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I. INTRODUCTION

In an era of continually expanding federal judicial power, the Supreme Court has fashioned and employed several devices designed to delegate certain classes of federal question litigation to the state court systems. Among these devices are the doctrines of abstention, comity, and exhaustion of state remedies. Implementation of these doctrines has enabled the Supreme Court to maintain state judicial presence in federal question litigation and retain at least the appearance of a manageable federalized judicial structure.

This article will attempt to analyze the function of the abstention doctrines as judicially-created tempering devices. Following a brief discussion of the factors that led to the evolution of an abstention doctrine, the four main abstention theories, as currently applied, will be identified, and their underlying purposes and functions will be assessed. Lastly, these doctrines will be re-evaluated with a view toward formulating a framework for applying abstention that will better serve the ends the doctrine was designed to achieve.

II. BACKGROUND

Article III of the United States Constitution vests the "judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[1] The Supreme Court very early assumed the power to interpret the meaning of the Constitution and bind the other federal branches and the states to its construction.[2] Indeed, the history of the Supreme Court decision-making consists largely of repeated efforts to define the substantive meaning of Article III and related clauses of the Constitution[3] and to establish the scope of subject matter jurisdiction of the federal courts.[4]

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1. U.S. CONST. art. III, § 1.

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See also* Cooper v. Aaron, 358 U.S. 1 (1958).

3. U.S. CONST. art. III, § 2, cl. 1,2; art. VI, cl. 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Cooper v. Aaron, 358 U.S. 1 (1958).

4. *E.g., Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Armed with the broad Article III mandate and its own self-declared power to construe it, the Court has played a key role in expanding both the extent of federal judicial power and the subject matter jurisdiction in which this power may be exercised. Specifically, although the state courts have concurrent jurisdiction over litigation concerning issues arising under the Constitution, laws, and treaties of the United States,[5] the Supreme Court has established through a consistent line of opinions that the federal courts are the preferred forum for vindication of federal rights and adjudication of federal issues.[6] Thus, with the expansion of federal judicial power has come the expansion of federal court jurisdiction.

Congress also has been an important, though at times unintending, participant in this process of expanding jurisdiction and judicial power. With the Judiciary Act of 1789[7] Congress established the basic framework of the present judicial system, granting federal courts exclusive jurisdiction over certain issues[8] and concurrent jurisdiction over others, including certain types of diversity cases.[9] The jurisdiction of the federal courts was expanded somewhat during the period from 1789 to 1866,[10] but it was not until the Civil War

5. U.S. CONST. art VI, cl. 2.

6. *E.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Abelman v. Booth, 62 U.S. (21 How.) 506 (1859); *Ex Parte* Young, 209 U.S. 123 (1908); Dugan v. Rank, 372 U.S. 609 (1963); Baker v. Carr, 369 U.S. 186 (1962); Dombrowski v. Pfister, 380 U.S. 479 (1965); Fay v. Noia, 372 U.S. 391 (1963); Flast v. Cohen, 392 U.S. 83 (1968); Younger v. Harris, 401 U.S. 37 (1971); Mitchum v. Foster, 407 U.S. 225 (1972); Steffel v. Thompson, 415 U.S. 452 (1974).

Younger v. Harris is viewed as expansive of federal jurisdiction, and it is so from an historical perspective. Prior to *Younger* federal courts were generally considered to be barred from granting injunctive relief against pending state prosecutions. The stringent restrictions on available injunctive relief in *Dombrowski* and Douglas v. City of Jeanette, 319 U.S. 157 (1943), applied to threatened prosecutions. *Younger*, coupled with *Mitchum*, broadened the federal court's jurisdiction by recognizing circumstances in which injunctive relief against pending prosecutions would be permitted. And Steffel v. Thompson broadened the availability of federal relief where state prosecution is threatened.

7. Ch. 20, 1 Stat. 73, *passim*.

8. For example, the Act granted federal courts exclusive jurisdiction in admiralty cases. *Id.* § 9, 1 Stat. 76.

9. *Id.* § 11, 1 Stat. 78, 79. No general federal question jurisdiction was conferred, and federal courts were denied the power to issue writs of habeas corpus with respect to state prisoners. *Id.* § 14, 1 Stat. 81.

10. The Act of February 13, 1801, ch. 4, § 11, 2 Stat. 92 granted federal courts judicial powers as broad as those stated in article III, but this Act was repealed soon thereafter when President Jefferson took office, Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132.

Removal to federal courts of litigation concerning federal revenue and customs laws was permitted by the Act of March 3, 1815, ch. 94 § 6, 3 Stat. 233; Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198; and the Act of March 2, 1833, ch. 57, § 3, 4 Stat. 633.

Federal courts were given the power to grant habeas corpus relief to prisoners in state

Reconstruction era that Congress again significantly expanded the scope of federal court jurisdiction by passing the Civil Rights Removal Statute,[11] the Voting Rights Act of 1871,[12] the Act of July 27, 1868,[13] and most importantly the Judiciary Act of 1875,[14] which granted federal courts concurrent jurisdiction and removal jurisdiction with respect to causes arising under the Constitution or laws of the United States. Coupled with this augmented jurisdiction were the various civil rights acts that conferred broad substantive rights on all persons in the United States and left the judicial branch substantial responsibilities for enforcement.[15] Since 1875 Congress has altered and generally added to the federal courts' jurisdiction in narrow, albeit significant, respects.[16]

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custody who were being held for crimes under federal law. Force Bill of 1833, Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634. And in 1867, federal courts were given the power to grant habeas corpus relief to state prisoners being held for violations of state law. Act of February 5, 1867, 28 U.S.C. § 2241 (1970).

11. Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27.

12. Act of February 28, 1871, ch. 99, §§ 15, 16, 16 Stat. 438-39. This provision was repealed in 1894. Act of February 8, 1894, ch. 25, 28 Stat. 36.

13. This act permitted the removal to federal court of cases brought against certain federally-organized corporations where defenses were based upon the Constitution, treaties, and laws of the United States. Act of July 27, 1868, ch. 255, § 2, 15 Stat. 227.

14. Act of March 3, 1875, ch. 137, §§ 1, 2, 18 Stat. 470.

15. *E.g.*, Act of April 9, 1866, ch. 31, § 3, 14 Stat. 27 (now 42 U.S.C. §§ 1981, 1982, (1970)); Act of May 31, 1870, ch. 114, 16 Stat. 140 (now 18 U.S.C. § 241 (1970)); The Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13 (now 42 U.S.C. §§ 1983, 1985(3) (1970)); Civil Rights Act of 1875, ch. 99, 18 Stat. 335, sections 1 and 2 of which were declared unconstitutional in tbe *Civil Rights Cases*, 109 U.S. 3 (1883).

These substantive powers were further expanded by Congress under the Civil Rights Acts of 1957, 1960, and 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968. *See* 42 U.S.C. §§ 1971, 1974, 2000(a)-(h), 3601-31; 18 U.S.C. § 245 (1971). The Supreme Court, under these provisions and the enforcement provisions of the 13th, 14th, and 15th amendments, as well as the Commerce Clause, has broadened the scope of federal powers vested in Congress, and has thereby broadened tbe subjects over which the judicial power exists. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966); United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Cox, *Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

16. For a detailed presentation of legislation after 1875, see Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U.L. REV. 841, 844-45 & nn.19-22 (1972).

Perhaps of more significance than jurisdictional expansion since 1875 has been Congress' substantial legislation regarding civil rights, *see* note 15 *supra*, and, most recently, the environment. *E.g.*, National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970); Clean Air Amendments of 1970, 42 U.S.C. §§ 1857d(g), 1857h-2 (1970). These and other federal statutes have greatly expanded the substantive domain of federal jurisdiction, and have contributed appreciably to increased caseloads in the federal system. For example, civil rights actions in federal courts numbered 296 in 1960. 1961 Annual Report of the Director of the Administrative Office of the United States Courts, Table C2, at 238 [hereinafter cited

This brief survey suggests that the history of the Supreme Court from its inception has been dominated by one common feature—a relatively consistent evolutionary process of expanding federal judicial power accompanied by expanding jurisdiction for federal courts. This pattern, however, has not been perfectly consistent. Congress has frequently attempted to curtail federal judicial power and has often succeeded.[17] The Supreme Court has also attempted to temper the pace of expanding federal judicial power by delegating certain classes of federal question litigation to state court systems[18] through such doctrines as comity[19] and exhaustion of state

as A.O. Report]. In 1970, the number of such cases had increased to 3,985, 1970 A.O. Report, Table C2, at 232, and in 1972, to 6,133, 1972 A.O. Report, Table C2. A thorough analysis of the increasing workload of federal courts during the past twelve years may be found in H. FRIENDLY, FRDERAL JURISDICTION: A GENERAL VIEW 15-55 (1972).

17. *E.g.*, Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132 (repealing Act of Feb. 13, 1801, ch. 4, 2 Stat. 89); *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1869)(congressional restriction of the Supreme Court's appellate jurisdiction). Following the Supreme Court's decision in *Ex Parte* Young, 209 U.S. 123 (1908), Congress enacted measures designed to temper or eliminate the use of federal court injunctions against state officials. *E.g.*, Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557, *as amended*, 28 U.S.C. § 2281 (1970)(three-judge federal district courts); Anti-Tax Injunction Act, 28 U.S.C. § 1341 (1970). For an interesting discussion of more recent, and largely unsuccessful, congressional attempts to curtail the Court's jurisdiction, see W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY, THE NEW LEGALITY 1932-1968, at 215-58 (1970).

One of Congress' earliest and certainly its most lasting effort at limiting federal judicial power was the Anti-Injunction Act passed in 1793. 28 U.S.C. § 2283 (1970).

18. One example of this is the Court's very narrow construction of the Civil Rights Removal Act, 28 U.S.C. § 1443 (1970), in Georgia v. Rachel, 384 U.S. 780 (1966) and City of Greenwood v. Peacock, 384 U.S. 808 (1966). The Court held in those cases that removal under 28 U.S.C. § 1443 would be justified only when a state statute clear on its face expressly required the denial of a specifically guaranteed federal right to racial equality and the denial of that right through enforcement of the state statute would inevitably result in denial of a fair trial, as in Strauder v. West Virginia, 100 U.S. 303 (1879), or when a state statute, not facially invalid, has been expressly preempted by a federal act that on its face immunizes from prosecution the conduct that is the subject of the prosecution. The effect of these decisions was to prevent an outright abandonment of state forums for the litigation of civil rights cases arguably falling within the federal statute.

It is interesting to note that the standards imposed for civil rights removal are remarkably similar to those announced in Younger v. Harris, 401 U.S. 37 (1971). *Younger* imposed restrictions on a federal court's ability to enjoin pending state criminal prosecutions.

19. This doctrine is best exemplified by Douglas v. City of Jeannette, 319 U.S. 157 (1943); Dombrowski v. Pfister, 380 U.S. 479 (1965); Younger v. Harris, 401 U.S. 37 (1971); and Samuels v. Mackell, 401 U.S. 66 (1971). While this doctrine is to be distinguished from the abstention doctrine and is beyond the scope of this article, there are significant parallels between the comity doctrine and the third variety of abstention identified in this article. *See, e.g.*, Burford v. Sun Oil Co., 319 U.S. 315 (1943). The difference, in part, lies in the fact that the preference for the state forum in *Younger* is based almost exclusively on notions of noninterference with historically rooted state judicial function. Under *Burford*, on the other hand, federal dismissal in favor of the state forum is based not only on notions of noninterference with the state judicial system, but on greater reliability attached to the state court's

remedies.[20] Abstention is yet another doctrine that the Court has employed to reduce the power and jurisdiction of the federal courts. The abstention doctrine, however, is not a monolith but is instead a concept grounded on four distinct bases, each of which finds its formulation in a Supreme Court decision.

III. THE ABSTENTION DOCTRINES

A. *Dispositive State Grounds—Railroad Commission v. Pullman Company*

While abstention was not unknown in the federal system prior to 1941,[21] Mr. Justice Frankfurter's opinion in *Railroad Commission v. Pullman Company*[22] is generally considered to be the first full articulation of the abstention doctrine. In *Pullman* the company and its black porters charged that an order of the Texas Railroad Commission was violative of the fourteenth amendment and in excess of the authority delegated to the Commission by the state legislature. The order required that all sleeper cars have in charge a pullman conductor, all of whom were white, rather than a porter, most of whom were black. The Court reversed the district court's

decision of federal issues. And under *Burford* abstention is complete; there is no later federal adjudication at the district court level. Under *Younger*, however, re-entry to the federal district court is available through habeas corpus.

The recent case of Steffel v. Thompson, 415 U.S. 452 (1974), substantially limits the scope and application of the comity principle by permitting a federal court to grant declaratory relief when a prosecution is threatened, without any showing of irreparable injury. The result of *Steffel* may be a race to the courthouse between the prospective criminal defendant and the state prosecutor. If the defendant wins, declaratory relief will be available, although it is by no means clear whether the federal declaratory judgment action will have any impact on the state criminal action, which might proceed contemporaneously. Any injunctive relief by the federal court, or any res judicata effect given to the federal judgment, may have to be tested in light of *Younger*, for at that stage a state proceeding will be pending.

20. Exhaustion requirements were imposed on habeas corpus petitioners in state custody. *See* Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 229 (1908) (Holmes, J.); *Ex Parte* Royall, 117 U.S. 241 (1886); Frank v. Mangum, 237 U.S. 309 (1915). These requirements were enacted in legislative form by Congress in 1948. 28 U.S.C. § 2254 (1970).

During the 1972 Term, the Supreme Court once again established a judicially created exhaustion requirement with respect to actions brought by state prisoners under 42 U.S.C. § 1983. Preiser v. Rodriquez, 411 U.S. 475 (1973)(in which a prisoner sought immediate or accelerated release from confinement).

