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Federal Courts and Procedures: Abstention

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Jr., on the other hand, thoroughly discussed the implications of reapportionment upon county governments and took a very different stand on such side effects.[30] He spoke of malapportionment as the most crucial obstacle to the development of "urban counties" which in turn might be a chosen instrument for "metropolitan salvation."[31] Speaking before *Avery*, Dixon's following prediction optimistically cited the side effects of a decision like *Avery:*

> In short, by judicial fiat, and as a totally unexpected by-product of the original state legislative reapportionment suit from Tennessee in 1962, we may soon have on hand a ready-made political instrument for 'metro' development, in the form of reinvigorated county government, that probably could not have developed in a generation of popular referenda. A county board on which all sections of the county—city, suburban, rural—are represented approximately in proportion to their population, could be a ready-made 'metro' instrument. The traditional character of the county should ease the path to acceptability.[32]

Dixon also saw the more difficult challenge that local reapportionment poses warning that "particularly in those states with a tradition of township organization, [it] is a more complex, more challenging, and potentially more revolutionary process than state legislative reapportionment."[33]

There are also inherent problems. For example, what does the Court mean by its conveniently vague "arbitrary and invidious" test? What is "an allowable population disparity"?[34] It was a simple matter, almost a constitutional reflex, to declare that districts of 67,906; 852; 414; and 828 were grossly disproportionate, but it will be in the gray fact situations that the idea of "the substantially equal vote" will provide the Court with its most challenging realities. As is the case with so many "breakthrough" decisions, only time and cautious but perceptive decisions by the Supreme Court in this vast new area will allow a true evaluation as to whether or not one man-one vote is applicable to local governmental units.

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Federal Courts and Procedure: Abstention: Under the Civil Rights Act of 1964, "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (3) To redress the deprivation, under color of any state law, . . .

and exurbia, the problem of allocating local government functions and benefits urgently requires attention, I am persuaded that it does not call for the hatchet of one man, one vote."

[30] 30 LAW AND CONTEMPORARY PROBLEMS 57 (1965).

[31] *Id.* at 70.

[32] *Id.* at 73.

[33] *Id.* at 74.

[34] For example of the problems present when the Court deals with population disparities *see* Lucas v. Colorado General Assembly, 377 U.S. 713 (1963).

of any right, privilege or immunity secured by the Constitution of the United States. . . ."[1] Thus, a litigant has the power to determine whether a state or federal court will hear and decide his federal constitutional claims. Simply because the state courts have the same obligation to enforce the United States Constitution as do the federal courts, "It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[2]

However, in those cases in which certain narrowly defined "special circumstances" are present, the judicial doctrine of abstention sanctions the right of a federal court to decline jurisdiction over federal constitutional claims. In *Railroad Commission v. Pullman Co.*,[3] the Supreme Court set forth the judicial policy underlying the application of the abstention doctrine when it said:

> Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, . . . or the administration of a specialized scheme for liquidating authority of a state court to interpret doubtful regulatory laws of the state. . . . these cases reflect a doctrine of abstention appropriate to our federal system, whereby the federal courts, exercising a wise discretion, restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary.[4]

In *Zwickler v. Koota*,[5] the Court held that absent any "special circumstances" which would permit a district court to abstain and remand the plaintiff to the state courts, "a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute."[6]

Sanford Zwickler was convicted of violating section 781-b of the New York Penal Law[7] because he had distributed anonymous handbills critical of the record of a United States Congressman seeking reelection in the 1964 elections.[8] Section 781-b makes it a crime for any person to distribute in quantity any handbill concerning any candidate without the name and address of the person distributing them appearing thereon. In his appeal to the New York Supreme Court, Appellate

[1] 28 U.S.C. § 1343 (1964).
[2] Monroe v. Pape, 365 U.S. 167, 183 (1960).
[3] 312 U.S. 496 (1940).
[4] *Id.* at 500-1.
[5] 389 U.S. 241 (1967).
[6] *Id.* at 254.
[7] N.Y. PENAL LAW § 781-b (McKinney 1965).
[8] People v. Zwickler (Crim. Ct. N.Y. City, Kings Co., February 10, 1965).

