NOTE

ABSTENTION: AN EXERCISE IN FEDERALISM

INTRODUCTION

Although the doctrine of equitable abstention is a relatively new concept, its roots are deeply embedded in our constitutional history. Judicially constructed to avoid the premature determination of federal constitutional issues and to minimize federal interference with state domestic policy and state action, the doctrine found its first authority in the traditional discretionary powers of an equity court. The existence of two concurrent sovereignties within the federal system, the peculiar structure of the double judicial hierarchy, the various bases of federal jurisdiction and the divergences in subject coverage, language, and construction between the various state constitutions and the federal constitution have provided potential areas of conflict between federal and state power and complicated the judicial application of the maxim that unnecessary constitutional adjudications are to be avoided. The pattern of increased state regulation of economic and social life has realized these conflicts and occasioned the need for self-imposed restraint by the federal courts in order to preserve a balanced system. A growing reluctance to interfere with state officials in the performance of their duties and the development of a policy of furthering harmony in federal-state relations resulted in formulation of the doctrine of abstention where the prescribed "exceptional circumstances"—those encouraging

---

1 Equitable abstention is one of a number of limitations developed both by judicial and by legislative action to curb excessive exercise of the federal judicial power following the Supreme Court's decision in Ex Parte Young, 209 U.S. 123 (1908). It is somewhat akin to the doctrine of exhaustion of state administrative remedies, and is "responsive to the same motives" which impelled Congress to require the convening of a three-judge district court to pass on challenges to state statutes, 28 U.S.C. § 2281 (1952), challenges to the collection of state taxes, 28 U.S.C. § 1341 (1952), and attacks on state rate orders, 28 U.S.C. § 1342 (1952). Its development closely followed the fashioning of the doctrine that the federal courts would not enjoin the enforcement of state criminal statutes. Cf. Wright, The Abstention Doctrine Reconsidered, 37 Texas L. Rev. 815 (1959).

2 The leading abstention case is Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), discussed in text accompanying notes 9-22 infra. Mr. Justice Frankfurter, there discussing the foundation of the doctrine, wrote: "The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication. An appeal to the chancellor . . . is an appeal to the 'exercise of the sound discretion, which guides the determination of courts of equity'. . . . The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction." 312 U.S. at 500.

3 See Young, Discretion to Deny Federal Relief Against State Action, 28 Texas L. Rev. 410 (1950). See also note 1 infra.
comity or seeming to press toward potentially premature constitutional
decision—were found to be present. Despite earlier unanimity on the
expression of the formula for abstention, the Supreme Court, in handing
down five decisions on June 8, 1959, was divided not only on the "application" but on the scope of the doctrine as well. In particular, the decision in *Louisiana Power & Light Co. v. City of Thibodaux* requires a re-examination of past precedent, since the division among the members of the Court in this case represents basic disagreement on a number of substantial issues which had heretofore been considered settled. It is the purpose of this Note to ascertain the import of the group of recent decisions, to explore the issues raised, and to attempt an evaluation of the proper scope of the abstention doctrine.

**History**

Although the Court had had occasion prior to 1941 to restrain the action of lower federal courts in situations that would now be typified abstention cases, it was not until that year, in the carefully fashioned opinion of Justice Frankfurter in *Railroad Comm'n v. Pullman Co.*, that the doctrine of equitable abstention received its full expression. The Texas Railroad Commission, acting under the authority of a Texas statute which empowered it to "prevent discrimination . . . and any or all other abuses," adopted an order directing that no Pullman car could be operated on any Texas railway unless in the charge of a white "conductor." Asserting diversity as the basis of jurisdiction, the Pullman Company and its colored porters appeared before a duly constituted three-judge federal district court challenging the order both as unauthorized under Texas law and as violative of the due process and equal protection clauses of the fourteenth amendment, and seeking an injunction prohibiting state officials

---

4 The decision in the *Pullman* case, 312 U.S. 496 (1941), was 8-0. Justice Roberts took no part in decision of the case.

6 28 U.S.L. Week 3049 (U.S. Aug. 25, 1959) (Review of Supreme Court's Work: Jurisdiction and Procedure). This writer apparently regarded the division in the Court as occasioned merely by a disagreement over "application" of a firmly established doctrine. Close examination of the cases, however, indicates that the split has far wider implications. See notes 104-32, 145-74 infra and accompanying text.


9 312 U.S. 496 (1941).

from enforcing it. This court, in the absence of state decisions construing the statutory language, itself determined that the commission lacked authority to promulgate the order, and issued the injunction sought. On direct appeal, the Supreme Court reversed and remanded with directions to retain jurisdiction but stay proceedings until such time as the parties could obtain definitive interpretation of the disputed statute from the Texas courts. Since the action below was equitable in nature and equity courts had traditionally retained broad discretionary powers in the exercise of their jurisdiction, there was an historic foundation to support the directed stay of the proceedings. Furthermore, Justice Frankfurter, speaking for a unanimous Court, relied on two distinct lines of precedent to reach this result. Pennsylvania v. Williams and Spielman Motor Co. v. Dodge represented instances where district courts sitting in equity proceedings had out of "scrupulous regard for the rightful independence of the state governments" exercised a "wise discretion" in restraining their authority. Injunctive relief had been denied in these cases on grounds of the comity due to state courts and to avoid obstruction of state administrative policy. On the other hand, Thompson v. Magnolia Petroleum Co. and Gilchrist v. Interborough Transit Co. illustrated the type of case where federal courts had stayed proceedings pending a determination of "unsettled" state law by the state courts, thus avoiding in whole or in part decision of a federal constitutional issue when the case in which it was presented might be disposed of on other grounds. Mr. Justice Frankfurter reasoned that deci-

12 See note 2 supra.
16 Ibid.
17 309 U.S. 478 (1940).
18 279 U.S. 159 (1929).
19 The distinction between the terms "unsettled" and "uncertain" or "difficult to ascertain" as applied to state law is an important one. As used in this Note, "unsettled" refers to situations in which an ambiguously worded state statute has not previously been construed by the state courts or in which there has been no expression by those courts on a common-law issue. The expressions "uncertain" and "difficult to ascertain" refer to situations where state statutes have been construed or where there is a body of doctrine available, but where decision in the instant case would require reasoning by analogy from, or interpretative extension of, this established precedent. For a discussion of the problem of federal courts in diversity finding state law see Note, 59 COLUM. L. REV. 504 (1959).
20 Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940), involved determination of ownership rights to certain minerals under a railroad right of way. While the substantive rights of the parties did not involve a constitutional issue—ownership was clearly a matter to be determined by state law—the question as to what court could constitutionally adjudicate those rights was fundamentally involved. The decision to "separate" the state issue and submit it to the state courts can, therefore, be viewed as avoiding more reaching jurisdictional questions. Furthermore, this case involved a peculiar type of federal equity jurisdiction, that of a bankruptcy court, and inasmuch as bankruptcy law particularly premises an intermeshing of state and federal law, the case is of special moment.
sion by the district court as to what authority the Texas statutes granted the Texas Railroad Commission was in fact "a forecast rather than a determination," \(^{21}\) especially since there were no authoritatively controlling Texas decisions or even decisions susceptible of application by analogy. In addition, issuance of an injunction would block the efforts of state regulatory officials to cope with an important matter of local concern. Thus, both lines of precedent merged: all the factors previously relied on—request for injunctive relief, "unsettled" state law, ongoing state administrative operations, federal constitutional question—were present in *Pullman*, and it is easy to understand why the Court was unanimous.\(^{22}\) The cases that followed, however, brought into sharper relief some of the problems inherent in attempting to apply this policy to the varied fact situations presented to the Court.

In general terms, those cases decided prior to the 1958 term again fall into two categories depending upon which of the two pertinent interests, comity or the avoidance of premature constitutional adjudication, predominates. Some suggestion has been made that other factors such as the invocation of diversity as opposed to federal question jurisdiction, and the novelty or difficulty of the federal constitutional question, might or should have influenced the course of the decisions,\(^{23}\) but opinions of the Court provide little support for such propositions. Two Justices, Douglas and Frankfurter, have in several dissents and concurrences concerned themselves with the particular jurisdictional grounds on which the case was presented,\(^{24}\) but no majority appears to have drawn any jurisdictional distinction. While it is true that in diversity cases a special congressional mandate for swift decision applies,\(^{25}\) interpretation of state law is here more frequently, more centrally determinative,\(^{26}\) and the Court has not appeared

---

\(^{21}\) *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941).

\(^{22}\) Justice Roberts took no part in decision of the case.


