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ABSTENTION—A PRIMROSE PATH*
BY ANY OTHER NAME

WILBER F. PELL, JR.**

INTRODUCTION

NASMUCH as it is not necessary to secure a concurrence in this particular composition, and hopefully it is not a dissent, there will be a few threshold observations of a personal nature. The writer's first judicial exposure to one aspect of the multifaceted procedure whereby a court does not cope with the evidentiary merits of litigation, generically referred to herein as abstention, was the case of Aetna State Bank v. Altheimer. 1

1. In a narrower sense than treated in this article, the "doctrine of abstention", generally accorded to have been sired by Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), was, or at least is, merely one of the facets, one which has had varying fortunes and one which will hereinafter for convenience of reference be designated as the Pullman doctrine. If the Pullman doctrine was not foreshadowed, it was at least placed in the position of being merely one aspect of abstention by the words of Mr. Justice Holmes in a railroad rate case: "Considerations of comity and convenience have led this court ordinarily to decline to interfere by habeas corpus where the petitioner had open to him a writ of error to a higher court of a state, in cases where there was no merely logical reason for refusing the writ. The question is whether somewhat similar considerations ought not to have some weight here." Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 229 (1908).

2. 430 F.2d 750 (7th Cir. 1970).
With the *Aetna* opinion in the public domain, one of the district judges in the Seventh Circuit undertook to abstain, in part, at least, in reliance on *Aetna*. While a reexamination of the *Aetna* opinion by its author in the hindsight afforded by the preparation of this article has caused a disturbing feeling that the words of approbation erred on the side of undue kindness, they naturally were gratifying. In due course, and in deference to the tradition that the unsuccessful litigant entertains the idea that a ghastly mistake has been made, the district court's case wended its way to the Court of Appeals for the Seventh Circuit. That court proceeded to reverse unanimously.  

The hope and scope of this article is directed toward the broad area of the exercise or nonexercise of jurisdiction. While the application of "the doctrine of abstention" has frequently been said to be limited narrowly to a set of special circumstances, "abstention" is a broad generic term encompassing multiple situations, both of judicial and statutory origin. Its machinery of application can range from a temporary stay through a dismissal with prejudice. It can become operative because of some pedantically technical ground or on account of a fundamental policy of government. It may be obviously justifiable or its *raison d'être* may be lost in legal obscurantism. It may be called abstention or it may bear causative appellations such as standing or mootness. Indeed, in its broadest sense it is a many splendored device.

Obviously all facets of judicial self-restraint cannot be dealt with even in an article of the projected breadth of the present one. Therefore, hopefully with only minor deviations, the project will be limited to those areas where judges have thought they were abstaining or refraining from doing so. Perhaps the deviations can get by as quasi-abstention. Noting the absence of the legal lore on the

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3. While an endeavor has been made throughout this article to provide supportive footnote citations, distracting though they may be to the reader, the writer with regard to the above bit of historical memorabilia has chosen to exercise the author's privilege of spreading the cloak of anonymity. At the moment of writing the petition for certiorari is still pending.

4. It is not proposed at this point to engage in the semantical exercise of differentiating between failure to exercise jurisdiction because it is non-existent and failure to do so even though it exists, as important as that differentiation on occasion may be, e.g., on the availability of discretionary power.

5. WRIGHT, LAW OF FEDERAL COURTS, § 52, p. 196 (2nd ed. 1970); 1 BARRON
subject raised the question as to the desirability of the author's abstention from the project. A further review of the cases, however, reflected the utilization of factors, i.e., determining elements in the abstention (nonabstention) process. In using this approach, the writer intended to avoid insofar as possible metaphysical analyses of what judges really intended (and probably never did) in their decisions; in short, to engage in a pragmatic analysis of the stuff going into the decisions.

All reasonable efforts have been made herein to avoid the expression of opinions as to what the law will be when it has not been determined other than when the prognosis may seem clear and certain. In any event, nothing herein is to be construed as an opinion of the United States Court of Appeals for the Seventh Circuit.

The factors are considered herein individually and specifically; however, for a starting point, the comprehensive historical summary of equity exceptions to federal exercise of jurisdiction written by Mr. Chief Justice Stone in Meredith v. Winter Haven should be most

6. At the outset of research, it had been conceived, although the West woods are full of cases, that many of actual abstention were buried to practically all except the involved litigants in unreported district court orders. Accordingly, a letter of inquiry was directed to all district judges of the Seventh Circuit as to possible unreported orders. The results were meagre, which suggests either the concept was incorrect or the judicial memory runneth not to unreported orders. Without exposing judicial foibles, it is observed that a familiar call to the law office junior partner is, "Smith, what was the name of that case we had involving collateral estoppel?"

7. 320 U.S. 228, 234 (1943).
helpful and is set forth as Appendix A of this article. Time has not
dimmed the sweep or general verity of his statement.

THE PRIMROSE PATH

DUTY TO EXERCISE JURISDICTION: The duty or obligation of federal
courts to exercise the jurisdiction properly accorded to them, as
stated in decisions, reflects both encomiastic and exhortatory aspects.
Buried in an 1821, 74 page opinion of Chief Justice Marshall are
the flat statements: “The judiciary cannot, as the legislature may,
avoid a measure, because it approaches the confines of the consti-
tution. We cannot pass it by, because it is doubtful . . . we have no
more right to decline exercise of jurisdiction which is given.”8 Ab-
stention must still have been beyond the horizon of recognition al-
most a century later when Mr. Justice Peckham stated in Willcox v.
Consolidated Gas Co.9 that no question of discretion or comity was
raised by the court’s exercise of jurisdiction, for “[W]hen a Federal
court is properly appealed to in a case over which it has by law ju-
risdiction, it is its duty to take such jurisdiction. . . . ”10 Cases sub-
sequent to the recognition of abstention continue at least to pay lip
service to the duty although obviously the obligation is of a less un-
adulterated character than that which was conceived by the Chief
Justice.11 The undoubted obligation of a federal court to proceed
to hear and dispose of a case properly before it is subject to absten-
tion only in certain exceptional cases.12

Recognizing Willcox as viable, the Supreme Court in 1964 opined
that there were fundamental objections to compelling a litigant with-
out his consent to accept a state court’s determination of his federal
constitutional claims if he had properly invoked the jurisdiction of
the federal district court.13 No doubt as a necessary corollary to the
recognition of the right of the federal constitutional claimant to an
ultimate federal adjudication was Judge Cummings’ articulation that
the “judiciary has always borne the basic responsibility for protect-

10. Id. at 40.
ing individuals against unconstitutional invasions of their rights by all branches of the Government." The federal courts are the primary forum for vindicating federal rights.14

Another frequently quoted statement was authored by Judge Murrah:

We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.16

Further viability of the Willcox duty was again recognized in this decade: unless there is an explicit exception to the duty of the federal court to hear a case to which Congress has extended its jurisdiction, that duty may not be disregarded.17 There appears to be no judicial discomfiture arising from the fact that the explicit exception in the case of abstention is itself often judicially established.

While the deviation from the path of exercise of jurisdiction might, at times, Lorelei-like, beckon as an easy disposition of a troublesome case, Mr. Justice Frankfurter rejected the possibility as being

an unworthy conception of the federal judiciary to give weight to the suggestion that acknowledgment of this power will tempt some otiose or timid judge to shuffle off responsibility. . . . Procedures for effective judicial administration presuppose a federal judiciary composed of judges well-equipped and of sturdy character in whom may safely be vested, as is already, a wide range of judicial discretion, subject to appropriate review on appeal.18

That the state courts have the solemn responsibility, equally with the federal courts, to guard, enforce and protect every right granted or secured by the United States would seem to be a springboard for a plunge into the abstention pool. However, the Supreme Court, without adverting to whether it had any opinion as to the manner in which the state courts might measure up to their solemn responsibility, did preclude the dual responsibility as being any escape hatch from the duty, when solicited, of serving as a forum for federal con-

The Supreme Court did, however, have occasion to observe in the analogous habeas situation that "it cannot be assumed that [the state courts] will be derelict in their duty" and one of the primary grounds for the requirement of exhaustion of state remedies is "the respect which federal courts have for the state judicial processes. . . ."20

POLICY FOR ABSTENTION: In essence, policy factors controlling, or at least persuasive to, abstention or not abstaining are revealed by an examination of the various factors mentioned by the courts; such factors will be individually treated herein. Therefore, under the present subcaption no more will be said than that insofar as the Pullman doctrine enunciated in Railroad Commission of Texas v. Pullman Co.21 itself is concerned, the writer of the opinion, Mr. Justice Frankfurter, while indicating that Pullman and its progeny had been equity cases stated, "[t]hey reflect a deeper policy derived from our federalism."22 An examination of cases involving nonexercise of jurisdiction, however, indicates that the policy derived from federalism has a broader sweep than the Pullman doctrine cases.

JUDICIALLY ESTABLISHED: Certain types of abstinence are statutorily mandated. Thus, 28 U.S.C. § 1341 provides: "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in accordance with such State."23

Any study of the broad sweep of the applicability and/or desirability of abstaining from the exercise of federal jurisdiction discloses the development of factors found in the statutes and applied, perhaps sometimes erroneously, in the nonstatutory cases. Nevertheless, while the source of abstention in its broadest sense may be statutory as well as nonstatutory, the statement is not infrequently seen in the cases that abstention is judicially established.24

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24. E.g., England v. Medical Examiners, 375 U.S. 411, 415 (1964) "Abstention
VIABILITY OF THE PULLMAN DOCTRINE: The Pullman doctrine, at least as it stood in 1964, subsequent to the departure of Mr. Justice Frankfurter from the Court, was summarized as follows:

The doctrine contemplates only 'that controversies involving unsettled questions of state law [may] be decided in the state tribunals preliminary to a federal court's consideration of the underlying federal constitutional questions,' 'that decision of the federal question be deferred until the potentially controlling state-law issue is authoritatively put to rest,' 'that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law,' 'that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality'.

In 1967 the observation was made that the retirement of Mr. Justice Frankfurter in 1962 left the abstention doctrine a judicial orphan unable to muster the enthusiastic majority typical of its earlier years. Whether or not properly accomplished by Reetz v. Bozanich, which one commentator has characterized as a "sport," and the later buttressing of Askew v. Hargrave, nevertheless, it may arguably be asserted that the status of orphanage was prematurely accorded. The line of cases beginning with Younger v. Harris will not disturb a view of an underlying rationale favorable to the exercise of judicial abstention.

Professor Kurland was not surprised that the abstention doctrine had become moribund in an activist court, and even after evaluating Reetz, opined that self-restraint was not yet reinstated as the governing principle of the Court.

Nevertheless, the Fifth Circuit early in 1971 made the flat statement that the principle of abstention retains its full vitality today. In a more recent case, Judge Kaufman of the Second Circuit, after

is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems.'

31. "No self-denying ordinance could be appropriate to a jurisprudence that regarded the federal courts as curer of all ills of American society." Kurland, supra note 31 at 80.
a brief tracing of the historical treatment of the *Pullman* doctrine, observed that "the last two Terms of the Court have witnessed the rejuvenation of the full implications of the *Pullman* doctrine."  

**EQUITABLE V. LEGAL RELIEF:** *Williams v. Hot Shoppes, Inc.* indicates that while the roots of the abstention principle may rely on federal equity jurisdiction, the application of the abstention doctrine no longer depends on whether a complaint has demanded equitable or legal relief. No case has come to the writer's attention indicating that this portion of the opinion is less than viable although no doubt equitable principles continue to underlie much of the abstention law.

**DISCRETION:** Assuming frequency of reference in the cases is a proper criterion, one of the brightly blooming blossoms on the path of abstention is the word "discretion." A review of the number of cases where the word "discretion" was at least voiced presents the possibility that district courts may have, after an appellate court decision, speculated as to whether the word had any real significance.

In *Baggett v. Bullitt*, a three-judge district court had abstained from ruling on a 1931 Washington state oath statute which had never been interpreted by the courts of that state. While Justices Clark and Harlan were of the opinion that Washington's highest court should be afforded an opportunity to construe the statute, the majority held that while abstention involves a discretionary exercise of a court's equity power, it is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law.

By way of contrast, in *Harman v. Forssenius*, the Court stated that in applying the doctrine of abstention, "a federal district court is invested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law." The three-judge district court refused to abstain and the Supreme Court unanimously affirmed.

35. Because of the not infrequent entanglements involved in the exercise of discretion, it may be assumed that a flower-bearing vine is involved.
37. *Id.* at 384.
38. *Id.* at 375.
40. *Id.* at 534.
In *Sarfaty v. Nowak*, the plaintiffs asserted that the doctrine of abstention did not apply where irreparable damage would occur to protected constitutional rights. Both sides relied upon the recently decided *Dombrowski v. Pfister*. The court held that the district court in its sound judicial discretion properly applied the doctrine by abstaining. While the reported case does not indicate that an injunction was sought against pending criminal proceedings, injunctive relief was sought as to enforcement of certain liquor laws.

Readers of appellate court opinions are aware of the fact that many matters occurring at the trial court level are viewed as being matters of the trial court's discretion, for example, the limitation on the scope of cross-examination. No doubt in any case of review of the exercise of discretion, a significant background factor is the impact that the exercise has on the complaining litigant. It probably could be safely stated that, at least in the case of failing to exercise jurisdiction by abstinence, there is a built-in impact. In any event, upon reading the cases, one sometimes comes away with a feeling that the appellate examination of the district court's action in regard to abstention has certain *de novo* overtones, a feeling no doubt shared by a reversed district court.

To the extent that determination of the correctness of abstention or nonabstention is truly a matter of discretion rather than a mechanical application of judicially established rules of thumb, some of which apparently have come along after the act, it would seem that the ordinary rules pertaining to evaluation of discretionary action should apply. The test is said to be that a trial court's exercise of discretion may be set aside only if arbitrary or if no reasonable man would take the view adopted by the trial court. Conversely, of course, if reasonable men could differ as to the propriety of the action taken, then it cannot be said that the trial court abused its discretion.