Term,[9] Zwickler alleged that section 781-b was void because it abridged his constitutional right of free expression. The court reversed his conviction on the ground that he had not distributed anonymous handbills *in quantity,* but did not rule as to the constitutionality of section 781-b. This decision was affirmed without opinion by the New York Court of Appeals.[10] Zwickler then petitioned the District Court for the Eastern District of New York[11] for both injunctive and declaratory relief, invoking its jurisdiction under the Civil Rights Act[12] and the Declaratory Judgment Act.[13] The district court applied the doctrine of abstention on two grounds. First, relying on *Dombrowski v. Pfister,*[14] it held that Zwickler had failed to demonstrate any conditions prerequisite to the granting of injunctive relief, and that consequently, this failure precluded it from considering the prayer for a declaratory judgment. Second, the court ruled that section 781-b was susceptible to an interpretation by the state courts that would either avoid or modify the constitutional issue, and therefore remanded Zwickler to the New York courts to seek an appropriate remedy.

The issues raised on appeal in Zwickler were:

> . . . *first,* whether abstention from the declaratory judgment sought by the appellant would have been appropriate in the absence of his request for injunctive relief, and *second,* if not, whether abstention was nevertheless justified because appellant also sought an injunction against future criminal prosecutions for violation of section 781-b.[15]

With regard to the first issue, the request for declaratory relief, in his amended complaint Zwickler alleged that section 781-b was not void for vagueness, but rather that its clearly overbroad sweep invaded his first amendment right of free expression. The appellee concurred with this contention, admitting that there was no way the state courts could possibly narrow section 781-b through a limiting construction so as to avoid a decision of the appellant's constitutional claim. In this context, the Court used as its guide to decision *United States v. Livingston.*[16] Quoting from Livingston, the Court stated: "Though never interpreted by a state court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it."[17] Having found no "special circumstances" present to support abstention, the Court went further in emphasizing that

[9] People v. Zwickler (Sup. Ct., App. Term, Kings Co., April 23, 1965).
[10] 16 N.Y. 2d 1069, 266 N.Y.S.2d 140, 213 N.E.2d 467 (1965).
[11] 261 F. Supp 985 (E.D. N.Y. 1966).
[12] 28 U.S.C. § 1343 (1964).
[13] 28 U.S.C. § 2201 (1964).
[14] 380 U.S. 479 (1964).
[15] 389 U.S. 241, 245 (1967).
[16] 179 F. Supp. 9 (E.D. S.C. 1959), *aff'd* 364 U.S. 281 (1960).
[17] 389 U.S. 241, 251 (1967).

the *Livingston* doctrine is particularly viable when an action is maintained under the Civil Rights Act and a statute is attacked for overbreadth and repugnancy to the First Amendment. The Court reiterated the rationale of *Dombrowski* when it said that the "chilling effect" of lengthy state court proceedings and ultimate review by the Supreme Court may well constitute irreparable injury to the very right that the plaintiff seeks to assert. In *Dombrowski,* the Court said:

> We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike *Douglas v. City of Jeannette,* statutes are justifiably attacked on their face as abridging free expression, or are applied for the purpose of discouraging protected activities.[18]

It is interesting to speculate whether the Court would have affirmed the decision of the district court had it found that section 781-b was susceptible to an interpretation by the state courts that would have narrowed or presented the constitutional issue in a different posture. It can be argued that the rule established in *Harrison v. NAACP*[19] would then be applicable. The Court said in *Harrison* that:

> All we hold is that these enactments should be exposed to a state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court.[20]

Conversely, it could be maintained that the very process of abstaining under this "special circumstance" would inevitably "chill" and therefore irreparably injure the plaintiff's first amendment right of free expression. The language of the Court in *Dombrowski* coupled with the pointed affirmation of those same principles in *Zwickler* strongly implies that the policy considerations of the latter argument would supersede those of the former, so that abstention should not be applied. Yet the Court states in its connective between the first and second issues that ". . . unless appellant's addition of a prayer for injunctive relief supplies one, no 'special circumstance' pre-requisite to application of the abstention doctrine is present here. . . ."[21] This statement is subject to a dual interpretation. It could mean that finding a "special circumstance," the Court would have *ipso facto* applied the abstention doctrine. More likely, it would seem to mean that the aforementioned policy conflict would have become a real issue to be resolved by the Court.

