administrative primacy in not involved and an abstaining federal court retains jurisdiction over the controversy. In a few such instances, only specific issues of state law have been remitted for determination.[80] Usually, however, abstaining courts have couched their orders of remission in general terms, stating only that the parties are to repair to the state courts for determination of state law.[81]

State Court Consideration of the Federal Question

In the latter situation, the remitted parties are faced with the problem of obtaining the necessary state law determination while preserving their right to return to the federal courts against a claim of res judicata.[82] Compounding their difficulties in this respect has been the Supreme Court's enigmatic holding in *Government Employees v. Windsor*[83] that a litigant remitted to the state courts via

Thus, abstention appears to be mandatory if "a federal decision would work disruption of an entire legislative scheme of regulation." Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329 (1964) (district court did not err in refusing to abstain where there was no danger of disrupting state regulatory scheme); Alabama Public Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951). *But see* Burford v. Sun Oil Co., *supra*, which suggests that a federal district court has discretion as to whether to abstain.

[79] See Note, 59 COLUM. L. REV. 749, 775 (1959); Note, 73 HARV. L. REV. 1358, 1362 (1959).

[80] See Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957). Note, 59 COLUM. L. REV. 749, 775 (1959), suggests that the case may represent a special solicitude for the rights of the United States to a federal forum.

[81] In most cases the parties have submitted the entire controversy to the state courts and there sought relief on claims under both state and federal law.

[82] See RESTATEMENT, JUDGMENTS § 63, comment *a* (1942). Ordinarily the doctrine of res judicata would bar relitigation of federal questions that might have been litigated before the state courts.

[83] 353 U.S. 364 (1957). The *Windsor* litigation has been aptly characterized as "an amazing odyssey possible only in our federal system." Note, 73 HARV. L. REV. 1358, 1363 (1960). The federal district court in which suit was filed abstained, and the Supreme Court affirmed the abstention order. 347 U.S. 901 (1954), *affirming per curiam* 116 F. Supp. 354 (N.D. Ala. 1953). Plaintiffs then entered the state courts, making timely arguments only as to the applicability of the state statutes which they had previously attempted to attack in the federal courts on Constitutional grounds. The Alabama supreme court ruled against the plaintiffs on the state law issue, but did not render judgment on the federal questions. 262 Ala. 285, 286, 78 So. 2d 646, 647 (1955). Plaintiffs then returned to the federal district court, which held the statute constitutional as applied to the plaintiffs. 146 F. Supp. 214 (N.D. Ala. 1956). The Supreme Court reversed the federal district court, reasoning that the state court's decision was only a "bare adjudication," not authoritative on the questions of state law, because the plaintiffs had not given the state courts the opportunity to construe state law in the light of their federal constitutional objections. 353 U.S. 364 (1957) (per curiam). The plaintiffs reentered the state courts, but the suit was dismissed on the grounds that a justiciable controversy had not been

abstention must afford the state courts the opportunity to construe state law "in light of the [federal] constitutional objections presented to the district court."[84] Where the state court is not given this opportunity, its decision upon state law is only a "bare adjudication" which affords an insufficient basis for federal disposition of the case. The vexing aspect of the *Windsor* holding was the Court's failure to prescribe the steps to be taken at the state level to insure that issues of state law are placed in the required constitutional perspective.

According to one view, nothing less than seeking complete adjudication of both state *and* federal questions would meet the *Windsor* requirements.[85] However, if a party sought and received binding relief on his federal question in the state courts, res judicata might bar his return to the abstaining federal court with regard to the federal question. Consequently, the statutory right to litigate federal questions in a federal forum would be substantially abrogated. Supreme Court review of an adverse state court determination of federal questions, while still available,[86] ordinarily is an inadequate substitute for initial federal determination.[87] As a general rule, the Supreme Court considers itself bound to accept state determinations of factual issues.[88] Since federal claims

demonstrated by the pleadings. American Fed'n of State, County & Municipal Employees v. Dawkins, 268 Ala. 13, 104 So. 2d 827 (1958). Plaintiffs sought federal adjudication once more, but were told to reframe their state pleadings. Government & Civic Employees Organizing Committee v. Windsor, Civil No. 7466, N.D. Ala., Dec. 24, 1958. See Note, 73 HARV. L. REV. 1358, 1363 n.38 (1960). At this point the weary plaintiffs capitulated. See also Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951), a suit that lasted nine years and went through eight courts before the plaintiff obtained a ruling of unconstitutionality of a state statute.