\(^{24}\) Justice Douglas in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957), appears to have based his dissent on the theory that abstention is not proper in a case where the federal government is a party. Cf. his dissenting opinions in *Harrison v. NAACP*, 360 U.S. 167, 179 (1959) (jurisdiction premised on civil rights statutes), discussed in text accompanying notes 68-83 infra; *Government & Civic Employees v. Windsor*, 353 U.S. 364 (1957) (issue of employees' right to join unions). In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), Justice Frankfurter's vigorous dissent was directed at the Court's alleged unwarranted undermining of the congressional mandate of diversity jurisdiction.

\(^{25}\) *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 187 (1959): "[A] District Court cannot refuse to discharge the responsibility, imposed by Congress under 28 U.S.C. §§ 1332, 1441, to render prompt justice in cases where its diversity jurisdiction is invoked." (Emphasis added.) Cf. Justice Frankfurter's dissenting opinion in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and cases therein cited. While the statute does not in express terms command "promptness" of decision, the courts have interpreted 28 U.S.C.A. § 1332 (Supp. 1959), and 28 U.S.C. § 1441 (1952), as requiring this result. See *Meredith v. Winter Haven*, 320 U.S. 228 (1943), and cases therein cited. *But see note 46 infra.*

\(^{26}\) A federal court sitting in diversity cases is considered for most decisional purposes another court of the state whose law it is called on to apply. It is under
in any brand of cases to be hesitant in requiring or allowing abstention if either of the two "exceptional circumstances" was found to be present. Nor has the Court appeared to have been motivated in its decisions by the degree of difficulty of the constitutional question that was raised. That a sharp line has been drawn, however, between cases involving constitutional questions and those involving other federal questions is evident; the doctrine of avoiding premature determination of constitutional issues has not been extended to issues of non-organic federal law.

Refusal to allow the federal courts to become enmeshed in matters concerning the appraisal or the shaping of state domestic policy in relation to functions granted to state administrative agencies or subdivisions would appear to be the key to the decisions in *Burford v. Sun Oil Co.* and *Alabama Pub. Serv. Comm'n v. Southern Ry.* Both of these cases came to the federal courts by way of diversity of citizenship, both involved federal constitutional claims, yet the Court, citing *Pullman* in directing dismissals of the actions, emphasized the comity principle. It is significant that Justice Frankfurter, author of the *Pullman* doctrine, rested his dissent in the former and his concurrence in the latter case upon the ground that the state law in each was "settled" and that therefore, in the face of the congressional prescription of prompt determination in diversity cases, the majority was patently in error in not directing decision. And while it appears that the principle of comity again influenced the Court's holding in

an affirmative duty to discover what the state law is and to apply it regardless of its own predilections. See Note, 59 Colum. L. Rev. 504 (1959), and cases therein cited.

27 See Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); notes 9-22 supra and accompanying text.


29 319 U.S. 315 (1943). This case involved a Texas Railroad Commission order allocating production of oil and gas in a certain field. The commission was empowered to secure the conservation of oil and natural gas resources of the state through the medium of production quotas. The Court rested its refusal to permit federal determination of the plaintiff's claim that the commission was acting in excess of its authority on the ground that the exercise of federal jurisdiction would require interfering in a regulatory scheme of important local concern.

30 341 U.S. 341 (1951). The question presented was the validity of an order by the Alabama Public Service Commission to a railroad company directing it to continue service on two intrastate lines which were being operated at a deficit. As the Court would otherwise be sanctioning interference with the regulation by a state agency of intrastate railway service where no discrimination against interstate traffic was alleged, the case was dismissed.

31 In both these cases the action was dismissed whereas in the *Pullman* case and cases involving constitutional questions, only a stay was ordered. Whether the development of the device of staying proceedings had not matured until after decision in these cases, so that the dismissals here and earlier in Pennsylvania v. Williams, 294 U.S. 176 (1935), can be dismissed as obsolescent law is open to speculation. In the recent case of Martin v. Creasy, 360 U.S. 219 (1959), dismissal without retention of jurisdiction was again employed. For a recent view that outright dismissal is an improper course of action see Wright, supra note 1. See also discussion note 106 infra.

32 The statutes in both cases had received considerable previous construction by the state courts. Justice Frankfurter's disagreement with the majority in regarding the unsettled condition of state law as determinative is consistent with his later positions in Sutton v. Lieb, 342 U.S. 402 (1952), and Propper v. Clark, 337 U.S. 472 (1949).
Chicago v. Fieldcrest Dairies, Inc.\textsuperscript{32} and perhaps in City of Meridan v. Southern Bell Tel. & Tel. Co.,\textsuperscript{34} Justice Frankfurter's own acquiescence in these decisions can perhaps be explained by the fact that the state law in both was clearly "unsettled" as well.\textsuperscript{35} The majority of the Court, however, would appear to have committed itself to the proposition that regardless of whether or not a constitutional issue is "lurking,"\textsuperscript{36} and regardless of the settled or unsettled condition of the applicable state law, abstention is called for in situations where the decision of the federal courts would involve a determination of state domestic policy or an unnecessary interference with the action of state officials.

By far the greater number of decisions, however, have involved the other determining element present, if not predominant, in Pullman: the possibility of avoiding federal constitutional adjudication where the status of state law is unclear or unsettled and its clarification may make unnecessary the determination of the ultimate federal question. As noted above,\textsuperscript{37} jurisdiction in Pullman was based on diversity of citizenship and a federal constitutional issue of a substantial nature was raised. In deciding future cases as they arose, it would have been possible for the Court to premise the appropriateness of abstention upon the type of federal question presented, the basis of jurisdiction for federal action asserted, or the nature and condition of the germane state law. Propper v. Clark\textsuperscript{38} and City of Chicago v. Atchison, T. & S.F. Ry.\textsuperscript{39} are clear holdings that abstention is improper if the federal issue presented is of non-constitutional origin. It is seemingly evident from the holdings in Leiter Minerals, Inc. v. United

\textsuperscript{32} 316 U.S. 168 (1942). This case involved the power of a city to regulate the specifications for containers for the sale of milk. Issues involved were not only interpretation of an unconstrued, ambiguously worded city ordinance, but also questions of the power of the city to impose its own controls in the face of a state statutory scheme for milk control.

\textsuperscript{34} 358 U.S. 639 (1959). Cf. Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949), 28 Texas L. Rev. 410 (1950), in which a previously unconstrued territorial law of Hawaii concerning the teaching of languages in the schools was challenged.

\textsuperscript{35} In neither of these cases had the legislative enactments received any prior judicial construction, nor had the city ordinance in Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942), been tested for validity under the applicable state constitution.

\textsuperscript{36} In neither case does the majority appear to consider the purported raising of constitutional issues as of any importance.

\textsuperscript{37} See text following note 10 supra.

\textsuperscript{38} 337 U.S. 472 (1949). The issue turned on the power of the Federal Administrator of Alien Property under an executive order to seize the property of an alien. Defendant receiver asserted that the alien's property had been completely vested in himself by his appointment as receiver for debtors and was thus beyond the reach of the Government. Despite the fact that a New York statute governing the rights initially granted a state receiver was clearly susceptible of differing interpretations, abstention was denied.

\textsuperscript{39} 357 U.S. 77 (1958). Chicago had attempted to regulate intracity transport by motor vehicle by requiring newly formed cab companies to apply for permit prior to operation. As the cab company in question here was engaged solely in transporting interstate passengers from one railway terminal to another, and exclusive control over interstate transportation had been vested by Congress in the Interstate Commerce Commission, the ordinance was invalidated. Abstention was held to be improper as there was no "constitutional" issue raised.
States;[40] Albertson v. Millard,[41] Sutton v. Leib[42] and Spector Motor Serv., Inc. v. McLaughlin,[43] that the basis of jurisdiction—United States a party, federal question or diversity—was not determinative. While it is true that a considerable amount of emphasis was placed on the need for prompt dispatch in diversity cases by the Court in refusing abstention in Propper v. Clark[44] and Meredith v. Winter Haven,[45] such a rather facile, invariably applicable and immediately appealing argument may readily be regarded as a make-weight, and there were other factors in both these cases which may account for the Court's denial of abstention.[46] Within the range of cases involving federal constitutional issues, it was the third possible sphere of distinction, that of the nature of the pertinent state law, that the Court appears to have considered as controlling. In fact, the "unsettled" nature of state law became a *sine qua non* for abstention. In Albertson v. Millard,[47] the Court reaffirmed its holding of Pullman that where a constitutional issue is properly raised concerning an unconstrued and ambiguously worded state statute, construction of the statute should be submitted to the state courts before federal consideration. The dissent in Albertson rested its position solely on the ground that the language of the statute was sufficiently clear

[40] 352 U.S. 220 (1957). A Louisiana statute made title to mineral rights in land deeded to the United States Government "imprescriptible." After a lessee of the Government was sued in a state court, the Government brought action in the federal district court to quiet title. The Supreme Court required abstention in order that the effect of the previously unconstrued Louisiana statute might be determined by the state courts prior to federal consideration of the issues.