21. *See, e.g.*, Pennsylvania v. Williams, 294 U.S. 176 (1935); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935) (relating to a state's interest in enforcement of criminal laws); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929) (relating to state regulatory schemes); Fenner v. Boykin, 271 U.S. 240 (1926).

22. 312 U.S. 496 (1941). *See* Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

judgment enjoining enforcement of the Commission order and held that the district court should have abstained from deciding the case until the Texas courts had had an opportunity to determine the legality of the challenged order on state law grounds. The Court noted that the race discrimination issue touched upon a tender area of social policy "which the federal courts ought not to enter unless no alternative to its adjudication is open."[23] Also pointing to state determination of the case was the Court's belief that the state law issue relating to the legality of the order was "far from clear"[24] and that it was "doubtful"[25] that the Commission had been empowered by state law to issue the challenged order. The district court's position, therefore, was that of "a federal court of equity . . . asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication."[26] Frankfurter reasoned that few public consequences are more significant to the exercise of equitable discretion than "the avoidance of needless friction with state policies"[27] that stems from " 'scrupulous regard for the rightful independence of the state governments . . . .' "[28] In addition, a state forum was easily available for determination of the state law issues through appeal from the Commission's order or defense to an enforcement action. On the basis of these considerations the Court ordered that the case be remanded to the district court with directions to retain jurisdiction pending a determination of proceedings in the state courts.

The form of abstention exercised in *Pullman*, then, occurs when the resolution of issues of state law may be dispositive of the federal question presented.[29] Most *Pullman*-type abstention cases have involved federal constitutional claims, but there is little reason to limit abstention to this context; a state law issue that might dispose of a question arising under federal statute could also require abstention.[30] *Pullman* abstention occurs only when the underlying state

23. 312 U.S. at 498.
24. *Id.* at 499.
25. *Id.*
26. *Id.* at 500.
27. *Id.*
28. *Id.* at 501, *quoting* Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 73 (1935).
29. *E.g.*, Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).
30. *See* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972). Nor, in light of Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), in which abstention was ordered in a diversity case presenting only state law issues, would there by any basis for limiting abstention to cases in which federal jurisdiction was granted concurrently with state courts.

law issues are unclear, because of inconsistent state court pronouncements, unaddressed state law questions,[31] or new and uninterpreted state statutes that may be subject to varying interpretations material to the federal question.[32] In such instances the federal court will stay its hand and allow the state court to adjudicate the relevant state law issues.[33] Abstention under *Pullman*, of course, will be ordered only if means of obtaining state court adjudication are available.[34]

Certain functional benefits of such an approach are obvious from the federal court's perspective. First, abstention in this context delays the decision of the federal question presented—often a constitutional question.[35] Also, if either the state law issue or the federal

31. An example might be, as in *Pullman*, state law restrictions on the delegation of legislative power to an administrative agency. Such restrictions might stem from state common law or state constitutional provisions, as well as other state statutory provisions. *See* Department of Social Services v. Dimery, 398 U.S. 322 (1970), *vacating mem.* 320 F. Supp. 1125 (S.D. Iowa 1969).

32. When a statute is new or totally without judicial construction, abstention has been ordered, as long as the construction of the statute is not clear and could obviate the need to determine the federal question. *See, e.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Harrison v. NAACP, 360 U.S. 167 (1959); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); *cf.* City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958); Toomer v. Witsell, 334 U.S. 385 (1948). In some cases, however, construction of the state statute will not suffice if the applicability of the statute is clear, but the challenge is based on the inherent vagueness of the statutory requirement. *E.g.*, Baggett v. Bullitt, 377 U.S. 360 (1964); *see* text accompanying notes 161-65 *infra*.

33. *E.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970); Department of Social Services v. Dimery, 398 U.S. 322 (1970); England v. Louisiana State Bd. of Medical Exam'rs, 375 U.S. 411 (1964); United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962); Harrison v. NAACP, 360 U.S. 167 (1959); Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959); Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957); Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957); Albertson v. Millard, 345 U.S. 242 (1953); Shipman v. DuPre, 339 U.S. 321 (1950); AFL v. Watson, 327 U.S. 582 (1946); Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

34. If no adequate state court remedy exists, abstention will not be ordered and the federal court will decide the state law issues. *E.g.*, Township of Hillsborough v. Cromwell, 326 U.S. 620 (1946).

35. Scott v. Germano, 381 U.S. 407 (1965), presents an interesting variant of the application of the *Pullman* abstention doctrine with respect to the granting of relief rather than adjudication of the underlying issues. After remand from the United States Supreme Court in Germano v. Kerner, 378 U.S. 560 (1964), the federal district court had declared the Illinois constitutional and statutory legislative apportionment provisions unconstitutional. Germano v. Kerner, 241 F. Supp. 715 (N.D. Ill. 1965). Shortly thereafter in People *ex rel.* Engle v. Kerner, 32 Ill. 2d 212, 205 N.E.2d 33 (1965), a separate proceeding in the state courts, the Illinois Supreme Court had likewise held the Illinois Senate apportionment invalid, and like

issue is resolved in favor of the federal plaintiff, the federal court avoids deciding the federal question altogether,[36] a result consistent with the frequently announced policy that a federal court should not decide a constitutional issue unless no alternative to its resolution exists.[37] *Pullman* abstention also shifts the responsibility for deciding state law issues to the state courts,[38] thereby serving the purposes underlying the principle of dual judicial sovereignty.

Other functional benefits of this form of abstention are perhaps less apparent. The most significant benefit is that an abstention permitting state court determination of possibly dispositive state law issues may not only avoid the federal court's need to decide the federal question, but may avoid the need to resolve the federal issues in any forum.[39] *Pullman* abstention may also serve as a convenient and effective technique for controlling and limiting the exercise of jurisdiction, particularly with respect to the Supreme Court's appellate docket.[40] The avoidance of decision that results, moreover,

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the federal court, had ordered that a new apportionment plan be enacted. Both courts retained jurisdiction to review the new plan or take any necessary action in the absence of an adequate new plan.

The federal district court was then asked to vacate its order holding the Illinois plan invalid and to stay further action in view of the state court decision. The district court refused, but the Supreme Court reversed and ordered the district court to establish a timetable for implementation of a new plan. In the absence of submission of an acceptable plan to the state court by the designated date, the federal court could re-enter the case and order necessary relief.

A number of observations may be noted. First, the Supreme Court did not vacate the federal court's judgment holding the state scheme unconstitutional; nor did it intimate that, prior to its judgment, the federal court should have abstained. Abstention was ordered only with respect to *relief* — to permit the state court to enforce its parallel judgment. Thus, the abstention that was ordered was extemely limited and was greatly affected by the pendency of the state court proceedings. Avoidance of duplicative judicial effort, as well as the harsh irritant of a federal court overseeing state legislative reapportionment, seems to be at the heart of the abstention decision.

36. *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Klinger v. State of Missouri, 80 U.S. (13 Wall.) 257, 263 (1872); Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965).

37. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498, 500 (1941). *See, e.g.*, Martin v. Creasy, 360 U.S. 219, 224 (1959); Harrison v. NAACP, 360 U.S. 167, 177-78 (1959); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510-11 (1972); Peters v. Hobby, 349 U.S. 331 (1955).

38. *See* Steffel v. Thompson, 415 U.S. 452, 474-75 n.21 (1974). Political capability may be a significant factor as well. Avoidance of politically explosive consequences may have affected the decision in Scott v. Germano, 381 U.S. 407 (1965), discussed in note 35 *supra*.

39. *E.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941). This result does not always ensue. *E.g.*, NAACP v. Button, 371 U.S. 415, 427-28 (1963); Harrison v. NAACP, 360 U.S. 167 (1959).

40. *E.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Askew v. Hargrave,

makes the doctrine a useful political tempering device.[41] And in a closely related sense abstention is, in part, a face-saving device for the federal court. It avoids the problem encountered in *Swift v.*

401 U.S. 476 (1971); Reetz v. Bozanich, 397 U.S. 82 (1970); Harrison v. NAACP, 360 U.S. 167 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). The abstention cases that have not arisen in this context have tended to be diversity cases. *E.g.*, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943). Without necessarily impugning the principled foundation of the abstention doctrine, the doctrine has also served as an effective device for controlling the Supreme Court's workload.

41. Its early development may in large part be attributed to the Court's decision in *Ex parte* Young, 209 U.S. 123 (1908). In *Young* the Supreme Court permitted state officials to be sued in their individual capacity for violations of federal constitutional duties occurring in the course of employment, notwithstanding the officials' compliance with applicable state law. *Young* also sanctioned the device of federal injunctions against the prosecution of threatened criminal proceedings.

Reaction to the *Young* decision was widespread and negative in some quarters, and the device of abstention may well have served to temper that reaction by permitting state court participation in litigation that resulted from *Young*.

See H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 965-79 (2d ed. 1973) for a discussion of the statutory limitations on the jurisdiction of federal courts to entertain actions against state officials after the *Young* decision.

That the doctrine was applied both to temper the reaction following *Young* and as a defense to further reaction by Congress is illustrated in the following quotation from *Pullman*, 312 U.S. at 501:

> 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 . . . . [Cases omitted.] 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. Compare 37 Stat. 1013 [28 U.S.C. § 380 (1940)]; Judicial Code, § 24(1), *as amended*, 28 U.S.C. § 41(1); 47 Stat. 70, 29 U.S.C. §§ 101-15.

The three statutes cited in the passage require a three-judge court when an injunction against enforcement of a state statute is sought (28 U.S.C. § 380 (1940), *as amended*, 28 U.S.C. § 2281 (1970)), probibit federal courts from enjoining both assessment or collection of state taxes and rate orders issued by state administrative agencies (28 U.S.C. § 41(1) (1940), *as amended*, 28 U.S.C. §§ 1331-32, 1341-42, 1345, 1354, 1359 (1970)), and limit the power of federal courts to order injunctive relief in a case growing out of or involving a labor dispute covered under 29 U.S.C. §§ 101-15. 29 U.S.C. §§ 101-15 (1970). The Court quite obviously had Congress's reactions to *Young* firmly in mind when *Pullman* was decided.

A sampling of cases in which abstention under *Pullman* has been ordered seems to bear this out. *Pullman* abstention has not been limited to cases concerning only economic or business interest. Rather, it has been applied with increasing consistency in the context of individual rights. *E.g.*, Harrison v. NAACP, 360 U.S. 167 (1959) (first and fourteenth amendment challenge to Virginia barratry statute which precluded the NAACP from providing legal advice and counsel in civil rights cases); Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957) (first and fourteenth amendment challenge to Alabama statute regulating labor union activities of public employees); Albertson v. Millard, 345 U.S. 242 (1953) (vagueness and first amendment challenge to Michigan Communist Control Act); AFL v. Watson, 327 U.S. 582 (1946) (first and fourteenth amendment challenge to state right to work law); Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945) (first and

Tyson[41.1] of conflicting federal and state court pronouncements on questions of purely local law.[42]

Since abstention in general is basically an allocative device designed to promote the sharing of responsibility in federal litigation with state courts, it takes advantage of the expertise of state courts on state law issues. State courts may be more capable of articulating and understanding the purposes underlying a state statute or regulatory order, and they may be better able to identify and narrow the relevant issues and accumulate the factual record necessary to a full and fair determination of the litigation.[43] In the *Pullman* abstention context, this expertise may be manifested in at least two concrete ways. First, as the state court is not prohibited from considering the state law issue in light of the federal issue,[44] a more sensitive resolution of the federal question may ultimately result from abstention,[45] whether the state or federal court ultimately passes on the federal question. Secondly and most importantly, the state court has the authority to make a permanent and binding construction of state law in a manner that could avoid the federal issue, while the federal court's power in this respect is severely limited.[46] Thus, *Pullman* abstention facilitates authoritative

fourteenth amendment challenge to state regulation of labor organizations); *cf.* Askew v. Hargrave, 401 U.S. 476 (1971) (equal protection challenge to Florida system of funding primary and secondary education); Department of Social Services v. Dimery, 398 U.S. 322 (1970), *vacating mem.* 320 F. Supp. 1125 (S.D. Iowa 1969) (equal protection challenge to Iowa welfare eligibility provision); Scott v. Germano, 381 U.S. 407 (1965) (challenge to Illinois Senate apportionment).

41.1. 41 U.S. (16 Pet.) 1 (1842).

42. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941). *See, e.g.*, Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1864).

43. *See, e.g.*, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959); Leiter Minerals, Inc. v. United States, 352 U.S. 220, 229 (1957); *cf.* United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973). *See* Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1960).

44. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 421-22 (1964); Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957).

45. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963).

46. *See* Alabama State Fed. of Labor v. McAdory, 325 U.S. 450, 470-71 (1945). While the federal court, faced with an issue of state law that had not been spoken to by the state supreme court, might have the power to construe the state statute in a way that would avoid the federal question, *e.g.*, Propper v. Clark, 337 U.S. 472, 486-91 & n.24 (1949); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941), such a construction would bind only the parties to the lawsuit. It would not bind state courts or other individuals; and when the state statute is clear, although uninterpreted, some cases suggest that the federal court would have no power to place a saving construction or gloss on the statute. *See* Wisconsin v. Constantineau, 400 U.S. 433, 438-39 (1971). A state court, however, is capable of placing a binding and permanent gloss on the state statute that might avoid the consitutional issues, clarify the

constructions of state statutes or regulations while permitting retention of the basic regulatory or statutory scheme and avoiding the possibility of a federal court misconstruction.[47] *Pullman* abstention is accordingly much more than a device that promotes a functionally rational allocation of judicial resources;[48] it also serves to protect the integrity of state government and the effectiveness of its regulatory systems.

