U.C. DAVIS LAW REVIEW

University of California Davis

VOLUME 20 FALL 1986 NUMBER 1

ARTICLES

Pullman and *Burford* Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases

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Critics attack use of Pullman *and* Burford *abstention to erode federal jurisdiction in constitutional cases. This Article explores the potential for erosion by examining Supreme Court and lower court decisions. It argues that federal courts' current use of the doctrines allows jurisdictional reallocations of constitutional cases according to prevailing views of federalism. Because these jurisdictional reallocations lack content-neutrality, they result in inconsistent federal forum availability in constitutional cases. The Article argues for eliminating those aspects of abstention analysis that facilitate judicially fashioned reallocations of cases based on subject matter. It suggests that this change in analysis would serve the policies underlying abstention while limiting its erosive tendencies.*

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INTRODUCTION

Nearly fifty years ago, the Supreme Court fashioned the doctrine of judicial abstention[1] in two landmark cases: *Railroad Commission v. Pullman Co.*[2] and *Burford v. Sun Oil Co.*[3] In the ensuing years, *Pullman* and *Burford* have weathered significant criticism from scholars[4] to become well-accepted vehicles for judicially fashioned reallocations of federal jurisdiction. Through *Pullman*, federal courts may postpone exercising their jurisdiction while an authoritative state ruling is sought on an issue of unclear state law.[5] *Burford* permits federal courts to abandon their jurisdiction entirely,[6] thus forcing litigants to resort to state judicial and administrative remedies.[7] The delay or abandonment of jurisdiction occurs even though litigants assert a substantial constitutional claim as the basis for invoking federal jurisdiction.

Those who believe that federal courts are particularly qualified to protect constitutional claims view abstention as threatening that protec-

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[1] Abstention, as used herein, refers to abstention by the federal courts from the exercise of their jurisdiction under either the *Pullman* or *Burford* doctrines. Although the Supreme Court recognizes other abstention doctrines, this Article deals only with *Pullman* and *Burford* abstention. The other types of abstention stem from the Court's decisions in Younger v. Harris, 401 U.S. 37 (1971), and Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). Both of these apply only when state court proceedings are pending. This distinction alone makes the doctrines analytically different from *Pullman* and *Burford*. Further, the *Younger* doctrine has diverged from the other abstention doctrines to such an extent that it has taken on a life of its own. Because of these differences, this Article discusses *Younger* and *Colorado River* abstention only to the extent that they are relevant to *Burford* and *Pullman* abstention.

[2] 312 U.S. 496 (1941).

[3] 319 U.S. 315 (1943).

[4] *See generally* Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974); Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977). *But see* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 92-96 (1973).

[5] *Pullman*, 312 U.S. at 498-500.

[6] *Burford*, 319 U.S. at 334.

[7] *Pullman* contemplates resort to state judicial remedies. In isolated instances, this may entail prior resort to state administrative remedies. *See, e.g.*, Cox Cable Communications, Inc. v. Simpson, 569 F. Supp. 507 (D. Neb. 1983) (redirecting plaintiff to Public Service Commission); Deck House v. New Jersey State Bd. of Architects, 531 F. Supp. 633 (D.N.J. 1982) (granting preliminary injunction but staying further proceedings pending completion of Board of Architects proceedings). *Burford* contemplates resort to state administrative and regulatory bodies with subsequent state court review. *See* Ryckman, *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 CALIF. L. REV. 377, 413 (1981).

tion. This Article examines in depth the basis for the perceived threat posed by abstention. The seeds of the problem are elements of uncertainty in Supreme Court decisions,[8] but these are seeds that the lower federal courts have cultivated. The federal courts have significantly different opinions as to the criteria for abstention.[9] In particular, many lower federal courts balance "sensitivity" of the issues or the dispute's local character against the strength of the federal interest.[10] This type of analysis leads to inconsistent decisions, and to the use of *Pullman* and *Burford* for effectuating each court's personal and subjective vision of appropriate jurisdictional allocations.[11] *Pullman* and *Burford* thus become linked to evolving theories of federalism, enforcing current jurisdictional theory. This association causes vast swings in federal forum availability during eras characterized by varying judicial philosophies of federalism.[12]

Since courts apply *Pullman* and *Burford* inconsistently, leading to differing federal forum availability for constitutional claims, this Article explores whether shifting constitutional cases into state courts is sufficiently serious to justify limiting abstention's use.[13] Lower federal courts' involvement in making constitutional law, and the federal judiciary's consistent independence, militate in favor of assuring that abstention does not erode the statutory guarantee of federal jurisdiction in constitutional cases.[14] While the Supreme Court itself has attempted to prevent such an erosion, systemic variations in federal forum availability still exist.[15]

Based on the above analysis, the Article discusses how to limit *Pullman* and *Burford* and considers several alternatives — ranging from exempting all constitutional claims from abstention, to exempting from or channeling toward abstention particular substantive claims.[16] The Article urges narrowing existing analyses so that abstention is based on the criteria that are most tangible and most subject to objective legal scrutiny. Thus, *Pullman* would apply only when uncertain state law issues exist and premature adjudication of constitutional questions could be avoided by referring the unclear state law question to the state

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[8] *See infra* text accompanying notes 20-76.
[9] *See infra* text accompanying notes 82-99.
[10] *See infra* text accompanying notes 90-99.
[11] *See infra* text accompanying notes 100-12.
[12] *See infra* text accompanying notes 113-17.
[13] *See infra* text accompanying notes 118-56.
[14] *See infra* text accompanying notes 118-39.
[15] *See infra* text accompanying notes 140-56.
[16] *See infra* text accompanying notes 157-203.

courts.[17] *Burford* would apply only when states had legislated in an area within their legitimate interests by providing specific judicial and administrative review of particular types of cases.[18] The Article proposes eliminating the less objective criteria of issue sensitivity and local concern, thereby removing the tendency of federal courts to express their own views of the proper jurisdictional allocation.[19] At the same time, *Pullman* and *Burford* would enable federal courts to facilitate federal-state relations in limited circumstances.

I. CONTOURS OF *Pullman* AND *Burford* ABSTENTION AS DEFINED BY THE SUPREME COURT

From 1941, when abstention first took on independent life in *Railroad Commission v. Pullman Co.*,[20] to the present, the Supreme Court has reviewed numerous abstention cases.[21] These cases have provided ample opportunity for the Court to refine its views about the conditions warranting abstention.[22] In recent years the Court has made progress

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[17] *See infra* text accompanying notes 208-31.

[18] *Id.*

[19] *Id.*

[20] Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), was the first Supreme Court case to refuse jurisdiction based on an independent abstention doctrine. Cases considered precursors of the *Pullman* doctrine are set forth in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 988-89 (2d ed. 1973) [hereafter HART & WECHSLER]. *See, e.g.*, Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940), *modified*, 311 U.S. 614 (1941); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929).

[21] The Supreme Court has addressed *Pullman* and *Burford* abstention issues in numerous cases. For cases discussing *Pullman*, see Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Reetz v. Bozanich, 397 U.S. 82 (1970); Harman v. Forssenius, 380 U.S. 528 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964); Harrison v. NAACP, 360 U.S. 167 (1959); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639 (1959); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944). For cases discussing *Burford*, see Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593 (1968); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951).

