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necessarily follow that the Supreme Court should today incorporate the Bill of Rights. Rather, stare decisis and the social pressures to incorporate should be considered.

The social pressures to incorporate have been held to a minimum by the "due process" clause. In order to insure justice, the Supreme Court has not needed to incorporate the Bill of Rights in its entirety.[81] Instead, the Court, relying on the due process clause, need only find that the state action violates "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[82]

This selective process has the advantage of not requiring that all of the first eight amendments be applied against the states.[83] Some of the amendments are no longer as necessary as they once were. For example, the second amendment guaranteeing the right to bear arms is not as important today as it once was. Also, the seventh amendment's twenty dollar maximum limit on certain trials without a jury is outdated due to inflation.

Thus, even if it be assumed that the fourteenth amendment was intended to incorporate the Bill of Rights, respect for stare decisis, plus lack of pressure to overrule past decisions are sufficient reasons to reject Justice Black's incorporation theory.[84]

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Federal Jurisdiction—Abstention—Right to Return to Federal Courts

The "abstention doctrine" is the name given to the principles applied by the federal courts when they refuse to decide a case over which they properly have jurisdiction,[1] and leave the plaintiff with the necessity of presenting part,[2] or all,[3] of the questions in the

[81] Green, *supra* note 63, at 906; Comment, *The Adamson Case: A Study in Constitutional Technique*, 58 YALE L.J. 268, 287 (1949); *The Bill of Rights and the Fourteenth Amendment*, *supra* note 64, at 675.

[82] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[83] Green, *supra* note 89, at 906.

[84] *Purpose and Scope of the Fourteenth Amendment*, *supra* note 89, at 47; *A Study in Constitutional Technique*, *supra* note 106, at 268; *The Bill of Rights and the Fourteenth Amendment*, *supra* note 90.

[1] Abstention is a decision on the merits, one which comes after the question of jurisdiction. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1963) (per curiam) (implicit), 42 N.C.L. REV. 236 (1963).

[2] *E.g.*, Harrison v. NAACP, 360 U.S. 167 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[3] *E.g.*, Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

case to a state tribunal in order to get an adjudication of his rights.[4] The power to decline to exercise jurisdiction was originally found in the discretion of the chancellor sitting in equity,[5] but recently there have been indications that general policy considerations of comity will allow abstention in suits at law, at least where a vital interest of a state is involved.[6] Although the doctrine is applied in many situations,[7] the cases fall into two categories for the purposes of this note: (1) those in which the federal action is merely stayed until the state courts have had an opportunity to state authoritatively what the state law is,[8] and (2) those in which the federal action is dismissed,[9] thus ending such a case's contact with the federal courts until it comes to the Supreme Court from the state courts by appeal or certiorari. In order to understand why a case is disposed of in one or the other of these ways, it is first necessary to understand the considerations that impel abstention in each class of cases.

[4] Up-to-date general discussions of the abstention doctrine are found in: WRIGHT, FEDERAL COURTS § 52 (1963) [hereinafter cited as WRIGHT]; Note, 59 COLUM. L. REV. 749 (1959); Note, 108 U. PA. L. REV. 226 (1959).

[5] Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-01 (1941).

[6] Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959) (eminent domain proceeding removed to federal court on basis of diversity). *Cf.* Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960) (inter-sovereign certification).

[7] "[I]t is more precise to refer to 'abstention doctrines' since there are at least four distinguishable lines of cases, involving different factual situations, involving different procedural consequences, different support in the decisions of the Supreme Court, and different arguments for and against their validity." WRIGHT 169. Two of Professor Wright's "four distinguishable lines of cases" are not directly taken up here as they are only collateral to the purposes of this note. One of these involves abstention solely in order to "leave to the states the resolution of unsettled questions of state law." *Id.* at 175. It had generally been thought that unsettled state law alone was not sufficient reason for a federal court to abstain. Meredith v. Winter Haven, 320 U.S. 228 (1943). The Fifth Circuit Court of Appeals, however, following what it thought to be the general trend of the cases, recently held that it was proper for a federal court to abstain in private diversity cases solely because the state law was unsettled and difficult to ascertain. United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964), *cert. denied*, 32 U.S.L. WEEK 3400 (U.S. May 18, 1964) (No. 958). The denial of certiorari by the Supreme Court, with only Justice Douglas dissenting, leaves the state of the law in this area in confusion.