While some types of abstention can be justified on the ground that they increase the responsiblity of state courts in adjudicating federal questions and thus promote greater respect for the state judiciary,[49] it is questionable whether *Pullman* abstention contributes appreciably to the realization of these objectives. Although abstention posited on potentially dispositive state law grounds results in state court participation in federal question litigation, such participation is severely limited, with respect to the federal issues, by the prospect of subsequent federal court re-examination of those issues. Under *England v. Medical Examiners*[50] the state court is given substantial responsibility only with respect to the state law issues underlying the federal cause of action. While the state court may also adjudicate the federal issues if it pleases, the full federal system stands ready to review the state judgment on these matters if a mistake is made.[51]

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reach of the statute, and leave the state statute or regulatory system intact. *See* Lee v. Bickell, 292 U.S. 415, 425 (1934); Glenn v. Field Packing Co., 290 U.S. 177, 179 (1933); Siler v. Louisville & N.R.R., 213 U.S. 175 (1909); Note, *Federal Interpretation of State Legislation*, 37 HARV. L. REV. 1129 (1924). *See* note 48 *infra*.

47. *See* A.F. of L. v. Watson, 327 U.S. 582, 598, 599 (1946); City of Chicago v. Fieldcrest Dairies, 316 U.S. 168, 171-73 (1942); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 499-501 (1941). *But see* Propper v. Clark, 337 U.S. 472, 486-89 (1949).

48. In Steffel v. Thompson, 415 U.S. 452, 474 n.21 (1974), the Court made the following observation:

> Abstention, a question "entirely separate from the question of granting declaratory or injunctive relief," *Lake Carriers' Ass'n. v. MacMullan*, 406 U.S. 498, 509 n.13 (1972), might be more appropriate when a challenge is made to the state statute as applied, rather than upon its face, since the reach of an uncertain state statute might, in that circumstance, be more susceptible to a limiting or clarifying construction that would avoid the federal constitutional question. *Cf.* Zwickler v. Koota, 389 U.S., at 249-252, 254; Baggett v. Bullitt, 377 U.S. 360, 375-378 (1964).

49. *E.g.*, Reetz v. Bozanich, 397 U.S. 82 (1970) (abstention to permit state court determination on the basis of state constitutional provisions similar to the federal constitutional provisions); Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943) (dismissal of federal jurisdiction to permit the state court to determine state law issues that are identical to the federal issues).

50. 375 U.S. 411 (1964).

51. *Id.* at 421-22. Under *England* the federal plaintiff is entitled to preserve his right to return to the federal district court after resolution of the state law issues in the state forum. *Id.* Appeal or certiorari from the state supreme court to the United States Supreme Court is not a prerequisite to return to the federal district court, nor will such appeal bar return to

B. *Modification of the Federal Question—Lake Carriers Association v. MacMullan*

A closely related, yet distinct variety of abstention occurs when state law grounds underlying the federal claim will most likely not be dispositive but will modify or assist in the decision of the federal question.[52] In these circumstances the federal court will abstain in order to permit a preliminary state adjudication but will retain jurisdiction in order to decide later the federal issue in light of the state court's judgment. The result may be a more precise definition of the the federal issue, in light of state law and policy,[53] or a more complete and reliable factual basis for deciding the federal issue.[54] These additional insights provided by the state forum may affect either the federal court's view of the merits of the federal claim or the scope of the federal court's opinion and judgment once the merits are reached.[55] The ripeness doctrine is an appropriate analogy.

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the federal district court. *Id.* at 416-17. Moreover, after making the required reservation the litigant may present the federal issues to the state court insofar as they bear on the resolution of the state law issue. *Id.* at 419-20.

Not only does the explicit reservation presented to the state court heighten the tension between the 2 judicial systems, it also frequently results in grossly inefficient use of judicial resources, for both the state and federal systems may have to decide the federal issues. *See* NAACP v. Button, 371 U.S. 415 (1963); Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364, 366 (1957). The consequences of *Pullman* abstention in terms of delay have been thoroughly documented. *E.g.*, Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967); Kurland, *Toward a Co-operative Judicial Federalism; the Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 813 (1959). Such delay and the additional costs associated with it constitute a serious misallocation of judicial resources when viewed from the perspective of the combined judicial systems. While the delay and inefficiency may be justifiable in some contexts in light of local prejudice—for example, when first amendment rights are at stake—an indiscriminate application of the *England* rule to all abstention cases presents serious problems regarding efficient and effective use of judicial resources.

52. *See, e.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Harrison v. NAACP, 360 U.Sm 16u (1959).

53. *See, e.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972). *See* note 19 *supra*.

54. *See, e.g.*, England v. Bd. of Medical Examiners, 375 U.S. 411 (1964). *Compare* Burford v. Sun Oil Co., 319 U.S. 315 (1943), *with* Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951). In this respect abstention is functionally similar to required exhaustion of administrative remedies.

55. Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972), serves as an example. *Lake Carriers* presented a question of federal preemption and the consequent validity of the Michigan Watercraft Pollution Control Act of 1970, MICH. COMP. LAWS ANN. § 323.331 *et seq.* (Supp. 1972). Not only was an understanding of the statutory terms necessary to a decision of the federal issue, but the Court also needed an understanding of the "legislative facts" giving rise to the Act and affecting its application in order to assess and balance the state's

While the case brought before the federal court would be ripe in the constitutional sense, the federal court might not be prepared to reach the merits, either because it lacks an appreciation and standing of relevant state policy[56] or because it lacks a full understanding of the meaning or application of a challenged statute or rule.[57] Proceeding to judgment in this context poses the danger that the federal judgment might be too broad or too narrow and that it might be based on insufficient sensitivity to legitimate state concerns.

The most recent example of this variant of abstention is *Lake Carriers' Ass'n v. MacMullan*.[58] *Lake Carriers'* involved a supremacy clause issue that had to be resolved in light of a careful and complete understanding of the allegedly preempted state statute and the policies underlying it.[59] The question presented was the extent to which the Michigan Watercraft Pollution Control Act of 1970[60] was preempted by the Steamboat Inspection Acts of 1871.[61] The Michigan statute was detailed, and the effect of its provisions not absolutely clear. While return to the federal court after abstention may have been inevitable, the state court's judgment concerning the effect and meaning of the state statute would be of substantial benefit to a later federal judgment on the extent of preemption.

Preemption is not the only situation in which this form of abstention would be appropriate. Despite the inevitability of federal re-entry into the litigation under *England*, abstention to permit articulation of state policy or development of a factual basis for an informed decision, particularly in matters "intimately involved with the sovereign prerogative,"[62] may not only result in a better informed later federal judgment but also in the elimination of cer-

interest in its regulatory scheme. Indeed, the dissenting justices felt that the statute was facially clear. 406 U.S., at 513-16. This fact, if true, strongly suggests that the motivation that gave rise to abstention was a need for a more thorough understanding of the effect of the state regulations and the policies underlying them.

56. *E.g.*, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

57. *E.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972).

58. 406 U.S. 498 (1972).

59. *See* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

60. MICH. COMP. LAWS ANN. § 323.331 *et seq.* (Supp. 1972).

61. Acts of Feb. 28, 1871, 16 Stat. 440, and of May 27, 1936, 49 Stat. 1380, *as amended*, 46 U.S.C. §§ 361 *et seq.* Pre-emption was also alleged to result from the United States-Canadian Boundary Waters Treaty of 1909, 36 Stat. 2448. 406 U.S. at 503 n.1.

62. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959). The policies underlying this form of abstention are substantially the same as those underlying Burford v. Sun Oil Co., 319 U.S. 315 (1943). The difference may lie in the fact that under

tain issues from the controversy. This form of abstention may consequently lighten the federal court's workload by reducing the scope of the adjudication required in that forum.

The drawback of this variety of abstention, however, should be noted. First, the state court is relegated to determination of state law issues without the satisfaction of finally disposing of the controversy. While the benefits to the state government of more reliable federal adjudication may offset this cost, one must be sensitive to the perceptions and attitudes of state court judges. The possible difficulties, moreover, may go deeper than mere pique. The state court may consider itself without jurisdiction in this context, as the state court judgment may be little more than an advisory opinion.[63] Secondly, when federal re-entry is inevitable, abstention and delay go hand-in-hand. Under *Pullman* the possible state court disposition of the case on state or federal grounds may result in more expeditious adjudication than that available in the federal court; under the instant variety of abstention this result is highly unlikely. These costs must ultimately be weighed against the benefits of a more responsible and sensitive adjudication of the federal issue because of the federal court's utilization of the state judgment.

C. *Interference with State Function—Burford v. Sun Oil Company*

A third variety of abstention occurs when a federal court is faced with a federal issue[64] that goes to the heart of important state

Burford the state forum is considered more reliable for adjudication of *all* issues presented—both state and federal. Here, however, the state court is not considered a fully reliable forum for adjudication of federal questions. *See* text accompanying notes 90-91 *infra*. Accordingly, dismissal of the action is not permitted.

63. *See* United Serv. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965).

64. The federal issue, as used here, includes both issues arising under the constitution, laws or treaties of the United States, and issues of state law arising in the context of a federal diversity action. U.S. CONST. art. III, § 2; 28 U.S.C. §§ 1331-32 (1966). *See, e.g.*, Martin v. Creasy, 360 U.S. 219 (1959); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943). In a diversity case raising only state law issues concerning the validity of a state statute regulating water rights under the New Mexico constitution, the Supreme Court ordered the federal court to refrain from deciding the case because the state law issue underlying the case was "one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue moreover, [was] a truly novel one" that would eventually have to be resolved by the New Mexico courts. Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968). It is noteworthy that a state court proceeding for declaratory judgment concerning the same underlying issue was pending. The federal court retained jurisdiction, but for the limited purpose of insuring prompt adjudication in the state court rather than for full scale readjucication under *England*. *Id.* at 594.

governmental interests, and, in view of the importance of the conflict's resolution to state government as well as the difficulty of resolving the issues in the federal forum, the federal court *dismisses* the case to permit determination of the federal issue in the state forum.

Burford v. Sun Oil Company[65] is the principal case illustrating this variety of abstention. *Burford* involved a challenge to an order of the Texas Railroad Commission that granted Burford permission to drill four wells on a small plot of land in Texas. This order would have allowed Burford to draw more oil than the applicable spacing requirements for wells permitted.[66] The challenge was based on both state and federal law: the commission was alleged to have unreasonably granted an exception to the state spacing rule and to have denied Sun Oil Company its property right to a proportional share of the oil in the field, in violation of the fourteenth amendment due process clause.[67] The action was maintained in federal court by virtue of diversity of citizenship, and the existence of federal jurisdiction over the controversy was unchallenged.[68] Notwithstanding the federal jurisdiction, the Supreme Court reversed the judgment of the district court and ordered the case dismissed.[69] Sun Oil Company was relegated to relief in state court on the federal due process question as well as the state law issue. Return to the federal district court after resolution of the state law issues was not permitted; rather, appeal or certiorari to the United States Supreme Court was the only means of federal court review that the Supreme Court would countenance.[70]

Three essential factors distinguish this form of abstention from the two varieties discussed earlier. First, under *Burford* a federal issue forms the basis for abstention; if state issues are present they are ordinarily identical to the federal issues.[71] Under *Pullman*, on

65. 319 U.S. 315 (1943).

66. *Id.* at 316-17. The challenged order permitted an exception to the general rule embodied in Rule 37, which provided for certain minimum spacing between wells. *Id.* at 322.

67. *Id.* at 317.

68. *Id.* at 317-18.

69. *Id.* at 334.

70.c *Id.*

71. *See, e.g.*, Martin v. Creasy, 360 U.S. 219 (1959); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Toomer v. Witsell, 334 U.S. 385, 392 (1948); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943); Pennsylvania v. Williams, 294 U.S. 176, 182 (1935). Of course, if the action is maintained in federal court on federal question grounds alone, there will be no applicable state law. Nonetheless, abstention under *Burford* may be ordered in appropriate circumstances for state court resolution of the federal question. *See* Great Lake Dredge & Dock Co. v. Huffman, 319 U.S. 293, 300-01 (1943).

the other hand, it is the applicable state law issue which justifies abstention, and the state issue is ordinarily distinct from the federal claim.[72] Secondly, under *Burford* unclarity of state law is not a basis for abstention; under *Pullman* unclarity of state law issues is the *sine qua non* of abstention.[73] Finally, under *Burford* the federal district court is not permitted to re-enter the litigation after the state court has spoken.[74] Under the *England* case, which applies in the *Pullman* abstention context, federal re-entry at the district court level is virtually guaranteed.[75] These distinctions serve to highlight the differing policies that give rise to abstention in the *Burford* context.

One such policy involves recognition of the various state interests that might underlie a state regulatory system. The *Burford* Court recognized that the Texas regulatory system for oil production represented the state's attempt to accomplish numerous objectives of overriding interest to the state, such as public financing and economic stability.[76] The *Burford* Court reasoned that the state court's greater understanding of those interests made it the more appropriate forum for adjudication of the issues.

The *sine qua non* of abstention under *Burford*, then, is the presence of issues relating to matters of overriding interest to state government, but this broad conception is too general to be of utility in predicting the doctrine's application. A sampling of numerous applications of *Burford* abstention, however, provides insight into the discrete components of this general standard. In *Burford*, abstention was ordered to avoid potential disruption of an historically established, broad-ranging, state regulatory program. The regulatory system itself, moreover, was designed to assure economic stability within the state, preserve important natural resources, and provide tax revenues for state government. In view of these factors,

72. *See* notes 29-33, 36-39 *supra* and accompanying text.

73. *See* notes 31-33 *supra* and accompanying text.

74. *See* cases cited in note 71 *supra*.