[22] Originally, abstention was associated with deferral of injunctive relief issued pursuant to the federal courts' equity powers. As Justice Frankfurter stated in Railroad Comm'n v. Pullman Co., 312 U.S. at 500:

> An appeal to the chancellor . . . is an appeal to the 'exercise of the sound discretion, which guides the determination of courts of equity.' The history of equity jurisdiction is the history of regard for public conse-

in communicating the abstention doctrines' distinguishing characteristics. In the most important abstention decision of the last decade, *Colorado River Water Conservation District v. United States*,[23] the Court reviewed the full range of circumstances under which a federal court might defer or relinquish jurisdiction. The Court discusses both *Pullman* and *Burford* abstention.

The Supreme Court considers abstention an "extraordinary and narrow exception" to the obligation of federal courts to exercise their jurisdiction.[24] In *Colorado River*, the Court emphasized that abstention is justified only when resorting to a state tribunal, rather than a federal court, "would clearly serve an important countervailing interest."[25] To ascertain what countervailing interests justify *Pullman* or *Burford* abstention, a review of those cases and their progeny is necessary.

A. Pullman Abstention

1. Conditions for Applicability

Pullman abstention[26] was the first variety of abstention recognized by the Supreme Court. *Pullman* indicated generally the conditions in

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> quences in employing the extraordinary remedy of the injunction. (citation omitted).

While the chancellor's discretion may have inspired the development of *Pullman* abstention, even Justice Frankfurter apparently did not believe that equity jurisdiction fully explained the doctrine. His dissent in *Alabama PSC*, 341 U.S. at 359, stated:

> An "adequate remedy at law," as a bar to equitable relief in the federal courts, refers to a remedy on the law side of the federal courts. . . . [I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it. This is so because discretion based solely on the availability of a remedy in the State courts would for all practical purposes repeal the Act of 1875.

See D. CURRIE, FEDERAL COURTS: CASES AND MATERIALS 615-22 (3d ed. 1982); Redish, *supra* note 4, at 89. Today abstention is no longer confined to cases seeking injunctive relief; the federal courts have abstained in common law damages actions. *See, e.g.*, Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970) (per curiam); United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962); Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960); West v. Village of Morrisville, 728 F.2d 130 (2d Cir. 1984); Williams v. Hot Shoppes, Inc., 293 F.2d 835 (D.C. Cir. 1961), *cert. denied*, 370 U.S. 925 (1962); Beach v. Rome Trust Co., 269 F.2d 367 (2d Cir. 1959).

[23] 424 U.S. 800 (1976).

[24] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); *Colorado River*, 424 U.S. at 813 (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)).

[25] *Colorado River*, 424 U.S. at 813.

[26] Because *Pullman* first articulated the principles governing this variant of absten-

which the doctrine would apply, and subsequent decisions have explained and defined the doctrine more formally.[27] Despite the abundance of Supreme Court decisions addressing *Pullman* abstention, its dimensions are still somewhat unclear.

In *Pullman*, the Pullman Company and the Pullman porters challenged a Texas Railroad Commission order precluding local trains from operating without a Pullman conductor. Prior to the order, trains on some routes operated with only Pullman porters in charge. The case raised a substantial constitutional question because all of the Pullman porters were black, while all of the Pullman conductors were white.[28] Justice Frankfurter, writing for the Court, acknowledged the existence of the important constitutional question but declined to decide the issue. Instead, he remanded the entire case to the district court. The district court retained jurisdiction while the parties brought a state court action to determine whether the Texas Railroad Commission had the statutory authority to issue an order reorganizing the staffing of Pullman cars.[29]

The Supreme Court's decision to abstain was premised in part on the tradition that federal courts avoid constitutional adjudication if ruling on a state issue could terminate the controversy between the parties.[30] Although this judicially imposed restraint ordinarily results in a federal court decision on the state law issue, in *Pullman* the federal court ordered the parties to seek a state court resolution of the state law question.[31]

As *Pullman* has evolved in later cases, federal courts may avoid constitutional decisions not only when a ruling on the state issue could terminate the dispute, but also when resolution of the state law issue might moot the constitutional question or cause its presentation to the federal court in a different posture.[32] *Pullman* abstention thus transported the tradition of avoiding constitutional questions to an entirely new dimension. *Pullman* encourages not only decisions on a state law ground, but also decisions by state courts when the state law issue is

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tion, the doctrine is identified by the case name.

[27] *See supra* note 21.

[28] *Pullman*, 312 U.S. at 497.

[29] *Id.* at 501.

[30] *Id.* at 498; *see also infra* text accompanying notes 50-51.

[31] This deviation from the classic form of the doctrine of avoiding constitutional decision is noted by Professor Field. *See* Field, *supra* note 4, at 1097 n.96.

[32] Bellotti v. Baird, 428 U.S. 132, 147-48 (1976); Kusper v. Pontikes, 414 U.S. 51, 55 (1973); Harman v. Forssenius, 380 U.S. 528, 534-35 (1965); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959).

likely to affect the ultimate presentation of the constitutional issue.

The Court justified its surrender of a state law claim to the state courts in *Pullman* by citing the lack of clarity of the state law issue. In *Pullman*, Justice Frankfurter stated that, "[r]eading Texas statutes and Texas decisions as outsiders, without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation."[33] Subsequent decisions echo the requirement of unclear state law as a precondition to the doctrine's applicability.[34]

Because of the inherent vagueness of the "unclear state law" requirement, critics have called *Pullman* abstention an expensive research tool.[35] Commentators have noted the existence of different shades of "unclarity," and the uncertainty of how unclear state law must be to justify abstention.[36] However, the Supreme Court has provided the lower federal courts with some guidance on this issue. The Court has stated, for example, that federal courts need not abstain on *Pullman* grounds unless a state statute is "fairly subject to an interpretation which will render unnecessary" adjudicating the federal constitutional question.[37] Thus, cases involving patently flawed state statutes are subject to immediate federal adjudication because a saving state court construction is implausible and highly unlikely. The Court has also explained that state law is not necessarily uncertain just because the state court has not yet passed on a particular question of state law.[38]

Although the conditions most commonly associated with *Pullman* abstention are avoidance of unnecessary constitutional determinations and unclear questions of state law, other conditions also may apply. Although not articulated by the Court in its recent descriptions of *Pullman*, these other conditions are reflected in varying degrees in the lower courts' analyses.

The first of these conditions is adequacy of the state remedy, includ-

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[33] Pullman, 312 U.S. at 499.

[34] *See, e.g.*, Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510-11 (1972); Harman v. Forssenius, 380 U.S. 528, 534 (1965).

[35] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 425 (1964) (Douglas, J., concurring); Redish, *supra* note 4, at 95.

[36] Field, *supra* note 4, at 1088.

[37] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984) (quoting Harman v. Forssenius, 380 U.S. 528, 535 (1965)).