[41] 345 U.S. 242 (1953). The Court directed submission to the Michigan courts of that state's newly enacted Communist Control Act prior to federal consideration of the constitutional issues raised by plaintiff. Jurisdiction was premised upon the presence of a federal question.

[42] 342 U.S. 402 (1952). After deciding the constitutional issue of the full faith and credit to be accorded to a New York annulment of a Nevada marriage, the Court directed that the decision regarding the remaining question of Illinois law be decided by the lower federal courts. The "lurking" federal question having been laid to rest, abstention became improper. Jurisdiction was premised solely on diversity, as in Pullman; apparently the Court accorded this consideration no particular weight in its decision.

[43] 323 U.S. 101 (1944). Jurisdiction in this case was predicated on the presentation of a federal question. Abstention was directed because attack on the state tax statute involved questions as to what property the statute in fact taxed.


[45] 320 U.S. 228 (1943).

[46] In Propper v. Clark, 337 U.S. 472 (1949), no pretense was made of a constitutional issue nor was there any risk of upsetting any state regulatory scheme. The federal government was suing to get possession of property belonging to an alien. In Meredith v. Winter Haven, 320 U.S. 228 (1949), the power of a municipality under state law to call its bonds at a date earlier than that originally fixed without providing premiums to the bondholders was in question. The allegedly unconstitutional taking of property was not a substantial claim, nor was there any potential interference as such with state domestic policy. Furthermore, there was a considerable body of Florida law on the subject, even though it must be conceded that ascertainment was uncertain. Chief Justice Stone's insistence on the necessity for swift decision in diversity cases and whatever implications unfavorable to abstention in the exercise of diversity jurisdiction may be drawn therefrom (if indeed that insistence be read as more than a make-weight), therefore would appear to go far beyond what decision in the case required.

so that there was no reasonable doubt as to its applicability in the factual situation presented.\(^{48}\) As in the earlier case of *Toomer v. Witsell*,\(^{49}\) it was apparent that abstention would be improper if the statute was in fact reasonably clear, since decision by the district court would not involve hazarding a groundless guess as to state law issues. And this duty to decide persisted in spite of the fact that the interference which would result by issuance of an injunction against state officials was, in this situation, necessary and unavoidable. But whether the policy of abstaining where there were no apposite state precedents, or analogy-furnishing guide lines for state statutory interpretation carried over, as well, into unclear areas of common law was not decided. *Sutton v. Leib*\(^{50}\) did involve an Illinois common-law question of alimony, but here the Court directed immediate decision by the federal forum on the ground that once the federal constitutional issue raised—one that had to be and was decided irrespective of the applicable state law rule—was already determined, no more reason for abstention appeared. It is significant that Justice Frankfurter would nevertheless have sanctioned abstention in this instance, apparently deeming that even where there existed no novel federal constitutional question to be avoided it was advisable to submit to the Illinois courts an issue of local law as to which there were no Illinois decisions from which the district court could reason. But Mr. Justice Frankfurter stood alone in *Sutton*. And on the other hand, until his recent reinterpretation of *Meredith v. Winter Haven*,\(^{51}\) it was generally thought that that case stood for the proposition that abstention was not proper, especially in a diversity case, where the district court had a considerable, although difficult, body of state precedent with which to work.\(^{52}\)

Thus, as late as the 1958 term the course of decision appeared to be relatively clear and consistent, although a number of procedural ramifications potentially involved in the abstention mechanism had not received full consideration. With *Pullman* as the leading case, two discernible lines of precedent had developed—the comity cases and those which refused


\(^{49}\) 334 U.S. 385 (1948).

\(^{50}\) 342 U.S. 402 (1952). See note 42 *supra*.

\(^{51}\) 320 U.S. 228 (1943).

\(^{52}\) Mr. Justice Frankfurter in footnote in the majority opinion in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27 n.2 (1959), stated that the issue in *Meredith* "was whether jurisdiction must be surrendered to the state court." (Emphasis added.) The lower court in *Meredith* had decided the controversy but had been reversed on appeal by the circuit court, which ordered dismissal without prejudice on abstention grounds. In Justice Frankfurter's view, the Court in reinstating the trial judge's determination was merely affirming the exercise of a discretion to abstain or decide deemed resident in the district court. This interpretation of the *Meredith* holding is considerably more narrow than that which had been generally accepted. See the Court's discussion of *Meredith* in *Propper v. Clark*, 337 U.S. 472 (1949) (Justice Frankfurter dissented).

\(^{53}\) See notes 84-92 *infra* and accompanying text.
prematurely to decide a constitutional issue. While in certain decisions where both of these separable aspects were to some degree involved it might be difficult if not impossible to ascertain the varying importance attached to each by the individual justices, the rationale of the majority of the Court in any particular case was usually apparent. Furthermore, all the cases in which the abstention problem had been brought before the Court had been equitable in nature. No major shifts in the basic tenets of the doctrine as originally established appeared to be developing. Indeed, as recently as January 1959, decision in *City of Meridan v. Southern Bell Tel. & Tel. Co.* was announced in a per curiam opinion.

**THE UNEXPECTED REEVALUATION**

That the Supreme Court was to hand down in one day five cases in which the doctrine of abstention would receive a complete reevaluation was not generally anticipated. In retrospect, however, there had been indications that certain members of the Court were not satisfied with the present state of the law. Mr. Justice Stewart in the majority opinion in *The Tungus v. Skovgaard* had raised, apparently on his own initiative, the question of whether proper resolution of that case did not demand submission of the construction of the New Jersey Wrongful Death Act to the New Jersey Courts. He had, however, resolved to postpone definitive deliberation of "the important and competing jurisdictional considerations until such time as they could be thoroughly evaluated." Of greater significance perhaps was the citation by Justice Frankfurter in a concurring opinion later filed in the same *Tungus* case of his earlier opinions in *Sutton v. Leib* and *Propper v. Clark*, a citation which confirmed his own continued dissatisfaction with certain of the established principles of the abstention theory. Notwithstanding these intimations, the simultaneous release of the decisions in *Martin v. Creasy*, *Harrison v. NAACP*, *Lassiter v. Northampton County Bd. of Elections*, *County of Allegheny v. Frank Mashuda Co.* and *Louisiana Power & Light Co. v. City of Thibodaux* on June 8, 1959, came as something of a doctrinal shock, especially since the gulf that apparently separates the members of the Court in these deci-

---

54 358 U.S. 639 (1959) (power of state to condemn ground for utility lines).
56 358 U.S. 588 (1959). Counsel apparently did not raise the abstention issue; Justice Stewart announced that it was interjected by the Court. *Id.* at 596.
58 358 U.S. at 596.
60 337 U.S. 472 (1949). See note 46 *supra*.
64 360 U.S. 185 (1959).
sions had been by no means evident. Not only does this set of cases cast in doubt certain of the principles which had heretofore served as the foundation of the equitable abstention doctrine, but they indicate that the term “equitable” as descriptive of the circumstances in which abstention is invoked may itself be a misnomer. Three of the cases follow the earlier pattern of decision, although each contains an aspect of special import in the application of the doctrine. Reconciliation of the other two with earlier precedent is, however, extraordinarily difficult.

*Development of the Established Pattern*

Of all the cases, perhaps the decision in *Harrison v. NAACP* received most nationwide attention. A set of five recently enacted Virginia statutes designed to limit the legal-representation and lobbying activities of the NAACP in Virginia were challenged. The Association, prior to any test of applicability of the statutes in the Virginia courts, brought an action to have the federal district court declare them unconstitutional and enjoin their enforcement, asserting three bases of federal jurisdiction. The three-judge constitutional court, basing its decision on a finding that the legislation had been enacted “to nullify as far as possible the effect of the decision . . . in *Brown v. Board of Education* . . . as parts of a general plan of massive resistance,” held three of the statutes unconstitutional on their face but abstained, staying proceedings pending construction by state courts as to the other two. On direct appeal by Virginia from the invalidation of her barratry and lobbying statutes, the Court in a six-to-three decision reversed the lower court and directed that these three acts should likewise have been subjected to “the possibility of limiting interpretation” by the Virginia courts. Mr. Justice Harlan in the majority opinion rested his decision on the fact that the laws were “lengthy, detailed and sweeping” and that several key words in each were ambiguous and susceptible of restrictive construction. Although the finding of the district court as to Virginia’s legislative purpose might arguably be deemed to negate any necessity for applying principles of comity, Justice Harlan appears to have ignored this finding. In determining that abstention was

---

66 *Harrison, Creasy and Lassiter.*

67 *Mashuda and Thibodaux.*


72 The district court ruled that relief should be granted where “the statute is free from ambiguity and there remains no reasonable interpretation which will render it constitutional.” *Id.* at 523.