75. *See* notes 50-51 *supra* and accompanying text.

76. In *Burford* the Court traced in detail the evolution of the regulatory system for oil production that was managed by the Texas Railroad Commission and that lay at the heart of that case. Under the auspices of the regulatory program, the State was endeavoring to accomplish numerous objectives involving the balancing of multiple and often competing interests: conservation of gas and oil, an important natural resource of the State; regulation of the impact of the oil industry on the economy of the State; cooperation with other oil producing states; protection of tax revenues from oil production which were applied to state educational and eleemonsynary institutions; response to market demand through regulation of supply; and protection of private wells that were competing for oil from a common reservoir. 319 U.S. at 320-23.

federal intrusion threatened matters that rested at the very heart of state government.[77]

Other cases in which *Burford*-style abstention has been invoked suggest a number of characteristics of the overriding state governmental interests that will justify this abstention. First, abstention will be ordered to protect the state's interest in regulating and preserving important natural resources.[78] Secondly, established state regulatory systems, with a history of state judicial experience reviewing cases arising under that system, often provide a basis for deference to the state forum under *Burford*.[79] Thirdly, cases involving areas of traditional state power, such as eminent domain[80] or public education,[81] are accorded deference under the abstention doctrine. Finally, even in the absence of an established regulatory system, abstention may be ordered in view of the very high possibility of an intrusive federal adjudication severely handicapping state government and state power.[82]

The presence of significant state governmental interest in the outcome of the controversy, however, will not, standing alone, justify abstention under *Burford*. In virtually every *Burford* abstention case the Supreme Court also has emphasized the reliability of the state court adjudicatory process in the resolution of the issues presented. In *Burford* the majority considered the state courts to be far more reliable than federal courts for adjudication of claims arising from the state regulatory system. State courts were "close" to the policies and facts underlying the system of regulation.[83] Specifically,

77. Burford v. Sun Oil Co., 319 U.S. 315, 332 (1943); *accord*, Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951).

78. Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968) (New Mexico's interest in a statutory system for regulating water rights).

79. *See* Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949); Pennsylvania v. Williams, 294 U.S. 176 (1935); P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951).

80. Martin v. Creasy, 360 U.S. 219 (1959) (state eminent domain power critical to the completion of a comprehensive state highway system).

81. Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 383-84 (1949).

82. *E.g.*, Scott v. Germano, 381 U.S. 407 (1965); *cf.* Martin v. Creasy, 360 U.S. 219 (1959).

83. 319 U.S. at 325-26. The *Burford* Court also noted that many prior federal court decisions involving the Texas regulatory system had seriously disrupted the State's ability to protect its interest, and federal adjudication had resulted in few, if any, salutory effects. *Id.* at 327-32. Because of the difficult legal as well as non-legal complexities involved in assessing the reasonableness of the commission's action in particular cases, the federal courts were seriously handicapped. "As a practical matter, the federal courts [could] make small contribution" to the organized system of regulations, *Id.* at 327; and federal intervention posed a real danger of a federal court misunderstanding state law and failing to appreciate the policies and facts underlying regulatory orders and rules. *Id.* at 327-28.

this reliability may have a number of sources: substantial experience adjudicating the issues raised in the litigation;[84] superior fact-finding abilities;[85] superior appreciation of and sensitivity to the issues presented and the underlying state policies bearing on the controversy;[86] or greater power to order relief[87] and expeditious resolution of the case.[88] In view of the considerations of both state interests and reliability, the *Burford* Court concluded that the state forum should more properly adjudicate controversies arising under the Texas regulatory system, despite the presence of federal jurisdiction and despite the presence of purely federal issues as well as state law issues cognizable under the federal court's diversity jurisdiction.[89]

The Court's opinion clearly manifests the basic policy underlying the present form of abstention. In certain selected areas, the state court is considered to be a more reliable and efficient forum for adjudication of federal issues than the federal court.[90] Unlike *Pullman* abstention, *Burford* abstention is not based on possible avoidance of the federal question. The *Burford* doctrine relates to where rather than when or whether the federal issue is to be determined. The state forum is not employed as a device for avoiding federal adjudication by resolving distinct state law issues or for "educating" a later federal judgment. Rather, it is employed to

84. *E.g.*, Martin v. Creasy, 360 U.S. 219 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

85. *E.g.*, Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 349 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Pennsylvania v. Williams, 294 U.S. 176, 182-89 (1935).

86. *See, e.g.*, Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968); Martin v. Creasy, 360 U.S. 219 (1959); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 383-84 (1949); Burford v. Sun Oil Co., 319 U.S. 315 (1943); *cf.* Scott v. Germano, 381 U.S. 407 (1965).

87. *See* Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 383-84 (1949); *cf.* Scott v. Germano, 381 U.S. 407 (1965).

88. *See* Martin v. Creasy, 360 U.S. 219 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Pennsylvania v. Williams, 294 U.S. 176, 182 (1935) (in the absence of abstention, federal court would duplicate efforts of state court, and could resolve only a portion of the controversy immediately).

89. "These questions of regulation of the industry by the state administrative agency, whether involving gas or oil prorationing programs or Rule 37 cases, so clearly involve basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." 319 U.S. at 332.

90. *See* Martin v. Creasy, 360 U.S. 219 (1959); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Toomer v. Witsell, 334 U.S. 385, 392 (1948); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943); Pennsylvania v. Williams, 294 U.S. 176 (1935); *cf.* Hawks v. Hamill, 288 U.S. 52 (1933). In each of these cases the federal action was dismissed.

decide the federal issue itself.[91] A federal district court does not wait in the background in order to review the state court judgment. Instead, the state court is raised to a level of decision-making parity with the federal court and only appellate review in the United States Supreme Court is available to assure the integrity of the state court's adjudication of the federal issue.

Finally, as noted earlier, most cases in which *Burford* abstention is applied raise difficult, frequently fact-specific, and time-consuming problems.[92] The legal issues raised by the cases may be clear, but application of law to fact is almost always very difficult,[93] politically explosive,[94] or simply very time consuming.[95] The importance of the federal right asserted also seems to bear on the application of the *Burford* rule, for while some *Burford* cases involve important or fundamental federal guarantees, the more common application of the doctrine is found in cases involving the regulation of business activity or the exercise of nonfundamental rights.[96]

From the perspective of the federal system, *Burford* abstention provides a broad range of benefits. The most important advantage lies in the fact that original jurisdiction in the federal courts is completely avoided. Moreover, in light of the difficulty of obtaining Supreme Court review of state court decisions, significant amounts of work may be lifted from the appellate docket of the federal system as well.[97] Many of the federal questions raised in the *Burford* con-

91. Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494-95 (1942).

92. *Cf.* Martin v. Creasy, 360 U.S. 219 (1959); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Pennsylvania v. Williams, 294 U.S. 176 (1935).

93. *E.g.*, Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968); Burford v. Sun Oil Co., 319 U.S. 315 (1943).

94. *E.g.*, Scott v. Germano, 381 U.S. 407 (1965); Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949).

95. *E.g.*, Pennsylvania v. Williams, 294 U.S. 176 (1935).

96. While *Burford* abstention appears typically to occur in business contexts, this is not invariably true. *See* Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949) (challenge to Hawaii statute limiting foreign language teaching in grade schools). *Cf.* Scott v. Germano, 381 U.S. 407 (1965) (state senate reapportionment). In the *Pullman* abstention context, however, the importance of the rights asserted seems to have little relation to the abstention decision. *See* note 41 *supra*.

97. During the 1971 Term the Supreme Court disposed of 82% of appeals properly filed without oral argument, and dismissed or denied certiorari in 90.4% of the certiorari petitions acted upon. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT A3, A10 (1972). In view of the difficulty of obtaining Supreme Court review of the judgment of a state's highest court, it is unlikely that federal re-entry at the Supreme Court level following *Burford* abstention will occur.

Many cases in which *Burford* abstention has been ordered would have required a 3-judge federal district court and subsequent direct appeal to the United States Supreme Court.

text, furthermore, are difficult, and by this abstention device the federal system avoids the need to decide hard questions.[98]

A second advantage of *Burford* abstention is that friction between the state and federal systems, which may be exacerbated rather than avoided under *Pullman* abstention,[99] is substantially eliminated. The state forum is given virtually final adjudicative authority, and consequently the prospect of later federal review does not serve as a divisive influence. Since there is no splitting of the litigation, and no opportunity to obtain full relitigation at the federal district court level, the delay so characteristic of *Pullman* abstention is effectively avoided.

Finally, more reliable and fair adjudication of federal issues is purportedly insured under the *Burford* rule. Although realization of this objective must depend on the peculiar circumstances of the controversy, at least in *Burford*, the consequence of better adjudication of the federal issues in the state court seems very likely to have resulted. Thus, the *Burford* rule protects the interests not only of the federal forum but also of the litigants who have selected the federal forum, for the litigants are entitled not to a favorable decision regardless of the merits, but to the best and most expeditious decision available on the merits.

Substantial benefits also flow to the state when the *Burford* rule is applied. The quality and reputation of the state judiciary is enhanced, due in large part to the greater responsibility in the resulting adjudication of federal matters. The coercive threat of later federal re-entry is avoided by dismissal in the federal court. The possibility of conflicting interpretations of state law by the state and federal courts is avoided,[100] and interference by the federal courts with important state governmental interests is virtually eliminated. Further, the state court has a free hand in assessing both the facts

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Abstention under *Burford* thus will result in avoidance of both time-consuming adjudication in that court and obligatory appellate review in the Supreme Court. When the cases could be heard by a single judge district court, *Burford* abstention will avoid not only district court and Supreme Court litigation, but appellate review at the Circuit Court level as well.

98. *E.g.*, Martin v. Creasy, 360 U.S. 219 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943). Of course, in each of these cases significant governmental interests were at stake, and significant expertise regarding the issues rested in the state forum. For a discussion of the meaning of these additional factors and their proper application see text accompanying notes 78-96 *supra*. Nevertheless, the "hardness" of the questions presented, despite clarity of underlying state law, is a significant element contributing to abstention under *Burford*.

99. *See* notes 49-51 *supra* and accompanying text.

100. Burford v. Sun Oil Co., 319 U.S. 315, 327-28, 334 (1943).

and the policies underlying the state regulatory system in light of federal requirements.[101]

Burford abstention, properly applied, seems to benefit everyone and prejudice the legitimate interests of no one. Thus, while, at first blush, it might be viewed as the least defensible form of abstention, particularly in view of the proposition that "a court having jurisdiction must exercise it,"[102] upon further analysis it seems the least impeachable of the various forms of abstention. It can result in the most satisfactory adjudication, occasioning no delay, coercion, or friction between the federal and state systems. It is a doctrine limited in scope and application that permits state court adjudication of federal issues at the federal court's discretion. *Burford* abstention requires sensitive discrimination between the types of federal issues that the state and federal courts are best capable of resolving and avoids the unseemly relegation to state courts of state issues alone. It is thus consistent with and protective of the federal adjudicative power that the state and federal systems jointly possess.

D. Identical State and Federal Issues—Reetz v. Bozanich

The final variety of abstention has been ordered when a state constitution embodying federal constitutional standards may dispose of the case.[103] *Reetz v. Bozanich*[104] typifies this variety of abstention. *Reetz* involved a challenge on federal equal protection grounds to an Alaska statute that limited the availability of commercial salmon-fishing licenses to certain persons who had fished in Alaskan waters in the past. A three-judge federal district court declared the statute and regulations unconstitutional and enjoined their enforcement.[105] The Supreme Court reversed and ordered the

101. *See* Steffel v. Thompson, 415 U.S. 452, 474-75 n.21 (1974); Wisconsin v. Constantineau, 400 U.S. 433, 438-39 (1971); Burford v. Sun Oil Co., 319 U.S. 315, 327-28 (1943); notes 46-47 *supra*.

102. Massachusetts v. Missouri, 308 U.S. 1, 19 (1939). *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

103. *E.g.*, Askew v. Hargrave, 401 U.S. 476 (1971); Reetz v. Bozanich, 397 U.S. 82 (1970). *But see* Wisconsin v. Constantineau, 400 U.S. 433 (1971).

Two further varieties of abstention are identified by Professor Wright: abstention to avoid decision of difficult questions of state law, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), and abstention to serve the convenience of the federal courts, *e.g.*, P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951). C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 52, at 203, 205 (2d ed. 1970). The former is subsumed in the third variety of abstention discussed in this article. *See* notes 92-95 *supra* and accompanying text. The latter has not been recognized explicity by the Supreme Court, although a number of cases could be viewed as incorporating, at least in part, such an approach. *E.g.*, Askew v. Hargrave, 401 U.S. 476 (1971); Reetz v. Bozanich, 397 U.S. 82 (1970).

104. 397 U.S. 82 (1970).

105. Bozanich v. Reetz, 297 F. Supp. 300 (D. Alas. 1969).

district court to abstain pending a determination of the issues by the state court. While the Alaska statute was clear, and no mention was made of a possible construction that might avoid or modify the federal issue, the Court held that abstention was proper in order to permit the Alaska courts to interpret theretofore uninterpreted provisions of the Alaska constitution.[106] Some emphasis was placed on the state's substantial interest in preserving its valuable natural resources,[107] but the abstention was not justified by any need for state court fact findings or elucidation of policy that would alter the federal question or educate later federal review. Rather, abstention was based on the need for the state court to determine an issue of state law, the construction and meaning of the Alaska constitutional provisions, a determination that could have the same result as would follow from the application of the fourteenth amendment's equal protection clause.[108] Inasmuch as state constitutional provisions may not be inconsistent with federal constitutional requirements,[109] the effect of abstention was to force a "federalization" of the relevant state constitution by the state court.[110]

This type of abstention is materially different from *Burford* abstention, in which the federal court dismisses a case because the state and federal issues are identical and sensitivity to local interest, as well as fact-finding competence, may be found in the state forum.

