NOTES

FEDERAL JURISDICTION

ADVISABILITY OF WITHHOLDING DECISION IN FEDERAL COURT PENDING STATE COURT'S INTERPRETATION OF UNSETTLED STATE LAW

A federal form of government does not necessarily predicate two court systems, the one national and the other local. Congress, however, by the first Judiciary Act[1] exercised its constitutional power[2] to create a separate federal court system. Since that time, as a necessary incident to the nation's political and economic metamorphosis and the attending complexity of rules governing social conduct, the federal and state courts have developed into highly complex organisms each having special adeptness when applying its own law. This has often presented delicate problems of reconciling their respective jurisdictions and competencies.[3] Although Congress has occasionally been called upon to settle such problems,[4] the courts have been required to work out the solutions themselves for the most part.

Where a state court is confronted with a case involving only state issues or a federal court is called upon to decide a case in which only federal questions are present no problem of reconciliation exists. And where a federal court is called upon to decide issues of state law only, or the state court of federal law only, difficulties are undoubtedly presented but are not of great magnitude.[5] But when either system is presented with a case involving an

1. Judiciary Act of 1789, 1 STAT. 73.

2. U. S. CONST. Art. III, § 1.

3. In Ponzi v. Fessenden, 258 U. S. 254, 259 (1921), Mr. Chief Justice Taft described the necessity of comity between the state and federal courts:

> We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws . . . It would be impossible for such courts to fulfill their respective functions without embarrasing conflict unless rules were adopted by them to avoid it. The solution requires, therefore, not only definite rules . . ., but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.

4. 50 STAT. 738 (1937), 28 U. S. C. § 1342 (1948), prohibits injunction of state public utility rate regulations where a plain, speedy, and efficient remedy is available in the state courts. 48 STAT. 775 (1934), 28 U. S. C. § 1341 (1948), forbids injunction of state tax orders on substantially the same basis. 28 U. S. C. § 2281 (1948), provides for a special three-judge court in suits to enjoin the execution of state statutes or administrative orders. Where the controversy is to be determined by state law, statutory or otherwise, the more severe inequities have been eliminated by Erie R. R. v. Tompkins, 304 U. S. 64 (1938), for we have assurance that in deciding local questions, a federal court will follow the same precedents observed by the state tribunals.

5. In Meredith v. Winter-Haven, 320 U. S. 228 (1943), jurisdiction was based on diversity of citizenship. The Supreme Court held that:

> In the absence of recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of judgment.

admixture of federal and state law the court, whether state or federal, must give serious consideration to the desirability of proceeding to judgment.[6] This note deals with the last of these situations further refined to the problem presented when a federal court cannot decide the federal question until it first resolves a question of local law which is, in the light of state decisions and statutes, in doubt. There are two areas where the federal courts are confronted with this problem:[7]

(1) Where the necessity for determining a constitutional question *depends* on the court's interpretation of unsettled issues of state law,[8] or where the state question may present an independent ground for invalidating a state administrative order.[9]

(2) Where the application of a federal statute *depends* on the court's interpretation of unsettled issues of state law.[10]

In either situation the state courts may reach an opposite result in a later decision dealing with the unsettled state issue.[11] To avoid this the federal courts, exercising a discretionary power, have at times declined jurisdiction leaving the parties to pursue an appropriate action in the state courts, thereby insuring an authoritative pronouncement of the unsettled state question. In these cases the Supreme Court has frequently reviewed the federal courts' exercise of discretion in refusing to hear the case on the merits or, where the court proceeded to judgment, its interpretation of the applicable state law.[12]

6. See note 11 *infra.*

7. These questions are presented to the federal court by direct petition seeking to invalidate a state statute or other provision claimed to be in conflict with federal law or the Constitution. The question also arises where a construction of state law, prior to interpretation by the state courts, is necessary, but where petitioners do not ask that the act be invalidated or the suit dismissed. Propper v. Clark, 337 U. S. 472 (1948); Railroad Comm'n of Texas v. Pullman Co., 312 U. S. 496 (1941); Thompson v. Magnolia Petroleum Co., 309 U. S. 478 (1940); Connecticut Ry. & L. Co. v. Palmer, 305 U. S. 493 (1938).