[84] 353 U.S. at 366.

[85] See Note, 59 COLUM. L. REV. 749, 773 (1959). A different view was expressed in Note, 73 HARV. L. REV. 1358, 1360-61 (1960). There it was contended that the state courts need only decide the state law issues. The parties might even be enjoined from presenting their federal questions to the state courts for adjudication and any forthcoming state court determination of the federal questions would be denied res judicata status by the federal courts.

[86] Prerequisites for Supreme Court review include the following: (1) a final decree or judgment; (2) a determination by the highest court in the state in which a decision might be had; (3) the existence of a substantial federal question; (4) a federal question that has been properly raised and reserved as required by state practice; (5) the absence of an independent, non-federal basis which supports the state court's judgment. Wiener, *Wanna Make a Federal Case Out of It?*, 48 A.B.A.J. 59 (1962). See note 91 *infra*.

[87] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964). See also Brennan, *State Court Decisions and the Supreme Court*, 31 PA. B.A.J. 393, 398 (1960); note 120 *infra*.

[88] See 64 COLUM. L. REV. 766, 770 n.47 (1964) (citing Fay v. New York, 332 U.S.

often turn upon these findings,[89] the impartiality and special competence of federal district courts to decide federal questions is the reason these courts are granted jurisdiction to entertain constitutional questions.[90] Moreover, since the extent of Supreme Court review may rest in the Court's discretion,[91] the scope of argument may be more restricted than it would be in lower courts.[92] Thus it is possible that complete adjudication of the federal constitutional question in state courts may deprive the parties of a comprehensive consideration of the federal right in a federal court.

The Parties' Option

In the recent case of *England v. Louisiana State Bd. of Medical Examiners*[93] the Supreme Court refused to allow *Windsor* to undermine federal jurisdiction in this manner. In *England* several chiropractors asserted that the educational requirements of the Louisiana Medical Practice Act had been applied to them in violation of the

261, 296 (1947)). *But cf.* Townsend v. Sain, 372 U.S. 293, 312-19 (1963) (federal courts are not prevented from going beyond the state records in habeas corpus proceedings).

[89] "How the facts are found will often dictate the decision of federal claims." England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964). See also Townsend v. Sain, 372 U.S. 293, 312 (1963); Speiser v. Randall, 357 U.S. 513, 525 (1958).

[90] See Friedenthal, *New Limitations on Federal Jurisdiction,* 11 STAN. L. REV. 213, 217 (1959).

[91] Review may be by way of discretionary writ of certorari where a state court sustains an attack upon a state statute as repugnant to the United States Constitution, 28 U.S.C. § 1257(3) (1958), or by appeal as a matter of right if the state court upholds the state law as Constitutional, 28 U.S.C. § 1257(2) (1958). In Tribune Review Publishing Co. v. Thomas, 120 F. Supp. 362 (W.D. Pa. 1954), the district court abstained in a case involving the Constitutionality of a county court rule prohibiting the taking of photographs in court during court proceedings. The highest state court passed upon both the state and federal questions and the Supreme Court denied certorari. *In re* Mack, 386 Pa. 251, 126 A.2d 679 (1956), *cert. denied,* 352 U.S. 1002 (1957). The plaintiff returned to the district court, which held that res judicata did not prevent presentation of the federal questions. The court of appeals affirmed. Trihune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957), *aff'd,* 254 F.2d 883 (3d Cir. 1958). Note, 73 HARV. L. REV. 1358, 1366, argues that the sole basis for this decision is the view that the Supreme Court's consideration of a petition for certorari is insufficient protection of the litigant's right to a federal forum on federal questions. Furthermore, the argument is advanced that the dismissal of an appeal for want of a substantial federal question or a summary affirmance affords no sufficiently greater protection. "[I]n view of the small amount of time which the Court has to consider each appeal, it seems unrealistic to hold that federal claims are barred by a disposition on appeal without full argument." *Id.* at 1367.