106. "Wherever occuring in their natural state, fish, wildlife, and waters are reserved to the people for common use." ALAS. CONST. art. VIII § 3. "No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State . . . ." *Id.* § 15.

107. 397 U.S. at 87.

108. Of course, this will not be the result in all cases in which state constitutional issues might dispose of the federal issue; rather, this form of abstention is limited to circumstances in which the state constitutional provision approximates the guarantee of the federal provision relied upon. For example, in Department of Social Services v. Dimery, 398 U.S. 322 (1970), the Supreme Court vacated and remanded a decision of a 3-judge district court that concluded that a challenged provision of a state AFDC regulation was invalid as a matter of state constitutional law because it constituted an undue delegation of legislative powers. Dimery v. Department of Social Services, 320 F. Supp. 1125 (S.D. Iowa 1969). In *Dimery* the ground for abstention was state consitutional doctrine, but the state constitutional question was distinct from the federal constitutional question under the equal protection clause. The fact that the delegation doctrine was of constitutional stature in Iowa does not serve to meaningfully distinguish *Dimery* from *Pullman*, in which the underlying state law issue also concerned the scope of legislative delegation of rulemaking power. In *Reetz*, however, the effect and substance of the state constitutional guarantee was the same as the federal equal protection clause, and the relevant issues under both the state and federal constitutions would be nearly identical.

109. U.S. CONST. art. VI, § 2.

110. This coercive effect is even more evident inasmuch as the Supreme Court did not order the federal district court to dismiss the case. 397 U.S. at 87.

In *Reetz* the matter was of interest to the state, but there was no indication of greater expertise or sensitivity to the relevant issues on the part of the state court.

The decision in *Reetz* and that of *Askew v. Hargrave*,[111] in which the Court similarly deferred to Florida's state courts, strongly suggest that when such a provision exists in the applicable state constitution and prior constructions of that provision have not foreclosed its application in a manner similar to the federal guarantee,[112] abstention will be ordered to permit the state system to determine the validity of the challenged state statute or regulation under the state constitutional provision.[113]

The consequence of this form of abstention is that the state court will adjudicate, under the state constitution, the issues initially presented to the federal court for resolution under the federal constitution.[114] Abstention of this sort, therefore, is an extension of

111. 401 U.S. 476 (1971). *But see* Wisconsin v. Constantineau, 400 U.S. 433 (1971).

112. No standards for determining whether prior construction or the clear language of a state constitutional provision would foreclose a state construction that would avoid the federal issue have emerged from the decided cases. Indeed, the Court has seemed intentionally to refrain from discussing this question, or even explaining the exact nature of the independent state constitutional ground on which abstention is based. *See* Askew v. Hargrave, 401 U.S. 476, 477-78 (1971); Reetz v. Bozanich, 397 U.S. 82, 86-87 (1970). *See* text accompanying notes 119-23 *infra*.

113. *See* Askew v. Hargrave, 401 U.S. 476 (1971); Reetz v. Bozanich, 397 U.S. 82 (1970); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 992-93 (2d ed. 1973).

114. The Court seemed to withdraw from *Reetz* in Wisconsin v. Constantineau, 400 U.S. 433 (1971), a case involving a due process challenge to a Wisconsin statute that permitted public posting of the names of persons who disturbed the peace through excessive drinking. In declining to order abstention, the Court stated that "the abstention rule only applies when 'the issue of state law is uncertain.' " The abstention cases, according to the Court, have dealt with "unresolved questions of state law which only a state tribunal could authoritatively construe." 400 U.S. at 438. *Reetz* was explained as involving a state statute that the state courts could have construed to avoid the federal question. *Id.* While this is true, the Court conveniently omitted the fact that the *source* of the saving construction in *Reetz* was a state constitutional provision that could be interpreted to apply the same standards as the federal constitution. Likewise, the Wisconsin Constitution contained a due process clause that could have heen employed to "construe" the statute in *Constantineau*, which was just as clear and unamhiguous as that involved in *Reetz*. The majority opinion in *Constantineau* failed to satisfy the dissenters, who stated that "Reetz cannot be distinguished . . . ." *Id.* at 442.

While *Constantineau* seemed to limit *Reetz* to its facts, the latter was once again resurrected in Askew v. Hargrave, 401 U.S. 476 (1971). In *Askew* a millage rollback provision of a recently enacted scheme for partial state financing of public education was attacked by residents of property-poor districts on equal protection grounds. The Supreme Court, on appeal, reversed the district court's action striking the rollback provision, and abstention was ordered. As in *Reetz* and *Constantineau*, the state statute was clear. There existed, however, grounds on which the rollback statute might be stricken on state constitutional grounds, and such claims were being considered in a state court proceeding that was then pending. Characterizing the state constitutional claims as "not the 'same claim,' that is, the federal claim of

Pullman abstention.[115] Under *Pullman*, as under *Reetz*, the state court is asked to determine an issue of state law that might dispose of the federal challenge and therefore make resolution of the federal issue unnecessary. Yet under *Pullman* the independent state law ground, whether it arises from common law, statutory law, or the state constitution, is substantively distinct from the federal issue. In *Pullman*, for example, the state court was asked to decide whether the legislature had delegated sufficient rulemaking power to the Railroad Commission to justify the challenged regulation. The federal issue, on the other hand, was whether the regulation as promulgated violated equal protection and due process standards embodied in the fourteenth amendment.

To be sure, after abstention in *Reetz* the state court could construe the State constitutional guarantee in a manner dissimilar to the federal guarantee. For example, broader rights than those required under federal law could be conferred. A narrower reading than that permitted under federal law would also be permissible, as long as the plaintiff was granted the relief requested. The narrower reading, however, would then be subject to challenge in federal court by any other proper plaintiff.[116] In no event would the state court be free to give the state constitutional provision a reading inconsistent with the requirements of federal law, for the federal court would be waiting in the background to enforce the federal limitations on the construction of the state constitutional provision.[117] Thus it can be seen that the interest in permitting the state forum to construe state law—an interest which is given great weight in the *Pullman* context—is of much less significance in the *Reetz* context.

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alleged denial of the federal right of equal protection, but primarily state law claims under the Florida Constitution . . . ," *id.* at 478, the Court held that abstention was proper and consistent with *Reetz*. It is difficult to distinguish *Askew* from *Reetz* as both involved clear state statutes that might be invalid under state constitutional provisions. Abstention in both was grounded on state courts deciding issues of law that were divorced from the challenged acts, and the inevitable consequence of each was to pressure the state tribunal to "federalize" the state constitution, thereby taking the heat off the federal system. In light of *Askew*, *Reetz* cannot be considered as strictly limited in scope. The more relevant question indeed may be whether *Constantineau* is now limited to its facts. *Constantineau* may have been decided simply because it was an easier case.

115. *See* note 108 *supra*.

116. If, for example, the state court in dicta construed the constitutional provision in a manner inconsistent with federal requirements, a person who might be injured by application of the construction could challenge it on federal constitutional grounds under the supremacy clause. U.S. CONST. art. VI.

117. England v. Medical Examiners, 375 U.S. 411 (1964); *see* Askew v. Hargrave, 401 U.S. 476, 478-79 (1971); Reetz v. Bozanich, 397 U.S. 82, 87 (1970).

This type of abstention, however, does accomplish two results. First, it avoids federal court decision of the federal question, and because the state and federal issues are the same, this can be accomplished very effectively. If the state court acts inconsistent with the requirements of federal law, the federal court stands ready to correct the state court's application of "federalized" state constitutional law.[118]

A second and equally significant consequence of this fourth type of abstention is that it allocates the power to adjudicate federal constitutional questions to the state courts, despite the fact that the litigation raising those issues was commenced in a federal forum. The possible use of this doctrine to dramatically alter the forum for federal constitutional adjudication can be easily foreseen. Many state constitutions contain due process clauses,[119] guarantee rights of free speech,[120] and guarantee citizens the equal protection of the

118. If the state constitutional provision was prohibitory in its impact, and its prohibition was inconsistent with federal law, the provisions would be stricken on constitutional grounds. On the other hand, if the provision granted rights rather than denied them, and the rights granted were not as broad as the federal constitution required, the state constitutional provision would not be stricken. Instead, in cases in which the federal guarantee is broader than that of the state, the federal guarantee would simpiy supplement the rights conferred by the state constitution. In the latter instance, abstention under *Reetz* would not require the state court to construe its constitutional guarantee as broadly as the federal guarantee, but significant enticement to do so—at the risk of losing judicial power in the future—would exist.

119. *See* ALA. CONST. art. I, § 1; ALAS. CONST. art. I, §§ 1, 7; ARIZ. CONST. art. II, § 4; ARK. CONST. art. II §§ 2, 8; CAL. CONST. art. I, §§ 1, 13, 26; COLO. CONST. art. II §§ 3, 25; FLA. CONST. art I, §§ 1, 9; GA. CONST. art. I, § 1, cls. 2, 3; HAWAII CONST. art. I, § 2; IDAHO CONST. art. I, §§ 1,13; ILL. CONST. art. II, §§ 1, 2; IND. CONST. art I, § 1; IOWA CONST. art. I, §§ 1, 9; KAN. BILL OF RIGHTS § 1; KY. CONST. § 1; LA. CONST. art. I, § 2; ME. CONST. art. I, §§ 1,6-A; MASS. CONST. art. I, §§ 1, 11; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 6; MISS. CONST. art. III, § 14; MO. CONST. art. I, §§ 2, 10; MONT. CONST. art. III, §§ 3, 27; NEB. CONST. art. I, §§ 1, 3; NEV. CONST. art. I, §§ 1, 8; N.H. CONST. art. I, §§ 2, 12; N.J. CONST. art. I, § 1; N.M. CONST. art. II, §§ 4, 18; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 1; N.D. CONST. art. I, §§ 1, 13; OHIO CONST. art. I, § 1; OKLA. CONST. art. II, §§ 2, 7; PA. CONST. art. I, § 1; S. C. CONST. art. I, § 5; S.D. CONST. art. VI, §§ 1, 2; UTAH CONST. art. I, §§ 1, 13; VA. CONST. art. I, §§ 1, 8, 11; VT. CONST. art. I, §§ 1, 9, 10; WASH. CONST. art. I, § 3; W. VA. CONST. art. III, §§ 1, 10; WIS. CONST. art. I, § 1; WYO. CONST. art. I, §§ 2, 6.

120. *See* ALA. CONST. art. I, § 4; ALAS. CONST. art. I, § 5; ARIZ. CONST. art. II, § 6; ARK. CONST. art. II, § 6; CAL. CONST. art. I, § 9; COLO. CONST. art. II, § 10; CONN. CONST. art. I, §§ 4, 5; DEL. CONST. art. I, § 5; FLA. CONST. art. I, § 4; GA. CONST. art. I, § 1, cl. 15; IDAHO CONST. art. I, § 9; ILL. CONST. art. II, § 4; IND. CONST. art. I, § 9; IOWA CONST. art. I, § 7; KAN. BILL OF RIGHTS, § 11; KY. CONST. § 8; LA. CONST. art. I, § 3; ME. CONST. art. I, § 4; MD. DECL. OF RIGHTS, § 40; MASS. CONST. art. I, § 16, amend. LXXVII; MICH. CONST. art. I, § 5; MINN. CONST. art. I, § 3; MISS. CONST. art. III, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. III, § 10; NEB. CONST. art. I, § 5; NEV. CONST. art. I, § 9; N.H. CONST. art. I, § 22; N.J. CONST. art. 1, § 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; N.C. CONST. art. I, § 20; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; ORE. CONST. art. I, § 8; PA. CONST. art. I, § 7; R.I. CONST. art. I, § 20; S.C. CONST. art. I, § 4; S.D. CONST. art. VI, § 5;

laws.[121] The supremacy clause of the United States Constitution,[122] however, requires that these state constitutional provisions be applied in a manner consistent with federal requirements,[123] and if not so applied, the state court judgment and enforcement would be subject to review under applicable federal standards. Thus, virtually any state constitutional provision guaranteeing rights similar to those protected by the federal constitution would require a state judicial interpretation consistent with the applicable federal provision. This would provide an independent state ground on which to base abstention and avoid the federal issue.

Despite the dramatic effect of reallocating power between the federal and state judicial systems, this result is not without justification. It would be extemely effective as a device for lightening the workload in the federal system—much of the federal litigation involving challenges to state action on federal constitutional grounds could be shifted to the state forum. Furthermore, it holds attractive prospects for increasing the quality of the state court systems. If substantial quantities of interesting and challenging federal litigation were placed in the state courts, the increased responsibility might serve to attract better qualified persons to the state court bench. Ultimately, if quality were significantly improved by this device, litigants might more often elect to litigate their federal claims in state courts. In this way, a more equal distribution of federal litigation between the federal and state courts could be voluntarily achieved.[124]

TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; UTAH CONST. art. I, § 15; VT. CONST. art. I, § 13; VA. CONST. art. I, § 12; WASH. CONST. art. I, § 5; W. VA. CONST. art. III, § 7; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20.

121. *See* ALAS. CONST. art. I, §§ 1, 3, 7; ARK. CONST. art. II, § 3; CAL. CONST. art. XX, § 18; HAWAII CONST. art. I, § 4; LA. CONST. art. I, § 4; ME. CONST. art. I, § 6-A; MICH. CONST. art. I, § 2; MISS. CONST. art. IV, § 94; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 11; PA. CONST. art. I, § 26; S.C. CONST. art. I, § 5; UTAH CONST. art. IV, § 1; WYO. CONST. art. I, § 3.