8. A. F. of L. v. Watson, 327 U. S. 582 (1946); Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159 (1929).

9. Chicago v. Fieldcrest Dairies, Inc., 316 U. S. 168 (1942); Railroad Comm'n of Texas v. Pullman Co., 312 U. S. 496 (1941).

10. Propper v. Clark, 337 U. S. 472 (1948); Estate of Spiegel v. Comm'r of Internal Revenue, 335 U. S. 701 (1948); Thompson v. Magnolia Petroleum Co., 309 U. S. 478 (1940).

11. A construction by the federal courts gives way to a later construction of the highest state court. Chicago, St. P. & P. R. R. v. Risty, 276 U. S. 567 (1928); Sioux County v. National Surety Co., 276 U. S. 238 (1928); Wade v. Travis County, 174 U. S. 499, 508 (1889); Green v. Lessee of Neal, 6 Pet. 289 (U. S. 1832). It would appear that a construction by a state intermediate appellate court is also binding in a federal question case, 13 LAW & CONTEMP. PROB. 165 (1948). *Cf.* Fidelity Union Trust Co. v. Field, 311 U. S. 169 (1940), where jurisdiction was based on diversity of citizenship.

For a discussion of the problem presented when the state courts are confronted with this question *see* Spector Motor Service v. Walsh, 135 Conn. 37, 61 A.2d 89 (1948), 1 STAN. L. REV. 551 (1949).

12. Cases are plentiful wherein the federal courts have refused to hear the case. A. F. of L. v. Watson, 327 U. S. 582 (1946); Spector Motor Service v. McLaughlin, 323

This doctrine of self-limitation[13] had its genesis in the desire of the federal courts to avoid friction with state policies and to minimize the difficulties presented when deciding complicated questions of state law.[14]

In order to justify this exercise of discretion the Supreme Court has alluded to "extraordinary circumstances" which warrant a refusal to hear the case. For this reason a federal court may decline to interfere with state criminal prosecutions except when moved by most urgent considerations; or to obstruct the state administrative function of prescribing local rates for public utilities; or to appraise or shape domestic policy of the state governing its administrative agencies.[15]

In addition the federal courts have considered certain general factors in arriving at an appropriate course of action. Some of these are the length of time that the controversy has been in the process of litigation, inconvenience or cost to the parties. Although not controlling, any one of them may be of sufficient gravity to move the court to hear the case without further delay.[16] Other influencing factors are the adequacy of state procedures to afford an easy and ample means for determining the unsettled

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U. S. 101 (1944); Burford v. Sun Oil Co., 319 U. S. 315 (1942); Chicago v. Fieldcrest Dairies, Inc., 316 U. S. 168 (1942); Texas Railroad Comm'n of Texas v. Pullman Co., 312 U. S. 496 (1941); Beal v. Missouri Pac. R. R., 312 U. S. 45 (1941). For decisions where the court entertained the matter and gave judgment see Propper v. Clark, 337 U. S. 472 (1948); Estate of Spiegel v. Comm'r of Internal Revenue, 335 U. S. 701 (1948); Meredith v. Winter-Haven, 320 U. S. 228 (1945); West v. American Tel. & Tel. Co., 311 U. S. 223 (1940); Fidelity Union Trust Co. v. Field, 311 U. S. 169 (1940).

13. There are no constitutional objections to this rule of self-limitation by judicial discretion. Congress could and, until 1875, did withhold from the lower federal courts jurisdiction in this class of cases. 18 STAT. 470 (1875). And the grant of jurisdiction does not carry with it the obligation to exercise it. The Supreme Court itself has imposed limitations on the jurisdiction of the federal courts. See note 12 *supra;* 40 HARV. L. REV. 969, 985 (1927). In Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947), the Supreme Court stated that a federal court is not bound to respect the jurisdictional choice of plaintiff no matter what type of suit or issues are involved, but may under proper circumstances decline jurisdiction.