RESOLUTION OF STATE LAW DISPOSITIVE: In *Railroad Commission v. Pullman Co.*, Mr. Justice Frankfurter pointed out several ways in

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41. 369 F.2d 256 (7th Cir. 1966).
42. 380 U.S. 479 (1965).
43. Particle Data Laboratories, Inc. v. Coulter Electronics Inc. 420 F.2d 1174, 1178 (7th Cir. 1969).
44. 312 U.S. 496, (1941).
which a state court resolution of the issues before the federal court would eliminate the necessity for further federal jurisdiction. One of the classic statements in the field followed: "In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands." With perhaps refining, or sometimes extending phraseology, subsequent cases approving abstention have indicated this approach as a key factor.

One aspect of the foregoing rule certainly is that construction of a statute by the state court may remove the constitutional issue from the federal case. Conversely, and this would seem to be a matter of certainty of state law, the rule is stated that whenever the statute is obviously applicable to the plaintiff in his course of conduct or when the statute is not susceptible to a construction that will otherwise avoid the necessity of deciding a constitutional question, the federal court may not properly stay its hand.

As might be expected, when a definitive ruling on state law questions would neither control the outcome of the litigation nor obviate the need to adjudicate the issues, basis for abstention would not ordinarily be found. State court action could be dispositive of the issue either by narrowing the state statute to bring it within federal constitutional limits or by finding that it was unconstitutional altogether.

Where a statute is void for overbreadth and is both clear and precise, there would be no basis for the possibility of a narrowing state court construction so as to render unnecessary a decision on a constitutional challenge. It was also brought out in United Steel Workers of America (AFL-CIO) v. Bagwell, in the event the statute is not susceptible to the narrowing construction then resort to the state court is not indicated. This does not, however, seem to meet the possibility of the state court itself voiding the statute on

45. Id. at 501.
46. United Steel Workers of America (AFL-CIO; v. Bagwell, 383 F.2d 492, 495 (4th Cir. 1967).
47. Barrera v. Wheeler, 441 F.2d 795, 801 (8th Cir. 1971).
49. 383 F.2d at 495.
grounds of constitutionality. It has been indicated in federal judicial utterances that it cannot be thought that the state court judges have less fidelity to the due process requirements of the federal constitution than do federal judges.\textsuperscript{50} It could be readily argued on this basis that unless the state court had already declared its statute constitutional, the case should always be remitted to the state court to give it the first opportunity to declare the statute unconstitutional. Cases need not be cited, however, to show the incorrectness of this proposition in practice.

The difficulties of prognostication in the present area are reflected by cases arising in the October, 1970, term of the Supreme Court. In \textit{Fornaris v. Ridge Tool Co.},\textsuperscript{51} the abstention doctrine was applied where a relatively new Puerto Rican statute, which had not been authoritatively construed by the Commonwealth courts, was susceptible by Commonwealth judicial confinement to a more narrow ambit which would avoid all constitutional questions. The federal courts were ordered to stay their hand until the Puerto Rican courts had spoken. However, in \textit{Wisconsin v. Constantineau},\textsuperscript{52} the Court had no difficulty in deciding that the hand should not be stayed. Mr. Chief Justice Burger, in dissenting, stated that "[f]or all we know, the state courts would find this statute invalid under the State Constitution, but no one on either side of the case thought to discuss this or exhibit any interest in the subject."\textsuperscript{53}

One might arguably conclude that where a statute was clearly unconstitutional on its face and the district court had declined to abstain, the tendency on the appellate level would not be at that point to disturb the district court's discretion by remitting the case to the state court. Whether the reverse of this situation, with clear unconstitutionality but in which the district court had abstained, is true is less clear, even arguably. In any event, other applicable factors can never be disregarded.\textsuperscript{54}


\textsuperscript{51} 400 U.S. 41 (1970).

\textsuperscript{52} 400 U.S. 433 (1971).

\textsuperscript{53} Id. at 440.

\textsuperscript{54} For example, the applicability of the so-called anti-injunction statute, 28 U.S.C. § 2283 or the line of cases of which the lead-off was \textit{Younger v. Harris}, 401 U.S. 37 (1971).
DIFFICULTY OF STATE LAW DETERMINATION: As an initial premise, it appears to be well established that the mere fact the district court in the exercise of diversity jurisdiction is required to make decisions based upon an undecided question of state law is not alone a sufficient ground for declining jurisdiction; or stating it otherwise, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy.\(^5^5\)

The matter of what state law is, however, is not a homogeneous panoply. It may range, on the one hand, from a relatively simple issue which has not been precisely determined but the resolution of which is pointed to by numerous state decisions, while, at the opposite end of the pole, there may be exceedingly complex and difficult issues with weighty public policy overtones. The question presents itself whether progression toward the difficult and complex is accompanied by greater persuasiveness toward abstension. Frequently, it is stated that such is not the case although here, as in the consideration of other factors, absolutes are hard to come by.

Meredit\(h\) v. Winter Haven\(^5^6\) is frequently cited for the proposition that the mere difficulty of ascertaining what the state courts may thereafter determine the state law to be is not in itself a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for a decision.\(^5^7\)

The Meredith concept has been extended to the effect that the fact that the issues of state law are novel or unsettled or are exceptionally difficult or complex is insufficient reason to invoke abstention.\(^5^8\) A striking illustration of this principle is found in Akin v. Louisiana National Bank of Baton Rouge.\(^5^9\) Involved was the effect of a Texas court nullification of a New Mexico decree of adop-

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\(^5^5\) Merritt-Chapman & Scott Corp. v. Frazier, 289 F.2d 849, 853 (9th Cir. 1961), cert. denied, 368 U.S. 835 (1962).

\(^5^6\) 320 U.S. 228 (1943).

\(^5^7\) In re Mohammed, 327 F.2d 616, 617 (6th Cir. 1964). After stating the rule flatly, it is of interest to note that Judge Magruder held that in the situation before the court there was "no essential circumstance which would indicate a different conclusion." See also Tomiyasu v. Golden, 358 F.2d 651, 654 (9th Cir. 1966); Miller v. Miller, 423 F.2d 145, 148 (10th Cir. 1970).

\(^5^8\) Sayers v. Forsyth Building Corp., 417 F.2d 65, 73 (5th Cir. 1969).

\(^5^9\) 322 F.2d 749 (5th Cir. 1963).
tion urged by a Texas plaintiff as a reason for her right to "forced" heirship in the estate of a Louisiana resident. The court held that the plaintiff under these circumstances had a right to choose a federal forum and it was the court's duty to take jurisdiction of the case.

While subscribing to the view that the difficult nature of local questions properly presented in federal courts is not alone sufficient cause for abstention in favor of state jurisdiction, the Court of Appeals for the Ninth Circuit in Tomiyasu v. Golden\(^6\) apparently considered the resolution of the state issue to be of a sufficiently technical nature, together with the fact that a preliminary question to the determination of such issue involving the same parties had not been resolved by the state court, to be sufficient bases for abstaining.

While the decade that has passed since the en banc decision of the District of Columbia Circuit in Williams v. Hot Shoppes, Inc.,\(^{61}\) a segregation in public facilities case, has relegated much of that opinion to a category of historical interest only, the court observed that "[i]t is, at the very least, unseemly for a Federal court to 'guess at the resolution of uncertain and difficult issues of state law.'"\(^{62}\) When this statement is contrasted with pronouncements of the duty of resolving state law, no matter how difficult, it might seem that the seemliness is more dependent upon sociological-political aspects than the uncertainty or difficulty of resolving questions of state law.

While it seems that the district court will find slight encouragement for abstention in the face of the problem of state law, it has nevertheless been stated that when that state law has been determined, the federal courts must apply the most recent interpretation thereof in diversity cases.\(^{63}\)

**POSSIBILITY OF CONTRARY LATER STATE DETERMINATION:** The mere possibility that a decision of a state law issue, by a federal court

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60. 358 F.2d 651 (9th Cir. 1963).
62. Id. at 841.
63. Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380, 384 (2d Cir. 1968). One nationally circulated magazine might, it seems, have put this item in its "Department of things that need not have been said."
in a diversity case, not previously decided by a state court, might thereafter be a matter which is found with hindsight to contravene a subsequent determination of the same issue by the state court is in itself no ground for abstention.  

**AVAILABILITY OF REVIEW OF STATE ACTION BY U.S. SUPREME COURT:** Arguably, a litigant would not be deprived of an adjudication of his federal rights by the federal district court action of abstaining and sending him to the state courts since direct review could eventually be sought in the United States Supreme Court. That Court, however, has stated that such review, "even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination—often by the three judges—to which the litigant is entitled in the federal courts."  

**AVAILABILITY OF STATE PROCEDURES:** The application of logic in the area of abstention would seem to require that if there is a deferral to state jurisdiction, a *sine qua non* would be the availability of state procedure. The quality of the state remedy is commented on elsewhere herein but the mere suggestion of availability would seem to connote that the state remedy must be real and not futile or illusory. That it would be the latter may be established by the litigant's prior state efforts. Availability, it seems, should also run to the matter of the likelihood of a reasonably early determination of state law which has not been heretofore crystallized. Thus, a statutory provision which had been in effect for 39 years had never been tested or interpreted at the appellate level in the state and no such case was pending or contemplated. This was determined to be an appropriate background for a finding of no abuse of discretion in the district court's refusal to abstain.  

In a teacher discharge case, the court considered whether suit in the district court might not be premature since conceivably the vote at a school meeting might be in plaintiff's favor. The court recog-
nized that dismissal arising out of the classroom use of "a vulgar term for an incestuous son" was a foregone conclusion. Thus, under the circumstances, the Court of Appeals accepted jurisdiction.\textsuperscript{68}

In a Third Circuit case,\textsuperscript{69} the court pointed out that appellant had sought the aid of federal courts because it was evident that all efforts to raise the federal question on the state level had failed. The district judge apparently felt that another attack should be taken by testing the power and authority of the public utility commission by seeking an injunction in the state court. The court of appeals disagreed with the exercise of the discretion and held that where it clearly appeared that the plaintiff was confronted with a serious block at the state level and jurisdiction existed in both courts, the abstention theory should not be applied.

The fact that jurisdiction has been taken which has permitted the availability of state action to become nonexistent by the bar of a statute of limitations has been indicative of foreclosing the district court's exercise of discretion to abstain, since the state remedy is no longer available.\textsuperscript{70} Conversely, however, as in the case of many other factors standing alone, the fact that a state remedy is available is not by itself a valid basis for federal court's abstention.\textsuperscript{71} Nevertheless, when other factors enter the picture, perhaps even only one additional factor being that the state action involved state constitutional claims, the sustainment of which would obviate the need for determining the federal issue, abstention may be warranted.\textsuperscript{72}

What has been said with regard to availability of state remedies, of course, is primarily directed at state judicial remedies. However, other types of remedies may be available. In an apportionment case, the Supreme Court pointed out that, except as an interim remedial procedure justifying a court in staying its hand temporarily, there is no significance in the fact that a non-judicial, political remedy might be available to effect rights to equal representation in a

\begin{itemize}
  \item \textsuperscript{68} Keefe v. Geanakos, 418 F.2d 359, 361 n.6 (1st Cir. 1969).
  \item \textsuperscript{69} Monongahela Connecting R. Co. v. Pennsylvania Pub. U. Comm., 373 F.2d 142 (3d Cir. 1967).
  \item \textsuperscript{70} Foster v. City of Detroit, 405 F.2d 138, 145 (6th Cir. 1968), \textit{motion denied}, 423 F.2d 660.
  \item \textsuperscript{71} Moreno v. Henckel, 431 F.2d 1299, 1300 (5th Cir. 1970).
  \item \textsuperscript{72} Askew v. Hargrave, 401 U.S. 476 (1971).
\end{itemize}
state legislature. "Courts sit to adjudicate controversies involving alleged denials of constitutional rights."\(^{73}\)

**QUALITY OF ALTERNATE REMEDY:** It has been indicated elsewhere herein that the alternate state remedy, when abstention is utilized, must be real and not merely illusory. Thus, it is no surprise to find articulated that a plain, speedy and efficient remedy for the claim asserted must be available in the state courts.\(^{74}\) The requirement has also been phrased in terms of "plain, adequate and complete."\(^{75}\)

The strain, or factor, here involved is found in other areas of abstention. In the recent case of *Parisi v. Davidson*,\(^{76}\) the Supreme Court had before it the question of whether a federal court should postpone adjudication in a civil suit clearly within its original jurisdiction where there were pending court-martial proceedings involving petitioner, a member of the Armed Forces who had applied unsuccessfully for a discharge as a conscientious objector. The Court stated that the judicial hand should be stayed only if the relief requested would also be available to the petitioner with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the court-martial charge. The Court was not persuaded that such relief would be even potentially available, much less that it would be either prompt or certain.

The factor is also observed as a statutory principle. Thus, a district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law "where a plain, speedy and efficient remedy may be had in the courts of such State."\(^{77}\)

**SUBSEQUENT STATE REMEDY:** In *Foster v. City of Detroit*,\(^{78}\) the city argued that even though federal jurisdiction may have been proper when invoked at the time the suit was commenced, subsequent de-


\(^{75}\) Holmes v. New York City Housing Authority, 398 F.2d 262, 267 n.7 (2d Cir. 1968).

\(^{76}\) 40 U.S.L.W. 4177 (Feb. 23, 1972).

\(^{77}\) 28 U.S.C. § 1341. See, for an application of the statute, where the court found that the state remedies were plain, speedy, and efficient, Natural Gas Pipe Co. of America v. Sergeant, 40 U.S.L.W: 2458 (U.S.D.C. Kan., Jan. 12, 1972).