122. U.S. CONST. art. VI.

123. *See* note 118 *supra*. The federal requirements could be either constitutional or statutory.

124. Litigation of federal questions in state courts is relatively infrequent today with at least certain types of jurisdiction. For example, actions arising under 42 U.S.C. § 1983 (1970) are rarely maintained in state court. Indeed, some state courts have expressed doubt concerning their jurisdiction over such cases. *E.g.*, Hirych v. State, 376 Mich. 384, 394, 136 N.W.2d 910, 914 (1965). State courts do, however, possess concurrent jurisdiction over § 1983 claims. The jurisdictional counterpart of § 1983, 28 U.S.C. § 1343(3) (1970), grants the federal courts original but not exclusive jurisdiction over cases arising under § 1983. The Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, contained language that required § 1983 actions "to be prosecuted in the several district or circuit courts of the United States," but this language was deleted in the 1873-74 codification. Rev. Stat. §§ 563(12), 629(16) (2d ed. 1873-74). It would be difficult to treat this deletion as an elimination of "surplusage." *See* Jones v. Alfred

It seems evident that, at the very least, frequent resort to the *Reetz* doctrine could result in significant alteration of the federal courts' role in adjudicating constitutional challenges to state statutes, regulations, or official acts. By calling for abstention in cases such as *Reetz* and *Askew*, the Supreme Court has held, albeit selectively, that while a suitor's choice of a federal forum for vindication of federal rights should be recognized and protected,[125] there is nothing in the Constitution or any act of Congress that expressly requires that forum.[126] Indeed, this form of abstention would make the constitutional principle of concurrent jurisdiction over most federal issues a reality.[127]

IV. A Proposed Abstention Model

Identification of these four varieties of abstention is helpful in constructing a descriptive model of the currently applied abstention rules and in predicting the circumstances in which a federal court is likely to refrain from immediate decision. The policies served by abstention and the concomitant justifications for abstention in any

H. Mayer Co., 392 U.S. 409, 422 n.29 (1968). Inasmuch as § 1343(3) does not provide for exclusive jurisdiction over § 1983 actions in the federal courts, the state courts possess concurrent jurisdiction under § 1343(3). *See* Claflin v. Houseman, 93 U.S. 130, 136 (1876). *See generally* U.S. Const. art. VI.

125. Zwickler v. Koota, 389 U.S. 241, 248 (1967); *see* Harman v. Forssenius, 380 U.S. 528 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964).

126. The Supreme Court has often announced the principle that a federal court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). Yet the principle's application is not so rigid as this statement suggests. In Massachusetts v. Missouri, 308 U.S. 1 (1939), for example, the Court discussed its obligation to accept jurisdiction in light of the *Cohens* opinion.

> We have observed that the broad statement that a court having jurisdiction must exercise it . . . is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum . . . . Grounds for justifying such a qualification have been found in "considerations of convenience, efficiency and justice" applicable to particular classes of cases.

308 U.S. at 19. Meredith v. Winter Haven, 320 U.S. 228, 236 (1943); Rogers v. Guaranty Trust Co., 288 U.S. 123, 131 (1933); Canada Malting Co. v. Paterson Steamships, 285 U.S. 413, 422-23 (1932); *see* Martin v. Creasy, 360 U.S. 219 (1959); P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d. Cir. 1951). For an interesting analysis of this question in the context of diversity jurisdiction see Vestal & Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 Minn. L. Rev. 1 (1956).

127. Unless jurisidiction is granted exclusively to the federal courts by statute, the state courts have concurrent jurisdiction with the federal courts over most cases arising under the constitution, laws or treaties of the United States. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Robb v. Connolly, 111 U.S. 624 (1884); Chaflin v. Houseman, 93 U.S. 130, 136 (1876); U.S. Const. art. VI; P. Bator, D. Mishkin, D. Shapiro & H. Wechsler, The Federal Courts and the Federal System, 428-34 (2d ed. 1973).

given case, however, remain to be considered. The following pages will be devoted, first, to identifying and evaluating those policies, and secondly, to constructing a set of principles that should govern the application of the abstention device.

A. *The Principles Underlying Abstention*

Two justifications are most often cited for application of the abstention doctrine:[128] the avoidance of a constitutional decision and the conflict that might be engendered between the federal and state systems by federal decision of local law issues. Analysis of the decisions, however, establishes that these policies are neither consistently employed nor always fulfilled. Were avoidance of constitutional questions the only justification for abstention, for example, a persuasive argument could be made that only *Pullman*-type abstention would be proper. In general, the other forms of abstention do not result in avoidance of the federal question but in its postponement or decision in another forum.[129] If, on the other hand, avoidance of friction between federal and state systems is the paramount justification for abstention, one might well conclude that only *Burford*-type abstention would be wholly justified.[130] It is only under *Burford*, when abstention occasions dismissal of the federal action, that complete confidence in the state judicial system is manifested.

The consequence is that neither justification for abstention satisfactorily explains the decisions invoking it. Moreover, the justifications themselves may be challenged as unduly vague and inherently unpredictable in their application. But a "bright-line" policy of inflexible rules is not necessary and such a policy may not be desirable,[131] given the various contexts in which abstention arises

128. *See, e.g.*, Reetz v. Bozanich, 397 U.S. 82 (1970); Harrison v. NAACP, 360 U.S. 167 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 52, at 196-208 (2d ed. 1970); Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1959); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

129. *See* text accompanying notes 52-63 (abstention in order to permit a modification of the federal question), 64-102 (abstention to avoid interference with state functions), and 103-27 (abstention in light of state constitutional provisions), *supra*.

130. *See* text accompanying notes 21-51 (abstention in light of dispositive state law issues), 52-63 (modiciation of the federal issue), and 103-27 (state constitutional provisions), *supra*.

131. *Compare* Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815, 825-26 (1959), *with* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 94-96 (1973). The American Law Institute has proposed a codification of the abstention doctrine. AMERICAN LAW

and the sensitivity required in applying the relevant standards. A certain degree of predictability and systemization, however, does emerge from an analysis of the decisions, suggesting two further principles that contribute to the abstention decision. Both stem from a single proposition: in many instances a federal court, notwithstanding its jurisdiction, is less qualified to adjudicate a controversy than the state court.

First, when the federal court fears that in the course of adjudication a significant and damaging misinterpretation of state law will occur, with consequent harm to the state or local government, it will first ask the state forum to announce its binding judgment as to the meaning and application of local law. It is not essential for this principle's application that such a pronouncement dispose of the need for subsequent federal action, but if it does, that is an added factor favoring abstention. The important factor, however, is that the state pronouncement will "educate" subsequent federal review of issues appropriately in that forum and consequently increase the quality of the federal decision.

Secondly, when the federal court is faced with issues—federal, state, or both—for which the state forum has more competence or skill to adjudicate, the federal court will relinquish its original jurisdiction in favor of the local forum. This action is based on an assessment of the respective strengths and weaknesses of the federal and state courts. If the federal court is less capable of adjudicating the issues, developing the facts, and applying law to fact, there is no justification—all other things being equal—for employing the federal forum for resolution of the controversy. To do so would be consciously to select the forum least likely to reach a proper and just result.

These two principles are markedly distinct in their results, even though they are based on an identical underlying policy designed to assure the highest quality adjudication. The first principle—abstention in order to educate later federal adjudication—relates to the *timing* of federal review. The second principle—abstention in order to permit the state forum to adjudicate issues clearly within the federal court's jurisdiction and traditional domain—relates to the *place* for or location of judicial review. Both, however,

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INSTITUTE, STUDY OF THE DIVISON OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371 and commentary, at 282-90 (1969). The ALI formulation would permit abstention in cases involving only state law issues when the state law is unsettled or when federal court decision of state law would embarrass the effectuation of state policies if in error. § 1371(c). When ahstention is appropriate under the ALI model, the *England* rule would not apply. § 1371(d).

are allocative devices designed to insure the highest quality review and the preservation of respect for the institution of judicial review.

These principles, however, do not serve to justify abstention under *Reetz v. Bozanich*[132] and *Askew v. Hargrave*.[133] It is difficult to conclude that the state courts in these cases would contribute meaningfully to the federal judgment, despite the fact that *Reetz* involved Alaska's admittedly substantial interest in preserving wildlife, an abundant and important natural resource in that state, and *Askew* involved Florida's substantial interest in its allocation of resources to education. The issues presented were new, difficult, and of the sort that the federal courts are most capable of deciding. *Reetz* and *Askew*, accordingly, may be read to represent a very different principle: state courts should adjudicate the constitutionality of state statutes. Thus *Reetz* and *Askew* clearly seem to represent a marked extension of the *Pullman* doctrine, in which abstention is based upon potentially dispositive state law grounds. The extension stems from the identity of the state and federal issues and the vast reallocative effect that results when this identity is recognized. The potential for application of this extended *Pullman* rationale is almost limitless when the rationale is applied in the absence of considerations bearing on the competence of the state forum.[134]

132. 397 U.S. 82 (1970).

133. 401 U.S. 476 (1971). For a discussion of *Reetz* and *Askew* see text accompanying notes 103-27 *supra*. *Cf.* Wisconsin v. Constantineau, 400 U.S. 433 (1971).

134. *Reetz, Constantineau,* and *Askew* can also be interpreted as cases involving abstention based solely on the presence of a potentially dispositive state law ground that would permit avoidance of the federal question. However they are viewed, it is submitted that they represent a marked extension of the abstention doctrine and an extension that should not be continued. This conclusion is based on two premises. First, *Reetz* strongly suggests that the Supreme Court is assuming the power to reallocate adjudicatory responsibility over federal questions to the state systems on the basis of nothing more than the increasing federal workload and diminishing participation of state courts in the adjudication of federal matters over which they have concurrent jurisdiction. This sort of judgment, unaccompanied by further circumstances that would suggest that the state forum is superior to the federal forum for adjudication of the particular issue presented, should be made by the Congress rather than the judicial branch. Significant personal rights are at stake, as well as the litigant's right to free choice of forum in the absence of compelling circumstances that justify departure from that rule. And the potentially broad application of the *Reetz* rule suggests that the balance of rights and interests, as well as the potentially revolutionary alteration of the scope of original federal jurisdiction, counsel in favor of consideration by Congress. Secondly, *Reetz* abstention, even when viewed as simply a special application of *Pullman* abstention, manifests the inherent difficulties involved in limiting the principle that a federal court should abstain if possibly dispositive state law grounds exist. These difficulties, in turn, counsel against exclusive reliance on dispositive state law grounds as a general basis for the abstention technique.

An assessment of the competence of the state forum to adjudicate the controversy or contribute to its adjudication in a significant way would provide an alternative approach that would avoid the problems of application manifested by the *Reetz* case. Under this alternative formulation, *Wisconsin v. Constantineau*[135]—in which the Supreme Court declined to order abstention—would not be irreconcilable with *Reetz* and *Askew*. *Constantineau* involved a due process challenge to a Wisconsin statute that permitted public posting of names of persons who disturbed the peace through excessive drinking. In that case there was little, if anything, that the state courts could have contributed to the federal adjudication.[136] It seems clear that in *Constantineau* the federal court was best suited to adjudicate the controversy in light of the type of issue presented, the presence of a full and adequate record, the experience that the federal forum possessed by virtue of its familiarity with the issues presented, and the speedier adjudication that would result in the previously filed federal action.[137]

Lastly, the presence of possibly dispositive state law grounds or the avoidance of friction between the federal and state courts are inadequate grounds for the invocation of abstention because these grounds are at once too broad and too narrow in application. This approach, moreover, would require a reading and interpretation of state law that the federal court may not be capable of undertaking. In its extreme applications this approach breeds inconsistency that can be explained only in light of the Court's largely unarticulated judgments concerning the difficulty of the issues presented or its desire to postpone resolution of the issue until a later case. If an issue is properly presented and falls within a federal court's jurisdiction, it should be resolved on the merits. The only questions properly addressed through the abstention doctrine should be *where* and *when* the case would be best decided.

135. 400 U.S. 433 (1971).

136. *See* note 114 *supra*.

137. It should be noted that while this formulation of the abstention rule serves to explain *Constantineau*, the *Reetz* and *Askew* decisions might be inconsistent with or wrongly decided under the formulation. Reconciliation of the 3 cases under this formulation is not foreclosed or impossible, however, since the Court's brief opinions in *Reetz* and *Askew* are sufficiently ambiguous to permit the conclusion that abstention was ordered in *Askew* in light of distinct state law grounds and in *Reetz* in order to permit the state court to modify the federal issue and consequently "educate" later federal adjudication. These alternative interpretations, however, are strained.

Procunier v. Martinez, 94 S. Ct. 1800 (1974), can be read to represent a movement toward this application of the *Reetz* abstention model.

B. The General Model

A general model for abstention can now be identified. The model consists of a three-pronged test, each prong representing a distinct variety of abstention. Each prong, likewise, is based on somewhat different policies and results in different consequences.

First, if there exists a distinct state law issue, the resolution of which will require the application of legal standards different from those embodied in an underlying federal issue, and if there is a clear basis for predicting that the state law issue might dispose of the case, abstention will be justified.[138] The policy underlying this variety of abstention is the avoidance of unnecessary federal adjudication. This type of abstention should not be employed unless the state court is more capable of resolving the state law issue than the federal court.[139] Furthermore, if the state court would also be as capable of resolving the federal issue as the federal court, the court should dismiss the action rather than retain jurisdiction.[140] Finally, in employing this form of abstention, the federal court should be mindful of both the delay that will likely result from abstention and the federal-state friction that may be caused by the prospect of federal re-entry under the *England* rule. As a consequence, this form of abstention should be employed only where the state law issue is likely to be dispositive and when employed, a presumption of dismissal by the federal court should apply.

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138. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), would remain the principal case under this heading.