14. Chicago v. Fieldcrest Dairies, Inc., 316 U. S. 168 (1942); Railroad Comm'n of Texas v. Pullman Co., 312 U. S. 496 (1941); Beal v. Missouri Pac. R. R., 312 U. S. 45 (1941); Di Giovani v. Camden F. Ins. Asso., 296 U. S. 64, 73 (1935); Pennsylvania v. Williams, 294 U. S. 176 (1935); Warren, *Federal and State Court Interference,* 43 HARV. L. REV. 345 (1930); Frankfurter, *Distribution of Judicial Power Between the United States and State Courts,* 13 CORNELL L. Q. 499, 520 (1928); Isseks, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials,* 40 HARV. L. REV. 969, 985 (1927). Commenting on A. F. of L. v. Watson, 327 U. S. 582 (1946), the writer in 22 IND. L. J. 87 (1946) concludes that the decision rests on a basis of convenience in a situation involving substantial economic import in the particular state. 20 So. CALIF. L. REV. 217 (1946); 56 HARV. L. REV. 825 (1943); 41 COL. L. REV. 925 (1941).

15. *See* Meredith v. Winter-Haven, 320 U. S. 228, 235 (1943), and cases cited.

16. Burford v. Sun Oil Co., 319 U. S. 315 (1943); Public Utilities Comm'n of Ohio v. United Fuel Gas Co., 317 U. S. 456 (1943), 56 HARV. L. REV. 825 (1943). *But see* Chicago v. Fieldcrest Dairies, Inc., 316 U. S. 168, 172 (1942), where Mr. Justice Douglas stated that "Considerations of delay, inconvenience and cost to the parties . . . do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities, functioning as a har-

state law,[17] or the existence of litigation pending in the state courts at the time an identical action is brought in the federal court.[18]

The majority of cases have arisen where an unsettled state issue[19] is inextricably connected with a question of constitutionality. In these cases, the court's refusal to entertain the matter was justified on the ground that the court will avoid unnecessary constitutional decisions when at all possible.[20] In *Railroad Commission of Texas v. Pullman Co.*[21] an action was brought in the district court to enjoin the enforcement of the commission's order forbidding the operation of sleeping cars without a pullman conductor. The issues presented alternative grounds for invalidating the order. If invalid it could have been set aside either as unauthorized under the Texas statute, or as violating the due process and equal protection clauses of the United States Constitution. The Supreme Court held that the federal court, to avoid need-

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monious whole." If the district court declines jurisdiction appeal of its order will cause no further delay as proceedings in the state court will not be affected. But it has been suggested that such orders would not be appealable, by analogy to remands. 7 U. OF CHI. L. REV. 727, 732 (1940). The doctrine might have the deterrent effect of influencing litigants to avoid the federal courts and thus prevent delay.

17. *Compare* Burford v. Sun Oil Corp., 319 U. S. 315 (1943), where the Supreme Court noted that expeditious and adequate review of the matter was available in the state courts, *with* Hillsborough v. Cromwell, 326 U. S. 620 (1946), where an opposite conclusion was reached on the grounds that an adequate state remedy was doubtful. A. F. of L. v. Watson, 327 U. S. 582 (1946); Railroad Comm'n of Texas v. Pullman Co., 312 U. S. 496 (1941). See note 4 *supra*.

18. A. F. of L. v. Watson, 327 U. S. 582 (1946); Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159 (1929); 56 HARV. L. REV. 825 (1943); *cf.* Johnson v. Drainage Dist., 126 F.2d 23, 25 (8th Cir. 1942).

For a thorough discussion of these considerations, see 25 IND. L. J. 365 (1950), where the writer deals with a new doctrine concerning stay of proceedings in diversity cases when a concurrent suit is pending in a state court.