73 360 U.S. at 177.

74 Justice Douglas in dissent raised the question as to whether the findings of anti-integration legislative purpose would not make abstention particularly inappro-
required he relied for precedent on the line of authority in which, federal constitutional issues having been raised and the challenged state statutes being found ambiguously worded and unconstrued, abstention was directed or approved. Unquestionably the most interesting aspect of the case, and the major point made by the dissent, was that jurisdiction in *Harrison* was premised primarily upon the civil rights statutes: *Unquestionably the most interesting aspect of the case, and the major point made by the dissent, was that jurisdiction in *Harrison* was premised primarily upon the civil rights statutes:* 76 despite the strong case that can be made for special urgency in having the federal courts determine all the relevant issues in cases involving individuals' basic personal liberties, the majority passed over this point without comment. Another interesting feature was that from the tenor of the majority opinion abstention evidently was not conceived as a device to be "automatically" 77 applied by the lower courts. Indeed, that the district judge should rather weigh whether or not the challenged statute is ambiguous and whether or not there is a federal constitutional issue raised before he stays proceedings was confirmed by the decision two weeks later in *NAACP v. Bennett.* 78 The majority, in a short per curiam opinion reversing the summary stay of proceedings granted by the lower court, pointed out that the lower court 77 The majority opinion cites the *Pullman* case as standing for the proposition that abstention is proper only if either of the "exceptional circumstances" therein found are present. Other cases cited were *Government & Civic Employees v. Windsor,* 353 U.S. 364 (1957); *Albertson v. Millard,* 345 U.S. 242 (1953); *Spector Motor Co. v. McLaughlin,* 323 U.S. 101 (1944); *Chicago v. Fieldcrest Dairies, Inc.* 316 U.S. 168 (1942). 78 *Supra* note 77.
on remand should be "guided in its decision by the principles expressed in *Harrison v. NAACP*." Whether *Bennett* represents a definite shift from the earlier more categorical approach to one in which the lower court is given a considerable breadth of discretion in determining whether absten-

tion is proper is not wholly clear. It would seem, however, from the language of the per curiam opinion taken in conjunction with Justice Frankfurter's majority opinion in *Thibodaux*, that such a change has been effected. Within the limits set by the *Harrison* decision and the decisions in *Thibodaux* and *Mashuda*, the district court would possess the power, based on its own findings as to the clarity of state law, to decide whether or not to abstain.

*Lassiter v. Northampton County Bd. of Elections*, although not before the Court on an abstention issue, is significant because it casts some light on the subsequent course of a case in which the abstention mechanism has been utilized. The federal district court, upon complaint by a Negro resident of North Carolina that she had been deprived of her voting rights in contravention of the fourteenth, fifteenth and seventeenth amendments, stayed its proceedings pending determination by the North Carolina courts of the status of that state's constitutional and statutory literacy test. The North Carolina Supreme Court, interpreting its constitutional provisions in the light of subsequent organic amendments and finding the prescribed literacy requirement separable from an objectionable grandfather clause, ultimately overruled the plaintiff's contention that the voter-selection scheme violated the federal constitution. The Court, on appeal from the state

---

70 360 U.S. at 471.

80 While a ruling that the district courts are not "automatically" to stay pro-
ceedings whenever faced with an unconstrued state statute, but are to make the kind of complex consideration of situational factors typified by the Court's opinion in *Harrison*, may be interpreted as a recognition of some measure of discretion in the lower court, such an interpretation is by no means inevitable. That the Supreme Court should require a decision to be made on balance of a number of interlocking and countervailing elements is not necessarily to say that that balancing will not be subject to strict reappraisal on review, or that the Court will not itself independently strike the balance in every case before it without regard to the conclusion of the court below. Merely to enumerate relevant considerations is not to declare the degree of freedom with which the trial judge is to appraise those considerations, nor does the intricacy of the considerations itself inevitably imply a legal discretion. However, while *Bennett* alone might not unreasonably be read as reserving to the Court the role of plenary redetermination of the original abstention ruling of the district court in every case, *Bennett*, seen in view of *Thibodaux*, seems more plausibly to constitute additional support for the thesis that the Court is shifting to a doctrine stressing lower court discretion.


85 The North Carolina Constitution included in one section a provision for the literacy test and a grandfather clause. The grandfather clause being clearly uncon-
stitutional, the validity of the test depended upon whether subsequent amendment to a different section of the constitution and the passage of a new statute in 1957 had effectively severed the literacy test from the invalid article.

supreme court, affirmed, but was careful to note that the district court was still open to the plaintiff if she chose to attack the manner in which the otherwise valid scheme was being administered. An effective route for the handling of the difficult problem of abstention in putative civil rights denials is thus opened. Attack on the face validity of unconstrained state statutes amenable to limiting construction because of lack of clarity would require initial abstention on the part of the federal district courts. Submission to the state court systems, subject to United States Supreme Court review, of the paper, legal-question issues of federal constitutionality would not involve a risk of biased fact finding and record distortion while, on the other hand, it minimizes "unnecessary" federal interference in state concerns.

As the most recent cases indicate, there may be a difference of opinion among members of the Court as to the degree of interference which meets the "unnecessary" standard, but it would seem that if in fact the plaintiff is sufficiently protected both from unwarranted delay and expense and from the risk of unfair treatment under state procedures, action on the part of the lower federal court would not be required. Immediate review of an adverse state court holding on the federal claim is available through either appeal or certiorari: by pursuing this direct route to the Supreme Court from the state court system, decision on the legal issue can be achieved sooner than if the plaintiff were forced to return to the district court for its findings before appeal. There is the added advantage of encouraging the state court to construe its statute in a perceived constitutional context. The danger of federal invalidation of a statute which, submitted to the state courts, might be saved through limiting construction, is avoided. Thus, consistent with the most effective expedition of plaintiff's case, a maximum of protection and a greater surety of decision by an appropriate tribunal is secured. Only if, in a further challenge to a statute of itself held valid, plaintiff subsequently attacks the unjust or discriminatory manner in which the statute is applied or enforced, will the federal

88 "Unnecessary" interference would appear to include at a minimum any invalidation of a state statute where there is plausible means of saving it. While the concept clearly extends to potential blocking by federal court action of state regulatory schemes affecting only intrastate affairs, there is considerable doubt as to how far it carries when applied to relations between federal and state courts. If there are no countervailing factors which would require federal court action—e.g., a congressional grant of specific jurisdiction—wise judicial administration might justify a self-imposed restraint where state judicial processes are already underway.
89 See the majority opinion in Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), discussed in text accompanying notes 120-131 infra.
90 Appeal if the state court upheld the state statute and denied the federal claim, as in the instant case, 28 U.S.C. § 1257(2) (1952); certiorari if the state upheld the federal claim. 28 U.S.C. § 1257(3) (1952).
91 Cf. Government & Civic Employees v. Windsor, 353 U.S. 364 (1957). The Court directed abstention a second time on the ground that the state court had not interpreted the statute in light of the specific federal constitutional objections raised in the district court. See also Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).
court be required to decide the case.\textsuperscript{62} \textit{Lassiter}, then, may demonstrate the way to obviate a considerable number of factors which would otherwise have strongly weighed against the use of the abstention doctrine in the highly critical civil rights field. And unintentionally perhaps, Justice Douglas may have further pointed the way toward the answer to his dissenting position in the \textit{Harrison} case.\textsuperscript{98} Depending on the nature of the plaintiff's case, the decision whether or not to abstain may be grounded not solely on principles of comity or concern over premature constitutional adjudication, but upon considerations of convenience of the allegedly injured party as well.\textsuperscript{94}

While the rationale of the decision in \textit{Harrison} is clearly discernible, that of \textit{Martin v. Creasy}\textsuperscript{96} is not. There plaintiff landholders had challenged the constitutionality of the Pennsylvania Limited Access Highways Act\textsuperscript{98} on the ground that deprivation of ingress and egress without compensation was an unconstitutional "taking" of property in violation of the fourteenth amendment. The district court initially stayed proceedings while a declaratory judgment action was initiated in the Pennsylvania courts to determine the effect of the statute.\textsuperscript{97} The Pennsylvania Supreme Court, affirming a refusal to construe the act in advance of the \textit{post hoc} judicial proceedings which the act itself authorizes, explicitly adopted in its per curiam decision the lower court's opinion that "at all times [plaintiffs'] constitutional rights, whatever they may be, will be guarded and protected."\textsuperscript{98} The lower federal court, after this inconclusive state judgment, determined for itself that in fact the statute took a property right without compensation, and issued a sweeping injunction barring the implementation of the state's limited access highway program.\textsuperscript{99} On appeal, the Supreme Court reversed, all the Justices joining in the holding that such an injunction was improper.\textsuperscript{100} Justice Douglas did maintain, however, that the situation called for a federal declaratory judgment concerning the plaintiff's federal rights. Whether the Court's holding can be attributed to the honored equity

\textsuperscript{62} The state statute would have been by this time authoritatively construed and the district court would be faced with only the task of determining the facts and applying the settled state law to them. It is arguable that this is the level at which there exists most danger of distortion or biased fact finding and that such danger is one of the primary justifications underlying the grant of jurisdiction to the federal courts.