[92] See note 91 *supra.* Supreme Court rules limit the duration of oral argument. U.S. Sup. Ct. Rule 44.

[93] 375 U.S. 411 (1964).

fourteenth amendment. There a three-judge district court was convened on remand[94] from the Fifth Circuit and abstained, *sua sponte*,[95] on the ground that the state courts might find that the statute did not apply to the plaintiffs.[96] No appeal was taken from the abstention order.[97] Thereafter the plaintiffs were denied relief in the state courts on both their state and federal questions.[98] When they attempted to return to the abstaining district court,[99] plaintiffs were met with a successful plea of res judicata since the state courts had passed upon federal issues.[100] Pursuant to statute,[101] plaintiffs appealed directly to the Supreme Court.

The decision was reversed by the Court[102] on the basis of the

[94] 259 F.2d 626 (5th Cir. 1958), *petition for rehearing denied*, 263 F.2d 661, *cert. denied*, 359 U.S. 1012 (1959).

[95] The Supreme Court has frequently invoked abstention *sua sponte*. See City of Meredian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959); Albertson v. Millard, 345 U.S. 242 (1953); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942).

[96] 180 F. Supp. 121 (E.D. La. 1960).

[97] The plaintiffs did not appeal the district court's order of abstention, nor did they challenge it before the Supreme Court. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 413 n.2 (1964). The Court did not consider the validity of abstention under the circumstances, and it may well be argued that abstention was inappropriate. The Louisiana courts had long ago determined the applicability of the State Medical Practice Act to chiropractors, Louisiana State Bd. of Medical Examiners v. Fife, 162 La. 681, 111 So. 58, *aff'd*, 274 U.S. 720 (1927), but the federal district court held the state courts should have the opportunity to reexamine their position in light of modern medical developments. The federal district court did not elaborate, however, regarding the question of whether new medical knowledge existed which would indicate that chiropractic should be entitled to greater recognition than in the past.

Furthermore, the fact that the state legislature had for a considerable length of time acquiesced in the earlier decision would seem to indicate that the prior determination was a proper interpretation of the state statute. See also Seiden v. Boone, 221 F. Supp. 845 (D. Del. 1963) (abstention held improper in action to compel issuance of license to practice dentistry premised on Civil Rights Act).

[98] England v. Louisiana State Bd. of Medical Examiners, 126 So. 2d 51 (Ct. App. La. 1960), *aff'd*, 130 So. 2d 671 (La. 1961). The Louisiana Court of Appeals stated that "[l]n the case of Louisiana State Bd. of Medical Examiners v. Beatty, 220 La. 1, 55 So. 2d 761, the Supreme Court of this state had before it the resolution of every contention made by the plaintiffs herein and that court determined adversely the contentions herein." *Id.* at 53. The court did agree, however, that whether chiropractry is a "useful profession" and entitled to recognition is "primarily a question of fact." The parties had submitted affidavits debating this question at the trial level and the trial court found adversely to the plaintiffs. *Id.* at 56.

[99] The plaintiffs did not attempt to obtain appellate review of the state court decision. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 414 n.4 (1964).

[100] England v. Louisiana State Bd. of Medical Examiners, 194 F. Supp. 521 (E.D. La. 1961).

[101] 28 U.S.C. § 1253 (1958).

[102] Mr. Justice Black would have dismissed the action for want of a substantial federal question. *Id.* at 437.

plaintiffs' good-faith reliance on a reasonable misinterpretation of *Windsor*.[103] In establishing a standard for future cases, the Court held that *Windsor* did not require a remitted litigant to seek final adjudication of his federal claims in the state court, but required him only to "inform" the latter of the existence and nature of his federal constitutional questions.[104] This would enable him to avoid an anomalous application of res judicata that would bar subsequent federal adjudication of his federal claims.[105] Recognizing the difficulty of resisting argument of federal claims and the virtual impossibility of preventing a state court from deciding a federal question if it were so inclined,[106] the Court held that a litigant's right to return "will *in all events* be preserved"[107] if he makes a *formal reservation* on the state record of his right to return to federal court for adjudication of his federal claims.[108] In the absence of a formal reservation, a plaintiff would be entitled to return if he had not fully litigated his federal question in the state court.