19. Whether the underlying issue of state law necessitates the interpretation of a state statute or the common law of the state should not be determinative of the federal court's exercise of discretion in accepting or refusing jurisdiction. Railroad Comm'n of Texas v. Pullman Co., 312 U. S. 496 (1941) (state statute); A. F. of L. v. Watson, 327 U. S. 582 (1946) (state constitutional amendment); Thompson v. Magnolia Petroleum Co., 309 U. S. 478 (1940) (state common law). Similarly, a distinction should not be drawn between a petitioner's request for equitable relief, such as injunction of the challenged activity, and a suit at law. In Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947) the Supreme Court stated that a federal court is not bound to respect the jurisdictional choice of plaintiff no matter what type of suit or issues are involved. No such distinction is apparent in the *forum non conveniens* cases. *Ibid.; cf.* Canada Malting Co. v. Paterson Steamship, Ltd., 285 U. S. 413, 423 (1932), where the Supreme Court stated that courts of equity and of law occasionally decline to exercise jurisdiction; Heine v. New York Life Ins. Co., 45 F.2d 426 (D. Ore. 1930), *aff'd*, 50 F.2d 382 (9th Cir. 1931). The power to decline jurisdiction would seem to be inherent in every court where a more appropriate forum exists. *See* Rogers v. Guaranty Trust Co., 288 U. S. 123, 130 (1933); 54 HAR. L. REV. 1379 (1941). For an opposite view see 20 So. CALIF. L. REV. 217 (1946).

20. A. F. of L. v. Watson, 327 U. S. 582 (1946); Spector Motor Service v. McLaughlin, 323 U. S. 101 (1944); Chicago v. Fieldcrest Dairies, Inc., 316 U. S. 168 (1942); Railroad Comm'n of Texas v. Pullman Co., 312 U. S. 496 (1941); *cf.* Thompson v. Consolidated Gas Utility Corp., 300 U. S. 55 (1937).

21. 312 U. S. 496 (1941), 41 COL. L. REV. 925, 54 HARV. L. REV. 1379, 50 YALE L. J. 1272, 19 TEX. L. REV. 86 (1940).

less friction with state policies, should refuse to hear the case until the state courts had interpreted the statute. The Court reasoned that the state court's construction might render the order invalid, in which event constitutional adjudication by the federal court would be unnecessary. They also noted that the state law afforded an easy and ample means for determining the commission's authority to make such an order.

A similar result was reached in *A. F. of L. v. Watson*,[22] where suit was instituted in the district court to enjoin the enforcement of an "anti-closed shop" amendment to the Florida Constitution on the ground that it violated the Fourteenth Amendment. In order to resolve the constitutional issue it would have been necessary to construe the heretofore uninterpreted state amendment. One interpretation of the amendment would make a decision of the constitutional question inescapable while the alternative answer would eliminate the necessity entirely. Thus a decision by a federal judge powerless to stamp binding precedent on the state issue before him, even incapable of declaring a rule of more than transitory validity for the instant case, might result in the formation of a constitutional precedent on the basis of a hypothetical grievance. The Supreme Court again referred to the adequacy of state procedures to determine the issue and to the fact that litigation was in progress in the state courts at the time. By refusing to hear the case unnecessary friction with state policies could be avoided without undue hardship to the parties. When a similar situation was presented in *Chicago v. Fieldcrest Dairies, Inc.*,[23] the Supreme Court not only directed that the district court should refuse to entertain the matter but that it should disregard considerations of delay, inconvenience or cost to the parties as well.[24]

The more difficult problem is presented where jurisdiction is based on a federal statute and unsettled questions of state law must be resolved before deciding the federal issue.[25] Since no constitutional question is involved, the federal courts are unable to base their decision on a reluctance to decide such questions. This was the situation in *Thompson v. Magnolia Petroleum Co.*[26] where jurisdiction of the federal court was invoked under the Bankruptcy Act. Title to oil found on the right of way of a railroad in reorganization depended on whether the right of way was a fee simple or an easement. The Supreme Court ordered conservation of the oil pending an action in the

22. 327 U. S. 582 (1946), 22 IND. L. J. 87, 20 So. CALIF. L. REV. 217.

23. 316 U. S. 168 (1942). Application by the dairy for a permit to market milk in paper containers was refused by the Chicago Board of Health because of a 1935 ordinance permitting delivery of milk in "standard milk bottles" only. The order was challenged as conflicting with a state statute and as violative of the Dairy's constitutional rights.

24. See note 16 *supra*.

25. Propper v. Clark, 337 U. S. 472 (1948); Estate of Spiegel v. Comm'r of Internal Revenue, 335 U. S. 701 (1948); Markham v. Allen, 326 U. S. 490 (1946); Thompson v. Magnolia Petroleum Co., 309 U. S. 478 (1940).

26. 309 U. S. 478 (1940).