The other "distinguishable line of cases" involves abstention in order "to ease the congestion of the federal court docket." WRIGHT 176-77. Cases supporting abstention for this purpose are: P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949). *Contra*, Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820, 835 (9th Cir. 1963).

[8] See the cases cited in note 2 *supra.*

[9] See the cases cited in note 3 *supra.*

Lurking behind all abstention cases are considerations of comity between dual sovereigns, and a desire to avoid an unnecessary disruption by federal courts of state policies as expressed in state statutes, case law, and administrative action.[10] In the abstention cases in which an order of dismissal is appropriate, these are the primary considerations. Here, the federal courts completely defer to the state tribunal because it is felt that "a state tribunal is a more appropriate one for resolving the [whole] controversy."[11] The state tribunal is usually declared to be more appropriate "in order to avoid needless conflict with the administration by a state of its own affairs."[12] Thus, a federal court will not usually entertain either a suit challenging state administrative action under a complicated regulatory scheme,[13] a suit for a declaratory judgment against a state tax,[14] a suit to enjoin a state criminal prosecution,[15] or a suit to enjoin the use of illegally obtained evidence in a state court.[16] The plaintiff's federal constitutional claims can be protected through the appeal and certiorari procedures.[17]

A different consideration is most often foremost in the thinking of the courts when it is decided to stay the federal action rather than dismiss. Here, the abstaining federal court is usually seeking to avoid an unnecessary adjudication of federal constitutional ques-

[10] The doctrine has been described as an extention by the courts of the same policies embodied in the federal statutes providing for three-judge district courts in suits seeking injunctions against state statutes and forbidding injunctions against certain types of state action. Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815, 815-16 (1959); Note, 59 COLUM. L. REV. 749, 749-50 (1959). This conclusion finds support in Justice Frankfurter's comment in the "original" abstention case that "this use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers." Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941).

[11] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 423 (1964) (concurring opinion).

[12] WRIGHT 172.

[13] Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951) (suit to enjoin the enforcement of a state statute which forbade discontinuance of train service without permission of the commission); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (suit to enjoin the execution of a proration order given by a state commission in charge of oil).

[14] Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).

[15] *E.g.*, Douglas v. City of Jeanette, 319 U.S. 157 (1943); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941).

[16] Cleary v. Bolger, 371 U.S. 392 (1963); Pugach v. Dollinger, 365 U.S. 458 (1961); Stefanelli v. Minard, 342 U.S. 117 (1951).

[17] Douglas v. City of Jeanette, 319 U.S. 157, 163 (1943); Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943).

tions in a suit attacking state action.[18] It is a maxim of federal practice to avoid decisions on constitutional issues if the case can be disposed of on other grounds.[19] In a situation where the state law is uncertain and federal constitutional claims could be mooted, or changed in nature,[20] by construction of the state law, the reasoning of the federal courts is simply this: Any determination by a federal court as to the meaning of a state statute would only be tentative since the state courts have the final word as to the meaning of state law; therefore, the state court should be given an opportunity to have the final word on it before a federal court measures it against the strictures of the constitution.[21] Abstention in this situation, called *Pullman*-type abstention,[22] involves no fundamental decision that the state tribunal is a "more appropriate" one for the suit. This is shown by the fact that abstention is improper when the state law involved is settled,[23] or clearly unconstitutional under any possible construction of it.[24] Thus, the decision to abstain in this situation is not to be made automatically merely because state law is involved[25] but rather is to be made after considering these questions and also weighing any possible factors that call for an immediate decision as opposed to the delay engendered by abstention.[26] As the Supreme

[18] *E.g.*, United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962); Harrison v. NAACP, 360 U.S. 167 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[19] "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality... unless such adjudication is unavoidable." Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944). *Cf.* Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947).

[20] AFL v. Watson, 327 U.S. 582, 596-98 (1946).

[21] Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499-500 (1941). The federal courts have jurisdiction to decide ancilliary questions of state law in federal question litigation. Siler v. Louisville & N.R.R., 213 U.S. 175 (1909). This type of abstention, then, is a decision not to exercise jurisdiction over the ancilliary questions. WRIGHT 170.