\(^{78}\) 405 F.2d 138 (6th Cir. 1968).
cisions of the Michigan Supreme Court provided plaintiffs a remedy in the Michigan courts and that federal district court jurisdiction was thereby lost. The Sixth Circuit summarily disposed of the contention by stating that the jurisdiction, once properly invoked, remained.

LOCAL EXPERTISE: The first aspect of this factor is the consideration given by the courts to the likelihood that a state court may be able to cope more knowledgeably with the state law than the federal courts. The second aspect is that a federal judge himself may be thoroughly trained, from his own days of practice, in the state law with which he is asked to deal. The matter, of course, is particularly true of the district judge, who ordinarily is holding court in the state in which he was a practitioner. Further, the induction to the district court bench has probably never placed a wall between the judge and his continuing knowledge of his own state law, a status made even more true by *Erie R. Co. v. Tompkins.*

The Second Circuit impliedly recognized this factor in dictum by referring to the possibility of the administration of a complex state process in which state courts have greater expertise. In addition, Mr. Justice Douglas in *Jackson v. Ogilvie* stated that "federal courts are usually less able than state courts to work their way through a maze of state electoral laws." In the analogous case of pendent jurisdiction, Mr. Justice Brennan in *Mineworkers v. Gibbs,* in referring to the necessity for avoiding needless decisions of state law, referred to "procuring for them a surer-footed reading of applicable law." It is assumed Mr. Justice Brennan was not necessarily referring to a more expeditious reading.

An illustration of the first aspect of local expertise is found in a recent Second Circuit case. Involved before the court was an interpretation of a Connecticut statute in connection with a suit against an insurance company wherein plaintiff's judgment against the in-

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79. 304 U.S. 64 (1938).
81. 401 U.S. 904 (1971).
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sured was approximately $75,000 more than the coverage. The insurance company asserted that there should have been settlement within the policy limits. Recognizing that in the diversity action it was necessary to predict the result which the Supreme Court of Connecticut would reach as to the statute, which had been on the books since 1919 and had been previously construed in only one federal case, the majority opinion, without reference to any possibility of abstention, proceeded to arrive at an interpretation differing from that of the district court. The dissenting opinion stated that not only did the majority opinion run counter to Connecticut legislative policy but that the court was reversing the decision of a trial judge well versed in Connecticut law. With the statute having venerability of more than a half a century, it would seem that the likelihood of an interpretation by the Connecticut Supreme Court, in the absence of the showing of a pending case, was scarcely persuasive for not proceeding with an interpretation of the state statute.

An even more recent case reflects the deference which may be accorded to what has been termed local expertise. In a case involving interpretation of a Georgia abusive language statute, Mr. Justice Brennan stated, "[t]he District Judge and one member of the unanimous Court of Appeals panel were Georgia practitioners before they ascended the bench. Their views of Georgia law necessarily are persuasive with us." So that this will not be construed as a carte blanche elimination of any further inquiry, in the next sentence of the opinion the statement was made that "we have, however, made our own examination of the Georgia cases, both those cited and others discovered in research."

The Fifth Circuit has been reluctant to substitute its view of state law for that of the district court sitting in the state and experienced in its jurisprudence. This approach, however, might seem to lead to some undesirable subjective evaluations.

Upon analysis, the present factor in its first aspect is possibly susceptible to the charge of mislabeling as the criterion is not so much

that state courts can more accurately interpret state law but rather that they can more authoritatively do so. This seems to be borne out by Mr. Justice Frankfurter’s words in the *Pullman* case which pointed out that no matter how seasoned the judgment of the district court might be, it could not escape being a forecast rather than a determination and the last word on the statutory authority of the railroad commission in the case before the court belonged not to any federal court but to the Supreme Court of Texas. The tentative answer of the federal court might be displaced the next day by a state adjudication. This, of course, is the attendant risk, or duty if you will, placed upon, and accepted by, the federal courts in numerous cases. A complete extension of the rationale would certainly lower the caseload in the federal courts.

**CERTAINTY OF STATE LAW:** This factor in abstention is probably merely a variation, or an extension, of the difficulty of determining state law. As might be expected, the cases reflect that where the state law is certain, the need for abstention is minimized, if not eliminated, but not necessarily conversely, where the state law is uncertain. Consideration, at least, will be more likely given to the desirability of abstention.

Whether uncertainty of the state law is a key to the door of abstention seems to be to a considerable extent dependent upon the type of litigation involved. In diversity cases, it generally appears that the uncertainty of state laws is unlikely to provide a basis for abstention. In *Stool v. J.C. Penney Co.*, the court stated flatly that a federal diversity court “cannot decline to exercise its jurisdiction even though the state law which it is bound to apply cannot be found with certainty.” The court in connection with the duty of

89. Akin v. Louisiana National Bank of Baton Rouge, 322 F.2d 749, 756 (5th Cir. 1963). The lack of complete certainty is not in itself sufficient reason for refusal to exercise jurisdiction; Reetz v. Bozanich, 397 U.S. 82, 86 (1970), abstention “should be applied only where ‘the issue of state law is uncertain.’”
90. 404 F.2d 562, 563 (5th Cir. 1969).
ascertainment imposed upon the federal court further stated the following:

We therefore fall back on formulary surrogates to account for our mysterious application of an uncoined code. Thus where the controlling state law eludes the researcher, the court must attempt to ascertain the policy inclination of the state's highest tribunal with regard to the matter in controversy. Failing that, the court may assume that the state courts would adopt the rule which, in its view, is supported by the thrust of logic and authority.91

In non-diversity cases where federal issues exist, it would appear that the uncertainty of state law would probably be accorded greater weight than in the diversity situation. Furthermore, even where flat statements are made in the diversity situation, it is customary to find that both in the area of difficulty and lack of certainty, significance must be attached to the ordinarily qualifying words, "standing alone." The Supreme Court has had no difficulty in finding abstention applicable in diversity cases, even though there may have been a federal constitutional issue raised by the pleadings.92

ENTANGLEMENT IN STATE LAW: The Second Circuit, in finding that abstention was not appropriate in the case before it, mentioned, inter alia, the factor that the actions were not entangled in state law.93 It seems clear that the lack of such entanglement in a federal issue would not result in abstention. Whether the reverse is always true is perhaps arguable although in any event it would probably only mean that this would be a factor for abstention, the weight of which could only be determined upon an individual case basis. The Supreme Court stated the matter somewhat more dramatically and completely in McNeese v. Board of Education94 as follows: "Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed."

STATE CONSTITUTION V. STATE COMMON LAW QUESTIONS: In reliance on a three-judge district court decision,95 the Court of Appeals for the Sixth Circuit stated in 1970 that the circuit had recognized abstention in a case involving construction of the constitution of a state

91. Id. at 563.
94. 373 U.S. 668, 674 (1963).
but that abstention was not ordinarily granted in cases involving common law questions which the federal court under its diversity jurisdiction is bound to decide.\textsuperscript{6} While the statement that the federal court "is bound to decide" might seem to be on the strong side, as there are relatively few absolutes, if any, in the area of abstention, it would appear to the writer of this article that some differentiation between cases involving a state constitution and the common law of the same state is warranted although this would seem to be a matter of weight rather than mandate.

Support for the differentiation may be found in \textit{Reetz v. Bozannich},\textsuperscript{9} in the following: "The \textit{Pullman} doctrine was based on 'the avoidance of needless friction' between federal pronouncements and state policies. . . . The instant case is a classic case in that tradition, for here the nub of the whole controversy may be the state constitution." Particular significance may be accorded the language used in \textit{Reetz} since the opinion was written for a unanimous Court by Mr. Justice Douglas who himself has been cast in the role of dissenter in cases approving abstention.\textsuperscript{8}

\textbf{CERTIFICATION OF STATE LAW QUESTIONS:} One well-founded judicial complaint concerning the application of abstention, a complaint which ordinarily will have the joinder of a plaintiff, is the possible delay inherent in the situation. This matter as a factor is discussed elsewhere herein. However, a possible means of expediting the determination of state law is found in the procedure of certification by federal courts of doubtful state law questions to state high courts for decision.\textsuperscript{90} It is sufficient to note here that the procedure is of recent origin and, until 1965, Florida was the only state with established certification procedure and it had only occasionally been invoked. In the past six years, six additional states have followed Florida's lead, and the Commissioners on Uniform State Laws have

\textsuperscript{6} Krakoff v. United States, 431 F.2d 847, 848 (6th Cir. 1970). It is noted that Circuit Judge Weick, the author of the \textit{Krakoff} opinion, was the circuit judge assigned to the three-judge court in the \textit{Nolan} case, \textit{supra}, which had issued a per curiam opinion.

\textsuperscript{9} 397 U.S. 82, 87 (1970).

\textsuperscript{8} \textit{See}, e.g., Martin v. Creasy, 360 US. 219, 226 (1959), and United Gas Co. v. Ideal Cement Co., 369 U.S. 134, 136 (1962).

adopted a Uniform Certification of Questions of Law Act. A number of states will undoubtedly adopt the Uniform Act or variations thereof in the next few years. 100

At least one additional state, Indiana, has adopted a variation of the Uniform Act. 101 The Indiana statute limits by its terms the certifying courts to the federal appellate courts. While the procedure may be helpful to these courts it obviously is not an answer to the question of the inherent delay in abstention. The Uniform Act is broader and includes United States district courts and, as a bracketed possible addition, the highest appellate court or the intermediate appellate court of any other state. 102

The Supreme Court in Clay v. Sun Insurance Office Ltd. 103 noted the Florida facilitating statute and in Aldrich v. Aldrich, 104 on its own motion, certified a question of law to the Supreme Court of Florida. While it might not seem to require stating, the Court of Appeals for the Sixth Circuit has had occasion to observe that in the absence of a statute or rule in the state authorizing certification procedure, resort could not be had to the state Supreme Court. The state Supreme Courts, of course, do not ordinarily render advisory opinions. 105

In the situation when a state does not have certification procedures, the alternative of a state declaratory judgment action is suggested by the Supreme Court in United Gas Co. v. Ideal Cement Co. 106

ACTIONS PENDING IN BOTH STATE AND FEDERAL COURTS: In Liberty Mutual Ins. Co. v. Pennsylvania R.R. Co., 107 a diversity case in

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100. Id. at 888.
102. 18 U.C.L.A. L. Rev., supra note 104, at 913. The authors note that the original Florida Statute did not permit district court certification and that there are at least two reasons for restricting certification to appellate level courts: First, the number of potential cases is reduced and second, the problem of premature certification is avoided. An intermediate alternative is suggested of allowing certification by three-judge district courts. It is also, of course, necessary in the ordinary case for the district court to resolve factual disputes before reaching the law questions.
107. 322 F.2d 963 (7th Cir. 1963).
which there was admitted federal jurisdiction, the district court had
dismissed the action after pretrial development of the fact that all
of the parties except one were litigating the same issues in state court
actions. The district court apparently felt that it was fruitless to liti-
gate the issues in both the federal and state actions. The Court of
Appeals brushed aside the applicability of the doctrine of abstention
as being an extraordinary and narrow exception to the duty of the
district court to adjudicate a controversy properly before it. The
court held that in an in personam action to recover money damages
paid pursuant to insurance contracts for damage to property occa-
sioned by negligence, a federal district court is without authority to
abdicate its admitted diversity jurisdiction by dismissing the action
solely on the ground that other litigation is pending in a state court
involving substantially the same parties and subject matter even
though done in order to obtain complete justice and avoid multiple
litigation.

As indicated previously, the scope of this article is to consider ab-
stention in a broader sense than that to which the court referred in
Liberty Mutual. As far as can be seen at this time, there is no firm
signal on the horizon that the build-up of pending litigation in all
courts might make the avoidance of multiple litigation a more im-
portant factor for abstention. It would not seem to be beyond the
realm of possibility. Indeed, in Liberty Mutual, the court expressly
noted that it was not required to determine whether the district court
would have been justified in staying the action in that court pend-
ing the termination of the controversy in the state courts which, of
course, is abstention in the broader sense.

In Tomiyasu v. Golden,108 the situation was only analogous in
that the state litigation was not pending at the time of the district
court action. However, the Court of Appeals treated the district
court action as in the nature of a collateral attack on state court pro-
ceedings and held that the district court should have abstained and
dismissed. The court rather obviously balanced several factors in
arriving at its conclusion including the factor that the issues raised
should be left to those preeminently competent to answer them.
The circumstances here that were being raised in the district court

108. 358 F.2d 651 (9th Cir. 1966).
had not been considered in the state court actions. The principal exceptional circumstances seem to have been that otherwise there would be interference with the policies of the state court plus questions of strictly state law.

In *Kaiser Steel Corp. v. W.S. Ranch Co.*,\(^{109}\) in a short *per curiam* opinion, the Supreme Court held that the Court of Appeals erred in refusing to stay its hand in a case in which the state law issue was crucial, was one of vital concern in the state involved and was a truly novel one which eventually would have to be resolved by the state courts. A declaratory judgment was actually pending at the time and in all likelihood a resolution would soon be forthcoming. "Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which would apply to all other businesses and land owners concerned with the use of this vital state resource."\(^{110}\) Federal jurisdiction was ordered retained in the district court in order to insure a just disposition of litigation should anything prevent a prompt state court determination. Justices Brennan, Douglas and Marshall specially concurred on the ground that the case presented one of the narrowly limited special circumstances which justified the invocation of the judge-made doctrine of abstention.