Illinois courts to determine ownership of the land. Here neither considerations of constitutionality nor interference with a recognized state policy were involved. Absent also were the concomitant extraordinary circumstances previously relied on to justify the district court's action in declining jurisdiction where the state law was unsettled.[27] The Court's position rested solely on a desire to substitute a rule by the state courts with some probability of achieving duration for a decision by the federal court possessing little of the coin of predictability Unfortunately, subsequent cases have not followed the Court's disposition of the problem in this case.[28]

The most recent example of this is *Propper v. Clark*,[29] where the New York law was admittedly unsettled on the question of whether title to assets claimed by the litigants vested upon appointment of a temporary receiver or a permanent receiver. The property in question was claimed by a federal official under the Trading With the Enemy Act, and jurisdiction of the district court was invoked to test the rights of the state appointed receiver. A decision of the state question directly affected the rights of the parties to control of the assets, and state procedures capable of providing a prompt and dependable determination were available under the New York Declaratory Judgment Act.[30] The Supreme Court held that where a case involves a nonconstitutional federal issue the federal court will decide all necessary state and federal questions.[31]

In order to receive the benefits of a dual judicial system it is necessary that federal and state courts occupy themselves primarily with the interpretation and enforcement of law emanating from the sovereign which created them. The goal is not the complete separation of federal and state questions, that is impossible. But for the system to function smoothly, it is necessary to perfect a set of rules whereby conflict and confusion can be minimized.[32]

It is contended that the court's refusal to entertain the case on the merits, in the absence of special circumstances, would not only penalize the petitioner

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27 See note 15 *supra*.

28. Mr. Justice Frankfurter, dissenting in Estate of Spiegel v. Comm'r of Internal Revenue, 335 U. S. 701 (1948), stated that since tax liability depended on the Court's interpretation of the unsettled Illinois law, common sense dictated an adjudication from the Illinois courts if some appropriate procedure was available. Propper v. Clark, 337 U. S. 472 (1948), Markham v. Allen, 326 U. S. 490 (1946) (jurisdiction invoked under the Trading with the Enemy Act), Meredith v. Winter-Haven, 320 U. S. 228 (1943) (jurisdiction based on diversity of citizenship).

29. 337 U. S. 472 (1948), see Mr. Justice Frankfurter's dissenting opinion. *Id.* at 493.

30. N. Y. Civ. Prac. Act § 473.

31. This was the result reached in Estate of Spiegel v. Comm'r of Internal Revenue, 335 U. S. 701 (1948), where federal jurisdiction was invoked under the Internal Revenue Act. See note 28 *supra*.

32. Wendell, Relations Between the Federal and State Courts c. 3 (1949), Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930), Frankfurter, *Distribution of Judicial Power Between the United States and State Courts*, 13 Cornell L. Q. 499 (1928).

for resorting to a jurisdiction he is entitled to invoke, but would thwart the purpose of federal jurisdiction as well.[33] This argument is of dubious merit, however, since the right to decline jurisdiction where a more suitable forum exists should be inherent in every court.[34] Indeed, this is the very proposition the courts have adhered to in the *forum non conveniens* cases.[35]

Legal proceedings already consume extended periods of time and impose heavy financial burdens on the parties. Their contention that once a case is fought through its initial stages they should not be compelled to begin anew in another forum is not without merit. And the federal courts have considered such factors as time, inconvenience and cost to the parties in arriving at an appropriate disposition of the case.[36] When these conditions make resort to the state courts undesirable the federal court may well be justified in hearing the case. But where such expeditions state remedies as an applicable Declaratory Judgment Act are available the federal court should refrain from interpreting the state law.[37]

Where the circumstances make a decision on the merits undesirable the Supreme Court has suggested several alternatives that the lower court may follow in disposing of the matter. For example, the complaint may be dismissed without prejudice to an action in the state courts, or the state issues may be decided adding a proviso that in the event the state courts should interpret the state law otherwise the parties may apply for a modification. In some cases the constitutionality of the statute or order may be decided and if it is constitutional the complaint dismissed and the parties referred to the state courts for determination of the state issues.[38] Or the court may retain jurisdiction, but refrain from exercising it pending a decision of the state issues in the state courts.[39] Congressional intervention by way of statutory