[22] So called from the name of the first case in which this technique was employed, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[23] City of Chicago v. Atchison, T. & S. F. Ry., 357 U.S. 77 (1958); Public Utilities Comm'n v. United States, 355 U.S. 534 (1958).

[24] Turner v. City of Memphis, 369 U.S. 350 (1962) (statute requiring segregation).

[25] It is error to automatically abstain. NAACP v. Bennett, 360 U.S. 471 (1959) (per curiam).

[26] Ordinarily, the fact that the delay caused by abstention will injure the plaintiff's interests has not been considered by the courts in determining whether or not they will abstain. However, there are recent indications that such will no longer be the case, at least in civil rights litigation. In Griffin v. County School Bd., 32 U.S.L. WEEK 4413 (U.S. May 25, 1964), the

Court has said, "this principle does not... involve the abdication of federal jurisdiction, but only the postponement of its exercise...."[27] Therefore, a stay of the federal action is all that is required in order to carry out the purposes of this *Pullman*-type abstention, and it is error to dismiss such a case.[28] The plaintiff is entitled to an adjudication of his constitutional objections in the federal court once the state court has settled, or had an opportunity to settle,[29] the state law in question.

Under *Pullman*-type abstention as originally contemplated, it would seem that the plaintiff who has been sent back to the state

Virginia school-closing case, the Supreme Court reversed a circuit court decision to abstain and proceeded to the merits of the case. The Court noted that the issues had been passed upon by the state courts, but added: "[Q]uite independently of this, we hold that the issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits.... There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights.... We accordingly reverse...." *Id.* at 4415-16.

A similar point was made by the Court a week later in *Baggett v. Bullit*, 32 U.S.L. WEEK 4425 (U.S. June 1, 1964). A three-judge district court abstained in an action which sought declaratory and injunctive relief against a Washington statute requiring an oath of allegiance from all teachers on the grounds that the statute was void for vagueness. The Washington Court had never been called upon to construe the statute. On appeal, the Supreme Court reversed the district court's dismissal of the action and proceeded to the merits of the case. One of the reasons the Court gave for refusing to abstain was that abstention would delay an "ultimate adjudication on the merits for an undue length of time,... a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms." *Id.* at 4430. The main reason for the refusal to abstain, however, was the very vagueness of the statute itself. The question before the Court was not whether the statute applied, but rather was one as to what the statute required the plaintiff teachers to do upon taking the oath. The Court noted that previous cases in which abstention was held proper all involved "a choice between one or several alternative meanings of a state statute." *Id.* In *Baggett*, however, the statute was "not open to one or a few interpretations, but to an indefinite number" and the Court found it "difficult to see how an abstract construction... in a declaratory judgment action could eliminate the vagueness from these terms" of the statute. *Id.* The Court then added, in strong and positive language, that "it is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this." *Id.* The decision is sound, for if the result were otherwise, the right to a federal court adjudication of the constitutional objection of vagueness to state statutes would be seriously impaired.

[27] Harrison v. NAACP, 360 U.S. 167, 177 (1959).

[28] Doud v. Hodge, 350 U.S. 485 (1956).

[29] Besides leaving the case open so that the federal constitutional issues may be litigated in the federal court after the state law is settled, a stay leaves the federal court in a position to decide the state issues if anything should prevent getting a decision by the state courts within a reasonable time.

courts for an adjudication of the state law questions would have to present only his state law claims to those courts. However, in *Government & Civic Employees Organizing Comm. v. Windsor*,[30] the Supreme Court held that a plaintiff who returned to an abstaining federal court was not entitled to an adjudication of his federal constitutional objections there because he had not "presented" his federal claims to the state court so as to enable it to construe the state statute involved "in light of the constitutional objections."[31] This decision, combined with holdings that the plaintiff in such an abstention case can "elect" to litigate all his claims, state and federal, in a state court and then seek review in the Supreme Court,[32] laid the basis for a dangerous procedural trap. The Supreme Court gave no guidelines as to what the plaintiff was required to do in order to "present" his constitutional objections to the state courts. Neither did it indicate what, short of seeking review in the Supreme Court,[33] would constitute an "election" on the part of the plaintiff to litigate his constitutional objections in the state courts. If the plaintiff litigated his federal claims in the state courts, normal rules of res judicata would bar him from relitigating them in a federal court.[34] The question became one of how to "present" the constitutional objections to the state court without "electing" to litigate them there. The answers to this question were given in a recent Supreme Court decision.