The *England* decision complements the earlier decision of the Court in *NAACP v. Button*,[109] holding that a party remitted to the state courts by abstention might there elect to litigate all his claims fully and without reservation, thus foregoing his prerogative to return to a federal district court which had retained jurisdiction.[110] Many times a litigant might wish to follow this course in order to avoid the delay and expense attendant upon return to the federal forum.[111]

The net result of *England* and *Button* is to make three alternative courses of action available to a litigant remitted to the state courts by abstention. He may (1) seek final adjudication of all his claims, both state and federal, in the state courts; (2) explicitly

[103] 375 U.S. at 422-23.
[104] *Id.* at 420.
[105] *Id.* at 421-22.
[106] *Id.* at 421.
[107] *Ibid.* (Emphasis added.)
[108] *Id.* at 419, 421-22.
[109] 371 U.S. 415 (1963).
[110] In *Button* the Court held that retention of jurisdiction by the abstaining federal district court was "purely formal" and did not prevent the state court decision from meeting the requirements of finality. *Id.* at 427-28.
[111] 375 U.S. at 419. *But see* Note, 73 HARV. L. REV. 1358, 1365, n.48 (1960): "[I]t seems inequitable to allow the plaintiff to make his choice of forum more than once during the course of the litigation; if, as seems unlikely, he desired to have the state courts decide his federal claims, he should either have dismissed his federal-court suit and begun anew in the state courts, or should have brought suit in the state courts in the first place."

reserve his right to return to the federal courts for adjudication of his federal questions; or (3) proceed in the state courts without revealing which course he is following, neither formally reserving his federal claims nor requesting binding adjudication thereof in the state courts.

(1) Final Adjudication in the State Courts.

The possibility of advantage to a plaintiff in seeking final adjudication of all claims in the state courts was vitiated by dictum in *England.* There the majority stated that despite a plaintiff's election to litigate fully in the state courts, the *defendant* may reserve the right to return to federal court by virtue of his removal power.[112] The majority did not require the defendant to exercise his removal power early in the trial in order to enter an appropriate reservation,[113] but stated that the mere refusal to oppose the federal claim was sufficient reservation.[114] Thus, if the defendant can compel relitigation of the issues in a federal court, the plaintiff will be unable to obtain a "final" state court adjudication against the defendant's will.[115]

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[112] 28 U.S.C. § 1441 (b) (1958). *"The reservation may be made by either party to the litigation.* Usually the plaintiff will have made the original choice to litigate in the federal court, but the defendant also, by virtue of the removal jurisdiction . . . has a right to litigate the federal question there. . . . Thus, while a plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forego his own right to return to the District Court, he cannot impair the corresponding right of the defendant. *The latter may protect his right by either declining to oppose the plaintiff's federal claim in the state court or opposing it with the appropriate reservation."* (Emphasis added.) 375 U.S. 411, 422 at n.13.

[113] Under the removal statute, the defendant must file a petition for removal within twenty days after he is served with notice of the plaintiff's suit. 28 U.S.C. § 1446 (b).

[114] See quotation, note 112 *supra.*

[115] *England* fails to indicate whether a decision adverse to the non-reserving party would be "final" and reviewable by the Supreme Court when the opposing party has preserved his right to return to the federal district court. It has been held that a judgment which leaves open the possibility of additional proceedings which may raise other federal questions is not "final" for the purpose of Supreme Court review. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948). However, if this rule were extended by analogy to cases such as *England,* a party submitting adjudication of his federal claims to a state court might be totally deprived of access to a federal forum. On the other hand, if such decisions are regarded as "final" and are actually reviewed by the Supreme Court, the principle of "law of the case" may pose other difficulties. See 5 AM. JUR. 2D *Appeal & Error* § 744 (1962) and cases cited therein. "Law of the case" prevents reconsideration of issues of law which have been raised or decided, or could have been raised, on prior appeal in the same action. Thus, subsequent action by a federal district court which had retained jurisdiction would be controlled as to matters of law by the review obtained by the non-reserving party. However, the federal district court could avoid subjection to the former Supreme Court holding by basing a