Upon balancing, however, it may become obvious that the state court is not the proper forum to determine the issues for a combination of reasons such as differences of issues, differences of parties and venerability of the litigation. Rather, the federal court must face the necessity of untangling the complex web which has resulted in the differences between the parties and thereby has engendered extensive litigation in both the federal and state courts.\(^{111}\)

In a recent Tenth Circuit case, the court of appeals differentiated between a diversity claim for deed cancellation and an action for declaratory judgment to invalidate an agreement. On analysis, finding no sufficient special circumstances, the court reversed the district court insofar as it had dismissed the claim for deed cancellation but held that the district court had properly declined to exercise diver-

\(^{109}\) 391 U.S. 593 (1968).
\(^{110}\) *Id.* at 594.
\(^{111}\) *Sayers v. Forsyth Building Corp.*, 417 F.2d 65, 74 (5th Cir. 1969).
sity jurisdiction over a declaratory judgment action raising state law issues which were being presented contemporaneously to state courts. The distinction here would seem to lie in the holding that federal courts are under no compulsion to exercise jurisdiction over suits brought under the Declaratory Judgment Act. Under the circumstances, the dismissal of the declaratory judgment action was not an abuse of discretion, but the absence of special circumstances constituted abuse in an ordinary diversity case where federal jurisdiction had been properly invoked.

Perhaps it is fair to say that the pendency of another action involving substantially similar issues and the same parties is not standing alone entitled to persuasive weight in favor of abstention where federal jurisdiction exists, which is not to say that it has no weight when taken with other factors.

**FEDERAL-STATE FRICTIONS:** In the application of the classic *Pullman* abstention doctrine, indeed throughout abstention cases, a principal underlying factor for judicial determination is the possibility of unduly disrupting federal-state relations. Mr. Justice Frankfurter dwelt at some length on the subject in *Pullman.* He observed that few public interests have a higher claim on the discretion of a federal chancellor than the avoidance of needless friction with state policies. Referring to earlier cases, he stated that they reflected a doctrine of abstention appropriate to the federal system whereby the federal courts, exercising a wise discretion, restrained their authority because of scrupulous regard for the rightful independence of state governments and for the smooth working of the federal judiciary. Noting that the use of equitable powers in this sense was a contribution of the courts in furthering the harmonious relations between state and federal authority, the need was eliminated for a rigorous congressional restriction of the courts' powers. This doctrine of judicial restraint was no doubt foreshadowed in Mr. Justice Holmes' philosophy.

While the matter of comity, or elimination of federal-state friction,

114. See Aetna State Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970).
115. 312 U.S. 496, 500-01 (1941).
ABSTENTION

has been articulated frequently in abstention cases involving the necessity of interpretation of state law, it is also found in other areas, such as habeas corpus petitions by state prisoners. Likewise in considering the matter of the exercise of pendent jurisdiction, the Court has had occasion to ascribe to comity the avoidance of needless decisions of state law.\textsuperscript{117}

While comity is frequently honored in opinions, particularly in general summaries of the law of abstention, the Supreme Court has not found the possibility of non-comity friction to be an insurmountable hurdle. Thus in \textit{County of Allegheny v. Frank Mashuda Co.},\textsuperscript{118} the contention was made that abstention was justified on the ground of avoiding the hazard of friction in federal-state relations when a district court was called on to adjudicate a case involving the state's power of eminent domain. The Court alluded to the fact that the district court would simply be applying state law in the same manner as would a state court and held the fact that the case concerned the state's power of condemnation no more justified abstention than any other issue related to sovereignty. "Surely," according to the Court, "eminent domain is no more mystically involved with 'sovereign prerogative' than a State's power to regulate fishing in its waters."\textsuperscript{119} The Court in this case relied on various types of cases which have been historically federally adjudicated without an apparent breakdown in federal-state relations. Again, as in the case of most of the factors, if not substantially all, the federal-state friction possibility seems to be another factor to weigh in the balancing process.

\textbf{EXCEPTIONAL OR SPECIAL CIRCUMSTANCES:} The rule has been stated variously that there must be exceptional or special circumstances clearly justifying an abstention.\textsuperscript{120} In \textit{Merritt-Chapman & Scott v.}

\begin{itemize}
  \item \textsuperscript{117} United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).
  \item \textsuperscript{118} 360 U.S. 185, 191 (1959).
  \item \textsuperscript{119} Cf. Mr. Justice Douglas' opinion for the unanimous Court in Reetz v. Bozanich, 397 U.S. 82, 87 (1970), in which abstention was approved with regard to fish resources, an asset unique in its abundance in Alaska.
  \item \textsuperscript{120} In County of Allegheny v. Mashed Co., 360 U.S. 185, 196 (1959), the Court after enunciating the rule, obviously found no such exceptional circumstances but to the extent, if at all, there were any, they were overridden by factors calling for no further delay. No effort is made in this article to distinguish County of Allegheny from Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1969) decided by the same court, the same term.
\end{itemize}
Frazier, the court stated that there were no problems of constitutionality or compelling considerations of policy present which constitute the special circumstances that would require or merit a stay to enable defendant to secure from the state court a definitive answer to questions presented in a state declaratory action. It is suggested that the mere existence of "problems of constitutionality" is not a very helpful guideline in arriving at what may be special circumstances. In Marshall v. Sawyer, it is indicated that abstention can only be justified "in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."  

Without specificity in this guideline, it appears that the matter is placed back squarely on equity principles of weighing and balancing what may be involved in the particular case. Whether the exceptional circumstances are found to exist because of numerous individual factors being present or because of the importance of a few is, of course, a part of the weighing and balancing process. It would appear something in the nature of judicial fiat may be sometimes involved with this factor, such as the flat statement that there are no exceptional circumstances in the case before the court which would justify abstention. Counsel contending that special circumstances exist would appear to be well advised to spell them out with specificity. This presumably would impose the duty on the court of showing either that the claimed circumstances were not special or exceptional, or that they were overridden by countervailing factors. The Ninth Circuit cases seem to be particularly addicted to recognition of the broadly generic, exceptional circumstances or situations factor although equally prone to finding that such did not exist. 

Perhaps, upon further analysis, the concept of special or exceptional circumstances is not so much a factor in and of itself as it is a stage upon which other factors may make themselves known. Con-

121. 289 F.2d 849, 854 (9th Cir. 1961).
122. 301 F.2d 639, 645 (9th Cir. 1962).
123. See, e.g., In re Mohammed, 327 F.2d 616, 617 (6th Cir. 1964).
124. Otherwise the wording may be as in Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 912 (9th Cir. 1964) "[B]ut nothing (in the way of exceptional situations) has been suggested by either the district court or the appellees which would justify such action (of abstention) in the present cases."
125. See also Mach-Tranoics, Inc. v. Zirpoli, 316 F.2d 820, 824 (9th Cir. 1963).
versely, exceptional or special circumstances may be of a type that may have an application resulting in the exercise rather than in the nonexercise of jurisdiction. The existence of special circumstances seems to be indicated as a necessity by the Younger v. Harris group of cases, discussed elsewhere, if the federal courts are not to refrain from exercising jurisdiction in the factual situations involved in those cases and cases of the Dombrowski type.

NARROW ISSUE: The danger that a federal decision would work a disruption of an entire legislative scheme of regulation is a factor which may be involved in abstention cases. Conversely, a narrow and specific application of a particular state statute will be more likely to set the stage for nonabstention. While the narrow factor here involved is cited for justification of nonabstention, paradoxically, narrowly limited special circumstances have frequently been given as the only acceptable criterion for the application of abstention.

NEED FOR EXPEDITIOUS HANDLING: The exact phraseology of the factor here involved was somewhat difficult. It could be termed simply "Emergency" in some cases, or on a lengthier basis, "The Desirability That Significant Public Policy Not Be Thwarted Indefinitely." In any event, the factor was illustrated in Griffin v. County School Board of Prince Edward County. The litigation involving state school segregation laws had commenced in 1951 and by 1954 the famous phrase "all deliberate speed" had entered the scene. Ten years later, the Court, under the circumstances, approved the district court's refusal to abstain awaiting state court determination of further issues. The necessity for quick and effective injunctive relief, of necessity, could no longer live with the delay of further absti-

129. Zwickler v. Koota, 389 U.S. 241, 248 (1967); see also Miller v. Miller, 423 F.2d 145, 148 (10th Cir. 1970), and Coleman v. Ginsberg, 428 F.2d 767, 769 (2d Cir. 1970). In the second sense here considered of narrowly limited special circumstances, we merely have one adjectival variation of the exceptional or special circumstances factor treated elsewhere herein.
nence. The time factor entered an apportionment case in another sense, however, with the Court holding that the district court properly stayed its hand because of the imminence of elections and, on remand of the case before it, indicated that the district court could again exercise its discretion in view of the imminence of the next election.132

In a voting rights case, the Court articulated the factor in *Harmon v. Forssenius*,133 in the following language:

In appraising the motion to stay proceedings, the District Court was thus faced with a claimed impairment of the fundamental civil rights of a broad class of citizens. The motion was heard about two months prior to the deadline for meeting the statutory requirements and just eight months before the 1964 general elections. Given the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident that the District Court did not abuse its discretion in refusing to abstain.

The necessity for expeditious action, however, even in areas of significant public policy does not equate with such haste as to result in the ill-conceived and not properly explored result.134

**DELAY IN AND EXPENSE OF LITIGATION:** At first blush, this might seem to be a result rather than a factor of determination. It clearly is the former but also has a solid impact on the latter. This is so, even though judicial references to cost and expense may be found in opinions dissenting from the approval of abstention. Excessive expense in litigation combined with inordinate delay in the administration of justice are bound in any event to make a persuasive case for reform.135

In *United Gas Co. v. Ideal Cement Co.*,136 the judgment of the court of appeals was vacated to permit a construction by the state court of a municipal code, "so far as relevant to this litigation, to be sought with every expedition in the state courts."137 Mr. Justice Douglas dissented on the basis that the long-drawn-out litigation

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133. 380 U.S. 528, 537 (1965).
134. See the concurring opinion of Mr. Justice Douglas in Jackson v. Ogilvie, 401 U.S. 904 (1971).
135. See discussion of the matter, AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Commentary, Section 1371(e), at 293 (1968).
137. Id. at 136.
was needless. He referred to the financial burden on litigants, "which can be afforded only by those who take the cost as a tax deduction or get reimbursement through increased rates."\textsuperscript{138}

In \textit{County of Allegheny v. Frank Mashuda Co.},\textsuperscript{139} the Court buttressed its action in refusing to order abstention by pointing out that the respondents had consumed considerable time and expense pursuing their claim and that to order them out of the federal court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties. The fact that litigation had already been long delayed, despite the plaintiff's efforts to expedite the proceedings, was given consideration in \textit{Hostetter v. Idlewild Liquor Corp.}\textsuperscript{140}

The Court accepted delay and expense as a factor against abstention in \textit{Baggett v. Bullitt},\textsuperscript{141} being unable to ignore the fact that abstention operates to require piecemeal adjudication in many courts thereby delaying ultimate adjudication on the merits for an undue length of time. The Court also referred to the costly result. However, here the reference was to the figurative expense to citizens of an inhibition of the exercise of First Amendment freedoms inherent in the vagueness of a state statute.

Quoting from \textit{Public Utilities Commission of Ohio v. United Fuel Co.},\textsuperscript{142} the Court laid down a salutary rule for the utilization of the present factor:

\begin{quote}
Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a substantial constitutional question, considerations of equity justify a rule of abstention. But where, as here, no state court ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible.\textsuperscript{143}
\end{quote}

\textbf{STATE CRIMINAL PROCEEDINGS:} Judicial decisions have fashioned a doctrine of abstention, "whereby full play would be allowed the States in the administration of their criminal justice without prejudice to

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\textsuperscript{138} \textit{Id.} at 136.
\textsuperscript{139} 360 U.S. 185, 196 (1959).
\textsuperscript{140} 377 U.S. 324, 329 (1964).
\textsuperscript{141} 377 U.S. 360, 378 (1964).
\textsuperscript{142} 317 U.S. 456, 463 (1943).
\end{flushright}
federal rights enwoven in the state proceedings . . . . With refinements, this doctrine requiring the exhaustion of state remedies [in the case of state prisoner habeas corpus proceedings] is now codified in 28 U.S.C. §2254.144

The present factor, however, deals with the generally recognized reluctance of federal courts to interfere or intervene in state criminal proceedings in other than the habeas situations. However, that the principle, as in most other instances of the area under study, is not an absolute is demonstrated by Dombrowski v. Pfister.145 There the Court, although discussing the historical development of the principle, contributed to legal lore the now often quoted words "chilling effect on free expression"146 and did interfere with threatened criminal prosecution on the basis that defense of the prospective state criminal prosecution would not assure adequate vindication of constitutional rights. Ultimately, the matter rested on the irreparable injury which would occur if the parties were required to await the state court's disposition and ultimate review in the Supreme Court of any adverse determination. Mr. Justice Harlan, joined by Mr. Justice Clark, dissented on the basis that the decision abolished the doctrine of federal abstention in all suits attacking state criminal statutes for vagueness on First-Fourteenth Amendment grounds.

Subsequent cases seem to indicate that a fair statement of the factor here under consideration is that it is a recognized policy for the federal courts to refuse to intervene in state criminal prosecutions except under extraordinary circumstances.147 It has been stated that the healthy functioning of the federal system is fostered when the administration of the state's criminal laws and the determination of their validity is left in the first instance to the courts of the state.148

If an eroding door was opened by Dombrowski on the disinclina-

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147. See Tomiyasu v. Golden, 358 F.2d 651, 654 n.2 (9th Cir. 1966). The word "extraordinary" will, of course, have to be interpreted in the light of the Younger v. Harris, 401 U.S. 37 (1971), group of cases, discussed hereinafter.
tion of the federal courts to intervene in state criminal proceedings, with possible widening of the passageway in subsequent lower court decisions, certainly the erosion was not only retarded but clearly narrowed by the pronouncements in the Younger v. Harris cases.\textsuperscript{149} The exact boundary lines of the impact will indubitably be the subject of cases in the federal courts during the next several years. Because of the position of the writer with respect to litigation in the federal courts, and because of the developing nature of the present matter, further comment on the impact will be confined to observation of some of the cases which are the progeny of the Younger v. Harris cases.

