CONSTITUTIONAL LAW: ABSTENTION DOCTRINE APPLIED TO AVOID DECISION ON CONSTITUTIONALITY OF CLOSING PUBLIC SCHOOLS

SINCE its initial formulation by the Supreme Court in 1941,[1] the doctrine of equitable abstention has been a subject of continuing controversy.[2] Its application in the field of civil rights by a sharply divided Supreme Court in 1959[3] raised many questions, several of which are illustrated by *Griffin v. Board of Supervisors*.[4] In this latest decision in twelve years of litigation aimed at the integration of the public schools of Prince Edward County, Virginia,[5] the Court of Appeals for the Fourth Circuit abstained from ruling on the constitutionality of closing the public schools in the county, in order to await clarification of questions of state law by the Virginia courts.

While the public schools of Prince Edward County have remained closed since 1959,[6] the education of the white children has continued in schools administered by a private foundation. This private school system is financed largely through state and county tuition grants to pupils and county tax credits to individual contributors.[7] In an action by Negro school children to compel de-

[1] Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). See note 20 *infra*.

[2] See generally: 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 64 (1960); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 858-85 (1953); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, 59 COLUM. L. REV. 749 (1959); Note, 108 U. PA. L. REV. 226 (1959). See also Ashwander v. TVA, 297 U.S. 288, 341 (1936) (concurring opinion by Brandeis, J.) for discussion of policy of avoiding constitutional adjudication.

[3] In Harrison v. NAACP, 360 U.S. 167 (1959), the Court, in a 6-3 decision, held that the lower court should have abstained from ruling on the constitutionality of five Virginia "barratry" statutes in order to give the state courts a reasonable opportunity to give them a limiting interpretation.

[4] 322 F.2d 332 (4th Cir. 1963).

[5] This litigation began as Davis v. County School Bd., 103 F. Supp. 337 (E.D. Va. 1952), and was one of the four school segregation cases decided as Brown v. Board of Educ., 347 U.S. 483 (1954). In Allen v. County School Bd., 249 F.2d 462 (4th Cir. 1957), the Court of Appeals ordered the district court to fix a time limit for integration, and in Allen v. County School Bd., 266 F.2d 507 (4th Cir. 1959), it ruled that seven years was an unreasonable time limit. In the latter decision, the court required the district judge to issue an order to the defendants to consider applicants on a non-racial basis for the school year 1959-1960. The order was issued on April 22, 1960.

[6] After the decision of Allen v. County School Bd., 266 F.2d 507 (4th Cir. 1959), the County Board of Supervisors decided to make no levy or appropriation for school purposes. This effectively closed the schools since the only funds received from the state were a small constitutional amount and funds matching those appropriated by the local board.

[7] In 1959 the Prince Edward School Foundation was organized to operate private

fendants to operate a free public school system,[8] the district court enjoined the payment of tuition grants and ordered the school board to submit a plan for the admission of students to the public schools on a non-racial basis.[9] The court reasoned that the public schools were part of a statewide system and that any partial closure of this system constituted a denial of the equal protection of the laws.

In a split decision reversing the district court, the Court of Appeals summarily dismissed plaintiffs' contentions that the state had a positive duty under the federal constitution to provide integrated public schools in each county[10] and that the school closing violated a prior court order to the Board of Education not to discriminate in admissions.[11] However, the court declined to decide whether the Prince Edward County school system was an autonomous unit or part

schools in the county. During the school year 1959-1960 the Foundation was financed by private contributions and charged no tuition. Tuition has been charged since 1960, and has been paid by the state pursuant to statutes passed that year.

VA. CODE ANN. § 22-115.30 (Supp. 1962) provides for state scholarships of $125 to students who wish to attend private nonsectarian schools. Section 22-115.31 allows local bodies to match this sum, as was done by the Prince Edward County Board of Supervisors on July 18, 1960. The total $250 scholarship for each pupil is applied toward the $265 tuition fee charged by the private schools. The lower court found that the wording of the statute precluded the payment of tuition grants to persons residing in counties which have abandoned public schools, and enjoined their use in Prince Edward County. Allen v. County School Bd., 198 F. Supp. 497 (E.D. Va. 1961).

Tax credits, not exceeding 25% of the total tax payable, to contributors to "nonsectarian schools not operated for profit located in Prince Edward County" was authorized by a local ordinance in 1960. 322 F.2d at 339.