In the absence of a specific requirement that the defendant reserve his federal questions at the commencement of state court litigation, it would seem that the defendant is presented with a double opportunity to win the case. Although the plaintiff who elects to present his federal claim would be bound by a state court adjudication thereof, the defendant, by refusing to oppose the argument, could exercise his removal power at the termination of unfavorable litigation. Whether the defendant's legitimate interest in a federal forum warrants a delayed removal power is questionable. Under present law a defendant may remove to a federal court only when the plaintiff has asserted a valid federal claim on the face of his complaint;[116] if the federal question is raised by way of defense, there is no basis for removal.[117] Some commentators argue that this situation is exactly the opposite of what should be the case.[118] Since the only reason for removal in many cases is the fear that federal claims may be treated "ungenerously" by state courts,[119] if the plaintiff is willing to submit determination of his claim to a state court, it seems anomalous to accord the defendant the right to remove. This would seem particularly true if, as *England* suggests, the defendant is accorded a double opportunity to try the facts of his case.

(2) The Formal Reservation

Even if defendant does not reserve the right to return to federal court, the formal reservation procedure outlined in *England* presents difficult questions as applied to plaintiffs.[120] Mr. Justice Doug-

variant ruling of law on facts different from those established in the records of the state court proceedings. See *Id.* § 748. This result would create additional problems. Since the state court determination of state law would be based upon a set of facts different from those established by the federal tribunal, it is not clear whether the state court decision would be regarded as "authoritative" as to the matters of uncertain state law of which clarification was sought by abstention. Consequently, contradictory findings of fact might be deemed to require another order of abstention by the federal district court. *Cf.* 64 COLUM. L. REV. 766, 773 (1964). This unhappy eventuality could be avoided by the federal district court making findings of fact prior to the initial abstention.

[116] See WRIGHT, FEDERAL COURTS § 38, at 110 (1963).

[117] *Id.* at 111.

[118] See, *e.g.*, Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 233-34 (1948).

[119] *Id.* at 234. Another justification for removal is grounded in convenience for the out-of-state defendant.

[120] *England* leaves in doubt the current status of Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959). There the North Carolina Supreme Court passed upon both the state law questions and the federal constitutional validity of

las in a concurring opinion stated that the formal reservation procedure is an unnecessary trap for the unwary, in that it establishes an "exotic rule of federal procedure" with which most attorneys will not be familiar.[121] He suggested, therefore, that res judicata should not bar a party from returning to federal court unless that party has "elected" state court adjudication by a request for Supreme Court review of a state decision;[122] until that step is taken, "he is only doing what he is *required* to do"[123] by virtue of abstention.

Another objection is that the procedure may prove unworkable in certain cases.[124] State courts may be reluctant to decide cases in piecemeal fashion by ruling only on state law questions, or they may conclude that they are being asked to render a forbidden advisory opinion.[125]

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the state statute on its face. Lassiter v. Northampton County Bd. of Elections, 248 N.C. 102, 102 S.E.2d 853 (1958). The plaintiff appealed to the United States Supreme Court. Defendants there contended that since the federal district court had retained jurisdiction over the federal issues, the state court's decision upon those questions represented mere dictum. The Supreme Court held that the state court properly passed upon the validity of a state statute upon its face, and indicated that the plaintiff could return to the federal district court to attack the application of the state statutes. See Note, 108 U. PA. L. REV. 226, 238 (1959).