A dramatic illustration of the impact is found in a Fifth Circuit case. In \textit{LeFlore v. Robinson},\textsuperscript{150} a municipal ordinance relating to demonstrations was the subject of attack. The suit was dismissed below and the court of appeals reversed holding that the limiting ordinance was facially invalid. The court did not reach the issue of whether the anti-injunction statute would preclude an injunction against pending municipal proceedings but recognized the availability of the declaratory relief, despite the tendency of interference with state proceedings, and anticipated that the municipality would honor the declaratory determination. The opinion of the court contains a comprehensive analysis of existing pre-Younger v. Harris authority.

While the petition for rehearing and for rehearing \textit{en banc} were pending before the court, the Supreme Court handed down the Younger v. Harris cases. Upon rebriefing and further consideration in the light of those cases, the earlier opinion was withdrawn and the case was remanded to the district court for a full evidentiary hearing, findings of fact and conclusions of law in the light of the principles announced in the Younger cases.\textsuperscript{151}

In a subsequent case in the same circuit, an action was filed to enjoin enforcement of municipal ordinances. In a \textit{per curiam} decision, the court declared that in view of the fact that neither irrepp-


\textsuperscript{150} 434 F.2d 933 (5th Cir. 1970).

\textsuperscript{151} LeFlore v. Robinson, 446 F.2d 715, 716 (5th Cir. 1971).
arable injury nor bad faith prosecution was present in the case, the rule laid down in Dombrowski would not be applicable, but on the contrary the case was controlled by the Younger v. Harris cases. The district court's judgment that the ordinances were constitutional, but that they had been unconstitutionally applied, was vacated and the case was remanded with the directions that it be dismissed.162

In Corbett v. Bowman,163 a three-judge court noted that the Younger cases determined as a matter of national policy that the federal courts should not interfere with pending state criminal prosecutions in the absence of exceptional circumstances. The case before the court involved juvenile proceedings but the panel saw no reason for differentiating such a case from the Supreme Court cases. The court finding no exceptional circumstances in the case to warrant intervention, the case was dismissed.

In Hull v. Petrillo,164 a case involving allegations of harassment in connection with the distribution of a Black Panther newspaper, the Second Circuit took cognizance of the recently decided Younger v. Harris cases but found that they did not require ignoring Dombrowski. In Hull, there was no pending prosecution sought to be enjoined. Despite the apparently unsettled reach of Younger, it would appear that the presence of harassment will be a factor, at least where First Amendment rights are involved, militating against abstention. Indeed Mr. Justice Black in the opinion for the Court in Younger v. Harris commented that Harris had failed to make any showing, inter alia, of harassment.

Two more recent cases illustrate one of the problems emerging from the Younger v. Harris cases. This concerns whether or not a difference exists between the injunctive and the declaratory relief situations. Facing the question, the First Circuit in Wulp v. Corcoran165 asked whether the same rigorous standard of "great and immediate" harm as defined in Younger applies to a case where no state prosecution is pending but there is every reasonable expectation that a violation will be criminally prosecuted; that is, asked the court, must the plaintiff in such a case show bad faith and harassment

152. Thevis v. Moore, 440 F.2d 1350 (5th Cir. 1971).
154. 439 F.2d 1184 (2d Cir. 1971).
with injury more than that incidental to any criminal proceeding, the chilling effect more than that stemming from any vague or over-broad law regulating expression and more than the minor impact on speech incidental to a law of regulating conduct? The court concluded that if this is so then there is no room left for the use of the Federal Declaratory Judgment Act in testing state and federal criminal statutes. Reference was made to Mr. Justice Brennan's extended views in the Perez\textsuperscript{156} case of the Younger \textit{v. Harris} groups but these theories did not prevail in the light of the majority's recognition of a prior pending state prosecution. The \textit{Wulp} court, however, felt it could not dismiss the congressional history reviewed by Mr. Justice Brennan and held that resort was proper to the milder, less intrusive, and more timely remedy of declaratory judgment to test criminal laws, both state and federal.

Some of the same issues were considered by the Third Circuit in \textit{Spencer v. Kugler}.\textsuperscript{157} The majority pronouncement of the Supreme Court in \textit{Samuels} was noted to the effect that where the relief sought by declaratory judgment would require a subsequent injunction to protect or effectuate that judgment, there is, in reality, no practical reason to differentiate between injunctive and declaratory remedies because the practical effect of the two remedies is identical—the disruption of the enforcement by a state of its statute. Because of other reasons for disposition of the case, the court did not attempt to resolve this issue. Obviously, of course, some court or courts will have to attempt to do so. The court's opinion also noted that the distinction between an injunction and a declaratory judgment action had been well-delineated in \textit{Zwickler v. Koota}.\textsuperscript{158}

In the background of all of these cases looms, of course, the anti-injunction statute itself. Future courts, in the context of that statute, as well as the \textit{Dombrowski} and \textit{Younger v. Harris} cases, will have to determine what are extraordinary cases, possibly bearing in mind that they now need to be more extraordinary, and further to determine to what extent, if any, declaratory relief is permissible where there is an impact upon state criminal procedures.

\textsuperscript{156} 389 U.S. 241 (1967).
\textsuperscript{157} 401 U.S. 82 (1971).
\textsuperscript{158} 40 U.S.L.W. 2513 (January 24, 1972).
ANTI-INJUNCTION STATUTE: The anti-injunction statute,\(^{159}\) obviously a factor in theories or applications of abstention in its broad sense, is short and seemingly to the point:

A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The origin of this statute traces back to part of the Act of March 2, 1793 (C.22, 1 Stat. 333, 334) which contained the brief provision: "nor shall a writ of injunction be granted to stay proceedings in any court of a state . . . ." The intervening years found one exception based upon Section 21 of the Bankruptcy Act of 1867. Until 1941, however, the effectiveness of the statute was diminished by restrictive construction and judge-made exceptions.\(^{160}\) In 1941, the Supreme Court, in *Toucey v. New York Life Insurance Co.*,\(^{161}\) reversed the previous trend and revitalized the anti-injunction statute. The issue before the Court in *Toucy* was whether a life insurance company, after having successfully defended against a claim in federal court, could seek an injunction to prevent relitigation of the claim in the state court when it could not remove to the federal court since the claimant had assigned his claim to avoid diversity. The question posed was whether the federal courts could use their injunctive powers, in spite of the statute, "to save the defendants in the state proceedings the inconvenience of pleading and proving res judicata."\(^{162}\)

Mr. Justice Frankfurter, speaking for the majority, rejected the view that such a judicially created exception to the anti-injunction statute was permissible. Indeed, the only judicially created exception he was willing to recognize was an injunction by a federal court to prevent a state court from interfering with a res in the custody of the federal court.

The enactment of the Judicial Code of 1948 apparently rejected the analysis of *Toucy*. The Reviser's Note to this section stated: "Therefore the revised section restores the basic law as generally un-

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159. 28 U.S.C. § 2283.
161. 314 U.S. 118 (1941).
162. *Id.* at 129.
derstood and interpreted prior to the Toucey decision.” Specifically, the exception was added, “to protect or effectuate its judgment.” However, Amalgamated Clothing Workers v. Richman Brothers Co.\textsuperscript{163} construed the revised statute in the Toucey manner. Despite the absolute language of the Court, exceptions have been found. In Leiter Minerals, Inc. v. United States,\textsuperscript{164} Mr. Justice Frankfurter writing for a unanimous Court held that the statute did not bar an injunction against state court proceedings where the United States sought the injunction.

In this setting, one can read Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers\textsuperscript{165} as a reaffirmation of Richman Brothers. The Court once again rejected the view that the Act only establishes a “principle of comity,” not a binding rule on the power of the federal courts. The argument before the Court implied that in certain circumstances the federal court might enjoin state court proceedings even if that action could not be justified by any of the three exceptions.\textsuperscript{166} In rejecting this argument and limiting federal court injunctions of state court proceedings to the three statutory exceptions, the Court merely restated its consistent majority opinion.\textsuperscript{167}

Because of its extended discussion of the anti-injunction statute as an enactment of the principle of comity, and its application in First Amendment freedom of speech cases, the pre-Atlantic Coast Line case of Sheridan v. Garrison\textsuperscript{168} is noted. This was a suit brought by television news reporters to enjoin a criminal prosecution in the state court on the ground that it was an attempt to harass and intimidate reporters in violation of their constitutionally protected rights of free speech. The district court had granted summary judgment in favor of the district attorney. On appeal, the holding of

\begin{itemize}
  \item \textsuperscript{163} 348 U.S. 511 (1955).
  \item \textsuperscript{164} 352 U.S. 220 (1957). The Leiter exception was construed to include a federal agency, N.L.R.B. v. Nash-Finch Co., 40 U.S.L.W. 4037 (Dec. 8, 1971).
  \item \textsuperscript{165} 398 U.S. 281 (1970).
  \item \textsuperscript{166} 398 U.S. at 286-287.
  \item \textsuperscript{167} On this occasion, the only dissenting opinion argued breadth of one of the statutory exceptions and not any judicially implied loophole. In contrast, in the Richman Bros. case, supra, 348 U.S. at 521, Mr. Chief Justice Warren, in dissenting, argued that § 2283 was intentionally written to contract rather than expand the impact of the anti-injunction provision.
  \item \textsuperscript{168} 415 F.2d 699 (5th Cir. 1969), cert. denied, 396 U.S. 1040 (1970).
\end{itemize}
the court was that the statute was not a bar to injunctive relief in the federal courts against a state criminal case in which there is adequate indication that the prosecution is brought in bad faith for the purpose and effect of suppressing free speech in violation of the First Amendment.

In view of *Atlantic Coast Line*, the authoritative effect of *Sheridan* is questionable although the lengthy analysis is worth the reading. As might have been expected, particular reliance was placed upon *Dombrowski*, whose principles were extended in the present case. The court of appeals did emphasize that the decision was in the context of First Amendment rights only and was limited in two other ways. First, the court noted that the criminal prosecution had "begun" only in a technical sense and that trial proceedings were not under way. Second, the court considered only the case in which it appears that if First Amendment rights are in jeopardy, no equally effective protection can be had for such rights other than resort to the federal injunction. Nevertheless, the salvation of the case as authority after *Atlantic Coast Line* remains in the arguable category.

An auxiliary question is now before the courts as to whether the Civil Rights Act falls within the exception of the anti-injunction statute, "as expressly authorized by an Act of Congress." The Supreme Court has heard oral argument in a case raising this issue: *Mitchum v. Foster*. The recent case of *Lynch v. Household Finance Corp.*, had raised this problem but the Court did not decide on this issue. The Court indicated a possible narrowing of the concept of "proceedings in a state court" under the anti-injunction statute. The Connecticut statutory provisions for garnishment were held by the majority not to be such proceedings and therefore the anti-injunction statute was not a bar to an injunction suit.

Another application of the anti-injunction statute is that a federal suit can not be barred merely because a holding of the case might be res judicata as to the same parties litigating the same issue in a state

court. In *County of Allegheny v. Frank Mashuda Co.*,\(^{173}\) upon the foregoing basis, the Court held that since the statute barred only injunctions designed to stay state court proceedings, it would not bar the relief requested in the suit before it, being a suit for ouster, even though the state court condemnation proceedings might be moot.

**STATE'S OWN AFFAIRS:** It has been stated in *Detroit Edison Co. v. East China Township School Dist. No. 3*\(^{174}\) that federal courts generally abstain from exercising jurisdiction in order to avoid conflict with the administration by a state of its own affairs. This is a broad and sweeping statement which seems to have been only an occasional basis for abstention. It is no doubt fair to say that some state authorities at least feel that any action in federal court dealing with state statutes or state procedures conflicts with administration by the state of its affairs. Obviously, the scope of this factor is not sweepingly broad.\(^{175}\)

The rationale here is that those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure. The present factor, to the extent that it is a valid one and a product of ratiocination rather than rationalization, is believed to be one which would be aided by the presence of other factors rather than standing alone as a bald statement of basis. Thus, in *Detroit Edison*, it was noted that there was claimed failure to comply with the state law, including the state constitution, and therefore the federal constitutional claims might well be avoided altogether by the resolution of the local law issues.

In another recent case utilizing the present factor,\(^{176}\) a case involving claims by students that they had been denied registration as voters in the state in which their college was located, abstention was

\(^{173}\) 360 U.S. 185 (1959).

\(^{174}\) Detroit Edison Co. v. East China Township Sch. Dist. No. 3, 378 F.2d 225 (6th Cir. 1967). The plaintiffs had sought a declaration pursuant to 28 U.S.C. § 2201 (1964) that the annexation of two larger school districts in which they owned property violated the Fourteenth Amendment and that the assumption of the bonded indebtedness of the two annexed school districts by the combined district violated both the federal constitution and state law. The complaint was dismissed by the district court, affirmed on appeal.

\(^{175}\) Reliance was placed on *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

\(^{176}\) *Harris v. Samuels*, 440 F.2d 748, (5th Cir. 1971).
approved on the basis that "in a matter of such importance to the State and the Government, federal courts should be slow to intervene but should instead avoid needless conflict with administration by the State of its own affairs." Again, however, the Court recognized that a federal construction of the state statute might be replaced the next day by a controlling state adjudication and that the federal courts might be proceeding to a premature, and perhaps unnecessary, constitutional adjudication. It would seem to be possible to find in these cases a substantial retrenchment from the clear duty, noted elsewhere herein, of the federal courts to exercise their jurisdiction when properly invoked despite difficulty of state law determination and the possibility a state court might later disagree. On the other hand, one can discern elements of avoidance of federal-state friction. In addition, there may be common strains of identification with the Burford-Southern Railway\textsuperscript{177} type of abstention. Clearly, Congress has indicated, as a matter of public policy, certain areas of freedom to the states in the administration of their own affairs.\textsuperscript{178}

**Impairment of State Functions:** The Court observed in Martin\textit{ v. Creasy}\textsuperscript{179} that the considerations which support the wisdom of abstention have been so thoroughly and repeatedly discussed by the Court as to require little elaboration. In addition to the desirability of avoiding unseemly conflict between two sovereignties and the premature determination of constitutional questions, the Court indicated that reflected among the concerns which have traditionally counseled a federal court to stay its hand is the unnecessary impairment of state functions.