[8] The present action is a continuation of the original suit filed against the Board of Education in 1951 to enjoin segregation in Prince Edward County public schools. In 1960, the plaintiffs filed a supplemental complaint making the Board of Supervisors a party defendant, and in 1961, filed an amended supplemental complaint demanding the opening of the schools closed in 1959.

[9] Allen v. County School Bd., 207 F. Supp. 349 (E.D. Va. 1962). VA. CONST. art. IX, § 129 provides that the General Assembly maintain an "efficient system of public free schools throughout the state." The court held that this mandate, along with the fact that the state provided much of the school funds and determined textbooks and curricula, showed that the county and the state were operating the public schools together. From this, the court concluded that they had violated a federal constitutional duty not to close part of the schools in the state system to avoid integration.

The injunction against payment of tuition grants entered in Allen v. County School Bd., 198 F. Supp. 497 (E.D. Va. 1961) was extended.

[10] The court stressed the negative application of the fourteenth amendment, stating that it is settled that the amendment prohibits discrimination by the state against a pupil because of race, but it does not require that the state or any political subdivision provide schooling for any of its citizens. 322 F.2d at 336.

[11] Since the prior order was only to abandon discrimination it was not violated when all schools were closed. Moreover, the prior order was issued to the school board, and they have been powerless to operate schools even if they wanted to since no funds have been appropriated for this purpose by the Board of Supervisors. *Ibid.*

of a statewide school system.[12] Consequently, there was no ruling on claims that the school closure and subsequent formation of the foundation amounted to an evasive scheme to perpetuate segregation[13] and that this closure discriminated against all students in Prince Edward County.[14]

The court based its decision to order abstention on the ground that a determination of the federal constitutional questions required a ruling on questions of uncertain state law regarding the relative duties of Virginia state and local governments.[15] It decided that such a ruling should be left to the state courts since a federal court adjudication of these issues would be merely a "forecast" of the state law.[16] Furthermore, the court reasoned that if the state supreme court should hold that the Virginia constitution required the state to maintain schools in each county, the necessity of the federal constitutional decision would be avoided since the case would be disposed of on those grounds alone.[17]

Rooted in the traditional discretion of equity courts to refuse

[12] Defendants contended that, under the laws of Virginia, the Prince Edward County school system is an autonomous unit and that as such it has the right to close all of its schools without violation of either the state or federal constitution. Brief for County School Board, Appellees, pp. 41-105.

[13] Plaintiffs contended that the effect of the tuition grants and tax credits was to turn the "private" schools into segregated public schools. This contention was based upon the statement in Cooper v. Aaron, 358 U.S. 1, 19 (1958), that "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." Brief for Appellants, p. 21.

[14] The United States as amicus curiae claimed that since Virginia operated a public school system elsewhere in the state, its failure to do so in this county violated the fourteenth amendment. Relying heavily on Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd mem.*, 368 U.S. 515 (1962), which struck down Louisiana statutes establishing a local option system of schools, the United States argued that the closing "discriminates geographically against all the students in Prince Edward County inasmuch as the sole basis for the closing—racial discrimination—is an unreasonable classification denying the equal protection of the laws." Brief for the United States as Amicus Curiae, p. 29.

[15] Some of the provisions of the Virginia Constitution are ambiguous and possibly conflicting. VA. CONST. art. IX, § 129 provides: "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." Section 130 vests the general supervision of the school system in a State Board of Education. Section 132 gives this State Board the general power over establishing school districts, managing the school fund, making rules and regulations for the management of the schools, and selecting textbooks. Section 133, however, vests supervisory power over the schools in each city and county in a local school board. Section 136 authorizes these local boards to levy taxes for "establishing and maintaining such schools as in their judgment the public welfare may require . . . ."

[16] 322 F.2d at 343.