No clarification is made in *England* as to whether a litigant may reserve a right to return to an abstaining federal district court when his federal question concerns only the validity of a state statute upon its face, or whether it is necessary for him to enter a formal reservation of his right to return to the federal district court when he challenges the constitutionality of a state's status *as applied*. Mr. Justice Brennan's opinion makes no explicit distinction between invalid-on-face and invalid-as-applied objections, thus indicating that both situations will be treated alike and the *Lassiter* distinction vitiated. However, Brennan also stated that "in 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. (Emphasis added.) This language may serve merely to distinguish the types of cases subject to the *England* rule from those involving the primacy of state regulatory agencies, since *England* is inapplicable to the *Burford* line of decisions. See note 78 *supra*.

[121] "Those who read this opinion may have adequate warning. But this opinion, like most, will become an obscure one—little known to the Bar. Lawyers do not keep up with all the nuances of court opinions, especially those touching on as exotic a rule of federal procedure as the one we evolve today. I fear therefore that the rule we announce today will be a veritable trap." *Id.* at 435.

[122] 375 U.S. at 429.

[123] *Ibid.*

[124] An example of the weaknesses in the *England* approach may be presented when a plaintiff brings suit in a state court and the defendant removes to a federal district court which abstains. Under these circumstances there seems to be no legitimate reason for allowing the plaintiff to reserve the right to return to the federal tribunal, since he has previously indicated a preference for a state court adjudication of his federal claims. See Chicago, B. & Q.R.R. v. City of North Kansas City, 276 F.2d 932 (8th Cir. 1960) (fact that defendant procured removal from state court does not bar invocation of abstention).

[125] WRIGHT, FEDERAL COURTS § 52 at 171 (1963): "Many states are likely to think,

Even if state courts determine they are able to decide only state law issues, it can be contended that formal reservation does not insure a meaningful rendition of state law. The primary reason for *Windsor's* requirement that state courts must be apprised of federal questions in a remitted case is that a state court may take greater liberties in construing a statute to preserve its constitutionality.[126] It might be argued that if the plaintiff enters a formal reservation, a state court need not decide the federal question; thus it might feel no compulsion to undertake a saving construction of state law, and state statutes might become increasingly vulnerable to constitutional attack. Nevertheless, the responsibility of state courts to perpetuate state policy would seem to be sufficient motivation to construe state law in a liberal and saving manner. When state courts are apprised of the federal question,[127] this responsibility remains even though the plaintiff has the power to transfer ultimate responsibility for decision to the federal judiciary.

(3) The Ambivalent Course of Action

Another complication under *England* is presented when the plaintiff elects to proceed in the state courts without entering a formal reservation of his right to return to a federal forum, and yet seeks to preserve that right by minimal compliance with the requirements of *Windsor*.[128] So long as the litigant merely "informs" the state court of his federal questions, his right to return is protected. Nevertheless, once a party undertakes to do more than "inform" the state court, *England* suggests that he may be deemed to

however, that the decision of only a fragment of a case, with the ultimate power to give judgment left to the federal court, is an advisory opinion beyond their power to render." See Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845 (1961) which seems to support the view expressed in Note, 73 HARV. L. REV. 1358, 1361 (1960), that the state courts will in all probability respect the wishes of the federal courts in such cases and decide only the state law issues. If the state courts refuse to pass upon the federal questions urged, presumably a party may return to the federal forum to litigate those issues even where he has fully litigated his federal questions in the state courts.

[126] *But cf.* Guy v. Rolvaag, 233 F. Supp. 301 (D. Minn. 1964); Telephone News Sys., Inc. v. Illinois Bell Tel. Co., 220 F. Supp. 621 (N.D. Ill. 1963) where the federal district court construed a previously unconstrued state statute and upheld its validity under the federal constitution. See also Baggett v. Bullit, 377 U.S. 360 (1964), which held abstention improper where an unconstrued state statute requiring loyalty oaths from teachers and state employees was void for vagueness and could not possibly be preserved by a saving construction by the state courts.

[127] 375 U.S. at 421.

[128] *Ibid.*

have elected in favor of final state court adjudication.[129] Attempting to hedge, therefore, would be extremely dangerous. The Court in *England* did not specify what actions would exceed the bounds of "information," and a party might be hard pressed to say with certainty that he had complied with *England* and *Windsor*.