33. See note 13 *supra*. The power to decline jurisdiction would seem to be inherent in every court where a more appropriate forum exists. *See* Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947); Rogers v. Guaranty Trust Co., 288 U. S. 123, 130 (1933); *cf.* Canada Malting Co. v. Paterson Steamship, Ltd., 285 U. S. 413, 423 (1932); Heine v. New York Life Ins. Co., 45 F.2d 426 (D. Ore. 1930), *aff'd*, 50 F.2d 382 (9th Cir. 1931); 54 HARV. L. REV. 1379 (1941). For a conflicting view see 20 So. CALIF. L. REV. 217 (1946).

34. *But cf.* Meredith v. Winter-Haven, 320 U. S. 228, 234, 237 (1943), 18 TULANE L. REV. 492 (1944); Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 208 (1938).

35. See note 33 *supra*.

36. See notes 16, 17, 18 *supra*.

37. See Mr. Justice Frankfurter's dissents in Propper v. Clark, 337 U. S. 472, 493 (1948) and Estate of Spiegel v. Comm'r of Internal Revenue, 335 U. S. 701, 667 (1948).

38. In Railroad Comm'n of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573 (1940), the Supreme Court upheld the Railroad Commission on the constitutional issue, and declined to enjoin it on the state ground, referring the plaintiff to the state courts for a determination of the state law.

39. For a thorough discussion of the advisability of using the various solutions and the situations in which they should be invoked see 54 HAR. L. REV. 1379 (1941). The district court might be empowered to certify specific questions of state law to the Supreme Court of the state, which would expedite final determination of the state issues at a minimum cost to the parties. However, this presents constitutional problems which are not within the scope of this note.

reform has also been suggested.[40] However, a judicially conceived solution would seem preferable since it will be equally effective in promoting a favorable balance between the two systems, and at the same time retain flexibility of application as compared to the rigidity of possible statutory change.[41]

A consistent policy requiring the parties to litigate the controversy in the state courts would reduce the work of an already overburdened federal system. While it is true that in some states the courts are farther behind in their work than the federal courts, the trend has been and will probably continue toward an ever increasing volume of purely national business incident to the expansion of the federal government.[42] At the same time such a policy would eliminate the necessity of a decision of tenuous validity by the federal court.

The position of the majority in *Propper v. Clark* and similar cases is anachronistic under the philosophy of the *Erie*[43] doctrine, which seeks uniformity in the application of local law.[44] If the federal court proceeds to interpret the unsettled issue of state law and the state court in a later case renders a contrary interpretation of that issue, the pyrrhic victory thus attained by the party failing in the federal court, as a result of the state decision, would afford little consolation. A policy of dismissal or similar appropriate action would eliminate this unfortunate possibility.

A further advantage of requiring the litigants to contest the matter in the state courts is that not only will an authoritative pronouncement of the unsettled state law be acquired in the process, but the parties can still petition the United States Supreme Court to review the state court's interpretation of the federal issues involved.[45] Contrast this with a final adjudication of the

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40. *Id.* at 1381; 53 COL. L. REV. 788 (1944).

41. In Railroad Comm'n of Texas v. Pullman Co., 312 U. S. 496 (1941), Mr. Justice Frankfurter states that: "The use of equitable powers is a contribution of the courts in furthering the harmonious relations between state and federal authority without the need of rigorous restrictions of those powers." 22 IND. L. J. 87 (1946). H. R. 4168, 79th Cong., 2nd Sess. (1946), would eliminate diversity jurisdiction if enacted.

42. WENDELL, RELATIONS BETWEEN THE FEDERAL AND STATE COURTS (1949); FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT 289, 290 (1927); Frankfurter, *Distribution of Judicial Power Between the United States and State Courts,* 13 CORNELL L. Q. 499, 504 (1928); COL. L. REV. 925 (1941); 54 HARV. L. REV. 1379, 1380 (1941).

43. Erie R. R. v. Tompkins, 304 U. S. 64 (1938).

44. The *Erie* doctrine is not limited to diversity cases. The error in thus limiting it arises from confusing those cases in which a federal right is asserted with those in which the right is a state created one. 13 LAW & CONTEMP. PROB. 165 (1948); 7 U. OF CHI. L. REV. 727 (1940).