[17] *Ibid.*

to exercise jurisdiction, the doctrine of abstention has been used to effectuate the longstanding policy of the federal courts to avoid constitutional adjudication whenever possible.[18] Although federal courts had deferred to state courts in a few earlier cases,[19] the abstention doctrine was first articulated by the Supreme Court in *Railroad Comm'n v. Pullman Co.*[20] From this decision has developed the general rule that a federal court may decline to exercise jurisdiction if a state court resolution of an uncertain issue of state law might render a decision on the federal constitutional issue unnecessary or premature.[21]

Abstention has also been used to aid in maintaining harmonious relations between state and federal governments. Particularly important are cases involving state administrative action in commerce and industry, where problems are complex and state interests are vital.[22] In such situations, abstention has been applied to prevent federal interference in legitimate state procedures even where the state law was relatively settled.[23]

Inherent in numerous abstention cases is the principle of judicial comity[24] that a court may defer action on a cause properly before it until courts of another sovereignty, already cognizant of the litigation, have an opportunity to pass on it.[25] This principle is one of courtesy—a willingness to grant a privilege in the interest of good will and convenience.[26] Although absent from many abstention

[18] See note 2 *supra.*

[19] Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940) (abstention based on the peculiar powers of a court of bankruptcy); Pennsylvania v. Williams, 294 U.S. 176 (1935) (based on "rightful independence of state governments"); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929) (based on complexity of questions of state law).

[20] 312 U.S. 496 (1941). Here plaintiff claimed that the action of the defendant was illegal under both state and federal law. The Court held that the state court should first be allowed to pass on the state claims. This was to "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Id.* at 500.

[21] See, *e.g.*, United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962); Metlakata Indian Community v. Egan, 363 U.S. 555 (1960); Harrison v. NAACP, 360 U.S. 167 (1959); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944); Chicago v. Fieldcrest Dairies, Inc. 316 U.S. 168 (1942).

[22] See, *e.g.*, Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951) (railway regulatory decision would be based on "predominantly local factors"); Burford v. Sun Oil Co., 319 U.S. 315 (1943) (state courts have more specialized knowledge of regulatory scheme than federal courts).

[23] See cases cited note 22 *supra.*

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

[25] Darr v. Burford, 339 U.S. 200, 204 (1950).

[26] Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485 (1900). *Accord,* Norwich Union

cases, it is quite important in the instant case since a suit involving the same issues had been instituted in the state courts.[27]

The court's emphasis in the *Griffin* decision was on neither the avoidance of an unnecessary constitutional decision nor the improvement of federal-state relations, but rather on the fact that an authoritative ruling on difficult questions of state law underlying the federal questions could best be made by the state courts. However, outside of the fields of state regulatory action and eminent domain, it appears well settled that uncertainty in state law alone does not justify abstention. While this uncertainty in state law seems to be an indispensable element,[28] the possibility of avoiding constitutional adjudication, or some other factor, must also be present to warrant the refusal to exercise jurisdiction.[29]

Even if the emphasis in this decision were on the fact that a constitutional decision might be obviated, the chance of such a

Fire Ins. Soc'y v. Stanton, 191 Fed. 813 (2d Cir. 1911); Torrey v. Hancock, 184 Fed. 61 (8th Cir. 1910).

[27] After the district court decision in favor of the plaintiffs, the defendants instituted a declaratory judgment proceeding in the state court to determine the plaintiffs' rights under state law to have the schools reopened.

In Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942), the Supreme Court ordered abstention where a case involving substantially identical issues had been brought by related parties in the state court. The fact that there was a suit pending in the state court was not determinative of abstention, but was used to show the availability of a state tribunal. See also Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820 (9th Cir. 1963); Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), holding that federal courts need not abstain because of a parallel suit pending in the state courts.

[28] See, *e.g.*, County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) (alternative holding); Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958); Albertson v. Millard, 345 U.S. 242 (1953); Toomer v. Witsell, 334 U.S. 385 (1948). These cases emphasize the fact that abstention will not be applied where the state law is settled.

In some cases of racial discrimination, the federal courts have not hesitated to construe the state statutes themselves and rule on the merits of the case if it appeared that there could be only one reasonable construction of the statute. See, *e.g.*, Garner v. Louisiana, 368 U.S. 157 (1961).

[29] Meredith v. Winter Haven, 320 U.S. 228 (1943); *accord,* Propper v. Clark, 337 U.S. 472 (1949); Markham v. Allen, 326 U.S. 490 (1946); Merritt-Chapman & Scott Corp. v. Frazier, 289 F.2d 849 (9th Cir. 1961), *cert. denied,* 368 U.S. 835 (1961).

But see, Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962); AFL Motors Inc. v. Chrysler Motors Corp., 183 F. Supp. 56 (E. D. Wis. 1960).

Although the recent case of Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), may be construed as extending abstention into the area of uncertain state law alone, the decision was narrowly drawn, emphasizing the added factor of an eminent domain proceeding "intimately involved with the sovereign's prerogative," and does not seem to support such a broad construction. *Id.* at 28.