In Hostetler\textit{ v. Idlewild Bon Voyage Liquor Corp.,}\textsuperscript{180} the Court referred to many cases in which abstention has been held appropriate where there was danger that a federal decision would work a disruption of an entire legislative scheme of regulation. Just as the origin of the "doctrine of abstention" is frequently ascribed to a particular case, Railroad Commission of Texas\textit{ v. Pullman,}\textsuperscript{181} the present type

\textsuperscript{177} For extended discussion, see infra, notes 186 & 187.
\textsuperscript{179} 360 U.S. 219 (1959).
\textsuperscript{180} 377 U.S. 324, 329 (1964).
\textsuperscript{181} 312 U.S. 496 (1941).
of abstinence is deemed to stem from *Burford v. Sun Oil Co.*182

**STATE ADMINISTRATIVE-REGULATORY PROCEDURE:** Although some aspects of this factor do not fall within the parameters of the classic *Pullman* doctrine of abstention,183 common elements are found to run through both areas of non-exercise of jurisdiction. Thus, in two statutes prohibiting injunctive action by district courts, one dealing with state taxes and the other so-called Johnson Act, dealing with rate orders of state agencies, there is in each a proviso that there must be a plain, speedy and efficient remedy in the courts of the state.

Beyond, however, the statutory interdiction, a body of judicial restraint has been developed in the area of complex state administrative-regulatory procedures. The foreshadowing of this development is no doubt found in *Prentis v. Atlantic Coast Line Co.*184 The cases, however, generally considered as siring this particular branch of abstention are *Burford v. Sun Oil Co.*185 and *Alabama Public Service Commission v. Southern Railway Co.*186 In both cases, the Supreme Court ordered the federal case dismissed on the ground that it involved issues of peculiar local interest regarding which the particular state concerned had established a specialized regulatory system for both decision and review.

The impact of the *Burford-Southern Railway* type of abstention may be limited but should not be ignored. It was unsuccessfully urged as authoritative in *Holmes v. New York City Housing Authority.*187 As the court of appeals there pointed out, "in those cases the federal courts were asked to resolve problems calling for the comprehension and analysis of basic matters of state policy . . . which were complicated by non-legal considerations of a predominantly local nature . . . which made abstention particularly appropriate." Both *Burford* and *Southern Railway*, in the opinion of the court, involved situations to which the federal courts could make small contribution. Further, the state legislatures in those cases had specially concentrated all judicial review of administrative orders in

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182. 319 U.S. 315, 323 (1943).
184. 211 U.S. 210 (1908).
185. 319 U.S. 315 (1943).
187. 398 F.2d 262, 266-67 (2d Cir. 1968).
one state court, in effect designating the state courts and agencies as "working partners" in a local regulatory scheme.

In a recent three-judge court decision in the Southern District of New York, the court based its decision, in part, on what it termed a second recommended area for the application of the abstention doctrine which was where the exercise of jurisdiction would disrupt state administrative processes. It appeared in the case before the court that the administrative process involved the complex relationships between the State of New York and the public employees of that state, in which relationship the court stated it should not unnecessarily intrude.

Even, however, in this area it can not be safely said that other factors commonly evaluated in the determination of whether to abstain or not to abstain may not successfully counterbalance what would appear to be a Burford-Southern Railway type of case. It is interesting to note in this respect that Mr. Justice Frankfurter, the author and exponent of the Pullman doctrine of abstention, dissented in Burford, in which dissent he was joined by three other members of the Court.

POLITICAL QUESTION DOCTRINE: The Kent State University incident provided the basis for a statement regarding the "Political Question Doctrine." The majority of the court in Morgan v. Rhodes held that the district court erred in dismissing the complaint as failing to state a claim upon which relief could be granted.

The majority's opinion adverted to the political question doctrine as follows:

The partial dissent in this case relies basically on a form of abstention usually referred to as the political question doctrine. At the height of its influence in the federal courts, it caused the courts to abstain from adjudicating many asserted federal constitutional violations in fields as widely diverse as voting rights and the rights of prisoners in correctional institutions. The diminished vitality of the political question doctrine is specifically illustrated in such voting rights cases as Reynolds v. Sims, 377 U.S. 533 (1964), and Baker v. Carr, 369 U.S. 186 (1962), and in such prisoner rights cases as Haines v. Kerner, 40 LW 4156 (1972) (Jan. 13, 1972), and Gonzales v. Rockefeller, 40 LW 2376 (1971) (Dec. 28, 1972).

It is suggested that the above quotation no doubt accurately reflects the present status of this particular doctrine. Whether changing political-philosophical concepts of the courts from time to time will make a change in this area is obviously anyone's guess.

**INCIDENTAL FEDERAL QUESTION:** While no case has been noted using the exact phraseology of this factor militating in favor of abstention, such a factor is at least suggested in some of the cases. Thus, in *Hohensee v. Pennsylvania Department of Highways*, the court cited the *Martin v. Creasy* language on full protection of United States constitutional rights being afforded by the state courts. The court of appeals summarily affirmed the denial of a claim to recover judgment for land taken under the "Federal-Highway Act" on the basis that the claimant had not invoked the aid of any state court insofar as the record showed.

A suggestion might also be found in those cases which have declined to decide whether a public school may constitutionally refuse to permit a student to attend solely because his hair style meets with the disapproval of the school authorities. Incidentally, the Supreme Court has, as of the time of this writing, itself abstained from passing on the issue although Mr. Justice Douglas, in dissenting from the denial of a petition for a writ of certiorari, pointed out recently that eight circuits had passed on the question with there being an even division.

The "long hair" cases are, of course, not abstention cases in the classic sense. The Supreme Court's abstention involved three consolidated cases in which dismissals were affirmed in two of the cases with a reversal with instructions to dismiss in the third case. No reason is seen for the retention of jurisdiction nor are these abstention cases in the sense that the claimants are being remitted to state remedies. Nevertheless, they reflect an interesting aspect in

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191. 383 F.2d 784 (3d Cir. 1967).
193. Freeman v. Flake, 40 U.S.L.W. 3468 (March 27, 1972). The cases cited are as follows: upholding school regulations—Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971); King v. Saddleback Jr. College, 445 F.2d 932 (9th Cir. 1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970); and Ferrell v. Dallas Ind. School District, 392 F.2d 697 (5th Cir. 1968); regulations not upheld—Massie v. Henry, — (4th Cir. 1972); Bishop v. Colon, 450 F.2d 1069 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) and Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).
the overall analysis of the point at which boundary lines are to be drawn in the exercise of jurisdiction on claimed federal constitutional questions.

In essence, incidental (or insignificant) federal questions as a factor may be only a different way of saying another or other factors. However, it is clear that the origin of abstention is to be found in the application of equitable principles.

PRIORITY OF FILING: Assuming a situation in which weight is given to the existence of actions of similar import and litigants pending in both federal and state courts, it would appear that some additional weight should be accorded the continuance of the litigation in the forum where first instituted. As is usual throughout the present area of study, other factors can not be ignored. Thus, in the Apodaca case, the state court had acquired possession of the res, a matter treated separately in this article, and original jurisdiction in the state court had not been obtained by "procedural fencing."  

RETENTION OF JURISDICTION: While ordinarily not a factor in the determination of the question of whether to abstain or not to abstain, the manner of implementation of the decision to abstain is clearly a factor in the overall picture. In Pullman, the Court remanded the case to the district court "with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion." In a display of deference to territorial and state courts as the natural sources for the interpretation and application of the acts of their legislatures, the Supreme Court in Stainback v. Mo Hock Ke Lok Po remanded the cause to the district court with directions to dismiss

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195. Apodaca v. Carraher, 327 F.2d 713 (10th Cir. 1964). It is noted that the court in Apodaca refers to the priority of filing and the actual possession of res as ordinarily compelling factors. Quaere as to whether priority is any more than merely persuasive. Also, as indicated in Apodaca, there are usual undercurrents of comity which perhaps are stronger where the state court action has been underway before the federal court action is instituted.

196. 312 U.S. 496, 501 (1941).

the complaint. Without deciding what procedures the district court should follow on remand, the Supreme Court in *Doud v. Hodge* did decide that it was error to dismiss the complaint for lack of jurisdiction.

In *Brown v. Pearl River Valley Water Supply District*, the court expressly directed its attention to the question of whether the district court should have retained jurisdiction and concluded it should not have and that the order of dismissal was proper. Yet, interestingly, the court in its opinion adheres to the view of the district court in its holding “that the questions were of a kind that should be first submitted to the courts of Mississippi.” The Supreme Court, in *Reynolds v. Sims*, while approving the district court’s refraining from acting until the Alabama legislature had been given an opportunity to remedy its apportionment scheme, also found propriety in the district court’s retention of jurisdiction in order to give the provisionally reapportioned legislature an opportunity to act effectively.

What apparently is the present position of the United States Supreme Court was forecast by Mr. Justice Harlan in his dissent in *Dombrowski v. Pfister*. He advocated abstention but further stated that the district court should have retained jurisdiction for the purpose of proffering appellants appropriate relief in the event the state prosecution did not go forward in a prompt and bona fide manner.

However, in *Tomiyasu v. Golden*, the court stated that the district court may either dismiss the action entirely or retain jurisdiction pending litigation in the state court. It pointed out that jurisdiction had been retained where constitutional interests might be

198. Professor Wright discusses the dismissal order of this case on the basis that it can only be regarded as a sport. *Wright, Law of Federal Courts*, § 52 at 198 n.19 (2d ed. 1970). It is not clear whether the abstention area is more subject to this appellation than other areas of the law but it is of interest that Professor Kurland had also termed another abstention case similarly, *Kurland, Supreme Court Review* 81 (1970).


200. 292 F.2d 395 (5th Cir. 1961).

201. *Id.* at 398 (emphasis added).


204. 358 F.2d 651, 655 (9th Cir. 1966).
jeopardized, where nonconstitutional federal issues remain to be decided following the intermediate determination of local issues by the state court, or, finally, where retention is necessary to insure prompt prosecution of the state court action. The court decided that no federal interest required retention of jurisdiction in the case before it. The court did recognize the possibility that new federal constitutional questions might be raised in the state determination but seemed to think that ultimate appeal to the Supreme Court from the state courts was the answer in such event.

In cases arising at about this time, courts of appeals referred to cases as being the application of the abstention doctrine even though there had been a dismissal of the action. Finally, in Zwickler v. Koota, the Supreme Court expressed the opinion that it "is better practice, in a case raising a federal constitutional or statutory claim, to retain jurisdiction, rather than to dismiss . . . ." Although there may be cases which factually indicate that no purpose could be served by retention of jurisdiction, the Zwickler rule has been followed in subsequent cases. The retention of jurisdiction, of course, is consonant with the often repeated characterization that abstention does not involve the abdication of federal jurisdiction but only the postponement of its exercise.

RESERVATION OF FEDERAL CONTENTIONS: The mere retention of jurisdiction would not seem, however, to eliminate a possible pitfall for the unwary litigant. England v. Medical Examiners indicates that a plaintiff who unreservedly litigates his federal claim in a state court may lose his right to return to the district court. This, according to the Court, would be so whether or not the litigant seeks direct review of the state decisions in the Supreme Court.

206. 389 U.S. 241, 244 n.4 (1967).
207. See, e.g., Coleman v. Ginsberg, 428 F.2d 767, 770 (2d Cir. 1970), and Hill v. City of El Paso, 437 F.2d 352, 357 (5th Cir. 1971).
210. Id. at 419.
In view of *Government Employees v. Windsor*, the Court in *England* indicated that the reservation may be accomplished by making a state record which informs the state court that the litigant is exposing his federal claims there only for the purpose of complying with *Windsor* 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." The Court observed, however, that such an explicit reservation is not indispensable and that the litigant is not to be denied his right to return to the district court unless it clearly appears that he voluntarily did more than *Windsor* required and fully litigated his federal claims in the state court.

*England* makes it clear that the right to have ultimate federal determination of the federal issue, assuming no waiver, is not a one way street. The reservation may be made by any party to the litigation. A plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forego his own right to return to the federal court, but he cannot impair the corresponding right of the defendant. The *England* Court pointed out that the defendant may in this event protect his right by either declining to oppose the plaintiff's federal claim in the state court or by opposing it with appropriate reservation. The Court did observe that a refusal to litigate or a reservation by any party may well deter the state court from deciding the federal question.

**FAILURE TO REQUEST ABSTINENCE:** Some courts have noted, apparently in passing, the failure of the litigants to request abstention. The Court in *Hostetter v. Idlewild Bon Voyage Corp.* accepted the district court's decision that abstention was unwarranted "where neither party requested it and where the litigation had already been long delayed, despite the plaintiff's efforts to expedite the proceedings." In *Amsley v. West Virginia Racing Commission*, although

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211. 353 U.S. 364 (1957).
213. It has been the observation of this writer that where a procedure is indicated as being desirable but not mandatory an abundance of caution is a faithful ally.
216. 378 F.2d 815, 818 (4th Cir. 1967).
the application of the doctrine of abstention was neither suggested nor urged in the pleadings, briefs or arguments, the Fourth Circuit indicated awareness of the doctrine by way of dictum, examined its applicability and decided that it would have been inappropriate under the circumstances present in the case. In *Reid v. Board of Education of the City of New York*,\(^\text{217}\) the Second Circuit stated that it "is no answer to the contention that the district court should have abstained, that appellants did not raise their state claims in their complaint. Appellants cannot be allowed to frustrate the policies underlying the doctrine of abstention by this simple expedient."\(^\text{218}\)

The conclusion in this area seems to be that courts will continue to mention the fact that abstention was not requested but will not find this as a factor of any real significance.