139. For example, in *Reetz* the Court was applying a variation of *Pullman* abstention because of the possible dispositiveness of the state court's interpretation of the state constitutional provision. It is very likely, however, that the federal court would have been as capable of construing the meaning of the state provision in light of that provision's similarity to the applicable federal guarantee, the federal court's experience with the particular issues raised in the case, and the lack of evidence—from the Court's opinion—that important state policies and interests were significantly implicated.

Another example might be Procunier v. Martinez, 94 S.Ct. 1800 (1974), discussed in text accompanying note 161-65 *infra*. In *Procunier* a vagueness challenge to certain regulations limiting prisoners' correspondence rights was instituted. Notwithstanding the possibility of a state court construction of the regulations that could avoid the federal question in the case, abstention was not ordered. The federal court could assess the facial constitutionality of the allegedly vague regulations, thus making the state court construction unnecessary.

140. When dismissal results, abstention produces the greatest functional benefits. Delay is avoided, tension from the threat of federal re-entry is diminished, federal workload at the district and appellate level is decreased, and state court participation and responsibility is at its greatest level. As developed earlier, however, dismissal should occur only when the federal court believes that the state forum is capable of adjudicating the entire controversy at least as reliably, efficiently, and fairly as the federal court. *See* text accompanying notes 64-102 *supra*.

The second prong of the abstention model applies when the federal court believes that state court resolution of underlying state law issues will predictably contribute in a significant way to later federal adjudication, despite the absence of a fully dispositive state law ground.[141] Here federal re-entry after abstention is inevitable, yet the state forum is employed as a "partner" in the federal decision-making process in order to "educate" later federal adjudication of the federal issues. While this variety of abstention can lead to significant friction between the federal and state courts, its application in narrowly confined circumstances can be justified in that it avoids erroneous or insensitive resolution of an issue that is properly in the federal court. An example of this variety of abstention would be preemption litigation in which the issue is not whether a federal statute has preempted state law, but the extent and nature of the preemption.[142]

The third prong of the proposed abstention model applies when the federal court concludes that a more reliable adjudication of the federal issues could be achieved in the state forum.[143] The existence of a potentially dispositive state law issue is not relevant here. When the state court is considered the more reliable forum, dismissal by the federal court should result, and original jurisdiction over the controversy should be shifted to the state forum. The policy underlying this form of abstention is not the avoidance of friction between the federal and state systems. Rather, the policy is the allocation of federal judicial power to the forum best suited to full and fair resolution of the issues. While this form of abstention is least likely to cause friction between the federal and state courts, it is potentially most prejudicial to the rights of the parties, for original jurisdiction over the case is shifted to the state forum with no prospect of later review in the federal district court. While there is no absolute right to selection of forum, the federal plaintiff's choice of forum should be respected unless compelling circumstances justify departure from that norm.

141. *E.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972).

142. Other examples, however, can be easily imagined. When a detailed, comprehensive state regulatory system is challenged in whole or in part, abstention to permit the state forum to construe the provisions, identify severable portions thereof, or articulate underlying policies or practical applications might be in order despite the inevitability of federal re-entry under *England. See, e.g.*, Procunier v. Martinez, 94 S. Ct. 1800 (1974); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). Of course, when important rights are at stake, the need for prompt adjudication may pretermit abstention that would otherwise be justified. *See* text accompanying notes 187-91 *infra*.

143. *E.g.*, Burford v. Sun Oil Co., 319 U.S. 315 (1943).

The basic purpose underlying all three prongs of this abstention model is the allocation of judicial power in each case to the forum that is most competent to resolve the issues presented. This involves, ultimately, an assessment of the relative abilities of the state and federal systems to adjudicate the issues, whether that adjudication involves resolution of a potentially dispositive state law issue, resolution of nondispositive state law issues that will bear on the federal questions and increase the reliability of later federal judgments, or resolution of the federal issues in the state forum. This perspective identifies the overriding thrust of abstention. While relevant, considerations relating solely to avoiding unnecessary decision of federal issues or mitigating friction between the federal and state systems are clearly of secondary importance in the abstention context. This is in marked contrast to the comity doctrine, in which avoidance of friction assumes paramount importance and matters of competence and expertise are distinctly secondary.[144]

V. Factors Bearing on Abstention

Variables relevant to the abstention decision have been developed above.[145] They are generally subsumed under the heading of efficient and expert adjudication. Further considerations can be identified, however, and used to determine those situations in which a federal court should abstain.[146]

A. Abstention Versus Certification

The availability of certification, a procedure that would permit the federal court to certify unsettled questions of state law to the state supreme court, is of substantial utility in the *Pullman* abstention context.[147] Under such a process the highest state court would render a definitive construction of uninterpreted or unclear state

144. *See, e.g.*, Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971). *See* C. Wright, Handbook of the Law of Federal Courts § 52, at 206 (2d ed. 1970); Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 Texas L. Rev. 535, 541 (1970).

145. *See* text accompanying notes 138-44 *supra*.

146. The application of these factors assumes that the federal court has concluded, as an initial matter, that the state forum is at least as experienced as the federal court in adjudicating the relevant issues and that the presence of other related factors, such as important state governmental interests or programs, counsels in favor of the state court as the best adjudicating body.

147. Certification procedures are now available in many states. *See* La. Rev. Stat. Ann. § 13.72.1 (Supp. 1974); Md. Ann. Code, art. 26, § 161 (Supp. 1973); N.H. Rev. Stat. Ann. ch. 490 App. R. 20 (Supp. 1973), Wash. Rev. Code Ann. §§ 2.60.010 - .030 (Supp. 1973); Colo. App. R. 21.1 (1970); Mass. Sup. Jud. Ct. R. 3:21 (1973); Mont. Sup. Ct. R. 1 (1973).

statutes or clarify other unsettled questions of state law.[148]

The United States Supreme Court has employed this device in the past,[149] as have numerous lower federal courts.[150] Recently the Court reaffirmed the availability and utility of the certification device in *Lehman Brothers v. Schein*,[151] a diversity action brought in federal court alleging misuse of corporate property through insider trading in securities. The federal court was forced to determine the scope of fiduciary obligations imposed under Florida law. The trial court proceeded to interpret and apply Florida law,[152] but the court of appeals reversed, interpreting Florida law differently.[153] The United States Supreme Court reversed and ordered resort to the Florida certification procedure despite the fact that the lawsuit had consumed more than two years of trial and appellate litigation.[154] Certification was considered "particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State [from the New York District Court in which the case was tried]."[155] In such a situation, federal judges attempting to interpret state law "act . . . as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction."[156]

The Court further intimated that if certification had not been available in *Lehman Brothers* the federal court would have been well advised to stay its hand by applying *Pullman* abstention and allowing the Florida courts to adjudicate the controversy.[157] The certification procedure, however, was considered more appropriate, as it "save[s] time, energy, and resources and helps build a cooperative judicial federalism."[158]

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148. For a discussion of the certification process and its objectives see Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629 (1951).

149. *See, e.g.*, Lehman Bros. v. Schein, 94 S. Ct. 1741 (1974); Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Dresner v. City of Tallahassee, 375 U.S. 136 (1963); Aldrich v. Aldrich, 375 U.S. 75 (1963).

150. The Fifth Circuit has been most active in employing the device. *E.g.*, Trial Builders Supply Co. v. Reagan, 430 F.2d 828 (5th Cir. 1970); Gaston v. Pittman, 413 F.2d 1031 (5th Cir. 1969); Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656 (5th Cir. 1968).

151. 94 S. Ct. 1741 (1974).

152. *Id.* at 1743.

153. *Id.*

154. *Id.* at 1745. (Rehnquist, J., concurring).

155. *Id.* at 1744.

156. *Id.* This language suggests that the Court would not have ordered resort to the certification procedure had the federal court been located in Florida rather than New York.

157. *Id.*

158. *Id.*

Without question, a certification procedure is more efficient than abstention for determining the meaning of state law and ascertaining the policies underlying the relevant state law issues present in the litigation. The benefits of certification, however, are limited. When questions of law and general policy or legislative purpose are present in a controversy, little more than a definitive ruling on the questions of law is necessary, and the certification process is adequate.

On the other hand, abstention is more appropriate in the many cases in which it is necessary to take advantage of the state court's fact-finding experience. This is ordinarily the case in the *Burford* context, in which abstention is based largely on a determination that the state forum would be a more efficient and reliable forum for the complete adjudication of all federal and state issues presented in the controversy. Because abstention allows a full and reliable determination of fact-laden issues and policy by the better-qualified state court,[159] it also serves as the better vehicle for abdication to the state courts when state law grounds might be dispositive or when significant modification of the federal questions presented in the litigation might result.[160] Therefore, while the certification device is a valuable tool for the abstaining court, its utility must be measured against the purposes underlying abstention. In the *Pullman* context certification will ordinarily be appropriate; in other abstention contexts its usefulness is less evident.

B. Vagueness Challenges

Vagueness challenges to state statutes or rules present a federal question that demands special attention,[161] because in almost all such cases an argument can easily be constructed under *Pullman* that abstention is necessary due to possibly dispositive state law grounds that would avoid or at least substantially modify the federal question. The Supreme Court addressed the dilemma posed by vagueness challenges in *Baggett v. Bullitt*[162] and again recently in *Procunier v. Martinez.*[163] In *Procunier* the Court stated the stan-

159. *E.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972).

160. *See, e.g.*, Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

161. *See, e.g.*, Procunier v. Martinez, 94 S. Ct. 1800 (1974); Cameron v. Johnson, 390 U.S. 611 (1968); Zwickler v. Koota, 389 U.S. 241 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964).

162. 377 U.S. 360 (1964).

163. Procunier v. Martinez, 94 S. Ct. 1800 (1974), discussed in text accompanying notes 188-91 *infra*.

dards governing abstention in vagueness cases as follows:

> For the purpose of applying the doctrine of abstention the Court [in *Baggett*] distinguished between two kinds of vagueness attacks. Where the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct, resolution of the unsettled question of state law may eliminate any need for constitutional adjudication. . . . Abstention is therefore appropriate. Where, however, as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to foreswear all activity arguably within the scope of the vague terms, abstention is not required. . . . In such a case no single adjudication by a state court could eliminate the constitutional difficulty.[164]

The distinction drawn by the Court appears to be between vagueness in the scope of the statute (overbreadth) and vagueness in the meaning of the proscriptive terms employed. In the former instance a state court in a single adjudication may be capable of limiting the scope of the statute. In the latter instance, however, the applicability of vague terms to courses of conduct must be determined on a case-by-case basis in the state court, and the state court's role in the abstention context would therefore consist primarily of clarification and construction of the statutory language rather than adjudication of the constitutional issue. Thus, a single state court proceeding would not adequately ameliorate the inhibiting effect of the vague terms on future conduct arguably within the statutory language.[165] In short, at least in cases involving first amendment overtones, the federal court would assess the facial constitutionality of the state statute or regulation when the proscriptive language is vague.

While this distinction is discernible and meaningful in the limited context of *Pullman*, in which possibly dispositive state law grounds serve as the basis for abstention, its applicability in other abstention contexts is not as clear. Under *Burford* the federal court will dismiss the case in favor of the more efficient, competent, and reliable state forum. Whether in this context the federal question in

164. 94 S. Ct. at 1805-06 n.5. *See* Dombrowski v. Pfister, 380 U.S. 479, 481-92 (1965); Baggett v. Bullitt, 377 U.S. 360, 376-78 (1964). *Cf.* Cameron v. Johnson, 390 U.S. 611 (1968), in which a 3-judge court's refusal to issue a declaratory judgment or injunction against a Mississippi anti-picketing law was affirmed on the ground that the challenged statute was not unconstitutionally vague or overbroad.

165. *See* Dombrowski v. Pfister, 380 U.S. 479, 490-92 (1965). *But see* Zwickler v. Koota, 389 U.S. 241 (1967), in which the Court refused to order abstention because the relevant statute was attacked as overbroad, with a consequent deterrent effect upon first amendment rights. *Zwickler* suggests that overbreadth in the first amendment context so inhibits the exercise of first amendment freedoms that abstention is improper, notwithstanding the contrary implications of *Baggett*. But *Cameron* and *Procunier* seem to undercut this reasoning.

the case involves overbreadth or facial unconstitutionality seems an irrelevant inquiry if the federal court is convinced that the state forum could more reliably and efficiently adjudicate the matter. This determination, in turn, will be governed in large part by considerations that will be discussed next relating to the difficulty and importance of the federal question presented in the case.

C. *The Nature of the Federal Issue*

The nature of the issues presented in a case should be considered before a federal court abstains. The impact of this consideration on the abstention decision can be assessed from two perspectives: the difficulty and sensitivity of the federal issue presented and the competence and reliability of the state forum.

1. The Difficulty and Sensitivity of the Issue

The fact that the difficulty and sensitivity of the federal issue is a factor to be considered in determining whether to invoke abstention should not be taken to mean that abstention will only be used in a narrow category of cases. As has been noted, abstention has been ordered in a broad variety of cases.[166] This is particularly true in the *Pullman* abstention context, in which possibly dispositive state law grounds serve as the primary basis for withholding decision in the federal court. *Pullman* abstention not only has been invoked in cases involving economic and business regulation,[167] but also in litigation involving race discrimination,[168] first amendment rights,[169] and other guarantees that are today considered "fundamental."[170] Nor can one conclude that the cases arising in these sensitive areas of personal liberties did not present claims with substantial merit.[171] Abstention under *Lake Carriers' Association v.*

166. *See* notes 41 & 96 *supra*.

167. *See, e.g.*, Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959).

168. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

169. *See, e.g.*, Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957); Albertson v. Millard, 345 U.S. 242 (1953); AFL v. Watson, 327 U.S. 582 (1946).