It does appear from Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962) that difficult, determinative questions of state law might be referred to a state court by certification. The Florida legislature passed a statute in 1945 authorizing the

result seems slight.[30] To avoid the constitutional questions in the instant case, the state court would have to hold that the state has a mandate under the Virginia constitution to operate public schools in each county. Such a holding, however, is not forecast by prior decisions, which point to a local option system.[31] The Supreme Court of Virginia seems likely to follow these precedents and hold that each county school board has sole authority to establish and maintain schools in the county, and that a decision not to maintain any schools is a valid exercise of this authority. The duty of the state courts is to preserve legislative intent in light of constitutional objections,[32] and this may be accomplished by holding that the

Florida Supreme Court to answer questions of uncertain state law certified to it by federal appellate courts. FLA. STAT. § 25.031 (1961), FLA. APP. RULES 4.61. This device was first employed in Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960). This may be a solution to the many cases in which the federal courts have to decide uncertain questions of state law. However, no such procedure exists in other states, and even in Florida, it only applied to federal appellate courts.

[30] There is some question whether the plaintiff must present all of his constitutional objections to the state court. The court in the instant case abstained "with leave to the District Court thereafter to entertain such further proceedings . . . as may then appear appropriate in light of the determinations of state law by the Supreme Court of Appeals of Virginia." 322 F.2d at 344. The United States Supreme Court has in some cases only ordered the presentation of state issues to the state courts. See United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959); Albertson v. Millard, 345 U.S. 242 (1953); AFL v. Watson, 327 U.S. 582 (1946).

However, in a majority of the cases involving a complaint against state action the Court has ordered that all of the plaintiff's state and federal claims be presented in the state courts. See, *e.g.*, Harrison v. NAACP 360 U.S. 167 (1959); Government & Civic Employees Organizing Comm., CIO v. Windsor, 353 U.S. 364 (1957).

Since the Court of Appeals ordered the district court to retain jurisdiction over the action, the plaintiffs will have recourse to the federal courts for decision of the federal issues if they are not presented in the state courts. If all federal issues, however, are raised and are decided against the plaintiffs they must appeal the decision to the United States Supreme Court.

[31] Past decisions indicate that the state operates a local option school system. Board of Supervisors v. County School Bd., 182 Va. 266, 28 S.E.2d 698 (1944), held that the county Board of Supervisors alone has power over the use and control of all school funds, whether derived from state or local sources. School Bd. v. Shoekly, 160 Va. 405, 168 S.E. 419 (1933), held that the General Assembly was forbidden by the state constitution from levying local taxes for school purposes. Griffin v. Board of Supervisors, 203 Va. 321, 124 S.E.2d 227 (1962) held that while the Board of Supervisors of the county had the authority to levy such taxes, they had no duty to do so, and thus were not subject to mandamus.

Both Judge Bell, dissenting in *Griffin*, and the district judge found that there was a statewide system of schools. However, this does not mean that the Virginia courts will find that Virginia has a state constitutional mandate to provide schools in each county. A finding that there is a local option school system would satisfy the state constitutional mandate but would not impose a duty upon the state to provide schools in each county, and thus would not obviate the federal constitutional question.

[32] See, *e.g.*, Harrison v. NAACP, 360 U.S. 167 (1959). In Government & Civic

Prince Edward County schools are an autonomous county system which may be closed at any time.[33]

The abstention doctrine still retains an equitable flavor despite the fact that it is no longer applied solely in equitable actions.[34] Since the application of abstention involves a decision to postpone, or even decline,[35] the exercise of jurisdiction conferred upon the courts by Congress and properly invoked by the litigants, it should be used sparingly and only in those cases in which the circumstances demand its application.[36] There is involved in such a decision a balancing of the public and private interests and a consideration of whether those interests are important enough to deny the plaintiff access to a federal court the jurisdiction of which he has properly invoked.[37]

As a general rule, a court will not abstain where to do so will cause a litigant irreparable harm.[38] For example, the federal courts

Employees Organizing Comm., CIO v. Windsor, 353 U.S. 364 (1957), the Supreme Court ordered abstention because the state court had not considered the state law in light of constitutional objections.

[33] A finding of autonomous county school systems within a state framework might justify a holding that there is no denial of equal protection of the laws when one of these systems is closed entirely; at the same time the apparent legislative intent to establish local autonomy in education would also be effectuated.