In *England v. Louisiana State Bd. of Medical Examiners*,[35] plaintiff chiropractors sought a declaration that the educational requirements of the Louisiana Medical Practice Act were unconstitutional as applied to them, and also sought an injunction against the act's enforcement as to them. A federal three-judge court abstained *sua sponte*,[36] staying the proceedings in the federal court until the courts of Louisiana had an opportunity to construe the statute and make a determination of the state law issue of whether the act applied to chiropractors. In the state court, plaintiffs briefed and argued their fourteenth amendment objections to the applica-

[30] 353 U.S. 364 (1957).
[31] *Id.* at 366.
[32] NAACP v. Button, 371 U.S. 415 (1963); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).
[33] See the cases cited in note 32 *supra*.
[34] Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).
[35] 375 U.S. 411 (1964).
[36] England v. Louisiana State Bd. of Medical Examiners, 180 F. Supp. 121 (E.D. La. 1960).

tion of the act to chiropractors in the belief that the *Windsor* decision required them to do so. In this way, the constitutional objections were "presented" to the state court. An intermediate appellate court held that the act applied to chiropractors and that so applied, it did not violate the fourteenth amendment.[37] The Louisiana Supreme Court refused to review this decision.[38] The plaintiffs then returned to the federal district court and again sought an injunction and a declaration that the act, now construed by the state court to apply to them, violated the fourteenth amendment. The district court dismissed,[39] saying that the litigation of the constitutional objections in the state court barred the plaintiffs from raising them again in the federal court. On appeal, the Supreme Court reversed the dismissal. The Court shed some light on this area by saying that the willing litigation of their constitutional claims in a state proceeding, as here, would normally bar a relitigation of them in the federal courts. The Court, however, was unwilling to apply the rule announced in the case to these plaintiffs who had only done what they thought, with some reason,[40] *Windsor* required.[40a]

[37] England v. Louisiana State Bd. of Medical Examiners, 126 So. 2d 51 (La. App. 1st Cir. 1960).

[38] England v. Louisiana State Bd. of Medical Examiners, Docket No. 45,509, Louisiana Sup. Ct., Feb. 15, 1961.

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

[40] The Court expressly noted that *Windsor* had been interpreted by others, including the district court here involved, as requiring such a submission of federal claims to the state courts. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 420 (1964). Further, the Court noted the misleading quality of the abstention order which had directed the "appellants to obtain a state court determination not of the state question alone but of 'the issues here presented'...." *Id.* at 422 n.14.

[40a] The fact that the rule set out by the court was not applied to the facts in the case, but was announced to operate *prospectively* as to all later cases is an interesting aspect of this case. The decision cannot be called a "prospective overruling decision" because it overrules nothing. The decision in *Windsor* is not changed. It is said to require nothing more or less than it ever did. What the case does say is that the plaintiff here was laboring under a reasonable misapprehension as to what *Windsor* required. See note 40 *supra*. The Court seems to be formulating a rule that where willfulness is required in order to give an act significance and the law by which willfulness is to be measured is in a confused state, any rule of law, given by the Court in such a situation which sets forth an objective standard against which to measure whether the act was willful or not, will be applied prospectively. This is because the party charged with willfulness cannot be said to have that subjective state of mind unless there is an objective standard given by law to measure his acts. Thus, in *England*, the plaintiff was required to have *willingly* litigated his claims in the state courts before the right to return to federal court was waived. If what *Windsor* required was un-