[38] Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971); Zwickler v. Koota, 389 U.S. 241, 251 (1967) (quoting United States v. Livingston, 179 F. Supp. 9, 12-13 (E.D.S.C. 1959), *aff'd*, Livingston v. United States, 364 U.S. 281 (1960)).

ing the plaintiff's ability to obtain the state law determination with reasonable promptness. In *Pullman*, Justice Frankfurter indicated that the district court should stay its hand unless the plaintiff could not obtain a definitive state court ruling with full protection of the constitutional claim.[39] Frankfurter believed that either review of the Texas Railroad Commission order or appropriate state action to enforce the order would provide the plaintiff with an adequate state court remedy.[40]

At a practical level, any limitation on abstention imposed by Frankfurter's statements regarding adequacy of the state remedy is minimal. State courts have concurrent jurisdiction to hear constitutional claims brought pursuant to section 1983[41] and can adequately protect such claims even if they do not decide them.[42] Further, although some *Pullman* language seems to require a prompt determination of the state law question,[43] in reality federal judges usually exhibit tolerance for the crowded state court dockets.[44]

Another possible *Pullman* condition is that the constitutional issue must touch "on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open."[45] Justice Frankfurter stated that *Pullman*'s constitutional question met this condition. Although the meaning of his statement is unclear, Frankfurter was probably referring to the discrimination issue. Professor Field has suggested that an issue's sensitivity may stem from its novelty, from its far-reaching and unforeseen consequences, from the probability of mootness by impending congressional action, or from

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[39] *Pullman*, 312 U.S. at 501.

[40] *Id.*

[41] 42 U.S.C. § 1983 (1982); *see* Martinez v. California, 444 U.S. 277, 283-84 n.7 (1980). State courts are not absolutely obliged, however, to hear § 1983 claims. Spencer v. South Carolina Tax Comm'n, 471 U.S. 1112 (1985) (affirming without opinion the South Carolina Supreme Court's decision at 281 S.C. 492, 316 S.E. 386 (1985)).

[42] *See infra* text accompanying notes 140-49.

[43] *Pullman*, 312 U.S. at 501-02.

[44] In certain circumstances, the urgent need for adjudicating a constitutional question may result in refusal to abstain. *See, e.g.*, Badham v. District Court, 721 F.2d 1170, 1173 (9th Cir. 1983) (holding that before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on plaintiff's right to vote). Concern about the urgent need for relief may also lead a federal court to grant interim relief even though it abstains. *See, e.g.*, Cox Cable Communication, Inc. v. Simpson, 569 F. Supp. 507 (D. Neb. 1983) (ordering abstention but granting a preliminary injunction during pendency of state court proceedings). The Supreme Court has stated that the question of abstention is 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).

[45] *Pullman*, 312 U.S. at 498.

failure of a particular controversy to present the issues in a realistic light.[46] While these reasons seem more palatable than a desire to avoid admittedly substantial, but nonetheless controversial, federal constitutional law issues, the Court did not articulate them.

If Frankfurter's reference to sensitive social policy issues alluded to the controversial tenor of the constitutional issue, federal courts might abstain in the most important of civil rights cases. However, subsequent cases indicate just the opposite. Federal courts are often reluctant to abstain when constitutional issues are of *Pullman*'s magnitude.[47]

The uncertain status of issue sensitivity as an abstention condition is attributable not only to confusion about what sensitivity means, but also to the Supreme Court's failure to include the notion in recent decisions recounting the conditions for abstention.[48] Whether or not the Supreme Court requires issue sensitivity as an abstention prerequisite, many circuit and district courts justify their abstention decisions through issue sensitivity.[49]

2. Policies Served by *Pullman* Abstention

Pullman abstention is justified at least in part by the tradition that federal courts should avoid deciding constitutional claims by adjudicating a state issue first.[50] This tradition stems from the perception that judicial review is antimajoritarian and that courts should avoid invalidating the wishes of the majority as expressed in legislation.[51]

Pullman abstention may also further harmony between federal and state courts because federal courts defer to state courts on unclear state law issues. This deference allows states to chart the course of their own

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[46] Field, *supra* note 4, at 1098.

[47] *See infra* text accompanying notes 83-84.

[48] *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976).

[49] *See infra* text accompanying notes 90-94.

[50] Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191-93 (1909), is part of that tradition. There the Court held that even if the state claims were merely pendent to federal claims, the lower court had the right to decide the case on local or state questions only. *See also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

[51] A. BICKEL, THE LEAST DANGEROUS BRANCH 111-33 (1962). Justice Frankfurter, the author of *Pullman*, was very conscious of judicial review's antimajoritarian qualities. *See* T. MASON, THE SUPREME COURT FROM TAFT TO WARREN 148-49 (1968). Professor Mason argues that the writings of Jefferson, Madison, and Hamilton do not support this view; they all believed the Court was meant to perform an antimajoritarian function. *Id.* at 153.

law without the threat of erroneous federal court interference.[52] By minimizing the chances that the federal court will make mistakes in deciding state law issues, abstention reduces the likelihood of erroneous and intrusive disruption of state or local programs and policies.

3. Procedural Disposition of Cases Subject to *Pullman* Abstention

Pullman reserved the litigants' right to return to federal court if the state court decision did not moot or resolve the question.[53] However, the Court did not elaborate on how this forum shifting would occur. Nor did the Court recognize the danger that federal courts might bar some federal claims by res judicata or collateral estoppel when the litigants returned to federal court following state adjudication.

Some years later, in *England v. Louisiana State Board of Medical Examiners*,[54] the Court explained how litigants could preserve the right to return to a federal forum. A litigant ordered into state court pursuant to a federal court abstention order may reserve the federal claims for federal court decision after the state court decides the state claims.[55] If the plaintiff litigates the federal claims in the state court, she forfeits the right to a federal court trial of the constitutional claims. The only remaining federal forum is the Supreme Court — a body which, even if willing, is extremely limited in the cases it can hear. If the plaintiff receives relief on the basis of the state law issue decision, she need not exercise her right to a federal forum trial of the constitutional claims.[56]

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[52] *Pullman*, 312 U.S. at 500. Under the supremacy clause, states have no legitimate interest in sheltering from federal review a state statute or rule of law that is clearly contrary to the mandates of the United States Constitution. Zablocki v. Redhail, 434 U.S. 374, 379-80 n.5 (1978). When state law is unclear, states have an interest in avoiding an erroneous state law interpretation by a federal court. They also have an interest in avoiding possible interference with state programs as a result of such error. *Pullman* abstention thus facilitates correction of interpretive errors by the state appellate courts. *See* Field, *supra* note 4, at 1085.

[53] *Pullman*, 312 U.S. at 501.

[54] 375 U.S. 411, 421-22 (1964).

[55] *Id.* at 420.

[56] It is also possible that the parties could use a certification procedure. When a state statute permits certification, a federal court may certify the unclear state law questions to a designated state court. *See infra* note 148. The Supreme Court has endorsed this procedural mechanism because presumably it achieves abstention's benefits without the cost to the litigants in time and money. *See* Lehman Bros. v. Schein, 416 U.S. 386 (1974).

B. Burford *Abstention*

1. Conditions for Applicability

The Supreme Court described *Burford* abstention[57] as appropriate "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," in *Colorado River Water Conservation District v. United States*."[58] The pertinent state law questions need not determine state policy; if federal review "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern,"[59] *Burford* abstention may apply. Unlike *Pullman* abstention, *Burford* does not require unclear questions of state law.