\textsuperscript{93} See note 76 \textit{supra} and accompanying text.

\textsuperscript{94} Within the limits of discretion prescribed by Congress it would appear that wise administration of the judicial system is a factor to be taken into consideration.

\textsuperscript{95} 360 U.S. 219 (1959).

\textsuperscript{96} PA. STAT. ANN. tit. 36, §§ 2391.1-.15 (Supp. 1958).

\textsuperscript{97} The act clearly provided for deprivation of the right to leave and enter the designated road; compensation was to be limited to "damages arising from an actual taking of property . . . . not . . . . for consequential damages where no property is taken." PA. STAT. ANN. tit. 36, §2391.8 (Supp. 1958).


\textsuperscript{100} Martin v. Creasy, 360 U.S. 219 (1959). In his dissenting opinion Justice Douglas conceded that the injunction which was issued was improper.
notion of no "irreparable injury," 101 whether it was controlled—as the majority intimates and the concurring Justices clearly assert 102—by the principles of comity as expressed in Burford, 103 or whether the lurking evitable federal constitutional question influenced the decision, the case fits well into the previously determined pattern of decision. The interesting feature of it for a consideration of the abstention doctrine is its exemplification of one of the problems that can arise when the federal courts refuse to act: the state courts themselves may fail to provide a satisfactory answer to the question whose posture caused the district court to abstain.

Shifts in the Scope of the Doctrine

The decisions in County of Allegheny v. Frank Mashuda Co. 104 and Louisiana Power & Light Co. v. City of Thibodaux, 105 unlike those considered above, represent a definite break from past precedent. While both these cases involved eminent domain proceedings and jurisdiction in both was premised on diversity, in Mashuda district court abstention was reversed and in Thibodaux it was approved. 106 Although the holding in

101 Invocation of a federal court's injunctive powers is dependent on a showing of "irreparable injury." See Hershey Mfg. Co. v. Adamowski, 360 U.S. 717 (1959) (citing Doud v. Hodge, 350 U.S. 485 (1956)). On appeal from a judgment of the District Court for the Northern District of Illinois dismissing a petition by a slot-machine manufacturer seeking injunction of enforcement of an Illinois regulatory statute, the Court affirmed per curiam on the lower court's explicit finding that there was no "irreparable injury" shown.

102 360 U.S. at 224 (opinion of the Court), 225-26 (concurring opinion).


106 In Mashuda the district court dismissed the action and, on appeal, was reversed by the circuit court. Thus the Supreme Court in affirming was not technically directing immediate decision by the district court; it was merely approving a ruling that dismissal was erroneous. In contrast, the district court in Thibodaux had stayed proceedings, but retained jurisdiction, and its order of stay had been reversed on appeal. Here the Court, reversing, approved the initial stay with jurisdiction retained. It is possible, then, to distinguish the two cases on rather narrow procedural grounds. See Wright, The Abstention Doctrine Reconsidered, 37 Texas L. Rev. 815, 821 (1959). The same analysis could be employed to square Thibodaux with Meredith v. Winter Haven, 320 U.S. 228 (1943), see note 52 supra, a case deemed by the Thibodaux dissenters "squarely contrary" to Thibodaux, 360 U.S. at 37 (dissenting opinion), but which also involved a dismissal, not a stay. Nor would such a procedural distinction be without support in reason. Assuming the desirability of prior submission to the state courts of state law issues, the stay and the dismissal procedures, as vehicles for such submission, may offer different practical effects. By dismissal the federal courts lose all control over the subsequent disposition of the action (presuming that the state courts have subsequently assumed jurisdiction over it), including the very important power of expediting its prompt determination if the state tribunals seem inclined to prejudice plaintiff by delay. Injunction cannot issue to stay state process once federal jurisdiction has been surrendered. 28 U.S.C. § 2283 (1952). The significance of retaining jurisdiction to protect a party remitted to a possibly hostile or discriminatory state court from that court's sitting on his rights becomes apparent, especially in a civil rights context like that of Harrison or, indeed, in a case like Mashuda where a state agency, having taken land for an allegedly private purpose, can continue to put it to that purpose pendente lite. But this problem of guarding litigants properly before the federal courts from the potential harms of state dilatory action in abstention situations can, on the other hand, be too much stressed.
Mashuda is in line with past decisions, the rationale of the opinion seemingly represents a departure. Apparently the Court, faced squarely with the conflict of "competing jurisdictional considerations," was unable to achieve a common ground for their resolution.

In the Mashuda case, the Court affirmed reversal by the circuit court of a district court's dismissal premised on abstention principles. Wisconsin residents owning land adjacent to an airport in Pennsylvania, after initially submitting to a board of viewers determination of the damages sustained through county condemnation of the property for future expansion of the airport facilities, brought an action for ejectment in the federal court on the ground that the taking had been for private and not public

First, that problem appears not to arise at all in such cases as Thibodaux where, the state agency being itself the prosecuting party who seeks by judicial action to alter the status quo, substantial state delay is neither likely nor injurious to the interest seeking federal protection. Second, notwithstanding the danger of delay, there is a long line of established precedent including Burford, see note 29 supra, and Alabama Pub. Serv. Comm'n, see note 30 supra, firmly holding dismissal proper. "In these cases, in which the federal court should defer to avoid interference with state activities, dismissal of the action, rather than retention of jurisdiction pending a state determination, is normally appropriate." Wright, supra at 820.

The Burford line, however, is clearly distinguishable from a Thibodaux-Mashuda situation in another dimension. In the former, earlier cases where suit was for injunction, the decision to abstain and to refer to the state courts the determination as to the validity of local administrative action left nothing remaining between the parties which a federal court might subsequently adjudicate. Retention of jurisdiction, then, was unnecessary. In Thibodaux, on the other hand—an expropriation proceeding removed by the property owner to the federal forum—if the Louisiana state courts uphold the validity of the taking, there still remains the issue of damages on which the owner, in diversity, is entitled to be heard before the district court. The trouble with this reasoning, which by distinguishing injunctive or declaratory suits from eminent domain or other damage proceedings attempts to reinstate in spite of Burford the stay-versus-dismissal distinction, is that, however theoretically sound, it simply does not fit the facts of Mashuda. For in Mashuda, unlike Thibodaux, the owner of the property expropriated had not sought federal jurisdiction on the compensation issue, but was already engaged in state court litigation for the determination of damages.

It would appear, then, that to seize upon this evident procedural distinction as a means of reconciling the Mashuda-Thibodaux divergences would be unwarranted. In fact, in his separate concurring opinion in Thibodaux, Justice Stewart—whose views are perhaps particularly significant here inasmuch as his was one of the two votes that swung the Court from Thibodaux to Mashuda—remarks the procedural difference between the two cases. But then he goes on to indicate that other distinctions are more pertinent: "This case [Thibodaux] is totally unlike . . . Mashuda . . . except for the coincidence that both cases involve eminent domain proceedings. In Mashuda the Court holds that it was error for the District Court to dismiss the complaint. The Court further holds in that case that, since the controlling state law is clear and only factual issues need be resolved, there is no occasion in the interest of justice to refrain from prompt adjudication." 360 U.S. at 31. (Emphasis added.) And in view of the temper of Justice Brennan's majority opinion in Mashuda, vigorously denying the applicability of the abstention doctrine and insisting on the protesting property owner's right to swift federal trial, it would hardly seem open to the district court on remand to stay proceedings as was done in Thibodaux.

Abstention was denied in a legal action where neither a constitutional issue nor a potential interference with state functions was present.