**JUDICIAL ECONOMY:** While numerous factors pertaining to whether there should be abstinence appear in the cases, one which seems surprisingly underplayed is that of judicial economy. While there seems to be little argument that the burden on the federal courts is constantly increasing, despite the creation of new federal judgeships, it is doubtful that the worthwhile purpose of achieving judicial manpower conservation should be achieved by abstaining from the exercise of jurisdiction otherwise proper.

Nevertheless, in a recent case in the Southern District of Texas,\(^\text{210}\) in what was characterized as a typical secondary school discipline dispute, the court referred to the rapidly growing field of litigation which seriously impairs economic judicial administration within the federal court system. No doubt district judges have subconsciously entertained such a feeling with regard to the multitude of state prisoner habeas corpus petitions, but a conservation of judicial manpower has not been ordinarily given as a reason for declining relief.

The justification for the recognition of pendent jurisdiction as a doctrine of discretion, not of plaintiff's right, has been stated by the Supreme Court to be in part based upon considerations of judicial economy, both federal and state.\(^\text{220}\)

\(^{217}\) 453 F.2d 238 (2d Cir. 1971).

\(^{218}\) Id. at 242 n.7.


PREAMATURITY: At least one court of appeals has called the resort to the federal courts premature. In a case launched by an association of naturopathic physicians challenging California licensing statutes, the action was dismissed by the district court. Affirming, the court of appeals noted that there had been no effort made to challenge the validity of the statutes in the state courts, and, as a matter of fact, one recent opinion of a California Appellate Court had strengthened the position of the plaintiff. Under these circumstances, the court thought that the filing in the district court was premature.221

FEDERAL MONEY INVOLVEMENT: In Rosado v. Wyman,222 the Court stated that while it was no part of the business of the Court to evaluate, apart from federal constitutional statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, on the other hand, it is peculiarly a part of the duty of the Court, "no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use."223 While the Rosado case involved a matter of pendent jurisdiction, it is believed that the analogy to the abstention situation is sufficient to justify the inclusion of this matter as a factor militating against abstention.224

POSSESSION OF THE RES: In the situation in which litigation existed in both a federal and a state court and was in rem or quasi in rem so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, it was es-

221. The National Association of Naturopathic Physicians v. California State Board of Chiropractic Examiners, 442 F.2d 466 (9th Cir. 1971).
223. Id. at 422-23.
224. An interesting variation of the abstention matter suggested by the Rosado case is abstention in favor of a federal agency as opposed to the state courts in the ordinary case. When the case was before the court of appeals, that court indicated that the district court should have, at least, declined to act on the pendent claim until the Department of Health, Education and Welfare had completed its consideration of the relation between the federal statute and state statute. Rosado v. Wyman, 414 F.2d 170 (2d Cir. 1969). This contention was rejected by the Supreme Court (397 U.S. at 405) because neither principles of exhaustion of administrative remedies nor the doctrine of primary jurisdiction had any application to the situation before the Court. The Court did state, however, that although the formal doctrines of administrative law did not preclude federal jurisdiction, it did not mean that a federal court should deprive itself of the benefit of the expertise of the federal agency primarily concerned with the problems.
tablished prior to the Pullman doctrine that the jurisdiction of one court must of necessity yield to the other court having the res.

This principle is applied in the discharge of the long recognized duty of this court to give effect to such methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States.225

However, the fact that the litigation involved property did not bring the above rule into play. The rule was contended to be applicable in County of Allegheny v. Frank Mashuda Co.226 The contention was made in the context of a condemnation case that the Board of Viewers had established jurisdiction over the subject land. The Court's short answer was that the Board of Viewers under Pennsylvania law did not have in rem jurisdiction over the property and that the damage proceeding was simply an in personam suit to determine what the state must pay for the property appropriated. On the other hand, where the state court was in actual possession of the res and litigation had been first initiated in the state court, both reasons were found compelling by the Tenth Circuit for the federal court to refrain from entertaining jurisdiction.227

CHOICE OF FORUM: This factor, which seems to be adverted to most frequently in diversity cases, is couched in terms of Congress having authorized plaintiffs to choose a federal forum to try their suits if there is diversity of citizenship and, of course, if the requisite jurisdictional amount is involved. Principally, it has been stated, this is to allow suitors to avoid local prejudice.228

As might be expected, the flat statement regarding choice of forum is tempered in other cases. In a case involving suit by a federal agency, it was stated that unless "there is an explicit exception to the duty of a federal court to hear a case to which Congress has extended its jurisdiction, that duty may not be disregarded." The court then stated that the only possible exception in the case before

227. Apodaca v. Carraher, 327 F.2d 713, 714 (10th Cir. 1964). The general rules here applicable are discussed in Miller v. Miller, 423 F.2d 145, 146 (10th Cir. 1970), although in that case neither court had taken possession of the property.
228. Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380, 385 (2d Cir. 1968).
it was that which allows abstention.\textsuperscript{229} But the abstention doctrine as an exception is to be applied only in narrowly limited circumstances.\textsuperscript{230}

**FORUM NON CONVENIENS:** This factor, as stated in *Hoffman v. Goberman*,\textsuperscript{231} recognizes that while a litigant does not have an absolute right under all circumstances to maintain his suit in a federal court, his election of such a forum otherwise proper should not be disregarded in the absence of persuasive evidence that the retention of jurisdiction will result in manifest injustice to the defendant.

A type of abstention is involved in the relationship of one district court to another district court. The *Hoffman* court held that

A district court may in the interest of justice decline to pass upon the merits of a controversy and relegate the plaintiff to a more appropriate forum . . . However, when the doctrine of *forum non conveniens* is invoked on a motion to dismiss, 'it is subject to careful limitation and applied only in exceptional cases and unless the balance is strongly in favor of the defendant the forum chosen by the plaintiff should not be disturbed.'\textsuperscript{232}

**EXHAUSTION OF REMEDIES:** Occasionally, apparently aberrant references to exhaustion of remedies are found in the cases dealing with abstention in the narrower or quasi-	extit{Pullman} sense. Thus, in *Amsley v. West Virginia Racing Commission*,\textsuperscript{233} the district court, considering only lack of exhaustion of remedies, granted the defendant's motion to dismiss. The court of appeals, noting that the Commission's action with regard to the plaintiff was the exercise of a judicial function, held that there is no requirement that a person aggrieved by a decision of a state administrative agency performing a judicial function must first apply for relief in the courts of that state. "On the contrary, it is well settled that resort to a federal court may be had without first exhausting the judicial remedies of state courts."\textsuperscript{234} The court of appeals, by way of dictum, considered the possible application of the doctrine of abstention and found it inapplicable.\textsuperscript{235}

\textsuperscript{229} Federal Savings & Loan Corp. v. Krueger, 435 F.2d 633, 637 (7th Cir. 1970).
\textsuperscript{230} Moreno v. Henckel, 431 F.2d 1299, 1307 (5th Cir. 1970).
\textsuperscript{231} 420 F.2d 423, 428 (3d Cir. 1970).
\textsuperscript{232} Id. at 426. See also Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).
\textsuperscript{233} 378 F.2d 815 (4th Cir. 1967).
\textsuperscript{234} Id. at 817.
\textsuperscript{235} Id. at 818.
In Damico v. California, plaintiffs challenged certain provisions of the California Welfare and Institutions Code on the grounds that the statute and regulation were discriminatory and that the state in administering them had also deprived plaintiffs of their equal rights. A three-judge district court dismissed the complaint solely because it appeared that "all of the plaintiffs [had] failed to exhaust adequate administrative remedies." The Court in a per curiam decision summarily reversed on the basis that the Civil Rights Act sought to provide a remedy in the federal courts supplemental to any the state might provide and that relief under the Civil Rights Act may not be refused because relief is not first sought under state law which provides an administrative remedy.

A distinction was drawn in Moreno v. Hencke between exhaustion of state administrative remedies as opposed to state judicial remedies although the cases cited in the opinion clearly hold that in Civil Rights Act cases there is no necessity for exhausting adequate state administrative remedies. In any event, the district court had dismissed the complaint on the assumption of a necessary relationship between exhaustion of state judicial remedies and the abstention doctrine. The court of appeals here drew another distinction, stating that exhaustion of state remedies as a prerequisite to considering a case on the merits is a jurisdictional or a pseudo-jurisdictional requirement, while the abstention doctrine assumes that the court has jurisdiction. Thus, there is no general rule forbidding the court to act absent exhaustion of state judicial remedies.

It would seem, however, even in the correctly-called exhaustion cases, that the courts are dealing with, at most, a pseudo-jurisdictional requirement. It would appear that the exhaustion doctrine is not jurisdictional in the technical sense of that term and that the district court has jurisdiction which under the statute it does not exercise. What has been dealt with under this topic, of course, has no application to abstention in the broader conceptual sense such as

237. Id. at 417.
238. 431 F.2d 1299 (5th Cir. 1970).
239. "There are good reasons in favor of requiring exhaustion of administrative remedies which are not applicable to exhaustion of state judicial remedies." Id. at 1306-07.
240. Baldwin v. Lewis, 442 F.2d 29, 35 (7th Cir. 1971).
that involved in state prisoner habeas corpus proceedings or, in all probability, in other statutory types of proceedings requiring exhaustion of remedies before the exercise of district court jurisdiction.

At this point, it is appropriate to note what appears to be a tightening of adherence to the requirements of exhaustion of remedies as indicated by some recent cases. For example, in *Picard v. Connor*\(^241\) it was held that the substance of a state prisoner's habeas corpus claim must, in the first instance, be fairly presented to the state courts. It was immaterial that the respondent had presented all the facts, as the state court had not had a fair opportunity to consider the equal protection claim nor to correct this asserted constitutional defect in the respondent's conviction. "The claim that an indictment is invalid," stated the Court, "is not the substantial equivalent of a claim that it results in an unconstitutional discrimination."\(^242\)

Recognizing that *exhaustion of remedies qua* habeas and similar situations in confrontation with *remission to state remedies qua* abstention may be a resultant tweedledum and tweedledee, the law will perhaps be less disturbed if the distinction between them is not referred to as an interesting semantical exercise. Rather, the boundaries separating them should be maintained, and that is where the matter will be left herein.

**CLARITY OF DISTRICT COURT ORDER:** Generally, the factors under consideration have been those which have led to the determination of the applicability of or necessity for abstention. After the decision to apply the abstention doctrine has been reached the form of the abstention order becomes important.

The form of the order in the event of favorable or unfavorable action may have an impact upon appealability. Further, a significant problem is that which was involved in *England v. Medical Examiners*\(^243\) as to whether a litigant who has gone to the state court has stayed there to the extent of litigating to a conclusion his federal claims. As was pointed out in *England*, the district court's abstention order, "in instructing appellants to obtain a state court determina-

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242. *Id.* at 278. *See also* United States ex rel. Wilson v. Rowe, 454 F.2d 585 (7th Cir. Dec. 2, 1971).
tion not of the state question alone but of 'the issues here presented,' was also misleading." 244

In Williams v. Murdoch, 245 difficulty was occasioned by the fact that the court of appeals could not ascertain clearly whether the district court was attempting to apply the abstention doctrine or to remand the case to the state court or to do both. The order being at best ambiguous, the court could not treat the district court order as an exercise of abstention. As a result, the orders of the court below were vacated and the cause remanded for further proceedings (of clarification, delay and expense). In Detroit Edison Co. v. East China Township School Dist. No. 3, 246 the district court order was criticized in that it was grounded on inconsistent alternative holdings, one reaching the merits and the other sustaining abstention. It was pointed out that the district court should not have reached the merits where abstention was proper. As a decision based on such alternative holdings, the decision needlessly decides a constitutional issue and is in the nature of an advisory opinion. Over and above being the creator of confusion, the breadth of the decision might be subject to scrutiny in the state courts in the form of the defense of res judicata.

PENDENT JURISDICTION: Pendent jurisdiction is ordinarily not considered a factor in determining abstention. However, in a broader sense, it, itself, involves a type of abstention or nonabstention to which a number of the factors herein discussed are applicable. When exercised, it may involve state law questions; it is a matter of discretionary use of power and its justification lies in considerations of judicial economy, convenience and fairness to litigants. Comity matters between the state and federal systems are also involved. 247

A.H. Emery Co. v. Marcan Products Corp. 248 reflects the fact that the exercise of pendent jurisdiction may be influenced by the fact that abstention from the exercise of federal jurisdiction would be unwise at "this late date." The court, it was felt, should not tell

244. Id. at 422 n.14.
245. 350 F.2d 840, 842 (3d Cir. 1965).
246. 378 F.2d 225 (6th Cir. 1967).
248. 389 F.2d 11 (2d Cir. 1968).
the parties to litigate the matter anew in the state court. The district court was found not to have abused its discretion.

A further liberalization of the exercise of pendent jurisdiction is found in *Rosado v. Wyman*, in which the Court was not willing to defeat the common sense policy of pendent jurisdiction by a too rigid conceptual approach.

**SAME LITIGATION IN TWO OR MORE FEDERAL COURTS:** Although probably beyond the already extended scope of this article, an interesting situation by way of analogy, justifying at least passing reference herein, exists in the case of duplicating litigation in two or more federal courts. There appears to be no rigid or inflexible rule for determining priority of cases in such event but wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation does not counsel rigid mechanical solution to such problems. Perhaps the application of factors demonstrated in this article might in some instances be helpful.