Colorado River, read along with other major cases, provides insight for determining when *Burford* abstention is appropriate. The most important cases are *Burford*, *Alabama Public Service Commission v. Southern Railway*,[60] and *Louisiana Power and Light Co. v. City of Thibodaux*.[61]

Although the Supreme Court in *Colorado River* appears to classify the *Burford* and *Thibodaux* lines of cases together, denominating them as *Thibodaux* abstention, the cases present an important distinguishing characteristic. *Burford* and *Alabama Public Service Commission* raised constitutional questions as well as state law questions. Jurisdiction was therefore invoked both on the basis of diversity of citizenship and presence of a federal question. On the other hand, *Thibodaux* and *County*

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[57] This type of abstention originated as a distinct doctrine in Burford v. Sun Oil Co., 319 U.S. 315 (1943). The Court, however, relied on several prior cases in which it had exhibited reluctance to restrain state officials even when the rights asserted were federal in nature. *See, e.g.*, Pennsylvania v. Williams, 294 U.S. 176, 185 (1935) ("There are stronger reasons for adopting a like practice [relinquishing jurisdiction in favor of the state courts] where the exercise of jurisdiction involves an unnecessary interference by injunction with the lawful action of state officers."); Hawks v. Hamill, 288 U.S. 52, 61 (1933) ("Reluctance there has been to use the process of the federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin.").

[58] 424 U.S. 800, 814 (1976).

[59] *Id.*

[60] 341 U.S. 341 (1951). This case seems to expand *Burford*. While *Burford* might be interpreted as applying only in cases involving a resource important to domestic well-being, *Alabama PSC* was a dispute over the discontinuance of two intrastate train routes. *See infra* notes 66-68 and accompanying text.

[61] 360 U.S. 25 (1959).

of Allegheny v. Frank Mashuda Co.[62] raised no constitutional questions. The latter are classic cases illustrating *Burford* abstention principles when jurisdiction is based solely on diversity.[63] This Article focuses only on *Burford* abstention in cases properly invoking federal question jurisdiction.

The *Burford* case seems to indicate that its variety of abstention should apply narrowly. In *Burford*, plaintiff Sun Oil Company sought to enjoin the enforcement of a Texas Railroad Commission order granting Burford a permit to drill four oil wells. Texas established the commission to deal with the thorny regulatory problems entailed in conserving oil and gas. Since oil existed in the Texas fields in one giant pool, well operators could draw oil from under their own surface area and also, if advantageously located, from distant parts of the pool. Accordingly, the state legislature regulated each oil and gas field as a unit to ensure that "the speculative interests of individual tract owners will be put aside when necessary to prevent the irretrievable loss of oil in other parts of the field."[64] To this end, the legislature concentrated commission decision appeals in one state court of appeals and, finally, the state supreme court.

Based on this manifestation of state commitment to uniform decisions dealing with this important natural resource, the United States Supreme Court held that federal courts should decline to hear the case. Although the Court stated that the Texas courts should have the first opportunity to consider questions involving the commission's regulation of the industry, the Court did not instruct the district court to retain jurisdiction. Instead, it dismissed the case.[65]

Burford's expansive character became evident in *Alabama Public Service Commission*. There, the Court dismissed an action brought by the Southern Railway Company against the Alabama Public Service Commission. Southern Railway sought to enjoin the commission from enforcing an order precluding the railway from discontinuing passenger train service on some local routes operating mainly within Alabama.

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[62] 360 U.S. 185 (1959).

[63] The two cases were decided the same day, and only two Justices agreed with the results in both cases. In *County of Allegheny*, the Court declined to abstain, finding that no particular risk of state-federal friction existed and nothing in eminent domain actions inherently required deferral to state courts. 360 U.S. at 189-97. In *Thibodaux*, the Court abstained, stating that eminent domain cases are of a "special and peculiar nature. . . . intimately involved with sovereign prerogative." 360 U.S. at 28.

[64] *Burford*, 319 U.S. at 324.

[65] *Id.* at 334. Thus, in contrast to postponing jurisdiction, which typifies *Pullman* abstention, the federal courts relinquish jurisdiction altogether in *Burford*-type cases.

The Supreme Court reasoned that regulating intrastate railroad service was primarily a state concern and that the outcome of the dispute would turn on "the predominantly local factor of public need for the service rendered."[66] The Court noted that Alabama law would allow an appeal from a final commission order to a particular circuit court, which could reverse the order if it was contrary to "the substantial weight of the evidence or erroneous as a matter of law."[67] Because the Court found that adequate state court review of "an administrative order based upon predominantly local factors is available to the appellee," it held, notwithstanding plaintiff's due process claim, that "intervention of a federal court is not necessary for the protection of federal rights."[68]

Justice Frankfurter's concurrence attacked the Court's opinion in *Alabama Public Service Commission*. Although he agreed with dismissing the case,[69] he vehemently disagreed with the Court's reasoning. The decision, he argued, contradicted a long line of cases holding that the Court "cannot overrule the determination of Congress as to whether federal courts should be allowed jurisdiction, concurrent with the State courts, even where the plaintiff seeks to restrain action of a state agency."[70] Because the issue of discontinuing local train lines was much simpler than the complex oil regulation plan justifying dismissal in *Burford*, *Alabama Public Service Commission* gave *Burford* abstention a new scope and direction.[71]

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[66] *Alabama PSC*, 341 U.S. at 347 (citing Chesapeake & Ohio R.R. v. Public Serv. Comm'n, 242 U.S. 603, 608 (1917)).

[67] *Id.* at 348. The Alabama Supreme Court had also held that it would review an order of the Commission, if appealed directly, and that it would exercise independent judgment as to both law and facts when a party asserted denial of due process. However, the court would limit its review to the record taken before the Commission. *Id.*

[68] *Id.* at 349.

[69] Justice Frankfurter believed that the due process claim was so lacking in merit that it was insubstantial and should have been dismissed. *Id.* at 354-55.

[70] *Id.* at 355.

[71] Although the two cases are consistent in that both involved state administrative systems that concentrated review in particular courts, the administrative scheme in *Alabama PSC* was not complex. *See* Field, *supra* note 4, at 1157-58. If factual complexity and required expertise of the reviewing tribunal were the benchmarks of *Burford* abstention, the doctrine would be so narrow that arguably it would not apply in *Alabama PSC*. *Id.* The lower courts have applied *Burford* abstention in cases not nearly as complex as the *Burford* case itself. *Id.*

2. Continuing Questions as to *Burford*'s Scope and Policies

Since *Alabama Public Service Commission*, the Supreme Court has discussed *Burford* abstention in two major cases, finding it inapplicable in both instances. On neither occasion did the Court precisely clarify *Burford*'s scope.