45. Where a state statute or administrative order has been attacked as repugnant to the Federal Constitution and the decision of the state court is in favor of the validity of the state law, appeal to the United States Supreme Court will lie. 62 STAT. 929, 28 U. S. C. § 1257(2) (1948). However, when the state court's interpretation of the state law necessitates a determination of the application of a federal statute, resort to the Supreme Court is available by *certiorari* only. 62 STAT. 929, 28 U. S. C. § 1257(3) (1948).

state issues in the federal courts from which there is no recourse if they are incorrectly decided.

In addition, a policy of voluntary abstention by the federal courts would be a constructive step toward securing a proper balance between the state and federal judiciaries. The logic of this solution is apparent when it is recalled that the federal issue may have been prematurely asserted because one of the alternative answers to the underlying state problem will obviate the necessity of deciding the federal question. A decision of the state issue is inevitable while the necessity of resolving the federal question is conjectural. Thus the superiority of the federal court in deciding questions of national law, which is the very foundation of federal jurisdiction in these cases, is relegated to a position of secondary importance.[46] In view of this, the federal courts should decline to exercise jurisdiction thereby necessitating litigation of the matter in a forum well qualified to perform this function.[47]

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46. This would seem to apply with equal validity where federal jurisdiction is based on diversity of citizenship. See note 44 *supra*. The Supreme Court, however, when presented with precisely this problem in Meredith v. Winter-Haven, 320 U. S. 228 (1943), referred to the *Erie* doctrine as a mandate requiring a decision of all state questions whether the law was settled or susceptible of varying interpretations. This position does not appear to be in harmony with the tenet of uniformity sought in the *Erie* case. WENDELL, RELATIONS BETWEEN THE FEDERAL AND STATE COURTS c. 12 (1949); Collier, *A Plea Against Jurisdiction for Diversity of Citizenship*, 76 CENT. L. J. 263, 264 (1913); 41 COL. L. REV. 925 (1941); 7 U. OF CHI. L. REV. 727 (1940). But see Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A. B. A. J. 433 (1932); Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. OF PA. L. REV. 869, 887 (1931); 18 TUL. L. REV. 492 (1944).

47. The subsequent history of some of the cases discussed appears in the following material. No analysis of the facts stated has been undertaken herein.

In the following cases the federal court refused to entertain the matter on the merits, thereby requiring litigation in the state courts. After the Supreme Court decision in the *Pullman* case, plaintiff filed suit in the state district court challenging the railroad commission's order on federal as well as state grounds. A temporary injunction was granted, but for extrinsic reasons the case has never been tried. Following the decision in *Chicago v. Fieldcrest Dairies, Inc.* the matter was litigated in the state courts. Evidently the Supreme Court of Illinois did not consider the federal issue since the court ruled adversely to the plaintiff without discussing the federal question. Dean Milk Co. v. Chicago, 385 Ill. 565, 53 N. E.2d 612 (1944). The case was not presented to the federal court again since the city of Chicago amended the ordinance in question promptly after the Illinois court decided the case. Approximately two years elapsed from the time of the Supreme Court decision until final judgment was obtained in the state courts. Following the *A. F. of L. v. Watson* decision suit was filed in the state court in May, 1946. The Attorney General's objection to the joinder of actions was sustained. Plaintiff appealed and in July, 1947, the state supreme court dismissed the appeal. This would have necessitated filing six or seven separate suits; so the Florida litigation was dropped pending decision in Nebraska, Arizona and North Carolina on similar amendments. These cases reached the United States Supreme Court during the October term 1948. After the decision in *Spector Motor Co. v. Mc Laughlin*, a declatory judgment was sought in the Connecticut courts. By agreement trial was delayed until April, 1947. The Supreme Court of Errors decided the appeal in July, 1948, and action on the federal question is still proceeding in the federal courts. See 1 STAN. L. REV. 551 (1949) for a discussion of the action in the state courts. Two federal circuit courts came to opposite conclusions on the state issue presented in *Thompson v. Magnolia Petroleum Co.* before the Illinois Supreme Court