Nevertheless, in certain cases a party who is uncertain about pressing his federal claim in the state court might find it advantageous to avoid a specific reservation which at the outset would commit him to return to the federal courts. He might be able to forestall an election so long as the applicable state procedure provides an opportunity to initiate a new theory of relief based on a federal question. Conversely, if, as *England* suggests, mere "argument" of a federal claim is an election in favor of final state court adjudication, a party who anticipates favorable state court adjudication of federal questions may be able to finalize the forthcoming decision by launching an eleventh-hour "argument"[130] of those questions and seeking binding relief in state appellate proceedings. Clearly, however, the Court intended that reservation by a refusal to argue was necessary only to protect the remitted plaintiff who has inadvertently failed to enter a formal reservation.[131] The procedural antics mentioned above might be precluded if this alternative method of reserving the right to return to federal court were conditioned on a good faith error in failing to formally reserve a return to federal courts.

CONCLUSION

The sweeping encroachment upon federal jurisdiction advocated by Judge Brown in *Delaney* would appear to be totally unjustified.[132]

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[129] 375 U.S. at 418-19.

[130] *But cf.* American Fed'n of State, County & Municipal Employees v. Dawkins, 268 Ala. 13, 104 So. 2d 827 (1958). There plaintiff argued his federal constitutional questions on appeal after urging only the non-applicability of the state statute before the trial court. The state supreme court failed to pass on the federal questions and the Supreme Court subsequently held the state decision a "bare adjudication" not authoritative upon the state law questions, since the state courts were not given a sufficient opportunity to determine the state law issues in light of plaintiff's federal constitutional objections. Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957).

[131] This was apparently the majority's solution to the problem posed by Mr. Justice Douglas. See note 121 *supra* and accompanying text.

[132] Constriction of diversity jurisdiction is a matter properly left in the hands of Congress. A recent study of the American Law Institute concludes that federal diversity jurisdiction is unwarranted "when a person's involvement with a state is such as to eliminate any real risk of prejudice against him as a stranger and make it unreason-

It is true that determination of questions of uncertain state law might result in erroneous decisions, and federal courts may sometimes face the unpleasant task of conceding the "error" of their previous interpretation.[133] Nevertheless, the parties have had their day in court,[134] and their dispute has been settled by the rule of law. The risk of erroneous interpretation is but one factor which federal courts should consider in determining whether a court is justified in imposing the disadvantages of abstention upon the parties.

In those cases where abstention is ordered to avoid unnecessary decision of a federal constitutional question, the doctrine would be better served by modifying the position advanced in *England*. The defendant's removal power should be limited to express reservations at the initiation of suit in the state court. Furthermore, Mr. Justice Douglas' suggestion that only a request for Supreme Court review should be deemed an election in favor of "final" state court adjudication of federal questions would avoid most of the procedural entanglements suggested by the majority opinion.[135]

g.t.n.

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able to need any objections he might make to the quality of its judicial system . . . ." ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS at 2 (Tent. Draft. No. 2, 1964). The Institute proposes, therefore, to forbid diversity to be invoked (1) by a plaintiff in his home state; (2) by a "foreign" corporation in the state of a "local establishment"—when the action involves activities of the latter; (3) by a natural person in the state in which he has his principle place of business or employment; (4) by an out-of-state fiduciary in the state of the decedent or ward. *Id.* at 2-5.

[133] Note, 73 YALE L.J. 850 (1964) observes that the existence of a single *federal* precedent upon a matter of uncertain state law may be of benefit to the state courts, by acting as a gadfly. The federal determination may provoke learned commentary and provide working experience with a particular rule. The state courts then have the advantage of a trial balloon, without paying the price of a *stare decisis* determination.

[134] See note 57 *supra*.

[135] It is arguable that this method would afford the plaintiff a double opportunity to triumph by fully litigating in the state courts and then returning to the federal forum should he be unsuccessful. However, the likelihood that state courts will treat the plaintiff's claim with undue generosity seems particularly remote. If the plaintiff is able to prevail on constitutional challenges to state legislation at the state level, it is extremely probable that he would also prevail in a federal court.