107 Abstention was denied in a legal action where neither a constitutional issue nor a potential interference with state functions was present.


use in violation of the applicable Pennsylvania statute. While it is true that initially the ejectment claim was coupled with a request for an injunction against further proceedings then pending in the state damage action, it is clear that this request had since been dropped and that the action before the Supreme Court was essentially legal in nature. It is significant therefore that the majority of the Court in refusing to sanction abstention chose not to rest their decision on the theory that the abstention doctrine was to be conceived as an exercise of the discretion of the equity court and had previously been applied only in equitable proceedings. Instead, Justice Brennan took great pains to establish that not only was there no constitutional issue raised and no threatened interference with state domestic policy, but also that Pennsylvania law was in fact "settled" and in no way uncertain. This emphasis on the "settled" nature of the governing state law is especially surprising since until this case, although relevant in conjunction with one or the other of the "exceptional circumstances," the "settled" state law factor had not of itself been considered determinative. Whether in fact it was determinative of Mashuda is difficult to discern, inasmuch as Justice Brennan himself vigorously dissented in Thibodaux where the "unsettled" nature of state law appears to have been controlling. Furthermore, the dissent in Mashuda is not helpful in clarifying the question. Justice Clark rested his opinion on a combination of a waiver theory and the technical point that damage proceedings and a question of the validity of a taking of property might, under Pennsylvania law, be joined in the single pending state court suit. Although the circuit court had heard reargument on the possible consolidation point and had definitely rejected it, at least three members of the Court joined with Justice Clark in dissenting

111 Pa. Stat. Ann. tit. 16, §§ 2202, 5402(c) (1952). The county, after taking possession of the property, had immediately entered into an agreement leasing a portion of the land condemned to a contractor for his storage of supplies and equipment. While the contractor was at the time engaged in work on the expansion of the airport facilities, and the lease provided that cancellation was automatic in the event that his contracts were terminated, the plaintiff's theory was that the original condemnation had been motivated by a desire to provide the contractor with storage space and was thus "taking" for a "private purpose" rather than a "public use."

112 Both parties had appealed to the common pleas court from the award of the board of viewers.

113 Justice Brennan in the majority opinion noted that this request had been expressly abandoned in oral argument before the Court. 360 U.S. at 188 n.1.

114 "The applicable Pennsylvania substantive law is clear: 'It is settled law in Pennsylvania that private property cannot be taken for a private use under the power of eminent domain.' . . . On the basis of this settled law respondents brought suit . . . ." 360 U.S. at 187-88. "[T]he state law that the District Court was asked to apply was clear and certain." 360 U.S. at 196.

115 360 U.S. at 31-44.

116 The position of the dissent appears to be that the issue of the validity of the taking should have been raised at the time the case was submitted to the board of viewers; furthermore, since the case had by this time been appealed to the Pennsylvania common pleas court, the present action could and should be consolidated with the already pending suit. 360 U.S. at 201-02.

117 256 F.2d at 243.
on this ground. Thus, while the decision in the case is completely consistent with past precedent, the language and apparent rationale of the majority opinion, emphasizing the condition of the relevant state law, hint at a departure from the precedents. This departure finds its still more startling confirmation in Thibodaux.

In contrast to Mashuda, the Court in Thibodaux affirmed the exercise by a district court of its discretion in staying, on its own motion, proceedings in eminent domain which had been initiated by the city under local procedures and removed to the federal forum by the nonresident corporate defendant on grounds of diversity. A Louisiana statute, never previously tested, purporting to authorize municipalities to condemn property belonging to public utilities, had been ordered first to be submitted to the Louisiana state courts for determination as to its effect. On appeal from grant of the stay, the circuit court had reversed, holding that abstention was not appropriate in an eminent domain case because that proceeding was not equitable in nature and that, even were abstention available, there were present in this instance no such "exceptional circumstances" as would warrant its application. Mr. Justice Frankfurter, speaking for a majority of the Court, reversed again and overruled the circuit court on both grounds. Summarily disposing of the contention that abstention was not available in legal actions by typifying eminent domain proceedings as "unique," involving the "sovereign prerogative of the state," and hence analogous to suits in equity—and although there was no pretense made of present lurking constitutional issues—he went on to find that since the state law was "unsettled," postponement of decision was "best for fruition."

The dissent by Justice Brennan, author of the majority opinion in Mashuda, vigorously disputed both of these conclusions. The only possible rationales that Justice Brennan could attribute to the Thibodaux majority, in light of

---

118 See note 116 supra. Justices Black, Frankfurter and Harlan joined in Mr. Justice Clark's dissent. These four Justices, with Justices Stewart and Whittaker, composed the Thibodaux majority.


120 Ibid.

121 The Supreme Court in its grant of certiorari limited review by excluding any questions concerning the appealability of this order. 358 U.S. 893 (1958).

122 This 1900 statute, LA. REV. STAT. ANN. § 19:101 (1950), apparently granted power to municipalities to condemn public utility property, but the power had been called in question by an opinion filed by the Attorney General of Louisiana. 360 U.S. at 30.

123 255 F.2d 774 (5th Cir. 1958).

124 The Chief Justice and Justices Brennan and Douglas dissented. Justice Stewart wrote a brief concurring opinion.

125 "These prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism." 360 U.S. at 28.

126 360 U.S. at 28-29.

127 Justice Frankfurter made no attempt to refute this, the strong point of the dissent.

128 360 U.S. at 29.
Mashuda, were either a developing "distaste for diversity jurisdiction" or a cognizance of the differing degrees of "clarity" of state law in the two cases. Again, unfortunately, it is difficult to ascertain what influenced the members of the Court who had voted with the majority in Mashuda, apparently by their silence subscribing to Justice Brennan's view that eminent domain proceedings did not per se involve the "hazard of friction in federal-state relations," to arrive at an opposite outcome in Thibodaux. While it may also be possible to distinguish the two cases on a narrow procedural ground, the far more significant difference between them consists in the differing conditions of the state law in each, and it appears likely that this "settled" law factor was in fact controlling.

**IMPLICATIONS FOR THE FUTURE**

It is clear that these five cases have considerable import for the future of abstention as a friction-cushioning device within the federal system. Speaking to the situation of a federal constitutional issue which hinges on the construction of a state statute, the Court in *NAACP v. Bennett* affirmed what was implicit in *Harrison v. NAACP*, that abstention was not to be "automatically" employed by the lower federal courts whenever an unconstrued or ambiguously worded statute was called into question. The *modus deciden* of the *Harrison* majority in reasoning that such particular statutory words as "advocacy," "lobbying," and "stirring-up" were in fact susceptible of differing and limiting construction, implies as a logical corollary that when legislative language is clear and only one reasonable interpretation of the words is possible, the district court would be free immediately to decide the constitutional issue. There is Supreme Court authority in support of this proposition; moreover, this is precisely what

---

129 Id. at 32.

130 In *Mashuda* there was a considerable body of judicial doctrine delineating "private" as against "public" use. As Justice Stewart in his concurring opinion in *Thibodaux* phrased it, "the controlling law [in *Mashuda*] is clear and only factual issues need be resolved . . . ." 360 U.S. at 31. In *Thibodaux*, however, the "controlling law" as to whether the city possessed the power to condemn had not previously been determined by any court.

131 In *Mashuda* Justice Brennan wrote: "It is suggested, however, that abstention is justified on the ground of avoiding the *hazard of friction in federal-state relations* any time a District Court is called on to adjudicate a case involving the State's power of eminent domain . . . . But the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty." 369 U.S. at 191-92. (Emphasis added.) In dissent in *Thibodaux* he wrote: "But the fact of the matter is that this case does not involve the slightest hazard of friction with a State, the indispensable ingredient for upholding abstention on grounds of comity . . . ." 360 U.S. at 34.

132 See note 106 *supra*.


135 Id. at 177.

a lower court has recently done in invalidating a Pennsylvania statute requiring Bible reading in the public schools. While one may seriously question whether in fact the language of this statute was not susceptible of a saving restrictive construction, the further and more fundamental question remains: whether, in the interests of judicial comity, the Pennsylvania courts should not have been granted an opportunity in any event to pass on the validity of the statute prior to federal consideration. If in fact the statute was amenable to some alternative reading, or if it was possible for the courts of Pennsylvania by striking a portion of it to save its constitutionality, the present federal interference with an expression of state legislative policy might have been avoided. The statute had not been tested, and it is quite possible that the Pennsylvania courts might themselves have invalidated it on either state constitutional grounds alone or on a combination of state and federal grounds, thus either completely mooting the federal constitutional question or presenting a narrowed issue for Supreme Court certiorari determination in respect of the federal basis of the holding. There appears to be no serious risk of biased fact-finding or potential prejudicial and irreparable slanting of the record which would or should preclude this course of action. Furthermore, seeming clarity may in fact be deceptive. On the basis of the Harrison case and the earlier decision in Albertson v. Millard, there appears to be considerable difficulty in ascertaining which laws are so "clearly" worded that immediate federal decision is required. By more stringently regarding the apparently indispensable finding of clarity—by in effect recognizing that every legislative provision subjected to constitutional attack is in a measure unclear—the risk of inordinate delay caused by possible reversal of the district court on the ground that its findings as to degree of unclarity were incorrect would have been averted, and decision expedited. Not only would precipitous federal action have been avoided, but the friction-reducing interests of judicial comity would have been served. When or if a challenge

137 Schempp v. School District, 141 THE LEGAL INTELLIGENCER (Philadelphia) 273 (E.D. Pa., Sept. 16, 1959). The statutory mandate requiring reading of 10 verses of the Bible every morning prior to the start of school was challenged by the parents of a child who belonged to the Unitarian faith.