170. *See, e.g.*, Scott v. Germano, 381 U.S. 407 (1965); Harrison v. NAACP, 360 U.S. 167 (1959).

171. *Compare* Harrison v. NAACP, 360 U.S. 167 (1959), *with* NAACP v. Button, 371 U.S. 415 (1963).

One conclusion which might be drawn from this observation is that *Pullman* abstention is generously employed as an avoidance device. The same observations and conclusions may be drawn from *Reetz, Constantineau*, and *Askew*. *Constantineau* was by far the easiest of the

MacMullan,[172] to permit modification of the federal issue, has been so infrequently applied in its pure form that little analysis of its application can be undertaken. One might surmise, however, that due to its similarity and frequent coexistence with *Pullman* abstention,[173] the *Lake Carriers'* rule would be applied in a similar manner. Abstention under *Burford v. Sun Oil Company*[174] involves dismissal of the action in the federal court, and one might suspect from this that the inclination to avoid difficult decisions would be diminished. To some extent this appears to be the case, although the cases do not establish a clear pattern, for *Burford*-type abstention has been ordered when relatively important constitutional guarantees were involved.[175]

Many of these holdings provide support for Professor Wright's observation that instead of the aforementioned perspective of the difficulty and sensitivity of the federal issue being the basis for abstention, the doctrine is sometimes employed as a device to serve the convenience of federal courts and to avoid the decision of hard questions.[176] While Professor Wright's point was limited to only a few cases,[177] the observation seems plausible for all forms of abstention, and the use of abstention to achieve these ends is inconsistent with the federal court's obligation to decide cases properly before it or to refuse decision on principled and articulated grounds.[178] More importantly, however, those cases in which one most suspects that abstention was grounded on this foundation contain little, if any, evaluation of the sensitivity of the state court to the federal rights asserted or the need for prompt adjudication of the federal right.[179]

Absent other factors justifying abstention, the mere difficulty

three cases to decide, and accordingly, perhaps, abstention was not ordered. The Court in *Constantineau* devoted only 2 brief paragraphs to the relatively simple procedural due process point, 400 U.S. at 436-37, with no Justice expressing disagreement with the merits of the due process issue.

172. 406 U.S. 498 (1972).

173. *See* text accompanying notes 58-63 *supra*.

174. 319 U.S. 315 (1943).

175. *See, e.g.*, Scott v. Germano, 381 U.S. 407 (1965); Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949).

176. C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 52 at 203 n.51, 205 (2d ed. 1970).

177. *See, e.g.*, United Services Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir.), *cert. denied*, 377 U.S. 935 (1964); P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949).

178. *See* authorities cited note 102 *supra*.

179. *See, e.g.*, Askew v. Hargrave, 401 U.S. 476 (1971); Reetz v. Bozanich, 397 U.S. 82 (1970); Harrison v. NAACP, 360 U.S. 167 (1959); Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957).

of the questions presented to the federal court should not permit the federal court to avoid decision. The federal and state courts are in the business of deciding difficult and close questions; indeed, it is the easier questions or the frivolous cases that should most appropriately be removed from the docket. Those cases that present the most difficult questions often involve sensitive issues of personal liberty. It is in this general area that the state systems may exhibit the least reliability and sensitivity.

2. The Sensitivity and Competence of the State Courts

While the sensitivity and competence of state courts to adjudicate matters involving important constitutional guarantees has, with few exceptions,[180] occasioned little discussion in the Court's opinions, this should not be taken as conclusive evidence that such matters are not considered. An evaluation of the relevant state court system, or the particular state judges involved, would be unseemly and divisive if made explicit. It is altogether possible, however, that, particularly on the district court level, such considerations play a significant although unarticulated role in the abstention decision.

The sensitivity and competence of the state courts have been assessed in a less direct fashion. In a number of cases the Court has evaluated the importance of the right asserted in the litigation[181] and the need for prompt adjudication to avoid further and continued abridgment of the pertinent constitutional guarantee.[182] Such considerations have had a particularly strong influence in first amendment cases, in which prompt judgment may be required to remedy the consequences of a vague or an overbroad statute.[183] In other contexts the Court has also accorded such matters substantial weight,[184] yet no standard has been articulated or consistently applied.

Explicit evaluation of the competence and reliability of the state courts has been avoided in the past largely through selective invocation of the mottos that the federal courts are the preferred

180. *See, e.g.*, Martin v. Creasy, 360 U.S. 219, 228-29 (1959) (Douglas, J., dissenting); Harrison v. NAACP, 360 U.S. 167, 180, 182, 184 (1959) (Douglas, J., dissenting).

181. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965); Baggett v. Bullitt, 377 U.S. 360, 375-80 (1964); *cf.* Propper v. Clark, 337 U.S. 472, 492 (1949).

182. Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964).

183. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964).

184. *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433 (1971); Harman v. Forssenius, 380 U.S. 528 (1965); Griffin v. County School Bd., 377 U.S. 218 (1964). *Cf.* McNeese v. Board of Educ., 373 U.S. 668, 674-76 (1963).

forum for adjudication of federal rights[185] and that they have an obligation to respect the suitor's choice of forum if proper jurisdiction exists.[186] Federal courts have been and most likely will continue to be the most frequently employed forum for the adjudication of federal issues, and a suitor's choice of forum should presumptively be respected. But the issue squarely presented through the abstention doctrine is whether these rules ought to be inflexibly applied notwithstanding important countervailing considerations. Since 1941 the latter inquiry has been answered in the negative through consistent application of the abstention principle. When the competence of the state court to adjudicate sensitive federal issues is a relevant consideration, the question becomes one of how to assess that competence without demeaning the state forum while employing at least a modicum of explicit, principled, and predictable analysis.

Three factors should be assessed by the abstaining court in its effort to determine the reliability and relative competence of the state forum when adjudication of sensitive federal rights is required. These factors are the extent to which the state judges are independent of the political or electoral process, the availability and adequacy of effective remedies in the state courts, and the procedures and fact-finding capacity of the state courts. These purely objective criteria should be employed not to determine the subjective competence of the state courts, but to assess the reliability and adequacy of the state forum for adjudication of important federal rights. It is important to note, furthermore, that these criteria relate to matters beyond the control of the state courts. They do not require an assessment of past state court decisions, the personalities of state court judges, or the prevailing judicial philosophy of the state supreme court. Rather, they relate to characteristics of the state judicial process that are governed by external legislative or executive forces.

These factors will not be wholly relevant in every context. The weight that is accorded them should be determined in light of their relevance to the basic abstention inquiry: is the state form an efficient and reliable alternative to the federal court in this particular case? For example, in a case involving sensitive and potentially controversial issues, the independence of the state judiciary would assume great significance. In a case requiring immediate attention to avoid continuing and irreparable damage to affected parties, the availability of prompt relief in the state forum should be of para-

185. *See* authorities cited in note 180 *supra*.
186. *See* authorities cited note 102 *supra*.

mount importance. Likewise, cases involving issues that must be resolved on the basis of extensive discovery, in which impeachment of witnesses or admissibility of certain forms of evidence is crucial, should trigger inquiry into state and federal rules of discovery or evidence.

D. Making the Abstention Decision

The state court's competence and reliability in fairly and fully adjudicating matters involving important constitutional guarantees should be the relevant index for the abstention decision. In general, the evaluation of the state courts in this respect has two dimensions. The first dimension is an assessment of the ability of the state court itself, based on prior experience and other considerations, to reliably and impartially adjudicate the issues.

Apart from an inquiry into the competence of the state forum, a second dimension in which the difficulty of the federal issue can be assessed is the need for prompt relief regardless of the respective competences of the state and federal systems. For example, when important rights are asserted requiring immediate vindication, the federal court should proceed to judgment unless compelling circumstances dictate otherwise.

The importance of the right asserted or the need for immediate judicial relief, however, should not pretermit abstention in all cases. When warranted in light of all other considerations, abstention should be the general rule. An exception to that rule should be based on a careful assessment of the claim asserted, the particular context in which it arises in the litigation, and the particular plaintiff raising the issue. Furthermore, the need for immediate relief need not always preempt the abstention result, because the federal court could issue temporary relief prior to abstention and submit the issue to the state forum for decision in the calmer atmosphere of the status quo ante.

The posture of the federal court after abstention is ordered also should be considered when assessing the respective roles of the state and federal courts in adjudication of difficult or important federal issues. If the federal court will dismiss the case, thereby shifting original jurisdiction to the state forum, greater consideration should be given the nature of the issue presented and the competence of the state forum to resolve it.[187] When, on the other hand, federal

187. This may account for the infrequent application of *Burford* abstention to cases involving "fundamental" constitutional guarantees. *See* notes 96 & 175 *supra*.

jurisdiction is retained under either *Pullman* or *Lake Carriers'*, considerations relating to the competence and sensitivity of the state court diminish in importance and the need for immediate relief through prompt judicial review assumes predominant significance. Thus, two cases of equal merit involving the same substantive issue might be decided differently if one requires prompt judicial attention.

Finally, underlying all abstention decisions is the notion that the state and federal courts are engaged in a co-operative judicial enterprise of guaranteeing and enforcing the federal constitution, laws, and treaties. The need to preserve state judicial presence is ultimately essential to the preservation of those guarantees, particularly in light of the increasing burden of litigation that is being placed on the federal system.

The application of these considerations can be illustrated by the recent Supreme Court decision of *Procunier v. Martinez.*[188] The case involved a first amendment challenge to California prison regulations restricting prisoners' mail privileges. In declining to order abstention despite the presence of issues that would justify such a result—such as unclear and unimterpreted regulations that might be construed to avoid the federal question[189] and past experience by the California courts in adjudicating similar issues touching on important state interests and correctional policy[190]—the Court emphasized "the high cost of abstention when the federal constitutional challenge concerns facial repugnance to the First Amendment."[191] In this case, where important first amendment rights were at stake and prompt attention was required to avoid further loss of those rights under a continuing regulatory program, the interest in permitting the experienced federal forum to resolve the issues immediately outweighed the interest in promoting state court participation in federal constitutional adjudication. This result would occur under the proposed balancing approach notwithstanding the presence of a reliable state forum to fully and fairly adjudicate the controversy.

In short, the application of these factors on a case-by-case basis must be grounded on a realistic and sensitive evaluation of the

188. 94 S. Ct. 1800 (1974).

189. *Id.* at 1806.

190. *Id.*; *cf. In re* Jordan, 7 Cal. 3d 930, 500 P.2d 873, 103 Cal. Rptr. 849 (1972). In *Jordan* the California Supreme Court invalidated prison rules that had forbidden confidential attorney-client correspondence. A challenge to these rules was raised in the district court in *Procunier*, but the court stayed its hand pending resolution of the *Jordan* case.

191. 94 S. Ct. at 1807.

respective judicial systems and the requirements for resolution of each particular case. Inflexible standards that are applicable to all cases in all contexts cannot be articulated without significantly restricting the discretion of the district court and limiting the sensitivity of abstention as a device for achieving an efficient, fair, and functional allocation of judicial power and jurisdiction between the federal and state systems.

VI. CONCLUSION

The effect of abstention is a reallocation of judicial power. It is, by definition, a surrender of jurisdiction by the federal court as well as a declination by that court of its substantive power to interpret and apply the Constitution and laws of the United States. Abstention is not, however, a doctrine through which the judicial system disavows the power to adjudicate certain classes of issues. Nor is it a doctrine through which the judicial branch declines to decide the merits of a particular case presented to it. The political question doctrine[192] and the doctrines of standing,[193] ripeness,[194] and mootness[195] serve these functions.

Abstention presupposes the jurisdictional power and capacity of the judicial system to resolve a controversy. Through the vehicle of abstention the federal court considers whether the federal or state system is most capable of adjudicating the matter before it. Thus, abstention cannot be viewed or evaluated in the same terms as the political question and standing doctrines. It must be viewed in terms of the most appropriate allocation of subject matter jurisdiction and judicial power between the federal and state systems.

When considered from this perspective, three conclusions emerge regarding the abstention doctrine. First, abstention should not be based simply on elimination of friction between the federal and state systems, or on the avoidance of decision by the federal forum. While avoidance of friction and regard for the independence of state governments are laudatory goals that will hopefully be served by abstention, these goals are too broad and undefined to be

192. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969); Baker v. Carr, 369 U.S. 186 (1962); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

193. *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488 (1974); Flast v. Cohen, 392 U.S. 83 (1968).

194. *See, e.g.*, Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

195. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974).

of significant assistance in the doctrine's application. Abstention will serve these same ends when based on a careful appraisal of the experience, efficiency, and reliability of the state and federal courts as well as the needs and interests of the particular litigants at bar. So applied, the doctrine will possess a functional utility that some current applications belie.[196]

The second conclusion drawn from this study is that abstention should not be based on inflexible criteria that limit the discretion of the abstaining court. No general class of cases can be meaningfully excised from the doctrine's reach; no general set of circumstances can be identified that will always trigger the doctrine's application. Rather, abstention is an equitable doctrine in which sound judicial discretion is applied in each particular case.

Finally, abstention is a doctrine based on sound principles of federalism and joint participation of state and federal courts in federal litigation. An approach based on this principled footing, which seeks the most efficient and reliable forum for adjudication of federal interests, is the highest form of "cooperative judicial federalism."[197] Based as it is on a sensitive appraisal of the function and capacities of both state and federal systems, abstention will result in the meaningful participation of the state courts in the federal adjudicative process, an end that is consistent with the concurrent jurisdiction conferred upon them by the Constitution.

196. *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433 (1971); Reetz v. Bozanich, 397 U.S. 82 (1970).

197. Lehman Bros. v. Schein, 94 S. Ct. 1741, 1744 (1974); *see* Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960).