The opinion clarified the meaning of *Windsor* and gave to litigants in abstention cases the much-needed guidelines for preserving the right to return to the federal courts. The basic proposition underlying the reasoning of the Court in this area is that a party who has "properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims"[41] should not be unwillingly deprived of his right to have that court decide those constitutional issues on the basis of its own findings of fact.[42] The abstention doctrine does not alter this proposition; "its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."[43] From these principles, it necessarily follows that *Windsor* does not require the federal claims to be litigated in the state courts, and the Court so stated. Furthermore, complying with *Windsor* by "presenting" his federal claims to the state courts "will not support a conclusion . . . that a litigant has freely and without reservation litigated his federal claims in the state courts and so elected not to return to the District Court."[44]

It is obvious now that the presentation of the federal constitutional claims to the state courts as contemplated by *Windsor* involves nothing more than drawing the state court's attention to those claims. The Court in *England*, however, recognized that the litigant in a *Pullman*-type case faces a great temptation to argue the constitutional issues. This temptation results from what might be called the "coercive" effect of arguing such claims. That is, if the litigant is

clear, as it was, then he cannot be said to have willingly litigated when such was done only to comply with what he thought *Windsor* required.

A somewhat similar view was held by three judges in the Court's opinion in a recent prosecution for willful evasion of taxes. James v. United States, 366 U.S. 213 (1961). The petitioner failed to pay income taxes on funds which he had embezzled. He was convicted of willfully attempting to evade the federal income tax. A previous decision had held such funds not to be taxable income. Commissioner v. Wilcox, 327 U.S. 404 (1946). In *James*, the Court overruled this previous decision and held such funds to be taxable. The conviction was reversed and the case dismissed with three justices agreeing in the opinion of the Court that the element of willfulness could not be found when the former decision had held such income to be nontaxable. The other three votes for dismissal came from justices who thought the former decision had been decided correctly. For a full discussion of this case, see Note, 71 YALE L.J. 907 (1962).

[41] 375 U.S. at 415.

[42] The Court stressed the importance of the right to a record constructed by the federal courts. *Id.* at 416-17.

[43] *Id.* at 415-16.

[44] *Id.* at 420.

able to convince a state court that a statute is unconstitutional if applied to him, the court, in close cases, might be more likely to construe it to not apply to him.[45] In contemplation of such a situation, perhaps, the *England* decision states that the litigant may remove all doubts as to his intentions by making an explicit reservation preserving his right to return to the district court "in all events."[46] This is accomplished by putting into the state record a statement that "he 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."[47] Thus, when he explicitly makes the reservation, it appears the litigant will always have the right to return to district court. A reservation of this type is not necessary to preserve the right to return to the district court,[48] but the litigant in such an abstention case is running a risk

[45] *Id.* at 420-21.
[46] *Id.* at 421-22.
[47] *Id.* at 421.
[48] *Id.* at 421. The *England* decision probably precludes the approach taken in the case of *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). There, a Negro plaintiff challenged the constitutionality of North Carolina voting laws in a federal court. The three-judge district court abstained because the state law was unsettled and the nature of the constitutional question was uncertain. Lassiter v. Taylor, 152 F. Supp. 295 (E.D.N.C. 1957). The plaintiff then went to the state tribunals and elected to litigate in those tribunals the constitutionality on its face of a voting requirements statute. The plaintiff did not, however, raise the issue of whether the law was being applied in a discriminatory manner. The Supreme Court affirmed the state court holding that the statute was constitutional on its face, but indicated that the plaintiff could go back to the federal court to litigate the discriminatory application issue. 360 U.S. at 50. This decision actually goes further than the scheme of state courts deciding state issues and federal courts deciding federal issues as envisioned and provided for in the *England* decision. It allows the piecemeal litigation of the federal issues in a case. This result is inconsistent with the rule of res judicata normally applied in the federal courts. Where the parties and the subject matter are the same in a second suit as they were in a prior suit, a judgment on the merits in the prior suit is usually res judicata in the second "not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end." Grubb v. Public Util. Comm'n, 281 U.S. 470, 479 (1930). The inconsistency is perhaps justifiable because the findings of fact made by a federal court are much more important on issues of discriminatory application than they are on the issue of on-the-face constitutionality. See Note, 108 U. PA. L. REV. 226, 237-38 (1959). Allowing the litigant to have the more abstract question of constitutionality on the face decided in the state courts without giving up the right to have the discrimination issue tried in federal court would remove to a certain extent the objection to abstention based on time consumed. It would give the litigant a chance to perhaps get a quicker decision securing his rights and yet leave him in a position to take advantage of

of being found to have willingly waived that right if he does try to "coerce" the state court into construing the statute to be inapplicable to him by arguing the constitutional claims.[49]