It also appears that abstention in the instant case would not be justified on grounds of preserving the delicate balance of federal-state relations. The school closure was in accordance with a resolution passed by the Board of Supervisors on May 3, 1956, which provided that no money would be appropriated for the operation of integrated schools as ordered by the Supreme Court. Deference to a state, a county of which is attempting to frustrate a constitutional decision of the United States Supreme Court, seems to be a high price to pay for harmony. Moreover, it can be doubted that deference accomplishes more in this case than a postponement of the friction until after the state court decision.

[34] See Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). This is the first application of the abstention doctrine in a legal, as opposed to an equitable, action. However, it is not clear whether this is applicable outside of eminent domain proceedings. The court couched its opinion in narrow terms, stating that an eminent domain proceeding was only "deemed for certain purposes of legal classification a 'suit at law.'" *Id.* at 28.

[35] It has been argued that, despite assurances to the contrary by the Supreme Court, see, *e.g.*, Harrison v. NAACP, 360 U.S. 167, 177 (1959), abstention involves the abdication of federal jurisdiction because of the res judicata effect of a state court determination of the federal issues. See Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 LAW & CONTEMP. PROB. 216, 230 (1948).

[36] See, *e.g.*, County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959).

[37] The Supreme Court said in NAACP v. Bennett, 360 U.S. 471 (1959), that when a state statute is challenged, "reference to the state courts for construction of the statute should not automatically be made." It implied that the lower federal courts should balance the interests in the case, as the Supreme Court had in Harrison v. NAACP, 360 U.S. 167 (1959), handed down two weeks before.

[38] See, *e.g.*, Martin v. Creasy, 360 U.S. 219 (1959); Burford v. Sun Oil Co., 319 U.S.

will not abstain unless there is an adequate remedy in the state courts.[39] Thus, if the plaintiff, in order to assert his claim, must run the risk of criminal punishment[40] or payment of a tax,[41] abstention has been ordered only after an assurance by the state that enforcement will be withheld until after the state proceedings. This rule is also in keeping with the growing federal concern over delay in vindication of individual rights in state courts, as evidenced by recent decisions in such fields as habeas corpus[42] and administrative remedies.[43]

In cases of alleged continuing civil rights violation, abstention may cause the plaintiffs irreparable harm even if the rights they claim are eventually vindicated, since the deprivation complained of will continue pending state proceedings. In the instant case, plaintiffs may lose years of education. Moreover, the field of civil rights is one in which Congress has specifically expressed a desire to provide a federal forum for litigation.[44] Although this desire is not considered a grant of mandatory jurisdiction, it does present a strong policy factor for keeping the suit in the federal courts.[45]

In deciding whether to abstain, a court should consider the above policy factors and the underlying purposes of the abstention doctrine. The decision to abstain in the *Griffin* case stands little chance of avoiding a decision of the federal constitutional questions and is almost certain to cause irreparable harm to the plaintiffs. It is thus submitted that the Court of Appeals would better have considered the case on the merits.

315 (1943); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[39] See, *e.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941). The Court ordered abstention since there was no showing that "a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim." In Martin v. Creasy, 360 U.S. 219, 223 (1959), abstention was granted after the Court was assured "that the state statute provides a complete procedure to guard and protect plaintiffs' constitutional rights 'at all times.'"

[40] See Harrison v. NAACP, 360 U.S. 167 (1959); Toomer v. Witsell, 334 U.S. 385 (1948).

[41] See Chicago, D. & G.B. Transit Co. v. Nims, 252 F.2d 317 (6th Cir. 1958).

[42] United States *ex rel* LaNear v. LaVallee, 306 F.2d 417 (2d Cir. 1962) (exhaustion of state remedies before issuance of habeas corpus limited).

[43] McNeese v. Board of Educ., 373 U.S. 668 (1963) (plaintiff in civil rights suit not required to exhaust administrative remedies before recourse to federal courts).

[44] The traditional argument against abstaining in civil rights cases was that Congress, in passing the Civil Rights Acts, provided that the federal courts would have mandatory jurisdiction over cases arising under those laws. This argument was shattered, however, by the decision in Harrison v. NAACP, 360 U.S. 167 (1959), in which the Supreme Court ordered abstention in a case arising under that act.

[45] See note 44 *supra*.