The second issue faced by the Court is whether or not a federal

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[18] 380 U.S. 479, 489-90 (1964).
[19] 360 U.S. 167 (1958).
[20] *Id.* at 178.
[21] 389 U.S. 241, 252 (1967).

court may abstain from a request for declaratory relief if the plaintiff's plea for injunctive relief is denied. The Court stated that the district court misinterpreted the thrust of its opinion in *Dombrowski* when it dealt with the request for declaratory and injunctive relief as a composite issue. Instead, the Court said that *"Dombrowski* teaches that the questions of abstention and of injunctive relief are not the same."[22] Noting once again that the abstention doctrine would be inappropriate in a case of this nature, the Court resolved this issue by stating:

> [A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.[23]

Therefore, a district court confronted with a case like *Zwickler* must first decide the merits of the request for declaratory relief uncontaminated by any conclusions it may have reached with regard to the issue of injunctive relief. Only when the plea for declaratory relief prevails is it necessary or proper for the court to consider the propriety of an injunction.

In reaching a superficially palatable resolution of this issue, the Supreme Court leaves unanswered two questions provoked by it in the earlier part of the opinion. The Court never determines whether the addition of the request for injunctive relief could have produced a "special circumstance" which would be appropriate to the doctrine of abstention. In *Douglas v. City of Jeannette*[24] the Court said:

> Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds.[25]

Thus, if a court comes to the same conclusions on the issue of injunctive relief as the district court did in *Zwickler,* by applying *Douglas,* it might come to the further conclusion that the issuance of an in-

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[22] *Id.* at 254.
[23] *Ibid.*
[24] 319 U.S. 157 (1942).
[25] *Id.* at 163.

junction would constitute unwarranted interference with the state's criminal courts. This conclusion provides a "special circumstance" appropriate to the conventional application of abstention to a request for declaratory relief. Even if a court were faced by this possible consequence, it could invoke the judicial doctrine of comity between the state and federal courts, and thus deny an injunction but still grant declaratory relief to the plaintiff.

Even more fundamental is the question of whether a court can apply any "special circumstance" which might be produced by the request for injunctive relief to the issue of abstention from the prayer for a declaratory judgment. Since the Court says that the questions of injunctive and declaratory relief are "independent," and that under the circumstances present in *Zwickler,* a court's conclusions as to the propriety of an injunction are "irrelevant" to the issue of abstention, it can be inferred that the requests for injunctive and declaratory relief are to be treated as completely exclusive of each other within the prescribed order of decision.

In its opinion, the Supreme Court goes beyond a simple determination of the particular issues in *Zwickler.* As though they were purposefully conceived, the Court implies certain propositions which will be of particular significance when and if a court is confronted by a request for both injunctive and declaratory relief in the context of *Zwickler* and *Dombrowski,* and "special circumstances" are present which would support the conventional application of abstention. It is clear that, at the present time, the Court is not ready to transform these implications into mandates. Therefore, the Court's opinion in *Zwickler* will become additionally meaningful as those implications and inferences are clarified, and established as rules, in subsequent interpretations by the Supreme Court.

CHRIS MCNAUGHTON

Divorce: Cruel and Inhuman Treatment—Absence of Findings of Fact and Conclusions of Law. The guiding consideration in marriage dissolution cases is set forth in the first section of the Family Code:

> It is the intent of chs. 245 to 248 to promote the stability and best interests of marriage and the family. Marriage is the institution that is the foundation of the family and society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always. . . . The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned.[1]

[1] WIS. STAT. § 245.001(2) (1967).