In *McNeese v. Board of Education for Community Unit School District 187*,[72] the Court held that the plaintiffs, black students seeking injunctive relief from a segregated school system, did not need to avail themselves of Illinois state administrative remedies prior to filing suit in federal court. The Court rejected *Burford* abstention due to the lack of any dispositive underlying state law issue and on the additional ground that plaintiffs asserted a due process claim. In fact, both of these distinctions were specious given the Court's decisions in *Burford* and *Alabama Public Service Commission*.[73]

More recently, the Court in *Colorado River* declined to invoke *Burford* abstention. The Court reasoned that, although the federal claims involved would establish water rights that might conflict with state law water rights, this conflict would not impermissibly impair the state's policy respecting allocation of state waters.[74]

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[72] 373 U.S. 668 (1963).

[73] In *Burford*, the Court abstained not because the state law issues were necessarily controlling, but because the state provided a "unified method for the formation of policy and determination of cases by the Commission and by the state courts." 319 U.S. at 333. The Court believed that federal court intervention would endanger state policies, and preferred to allow the states the first opportunity to adjudicate the dispute. Federal review would follow, if necessary, in the Supreme Court. *Id.* at 334. The same path could have been taken in *McNeese*.

Further, *McNeese*'s due process claim should not, in theory, have exempted the case from *Burford* abstention, because in *Alabama PSC*, 341 U.S. 341, plaintiffs also asserted a due process challenge. This inconsistency in analysis is noted in Comment, *Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the* Burford *Doctrine*, 46 U. CHI. L. REV. 971, 979 (1979). Perhaps the difference in outcome resulted because *McNeese* was a desegregation case decided by the Warren Court. As one commentator has noted, "the Warren Court had a very special investment in school desegregation—its very being was tied up with the viability and implementation of *Brown v. Board of Education*." Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1149 (1977).

[74] *Colorado River*, 424 U.S. 800, 815 (1976). The facts of *Colorado River* suggest that *Burford*'s applicability was at least arguable. The Court acknowledged that water was a scarce and critical resource (much like oil in Texas), and that the southwestern states had established elaborate procedures for allocating and resolving disputes over water. In Colorado, water referees in each division ruled on applications for water rights and referred applications to water judges for their division. A state engineer and division engineers administered and distributed the waters according to division deter-

Burford and *Alabama Public Service Commission* are two distant poles that mark the range of possible interpretations of *Burford* abstention. The lack of any clear, unequivocal, and tangible criteria for *Burford* abstention is problematic for both courts and litigants.[75] Whether the allegation of a constitutional claim makes any real difference in applying the doctrine is unclear.[76] Further, the Court has never really defined the types of state interests and policies that are of such great local interest, or such extensive concern to the states, that they require protection from federal scrutiny even at the cost of abandoning jurisdiction over a constitutional claim.

II. Abstention as Applied by the Lower Federal Courts

Confusion and inconsistency in lower federal court abstention opinions reflect the Supreme Court's ambiguity regarding *Pullman* and *Burford*. This section explores the most significant areas of judicial confusion and examines their effect on abstention decisions.

A. Abstention Procedure Confusion

In considering *Pullman* and *Burford*, the threshold question is whether abstention is mandatory or discretionary. The Supreme Court decisions give no clear answer, and may even conflict.[77] Lower court

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minations. *Id.* at 804-05. *Burford* abstention's inapplicability may mean that notwithstanding *Colorado River*'s broad language, the Court intends *Burford* to apply in extremely limited circumstances.

[75] *See infra* text accompanying notes 88-89.

[76] In *Colorado River*, the Court noted that both *Burford* and *Alabama PSC* contained colorable constitutional questions. 424 U.S. at 815 n.21. The *Burford* and *Alabama PSC* Courts, while acknowledging this fact, treated it as insignificant. The Court in *Colorado River*, viewing these cases in hindsight, stated that "the presence of a federal basis for jurisdiction may raise the level of justification needed for abstention." *Id.* The Court cites *Burford*, 319 U.S. at 318 n.5, and Hawks v. Hamill, 288 U.S. 52, 61 (1933), to support this proposition. But those cases indicate that courts are reluctant to abstain when the rights are "strictly" federal (*i.e.*, no pendent state claims are involved). If this is *Colorado River*'s meaning, then the presence of state claims in many *Burford*-type cases may make the higher level of justification that the case referred to illusory.

[77] The following cases indicate that abstention is a discretionary exercise of the courts' equity powers: Baggett v. Bullitt, 377 U.S. 360, 375 & n.11 (1964); NAACP v. Bennett, 360 U.S. 471 (1959) (per curiam); Meredith v. City of Winter Haven, 320 U.S. 228, 235 (1943); City of Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 172 (1942). For cases indicating that abstention is mandatory, see Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959); *see also* City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 640 (1959) (per curiam); Ryckman,

discussions echo this uncertainty.[78] In addition, the route by which parties appeal a district court decision to abstain is unclear. Although litigants routinely appeal such decisions, the courts have never clarified appellate jurisdiction. The Supreme Court has sidestepped the issue twice,[79] and the circuits remain unsure of the basis for appellate jurisdiction.[80] Finally, once the circuit courts agree to review the cases, whether the standard of review is abuse of discretion or something more stringent is unclear.[81]

The circuit courts are amazingly flexible in coping with abstention's undefined procedural aspects. Refining abstention's procedural rules might enhance the predictability of abstention by ensuring that all courts view their role in the same way. However, the procedural ambiguities appear less significant in shaping the parameters of *Pullman* and *Burford* than do the substantive irregularities.

B. Confusion about the Substance of Pullman *and* Burford

Lower federal court confusion occurs regarding *Pullman* and *Burford* abstention despite the lower courts' genuine efforts to adhere to the Supreme Court's guidelines. The lower courts are well aware that they are obligated to exercise the jurisdiction granted them by Congress.[82] Many courts express extreme hesitation about abstaining or re-

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supra note 7, at 397 (decision to abstain not discretionary).

[78] *See, e.g.*, Traughber v. Beauchane, 760 F.2d 673 (6th Cir. 1985) (discretionary); Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (discretionary).

[79] *See* Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

[80] Drexler v. Southwest Dubois School Corp., 504 F.2d 836, 838 (7th Cir. 1974); Moses v. Kinnear, 490 F.2d 21, 24 (9th Cir. 1973); Druker v. Sullivan, 458 F.2d 1272, 1274 n.3 (1st Cir. 1972); Public Employees Local 1279 v. Alabama, 453 F.2d 922 (5th Cir. 1972); Weiss v. Duberstein, 445 F.2d 1297 (2d Cir. 1971); *see also* Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 592-602 (1977).

[81] Many courts profess to adhere to an abuse of discretion standard. *See, e.g.*, Kollsman v. City of Los Angeles, 737 F.2d 830, 833 (9th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); Badham v. District Court, 721 F.2d 1170, 1171 (9th Cir. 1983); Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), *cert. granted*, 455 U.S. 937, *cert. dismissed*, 459 U.S. 1012 (1982). *But see* Moe v. Dinkins, 635 F.2d 1045, 1048 n.7 (2d Cir. 1980) ("[A]ppellate courts from *Pullman* to the present have used a standard more searching of review [than abuse of discretion], and have reversed abstention orders whenever convinced that the decision was improper or wrong."). The court suggests that the standard of review approaches that of the plenary examination given to questions of law.