139 No federal review would be available as the Pennsylvania Supreme Court is of course the final arbiter of Pennsylvania law.

140 See note 90 supra.

141 The only question submitted to the Pennsylvania courts would have been the legal one of statutory construction.

142 345 U.S. 242 (1953)

143 Ibid. See note 41 supra. If in fact words such as "satellite" and "lobbying" are susceptible of "limiting construction" when there can be little question concerning the specific objective of the statute in which they are used—control of the Communist party in Albertson, restriction of NAACP activity in Harrison—then there would not appear to be many situations in which "clarity" is "clear."
to the manner in which the statute was applied were made, the federal courts, in accordance with the suggestion in *Lassiter*,144 would have had an authoritative state construction of the statute with which to work.

But while consideration of the significant points in *Harrison*, *Martin*, and *Lassiter* may be of interest, the decisions in *Thibodaux*145 and *Mashuda*146 have by far the greatest import for the future of abstention. All of the previous cases in which abstention had been considered or applied had involved an attempt to invoke the equity powers of the federal courts.147 The Court in *Pullman*, the acknowledged leading case, had squarely rested its decision to stay the proceedings on the traditional discretionary powers possessed by equity.148 *Thibodaux*, therefore, is the first holding that abstention is not a "technical" concept peculiar to equity jurisdiction, but is available in an action at law. Nor is the reasoning of the majority opinion in *Mashuda*, specifically resting its disapproval of abstention on grounds other than the legal-equitable distinction,149 inconsistent with this extension worked by *Thibodaux*.150 Even conceding that the circumstances of these cases are clearly analogous to earlier precedent, and that the transposition of "equitable" principles to this "unique" kind of action at law may be justified on the ground that potential obstruction of the "sovereign prerogative" of the state to condemn private property for public use threatens the same state-federal frictions as are inherent in interference by equitable injunction, this narrowest possible view of the cases still entails an expansion of the doctrine.151 But thus to read *Thibodaux*—to view eminent domain proceedings peculiarly as per se so entangling the federal courts in matters of critical state concern that the hands-off policy approved in *Burford*152 and *Alabama Pub. Serv. Comm'n*153 must be there applied—ignores the fact that at least two of the justices who voted with the majority in *Thibodaux*, by their silence at least may be taken to have approved Justice Brennan's rejection of this contention in *Mashuda*.154 It is significant as well that Justice Frankfurter, author of the majority opinion in *Thibodaux*, vigorously dissented in both *Burford* and *Alabama Pub. Serv. Comm'n* on the ground that since a body of law existed by which the federal court could

---

144 360 U.S. 45 (1959).
145 See notes 120-32 supra and accompanying text.
146 See notes 109-19 supra and accompanying text.
147 Justice Frankfurter in the majority opinion in *Thibodaux* conceded this point. See note 125 supra.
148 See note 2 supra.
149 The majority could not find a lurking constitutional issue, possible interference with the state, or "unsettled" state law. See note 114 supra.
150 See note 119 supra and accompanying text.
151 By identifying abstention as a technical concept of equity jurisdiction, its applicability could have been practically limited to only the most obvious instance of interference with state action, injunctive relief.
154 See note 131 supra. Justices Stewart and Whittaker voted with the majority in each case.
decide the state law issues, possible friction with state domestic policy was not of itself sufficient grounds to warrant abstention.155

The broadest permissible reading of Thibodaux, on the other hand, would be that the Court has now raised the question of the unsettled nature of state law from a subsidiary *sine qua non* demanded only where other factors make abstention appropriate, to the level of an independent and autonomous determining consideration.156 In short, abstention would be justified if the only complication were that state law was unsettled. However, while possible support for this position may be found in earlier opinions of Justice Frankfurter157 and in Justice Stewart’s *Tungus* dicta,158 and short concurring opinion in *Thibodaux*,159 it is difficult to believe that the other members of the Court who voted in the Thibodaux majority have so radically altered their earlier positions.160 Moreover, an interpretation of *Thibodaux* which would authorize a district court to stay proceedings in all diversity cases merely because state law is unclear not only opens the road to abstention in all routine contract and negligence cases, but also ignores at least one critical element which, in the facts of *Thibodaux*, is available to limit its holding.161 There the city, acting as an instrumentality of the state, was in the position of a defendant in the federal court: an obvious analogue to the earlier situations where the comity principle was found to dictate non-obstruction of state governmental function. Thus while it may be argued that *Thibodaux* is a key link in the chain by which the Court will ultimately arrive at abnegation of all federal decision of doubtful state law questions, this contention, at the present time, would not appear to be warranted.162 An intermediate view, although one for the most part unexpressed in the opinions of the Court, would more satisfactorily reconcile

155 In Sutton v. Leib, 342 U.S. 402 (1952), note 42 *supra*, one can see an extreme example of how far Justice Frankfurter would carry his particular conception of interference with state policy. There, even after the constitutional issue had been decided by the Court, his position was that the remaining state law issue—a question of alimony—should have been submitted to the state courts rather than remanded for determination by the lower federal forum. With no guide lines to enlighten the district court in this new and “uncharted” area of state law, Justice Frankfurter seemed to regard a possibly leading federal decision itself as such an interference as would warrant abstention. No other member of the Court, however, joined him in this view. It is significant that in *Sutton* the litigation was between private parties; this factor alone adequately distinguishes *Thibodaux*.

156 See the language of Justice Frankfurter’s concurring opinion in *Sutton v. Leib*, 342 U.S. 402 (1952).


159 “The Court further holds in that case [*Mashuda*] that, since the controlling state law is clear and only factual issues need be resolved, there is no occasion in the interest of justice to refrain from prompt adjudication.” 360 U.S. at 31.


162 Clearly the Chief Justice and Justices Brennan and Douglas, at least, would not subscribe. See their dissenting opinions in *Thibodaux* and in *Harrison*. It may
the apparent conflict between *Mashuda* and *Thibodaux* on either of two grounds: a wide legal discretion in the trial court whose exercise was to be regarded with respect on review, or a narrower and more refined conception of what constitutes "unsettled" state law.

Mr. Justice Frankfurter in the majority opinion in *Thibodaux* distinguishes the earlier holding in *Meredith v. Winter Haven* on the ground that in the latter the Court affirmed an exercise of "discretion" in the district court to decide a case in which, implicitly, it felt itself capable of making a decision on the state law questions. In *Thibodaux*, where the district court itself had initially determined to abstain—had abstained in fact sua sponte—because of the confusion it felt engendered by the apparent conflict between a state attorney general's opinion and the wording of an otherwise unconstrued statute, this decision of the lower court was held to be within its "wise discretion." Taken together with the apparent stress in *Bennett* on a considered and deliberative process by which the district court is to determine the propriety of abstention, this discrimination would appear to point to the development of a clearly defined area of lower court discretion: a realm of determination within which that court's appraisal of its own competence to discover clear guide lines of governing policy already articulated in the applicable state law, balanced in conjunction with such more traditional considerations as non-obstruction of state administrative programs, will be treated as conclusive. Thus, abstention in *Thibodaux*, where a major decision of local policy direction, left unresolved by the ambiguous language of a statute, had not yet been further delineated by state judicial interpretation, and where the utility-acquisition project of a municipality was directly implicated, would fall within the demarked limits of lower court discretion. But since there was no such showing of state law "unsettledness" in *Mashuda*, abstention there was clearly erroneous. This level of analysis would synthesize the comity line of precedent with the new "settled" law emphasis of *Thibodaux* and *Mashuda* by recognizing comity and clarity as two prerequisite components circumscribing and directing trial court discretion. Where either is absent—no state action is challenged, or the state law issue is enlightened by local authority—abstention is categorically improper. Where the components are present in degree, their assessment and balancing are for the district judge.