**SUPREME COURT ABSTENTION:** As has been developed elsewhere herein, it has been indicated that the difficulty of resolution of state legal questions is not per se a basis for declining existing jurisdiction. That this difficulty may nevertheless be entitled to weight is reflected in a case involving, original jurisdiction of the Supreme Court. The State of Ohio had sought leave to file a bill invoking the Supreme Court's original jurisdiction against the defendant companies, incorporated in Michigan, Delaware and Canada, to abate an alleged nuisance resulting in the contamination and pollution of Lake Erie from the dumping of mercury into its tributaries. Although admitting that it did have jurisdiction to hear the case, the Court declined to exercise its jurisdiction since (1) the issues were bottomed on local law that the Ohio courts were competent to consider; (2) several national and international bodies had been actively concerned with the pollution problems involved; and (3) the nature of the case required the resolution of complex, novel, and

technical factual questions that do not implicate important problems of federal law, which are the primary responsibility of the Court (and which sometimes have troubled the Court greatly in prior attempts at original jurisdiction). The Court applied a twofold test:

(1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to its other responsibilities. Mr. Justice Douglas dissented with primary emphasis on the transcending public importance of the case.253

At the time this article was under final preparation, the news media254 carried an article indicating that approximately one year after the Ohio decision, action had been instituted in the Cuyahoga County Common Pleas Court of Ohio. The news article indicated that the Ohio suit was a broader version of the earlier suit, indicative perhaps that the time lost by nonexercise of jurisdiction in one court may not be a total loss (at least from the plaintiff's viewpoint) if it results in further research and an improvement of the basic lawsuit.

ACT OF STATE: The expropriation by Cuba of an American corporation's sugar was the basis for an elaboration on the scope of the act of state doctrine, the litigation pertaining to which will provide an evening of interesting legal reading.255 The Second Circuit noted that the act of state doctrine had been recognized and applied by it and other courts, stemming from the desire of the judiciary to avoid possible conflict with or embarrassment to the executive and legislative branches of our government in its dealings with foreign nations. This attitude was coupled with a positivistic concept of territorial sovereignty and fear of hampering international trade by rendering titles insecure. Nevertheless, the court found that the Cuban decree of expropriation was in violation of international law and refused to find an applicable basis for nonexercise of jurisdiction in the act of state doctrine. The Supreme Court disagreed and reversed.

253. Id. at 499.
Congress disagreed with this particular form of abstention and passed the Hickenlooper Amendment, sometimes referred to as the Sabbatino Amendment.\textsuperscript{256} The American corporation ultimately prevailed on the basis that the Hickenlooper Amendment required that the legality of the expropriation be decided on the merits, using applicable principles of international law, unless the executive branch intervened. The litigation, interesting though it may be to read, is of primary concern here only in that the act of state doctrine is a continuing viable basis for nonexercise of jurisdiction in ordinary cases involving acts of foreign states.

While thoughts are many and varied on this particular item, it is appropriate to note the holding in \textit{Hoffman v. Goberman}.\textsuperscript{257} The court recognized that while it has been held that a court will not exercise jurisdiction to regulate the internal affairs of a foreign corporation, there is no absolute rule of law which requires dismissal of an action on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation. The court noted that the foreign aspect was only one factor to be considered along with the convenience of the parties and witnesses. The desirability of trial in a forum familiar with the law of the corporation's domicile and the enforceability of the remedy, if granted, may be analogized to the difficulty of ascertaining state law in the ordinary situation of diversity litigation. The court found there was not sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it.

\textbf{STAY OF CIVIL PROCEEDINGS IN STATE COURT:} The thrust of the present article, of course, is entirely on the matter of abstention at the federal level. The other side of the coin, \textit{i.e.}, stay of civil proceedings in a state court pending determination of action in the federal court in the same state, is the subject of an annotation.\textsuperscript{258}

\textbf{CASE-BY-CASE ANALYSIS:} The ascertainment of the existence of the circumstances requisite to, if not calling for, the application of the abstention doctrine must be made on a case-by-case basis.\textsuperscript{259} In

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\textsuperscript{256} See Banco Nacional de Cuba v. Farr, 383 F.2d 166, 171 n.5 (1967).

\textsuperscript{257} 420 F.2d 423, 427 (3d Cir. 1970).

\textsuperscript{258} Annotation, Stay of civil proceedings pending determination of action in federal court in same state. 56 A.L.R. 2d 335 (1957).

\textsuperscript{259} Baggett v. Bullitt, 377 U.S. 360, 375 (1964); Hill v. City of El Paso, Texas, 437 F.2d 352, 357 (5th Cir. 1971).
looking at each case, the facts and circumstances must be carefully examined to see if the countervailing interests are, on balance, more important to the federal constitutional system than a litigant's right to a federal forum.  

**MISCELLANY:** In an extremely broad meaning of the term abstention, any court action which is dispositive of a case without the merits being reached could be considered a situation of abstention. Thus, dismissal of an appeal for failure to comply with rules of court could be so considered. The scope of the analysis of this subject is far too broad for the intended scope of this article. The matter, however, was brought to the attention of the writer by an order of the Supreme Court. In that case, the appeal was dismissed for failure to docket the case within the time prescribed. Mr. Justice Douglas dissented, pointing out past uneven applications of the Rule. He concluded, "I cannot acquiesce in an arbitrary practice which permits the Court to sweep unpleasant cases under the rug." This appears to be a salutary admonition in any area of abstention. The fact that a case is unpleasant should not be the basis for avoidance whether achieved by arbitrary or by non-arbitrary practice.

The approach that has been used in this article has been that of considering various factors articulated by the courts. Possibly a factor which was not developed related to the type of case which the court may have before it. Certainly of interest on this subject is an analysis, which time and space does not permit herein, of whether certain types of cases are more likely to be the basis of abstention or the basis of abstention for denial. Clearly, in the growing area of civil rights litigation in the federal courts, it can. As correctly stated in *Wright v. McMann*, it is reasonable to conclude that cases involving vital questions of civil rights are the least likely candidates for abstention. Where other types of cases may fall will be dependent to a considerable extent upon a current analysis of the public weal significance.

The duty of the federal court, at least in the area of civil rights,

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262. 387 F.2d 519, 525 (2d Cir. 1967).
has been clearly set forth in an often quoted statement of Mr. Justice Douglas in *McNeese v. Board of Education*:\(^\text{264}\)

We would defeat those purposes [of the Civil Rights Act] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court. The First Congress created federal courts as the chief—though not always the exclusive—tribunals for enforcement of federal rights.

While, as mentioned at the beginning of this article, primary reliance has been placed on appellate court cases, a tabulation of district court opinions in this area does reveal some interesting information. Of 225 cases reviewed in which the courts dealt with the abstention issue in its opinion, the court abstained in 102, or approximately 45%. Of the 123 cases in which the court rejected a request by one party that it abstain, 26 specifically mentioned the "chilling" of First Amendment rights as a prime consideration; 24 that no possible construction of the state law could avoid the federal constitutional question; 19 that the statute or issue of state law was clear on its face; 12 that the state court had previously construed the statute and thus there was no unclear question of state law:\(^\text{265}\) Significantly, in 26 of the cases in which the court did not abstain, the ruling on the merits was for the defendant who had raised the abstention issue. Thus, the issue of abstention in those cases rarely received appellate review since the party seeking it won on the merits below.

Of the cases in which the district courts did abstain, by far the most frequent specific reason given was to avoid having to rule on a federal constitutional question when an authoritative decision on a question of state law would eliminate or substantially modify the federal question (34 cases). In 17 cases, the district courts specifically mentioned the availability of a state remedy, either administrative or judicial, as grounds for abstaining; 15 cases noted that the state courts were already handling the problem properly. Finally, 18 cases specifically opted for allowing a state court the first opportunity to construe a state statute. Most striking of all was the number of cases which did not fit into any clear pattern or based a decision on some of the less frequently articulated factors noted in the foregoing article.

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\(^{264}\) 373 U.S. 668, 672 (1963).

\(^{265}\) As might have been expected, numerous cases reflect a decision based on more than one factor for refusing to abstain.
As this article heads toward the printer, the news media present one more possible area of quasi-abstention, namely, the suggestion of statutorily imposed deprivation of jurisdiction in the so-called busing cases. The suggestion is that under Article III of the Constitution, Congress is granted the right to make "such exceptions" to the Supreme Court's appellate jurisdiction as it sees fit. No further comment will be made on the present matter than that a serious question might be posed as to whether legislation which itself constituted a constitutional invasion could be precluded from judicial review as to the constitutional issue.

CONCLUSION

The conclusion to be drawn from a compilation of the abstention factors would seem to be surprisingly clear and certain—hindsight is a valuable judicial attribute when determining whether or not to refrain from the exercise of jurisdiction. Lacking that, it appears that a careful analysis must be made of the particular case at hand in the light of the factors that have been found persuasive in that type of case at the juncture then involved. Since the pulls may be both ways, the sensitive process of balancing must then be utilized. It is to be hoped that with the ever-increasing case loads of all courts, greater latitude than has sometimes seemed to exist will be accorded the result which has flowed from what is obviously a well reasoned exercise of discretion. Discretion should not be a Hobson's choice.

Optimistically, neither the balancing judges, nor the writer of this article, will have to echo Terence's words, Hoc Pretium ob stultitiam fero.

266. Chicago Sun-Times, April 2, 1972, at 6.


268. The foregoing article was completed in April 1972. With the hope that no obsolescence of major proportions has set in, the article will stand as of May 1, 1972, except as to the following matters which have come, unsought, to the writer's attention.


(b) The writer had looked with favor upon a process of balancing the various pro and con factors appropriate to the factual and legal situation involved. Lake
“In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been 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 a judgment. Commonwealth Trust Co. v. Bradford, 297 U.S. 613, 618; Risty v. Chicago, R.I. & P. Ry. Co., 270 U.S. 378, 387; Kline v. Burke Construction Co., 260 U.S. 226, 234-235; McClellan v. Carland, 217 U.S. 268, 281-282. 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.

“The exceptions relate to the discretionary powers of courts of equity. An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. Beal v. Missouri Pacific R. Co., 312 U.S. 45, 50. Exercise of that discretion by those, as well as by other courts having equity powers, may require them to withhold their relief in furtherance of a recognized, defined public policy. Di Giovanni v. Camden Insurance Assn., 296 U.S. 64, 73, and cases cited. It is for this reason that a federal court having jurisdiction of the cause may decline to interfere with state crim-

Carriers' Assn. v. MacMullan, 406 U.S. 498 (1972), might seem to cast some doubt on the per se value of balancing. In Lake Carriers, the Court was reviewing a case in which a three-judge court had abstained on various specified grounds (or factors). The Supreme Court concluded that “abstention was not proper on the majority of the grounds given by the District Court,” but held that abstention was, nevertheless, appropriate for another reason suggested, but not fully articulated, in the lower court opinion. The factor carrying the day was that the state statute was susceptible to a construction by the state courts that would avoid or modify the federal constitutional question.

It can scarcely be said that the balancing scales were tipped by the factor—at least in the ordinary use of that term—as no weight whatsoever was apparently given to the other factors enumerated by the district court. Nevertheless, the fact remains that the careful marshalling of all of the factors required for a proper balancing process will likely produce the factor or factors to sustain the result reached, even if some of the factors are ultimately on appeal found to be alien to the scale.
inal prosecutions except when moved by most urgent considerations, Spielman Motor Co. v. Dodge, 295 U.S. 89, 95; Beal v. Missouri Pacific R. Co., supra, 49-51; Douglas v. Jeannette, 319 U.S. 157; or with the collection of state taxes or with the fiscal affairs of the state, Matthews v. Rodgers, 284 U.S. 521; Stratton v. St. Louis Southwestern Ry. Co., 284 U.S. 530; Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293; or with the state administrative function of prescribing the local rates of public utilities, Central Kentucky Gas Co. v. Railroad Commission, 290 U.S. 264, 271 et seq. and cases cited; or to interfere, by appointing a receiver, with the liquidation of an insolvent state bank by a state administrative officer, where there is no contention that the interests of creditors and stockholders will not be adequately protected, Pennsylvania v. Williams, 294 U.S. 176; Gordon v. Ominsky, 294 U.S. 186; Gordon v. Washington, 295 U.S. 30; cf. Kelleam v. Maryland Casualty Co., 312 U.S. 377, 381. Similarly it may refuse to appraise or shape domestic policy of the state governing its administrative agencies. Railroad Commission v. Rowan & Nichols Oil Co., 311 U.S. 570; Burford v. Sun Oil Co., 319 U.S. 315. And it may of course decline to exercise the equity jurisdiction conferred on it as a federal court when the plaintiff fails to establish a cause of action. Cavanaugh v. Looney, 248 U.S. 453; Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159. So too a federal court, adhering to the salutary policy of refraining from the unnecessary decision of constitutional questions, may stay proceedings before it, to enable the parties to litigate first in the state courts questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented. Railroad Commission v. Pullman Co., 312 U.S. 496; cf. Thompson v. Magnolia Petroleum Co., 309 U.S. 478. It is the court's duty to do so when a suit is pending in the state courts, where the state questions can be conveniently and authoritatively answered, at least where the parties to the federal court action are not strangers to the state action. Chicago v. Fieldcrest Dairies, 316 U.S. 168. In thus declining to exercise their jurisdiction to enforce rights arising under state laws, federal courts are following the same principles which traditionally have moved them, because of like considerations of policy, to refuse to give an extraordinary remedy for the protection of federal rights. United States ex rel. Greathouse v. Dern, 289 U.S. 352, 359-361; see Virginian Ry. Co. v. System Federation, 300 U.S. 515, 551-552 and cases cited; cf. Securities & Exchange Comm'n v. United States Realty Co., 310 U.S. 434, 455 et seq."