[82] *See, e.g.*, J-R Distribs., Inc. v. Eikenberry, 725 F.2d 482, 487 (9th Cir. 1984); Cinema Arts, Inc. v. County of Clark, 722 F.2d 579, 580 (9th Cir. 1983); C-Y Dev.

linquishing jurisdiction, especially in cases raising important civil rights issues.[83]

Notwithstanding the apparent good faith efforts to understand the nature and limitations of the Supreme Court's abstention doctrines, the lower courts' decisions reveal no uniform consensus about how and when abstention applies. The first stumbling block for some lower courts arises in deciding what criteria the Supreme Court has identified as warranting or mandating abstention. Most identify avoidance of premature constitutional adjudication and of erroneous state law interpretations as conditions for *Pullman* abstention. A number of courts be-

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Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983); Dionne v. Bouley, 583 F. Supp. 307, 310 (D.R.I. 1984); Brewer v. City of Bristol, 577 F. Supp. 519, 523 (E.D. Tenn. 1983).

[83] The Supreme Court has given some indication that it disfavors abstention in civil rights actions. For example, in McNeese v. Board of Educ., 373 U.S. 668, 673-74 (1963), the Court indicated that although abstention was particularly appropriate when the rights were "entangled in a skein of state law," federal courts may adjudicate federal rights. *See also* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16 (1964).

Subsequent cases indicate that the degree of state and federal law entanglement does not trigger abstention. Rather the possibility that a state claim might alter or moot the federal constitutional issue triggers abstention. Thus, even if a right is plainly federal in nature, the presence of a state law issue may result in abstention. This development undercuts any suggestion that the *McNeese* case contemplates federal court adjudication of all cases that are "plainly federal" in nature.

The Supreme Court has hinted that at least in *Burford* abstention cases, the presence of a federal claim might raise the level of justification needed for abstention. *See supra* note 77. However, the Supreme Court has not sanctioned an exception to the abstention doctrines for civil rights cases. *See, e.g.*, Harrison v. NAACP, 360 U.S. 167 (1959).

Many lower federal courts express reluctance to abstain in civil rights cases, particularly those raising issues as to voting rights and the first amendment. *See, e.g.*, Playtime Theatres, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984) (first amendment); J.R. Distribs., Inc. v. Eikenberry, 725 F.2d 482, 487 (9th Cir. 1984) (first amendment); Cate v. Oldham, 707 F.2d 1176, 1184-85 (11th Cir. 1983) (first amendment); O'Hair v. White, 675 F.2d 680, 693-94 (5th Cir. 1982) (voting rights); Duncan v. Poythress, 657 F.2d 691, 697 (5th Cir. 1981), *cert. granted*, 455 U.S. 937, *cert. dismissed*, 459 U.S. 1012 (1982) (voting rights); Spokane Arcades, Inc. v. Brockett, 631 F.2d 135, 137 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981) (first amendment); Canton v. Spokane School Dist. No. 81, 498 F.2d 840, 845-46 (9th Cir. 1974) (14th amendment equal protection); Southern N.J. Newspapers, Inc. v. State Dep't of Transp., 542 F. Supp. 173, 180 (D.N.J. 1982); Tepper v. Galloway, 481 F. Supp. 1211, 1215 (E.D.N.Y. 1979) (reluctance in suits brought under § 1983); Bergman v. Stein, 404 F. Supp. 287, 293 n.6 (S.D.N.Y. 1975) (reluctance in suits brought under § 1983).

For a discussion of the reasons for courts' reluctance to abstain in various classes of cases, see *infra* text accompanying notes 180-84.

lieve that both conditions are necessary for abstention.[84] Other courts believe that one factor alone will suffice.[85] Certain courts insist on additional factors.[86]

Having identified abstention's criteria, certain courts encounter difficulty interpreting their meaning. For example, some courts believe *Pullman* applies when a state law decision *may* make decision of a constitutional claim unnecessary. Others will abstain only when a constitutional question probably will be altered or mooted.[87]

Similar confusion surrounds *Burford*. Some courts apply *Burford* only when the facts are analogous to the *Burford* case. Others interpret *Burford* as a general mandate to exercise caution when decisions will impact on issues of local concern.[88] Some courts appear so baffled by the distinctions between *Pullman* and *Burford* that they apply the doctrines in aggregate form.[89]

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[84] *See, e.g.*, Cinema Arts, Inc. v. County of Clark, 722 F.2d 579, 580 (9th Cir. 1983); Manney v. Cabell, 654 F.2d 1280, 1283 (9th Cir. 1980); McRedmond v. Wilson, 533 F.2d 757, 761 (2d Cir. 1976).

[85] *See, e.g.*, Stephens v. Bowie County, 724 F.2d 434, 435 (5th Cir. 1984) (per curiam).

[86] *See, e.g.*, Badham v. District Court, 721 F.2d 1170 (9th Cir. 1983) (effect of delay); Nicholson v. Board of Comm'rs of Ala. State Bar Ass'n, 338 F. Supp. 48 (M.D. Ala. 1972) (adequacy of state remedy).

[87] Ratcliff v. County of Buncombe, 759 F.2d 1183, 1187 (4th Cir. 1985) (abstention appropriate when unsettled state law questions *may* make it unnecessary to decide constitutional claim); Duke v. James, 713 F.2d 1506, 1510-11 (11th Cir. 1983) (abstention proper when state statute is "fairly subject" to a construction that would avoid or modify the constitutional question); Lindenbaum v. City of Philadelphia, 584 F. Supp. 1190, 1199 (E.D. Pa. 1984) (abstention proper when statute is "fairly susceptible" to a construction that would avoid or modify the constitutional question). *But see* McRedmond v. Wilson, 533 F.2d 757, 764 (2d Cir. 1976) (court has right to abstain merely because a state court decision *might* render a federal adjudication unnecessary); Amusement Devices Ass'n v. Ohio, 443 F. Supp. 1040 (S.D. Ohio 1977) (requiring strong showing that state statute construction might avoid the constitutional question).

[88] *Compare* Educational Servs., Inc. v. Maryland State Bd. of Higher Educ., 710 F.2d 170, 173-74 (4th Cir. 1983) (*Burford* confined to own facts) *and* Holmes v. New York City Hous. Auth., 398 F.2d 262, 266 (2d Cir. 1968) (*Burford* confined to its own facts) *with* International Bhd. of Elec. Workers Local 1245 v. Public Serv. Comm'n, 614 F.2d 206, 211-12 (9th Cir. 1980) (*Burford* abstention to avoid federal intrusion into matters of local concern) *and* BT Inv. Managers, Inc. v. Lewis, 559 F.2d 950, 955 (5th Cir. 1977) (abstention when overriding state interest exists).

[89] *See, e.g.*, Mireles v. Crosby County, 724 F.2d 431, 433-34 (5th Cir. 1984) (finding *Pullman* abstention necessary if federal decision could interfere with integrated state regulatory program); Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916, 925 (6th Cir. 1980) (interference with important state policies or regulatory programs a factor for *Pullman* abstention); Pineman v. Oechslin, 637 F.2d 601, 605-06

However, the greatest area of interpretive confusion occurs in cases reading *Pullman* as justifying or requiring abstention when sensitive social policy issues exist. The lower courts' dilemma in deciding what constitutes a sensitive social policy issue, and its effect on an abstention decision, is attributable to the Supreme Court's failure to address the question.