Perhaps be assumed that Justice Stewart would vote with Justice Frankfurter; nevertheless, with the possible exception of Justice Whittaker the remainder of the Justices appear to have rejected this position in the past. While it is true that Justice Whittaker joined with Justice Brennan in *Mashuda*, he voted with the majority in *Thibodaux* and did not, as did Justice Stewart, write a separate concurring opinion.
Closely associated with but distinct from this rationale of district court discretion, another conception capable of incorporating Thibodaux and Mashuda into the preexisting body of precedent involves analysis of the posture of established state law with reference to the issue presented for federal decision. Under this approach, if, as in Mashuda and Meredith, there can be found a considerable body of state authority which the district court can directly apply to the facts or from which it can reason or analogize in reaching a decision on the merits, then (unless no decision at all is called for at the present) regardless of the lack of severity of potential interference with state action, immediate federal decision will be required. In the words of Justice Stewart, only "factual issues" here remain to be resolved, or, at most, issues demanding the application to specific fact situations of previously developed general policy principles originally established and patterned, in their wider dimensions, by state adjudication. For this essentially deductive task the federal courts are as well equipped as are the state courts themselves. Any risk that federal decision on the merits would represent a "forecast" or an erroneous pre-determination of state policy is here qualified by the necessarily limited impact which a single concrete ruling can have in a field of law already largely structured and delineated; and what risk there is, moreover, appears to be more than offset by the countervailing risk of possible biased fact finding or record distortion when an out-of-state party litigant is remitted to the local courts. On the other hand, where there are no existing guide lines for federal decision, where there obtains no body of state holdings whose presence can both prevent the federal determination from running too wide of the mark and, in context, restrict the potentially shaping effect of that determination, here the initial case which is to open up a new, uncharted area of state law and establish its primary premises should—if constitutional issues or possibilities of interference with state action are involved—be postponed until authoritative determination of state policy can be sought from the state courts. Since only purely legal issues need be submitted for state consideration, as in Thibodaux, the hazards here involved in giving the state courts power to "make" federal facts seem slight as compared to the correspondent hazards involved in giving the federal courts power to "make" state law. Moreover, in such first instances, where basic lines of political judgment will be laid that may be expected to carry over and

---

168 While the Court has spoken in terms of a "fact-law" distinction, this distinction is not to be read in the traditional manner. "Fact" would appear to include not only matters of fact-finding but also the area in which, there being available closely pertinent or analogous state court decisions, the federal court need only exercise the function of following these guide lines in arriving at the proper "legal" application in the precise factual situation presented. In contrast, "law" would appear to refer to those large areas of legal principle in which the major initial policy decisions, the expression of basic value judgments in structures of comprehensive doctrine, remained to be made.

169 In Meredith, the circuit court's plea of ignorance of Florida law was based upon an apparent conflict between a set of recent Florida Supreme Court pronouncements concerning municipal bond issues and an earlier line of decisions.

170 See note 159 supra.
determine the general terms of subsequent development of the state law in the area—law to be later applicable to in-state residents as well as out-of-staters—there is perhaps less risk of discriminatory considerations influencing the local tribunal.\(^\text{171}\) And, of course, any further challenge to inequality or unfairness premised upon the application, as contrasted to the face provisions, of state statutory law would be triable in the federal courts at a subsequent time.\(^\text{172}\) There appears to be sound reason, then, in a principle which distinguishes *Mashuda*—involving issues of fact or of established law in its application to specific fact—from *Thibodaux*—involving issues of broad, unstructured basic legal principle. Though it may be possible to view the holding in *Thibodaux* more broadly or more narrowly,\(^\text{173}\) to do so would require, on the one hand, the overthrow of a considerable body of precedent,\(^\text{174}\) on the other, the ignoring of an evident evolution in the thinking of the Court.

**Some Considerations for the Application of the Doctrine**

That diversity jurisdiction has been under increasing attack and that a "distaste for diversity jurisdiction" has been evidenced in decisions of the Court was noted in dissent in both *Thibodaux*\(^\text{175}\) and *Martin v. Creasy*.\(^\text{176}\) The bare fact remains, however, that Congress has consistently refused to repeal this grant of jurisdiction to the federal courts;\(^\text{177}\) whatever the present validity of the reasons which support it, any serious undermining of the jurisdiction, especially where only private parties are concerned, would seem an unwarranted judicial invasion of the legislative function.\(^\text{178}\) But once given this premise of the multitudinous diversity litigation in the district courts, with its recurrent and inevitable host of determinative state

\(^\text{171}\) In cases like *Thibodaux* where foreign corporations are resisting a state's attempt to expropriate their property, they should of course not be allowed to escape whatever the local law may dictate indiscriminately for all persons of like posture, whether domestic or foreign.

\(^\text{172}\) The issue at this point would be completely different: either an equal protection or a privileges and immunities question might be raised.

\(^\text{173}\) See Wright, *The Abstention Doctrine Reconsidered*, 37 Texas L. Rev. 815, 826 (1959). The writer characterizes the decision as perhaps "one of those instances in which the judicial process with its inevitable compromise prevented clarity of analysis and where decision turned on some concessions to cloudiness."

\(^\text{174}\) See notes 8-54 *supra* and accompanying text.

\(^\text{175}\) 360 U.S. at 41.

\(^\text{176}\) 360 U.S. at 227.

\(^\text{177}\) Some restriction of diversity was accomplished when the jurisdictional amount was recently raised from $3,000 to $10,000 and provisions redefining the citizenship of corporations were adopted. 28 U.S.C.A. § 1332 (Supp. 1959).

\(^\text{178}\) Different considerations are called into play when a state officer or a state instrumentality appears as defendant in the federal action than when only private parties are the contestants. It is plausible to argue that Congress in enacting the diversity statute was primarily concerned with the prejudice that individuals might encounter in the state courts, and where the state is, in fact, in one form or another a party to the litigation the danger seems greater. Even more significantly, of course, the countervailing consideration of potential disruption of state administrative programs, a nearly omnipresent consideration where the state's agencies are made defendants in a federal district court, is very rarely involved in run-of-the-mill private-party diversity cases. The whole historical development of the abstention doctrine, in its non-constitutional aspect, is tied to cases immediately involving the functioning of the organs of state government. The rationale of the doctrine appears to dictate that it will remain so tied.
law issues clear and unclear, it seems apparent that to impose the deterrents of doubling costs and delays on the parties litigant merely for the sake of some ideal of certainty and authoritativness of federal decision, is to create a hardship without benefits.\textsuperscript{179} Thus, to regard \textit{Thibodaux} as a jumping off point to the position that, regardless of the presence of constitutional questions or of problems concerning the states and their officials, the mere fact of "unsettled" state law will alone justify abstention, not only runs counter to all past precedent\textsuperscript{180} but to the proper exercise of judicial authority as well.

To view \textit{Thibodaux}, however, either as an exercise of permitted trial court discretion in a context of comity considerations and still unstructured state law,\textsuperscript{181} or as representing a case in which the risk of federal distortion of state policy overbalances all perceivable need for the safeguards of federally supervised procedures,\textsuperscript{182} not only saves the vitality of past precedent in the area but would appear to have considerable normative merit on its own. Granting that the courts as well as the legislature bear the burdens of resolution of the many inherent conflicts in our federal system and, more peculiarly, the duty to decide the individual conflict case when conflict is inevitable, still the judicial construction and application of a doctrine that will serve to avoid unnecessary conflicts would appear to be legitimate and proper. Abstention where the functioning of state or local government is challenged and where the relevant state policy determinations have not yet been cast in structures of established law to guide the federal court's decision, optimally serves this adjustive, preservative end. Even though the recognition of discretionary powers in the lower courts may not produce sharp lines confining and delimiting the circumstances of abstention, this doctrinal unpredictability is of course less to be resisted in such matters of procedure than in those areas of law upon which men in their daily actions must rely. Absence of sharp lines, moreover, cannot be said to burden courts and litigants with wasteful multiple appeals: the whole thrust of a sharply defined area of lower court discretion is to discourage appeals within that area itself. The discretionary principle, then, seems especially appropriate as applied to the federal abstention doctrine; within it the district courts will weigh, in the fact context of each case, all of the considerations relevant to a striking of efficient federal balance. It is to be hoped, therefore, that this is the sense in which \textit{Thibodaux} will be read, and that that case will not, rather—in pursuit of the ideal of authoritativness of each individual federal decision—be made a bridge to the application of abstention to all cases of "unsettled" state law.

\textit{I. G. I.}

\textsuperscript{179} Where constitutional questions are at issue or state functions are implicated in the decision, on the other hand, the overriding public interest justifies the expense and delay occasioned to the litigant who is being forced to take his case into several different courts.

\textsuperscript{180} See notes 8-54 \textit{supra} and accompanying text.

\textsuperscript{181} See notes 163-67 \textit{supra} and accompanying text.

\textsuperscript{182} See notes 170-72 \textit{supra} and accompanying text.