The *England* decision is praiseworthy because it clears up the procedural haze which has obscured the object of abstention by a federal court in a *Pullman*-type situation—which is to get an authoritative determination of state law issues—and because it shows that abstention is not entirely an abdication of federal jurisdiction. But the case also points up some serious objections to abstention in general. Most obvious is the expense involved in taking a case to the highest court of a state in order to qualify the litigant to have his federal claims heard in a federal court. Needless to say, this factor alone is enough to convince many litigants they should "elect" to have their federal claims heard in the state courts rather than in the federal courts where the Constitution and Congress have placed jurisdiction. The time involved in qualifying the party to litigate his federal constitutional question in the federal courts is also an objection.[50] It too helps the litigant to "elect" to have the state courts decide his constitutional claims. Compounding these objections is the fact that abstention in *Pullman*-type cases is no longer a discretionary maneuver to avoid ticklish problems, but rather is applied as an iron-clad rule. As Justice Frankfurter said, "where the issue . . . involved the scope of a previously uninterpreted state statute where, if applicable, was of questionable constitutionality, we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the

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the neutrality of the federal courts on the issue of discrimination if the attack on its face failed. However, it is doubtful whether *Lassiter* has survived *England* because *England* speaks in terms of giving up the right to return to the federal courts by willingly litigating constitutional issues in the state courts. "We now explicitly hold that if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then . . . he has elected to forego his right to return to the District Court." England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 419 (1964).

[49] The same result should be achieved in diversity cases where the federal court abstains merely because a difficult question of state law is involved. See cases cited notes 6 & 7 *supra*. The litigant should be allowed to return to the federal court for the trial of the case after the state law has been settled by means of a declaratory judgment. In this way, the litigant would receive the protection of the federal courts against local prejudice which diversity is designed to guard against.

[50] See the discussion by Professor Wright of the five-year litigation in the *Windsor* case which ended without a decision on the merits. Wright, *supra* note 10, at 817-18.

submission of the state law question to state determination."[51] This indiscriminate use of the abstention technique and the consequent time and expense involved in getting back into federal court assuredly amount to a partial abdication of federal jurisdiction.[52] The use of the federal courts in these situations is effectively removed from those who do not have the time or the money for such a long, expensive effort. The abstention doctrine is so entrenched today that it is doubtful that any changes will be made in its application despite the objectionable features mentioned here. The lawyer, however, should keep these possible results in mind and let them be his guideposts in deciding whether or not to carry his case to the federal courts.

ROBERT B. LONG, JR.

Real Property—Implied Warranties in New Housing

In a recent Colorado case,[1] the purchaser of a house brought suit against the vendor-builder for loss suffered as a result of the defective condition of the house. Prior to the purchase of the then incompleted house, plaintiff inspected the property and noted that caissons were being constructed for the foundation of the adjoining house. Upon inquiry about soil conditions, defendant assured plaintiff that similar precautions had already been taken in the construction of his house. After accepting the deed and entering into possession, plaintiff-vendee discovered that the foundation was inadequate for the type of soil involved. The Supreme Court of Colorado held the builder liable for breach of a implied warranty of fitness for habitation.[2]

[51] Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959).

[52] "Delay which the *Pullman* doctrine sponsors, keeps the *status quo* entrenched and renders 'a defendant's judgment' even in the face of constitutional requirements.... [L]itigants seeking the protection of the federal courts for assertion of their civil rights will be ground down slowly by the passage of time and the expenditure of money in state proceedings, leaving the ultimate remedy here, at least in many cases, an illusory one." England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 436-37 (1964) (concurring opinion).

[1] Glisan v. Smolenske, — Colo. —, 387 P.2d 260 (1963). The defendant-vendor was held liable for breach of an implied warranty of fitness for habitability when cracks began appearing in the surfaces of the house.

[2] The principal case involved a contract to purchase a house then in the process of construction; however, although the court allowed recovery