The requirement that a court abstain from sensitive social policy issues appears to serve two distinct purposes. Certain courts, including the Ninth Circuit, appear to use issue sensitivity to narrow the scope of *Pullman* abstention.[90] Thus, for example, when state law is unclear, the court will not abstain unless the issue is "sensitive." Other courts use the sensitivity requirement to justify abstention, thus expanding *Pullman*'s breadth.[91] Although these courts consider unclear state law and avoidance of constitutional questions as prerequisites to abstention, the crux of the abstention decision is the perception that federal inter-

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(2d Cir. 1981) (issues in lawsuit said to combine significant aspects of *Pullman* and *Burford* abstention in that state law is highly uncertain and subject matter of great importance to state and governmental functions); R.B. Brunemann & Sons, Inc. v. Duke Univ., 533 F. Supp. 365, 367-68 (M.D.N.C. 1982) (court drawing on principles of both *Pullman* and *Burford* without making explicit distinctions between them); McRedmond v. Wilson, 402 F. Supp. 1087, 1090-91 (S.D.N.Y. 1975) (holding abstention appropriate because state law unclear and federal constitutional adjudication could be avoided and because action concerns sensitive area of state administration as manifested by comprehensive statutory scheme).

[90] At least some panels in the Ninth Circuit seem to use lack of issue sensitivity as an independent reason to refuse to abstain. *See, e.g.*, J-R Distribs., Inc. v. Eikenberry, 725 F.2d 482, 487-88 (9th Cir. 1984) (issue sensitivity not present in first amendment cases because first amendment always an area of federal concern). At other times, the Ninth Circuit finds issues sensitive and therefore appears to channel certain cases toward abstention if other criteria are also satisfied. *See, e.g.*, C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983) (noting that Ninth Circuit has repeatedly found land use planning a sensitive area of social policy); *see also infra* text accompanying notes 92-94.

[91] Brooks v. Walker County Hosp. Dist., 688 F.2d 334, 338 (5th Cir. 1982) (indigent entitlement to medical services touches sensitive issue of social policy); Coley v. Clinton, 635 F.2d 1364, 1370 (8th Cir. 1980) (constitutional challenges to Arkansas procedures regarding commitment of criminal defendants would require deep intrusion into areas of state concern, such as allotment of jurisdiction between various state courts and relation of trial procedures to administration of mental health system); Bell v. Bell, 411 F. Supp. 716, 717-18 (W.D. Wash. 1976) (deeming constitutional challenge to Washington Dissolution of Marriage Act on ground of sex discrimination a subject touching a sensitive issue of social policy); McRedmond v. Wilson, 402 F. Supp. 1087, 1091-92 (S.D.N.Y. 1975) (constitutional challenge to New York law regarding placement of persons adjudicated in need of supervision would thrust courts into sensitive area of state administration).

vention in a particular case is inappropriate.

Lower courts have reached little consensus on which issues are sensitive.[92] Many courts appear to equate the issue's sensitivity with a determination of whether the issue is important to state or local entities.[93] Courts may also associate sensitivity with an assessment of the relative expertise of the state and federal judiciaries in handling a particular type of problem.[94] While the courts' efforts to define sensitivity of a social policy issue may appear to have produced comprehensible criteria, in reality those criteria are equally intangible and equally incapable of objective definition.

Burford abstention presents a similiar ambiguity with respect to whether a case touches "local concerns" so deeply as to require the federal courts to relinquish their jurisdiction. While the Supreme Court has referred to discontinuing train lines and allocating oil rights as

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[92] *See, e.g.*, Badham v. District Court, 721 F.2d 1170 (9th Cir. 1983) (reapportionment); C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983) (land use planning); Richardson v. Koshiba, 693 F.2d 911 (9th Cir. 1982) (operation of state's judicial merit selection scheme); Cox v. Planning Dist. I Community Mental Health and Mental Retardation Serv. Bd., 669 F.2d 940 (4th Cir. 1982) (grievance arbitration award); C.R. v. Adams, 649 F.2d 625 (8th Cir. 1981) (interpretation of statute relating to state's mental health program); Coley v. Clinton, 635 F.2d 1364 (8th Cir. 1980) (allotment of jurisdiction between various state courts and relation of criminal trial proceedings to administration of state mental health system); International Bhd. of Elec. Workers Local 1245 v. Public Serv. Comm'n, 614 F.2d 206, 212 (9th Cir. 1980) (regulation of state's public utilities); Garfinkle v. Wells Fargo Bank, 483 F.2d 1074 (9th Cir. 1973) (state's nonjudicial system of mortgage foreclosure); Reid v. Board of Educ., 453 F.2d 238 (2d Cir. 1971) (state education statutes); Crow v. North Carolina, 575 F. Supp. 893 (W.D.N.C. 1983) (state drunk driving statute); Phillip v. Carey, 517 F. Supp. 513 (N.D.N.Y. 1981) (substantial federal involvement in mental health indicates that court decision would not interfere with a program of substantial state concern); Bell v. Bell, 411 F. Supp. 716, 716 (W.D. Wash. 1976) (state statute regarding dissolution of marriage); Sotomura v. County of Hawaii, 402 F. Supp. 95 (D. Haw. 1975) (fact that case concerns land use no more justifies abstention than any other issue of state policy).

[93] Brooks v. Walker County Hosp. Dist., 688 F.2d 335 (5th Cir. 1982) (state health care law and policy has significant financial impact on State of Texas and indigent inhabitants); C.R. v. Adams, 649 F.2d 625, 625 (8th Cir. 1981) (state mental health program); Bell v. Bell, 411 F. Supp. 716, 719 (W.D. Wash. 1976) (domestic relations statute).

[94] *See, e.g.*, McRedmond v. Wilson, 402 F. Supp. 1087, 1091 (S.D.N.Y. 1975) (New York state statute regarding right to treatment for persons in need of supervision concerns sensitive area of state administration and statutory scheme is broad and complex); *see also* Snyder v. Altman, 444 F. Supp. 1269 (C.D. Cal. 1978) (special nature of California courts' jurisdiction over guardianship and conservatorship procedures cause federal case to touch sensitive area of state law).

matters of local concern, the Court has provided no precise definitions. Additional Supreme Court pronouncements as to the local character of particular activities are devoid of applicable principles.[95] As a result of this ambiguity, the lower courts' decisions recognize a very wide range of issues as local concerns.[96] Unless *Burford* is read narrowly, the consideration of what constitutes a matter of local concern is just as unclear as the question of what constitutes a sensitive policy issue for *Pullman* abstention.[97]

When *Pullman* is associated with deference for state court adjudication of important state or local matters,[98] it bears a considerable resemblance to the deference to local concerns associated with *Burford*. Indeed, the doctrines have converged to a considerable extent.[99] Each doctrine may be interpreted in a manner that makes appraisal of state or local interests the primary focus in determining whether the federal courts should exercise their jurisdiction.

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[95] *Compare* Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970) (state court should first define scope of term "just cause" in context of legislative enactment) *and* Reetz v. Bozanich, 397 U.S. 82 (1970) (state statute relating to fish resource management a matter of great state concern) *with* City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958) (statute concerning city's power to license motor vehicles appropriately interpreted by district court); Public Util. Comm'n v. United States, 355 U.S. 534 (1958) (state's power to regulate intrastate trucking questioned in federal district court without prior state court determination of state law) *and* Toomer v. Witsell, 334 U.S. 385 (1948) (upholding federal district court's ruling on constitutionality of state statute regulating fishing).

[96] Among the matters of local concern identified are: state administration of state-federal Medicaid program, New York State Ass'n for Retarded Children, Inc. v. Carey, 727 F.2d 240, 241 (2d Cir. 1984); comprehensive program for management of waste disposal, Ada-Cascade Watch Co. v. Cascade Resources Recovery, 720 F.2d 897 (6th Cir. 1983); fixing of pension benefits for state employees, Pineman v. Oechslin, 637 F.2d 601 (2d Cir. 1981); control of distribution and sale of alcoholic beverages, AFA Distrib. Co. v. Pear Brewing Co., 470 F.2d 1210 (4th Cir. 1973); administration of inmate trust fund, Urbano v. City Bd. of Managers, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970); right to require dredging and excavation within the jurisdiction, Northeast Mines, Inc. v. Town of Smithtown, 584 F. Supp. 112 (E.D.N.Y. 1984); land use policy, Heritage Farms, Inc. v. Solebury Township, 507 F. Supp. 33 (E.D. Penn. 1980), *rev'd*, 671 F.2d 743 (3d Cir.), *cert. denied*, 456 U.S. 990 (1982); city pistol licensing statute, Cristina v. Department of N.Y., 417 F. Supp. 1012 (S.D.N.Y. 1976); tenure policy of state university system, Oler v. Trustees of Cal. State Univ. and Colleges, 80 F.R.D. 319 (N.D. Cal. 1978).

[97] *Compare* cases cited *supra* note 96 *with* cases cited *supra* note 92.

[98] *See supra* note 93.

[99] *See* Ryckman, *supra* note 7, at 412.

III. Abstention's Role in Aligning Jurisdictional Allocations with Popular Federalism

This section examines the negative consequences resulting from judicial confusion concerning abstention. The ambiguity and multiplicity of potential abstention conditions diverts the lower courts' attention from abstention's specific purposes. This diversion facilitates use of abstention as a vehicle for effectuating jurisdictional allocations consistent with prevailing views of federalism. Used in this manner, *Pullman* and *Burford* have the potential both to dislocate cases that should receive federal court adjudication and to justify the exercise of federal jurisdiction over cases properly subject to abstention.

A. *Relationship Between* Pullman *and* Burford *and the Policy of Federalism*

The inherent vagueness of the criteria for applying *Pullman* and *Burford*, and the tendency of some courts to view abstention as a means of balancing state and federal interests in the issues at stake, indicate that the abstention doctrines promote a general — somewhat generic — policy of federalism. Little attention is given to the limited roles *Pullman* and *Burford* should play in maintaining state and federal relationships.

The term "federalism" describes a policy of promoting and maintaining the proper balance of power between state and federal governments.[100] In the context of federal jurisdiction, the principle of federalism is reflected in attempts to properly balance the judicial business allocated to federal and state judicial systems.[101] While jurisdictional allocations should be made in light of federalism, there is disagreement as to the appropriate balance of power between the state and federal courts, and what jurisdictional allocations that balance should dictate.

Both *Pullman* and *Burford* are, at least in part, responses to the Supreme Court's continuing concern about achieving the proper balance of state and federal court power.[102] Justice Frankfurter, *Pullman*'s author, believed that abstention would avoid "needless friction with state policies" and further "the harmonious relation between state

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[100] *See, e.g.*, Koury, *Section 1983 and Civil Comity: Two for the Federalism Seesaw*, 25 Loy. L. Rev. 659, 659 (1979); Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. Rev. 59, 65 (1981).

[101] *See, e.g.*, American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 1 (Official Draft 1969) [hereafter A.L.I. Study].

[102] *See infra* text accompanying notes 108-12.

and federal authority."[103] Similarly, Justice Black, *Burford*'s author, believed abstention would eliminate the "interminable confusion" that would result if the federal courts were allowed to review an order of the railroad commission.[104] He predicted that "conflicts . . . dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts," and that "[u]nder such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."[105]

Both *Pullman* and *Burford* identify specific ways in which postponing or abandoning jurisdiction would contribute to a proper allocation of power. *Pullman* prevents disruption of government programs or actions by eliminating the possibility of erroneous federal interpretation of unclear state law. *Burford* prevents disruption of a state's manifested desire to establish an elaborate administrative system pertaining to a matter that requires thorough and consistent oversight by one tribunal.[106] When state law is truly so unclear as to make the federal court's decision as to its content a haphazard guess, or when the state has consistently sought to regulate and adjudicate disputes relating to an important resource, abstention may promote comity. Yet neither *Pullman* nor *Burford* sanction a refusal to exercise federal jurisdiction simply because an important state or local governmental action is the subject of constitutional litigation. When the abstention doctrines are equated with a general policy of federalism, their narrow role in achieving this goal fades into the background and abstention becomes a tool to effectuate the demands of the political philosophy of federalism prevailing during a given era.

Associating abstention doctrines with a general policy of federalism introduces an element of inconsistency and variation in the extent to which a federal forum is ensured in cases raising constitutional claims. This inconsistency is directly related to the continuing controversy about the proper allocation of power between state and federal courts. Since the days of the Constitutional Convention,[107] jurists have debated

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[103] *Pullman*, 312 U.S. at 500-01.

[104] *Burford*, 319 U.S. at 326-27.

[105] *Id.* at 334; *see also* Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 351 (1951) ("It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." (quoting Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943))).

[106] *See supra* note 7.

[107] *See, e.g.*, Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 1, 9-28 (1948); Hufstedler, *Comity and the Constitution: The*

the question of distributing cases arguably within the sphere of interest of both state and federal tribunals. Although the United States Constitution resolved this dilemma by granting Congress the power to create lower federal courts and to formulate their jurisdiction, the tension between opposing camps has persisted.

The Supreme Court's own view of the "proper" balance has changed from era to era.[108] Under one view of federalism, the state courts are viewed as co-equal guardians of federal rights along with the federal courts. Each system operates somewhat autonomously, but each serves as a barrier against government interference with the rights of citizens.[109] This view of federalism does not require federal courts to reduce their responsibility over particular types of cases, because the exercise of jurisdiction should not cause friction between state and federal courts. Since both systems share co-equal responsibility in protecting rights and are working toward the same goal, federal adjudication should not offend the states as long as the adjudication protects the rights of the citizens.

Another view of federalism considers the state courts as an independent system with sovereignty over matters of particular concern to them.[110] Proper respect for state courts demands recognition that they are trustworthy in adjudicating federal constitutional claims. It further demands deferring to state courts as adjudicators of cases raising constitutional claims when the state courts have a strong interest in adjudicating a particular type of dispute.[111] Thus, this view contemplates re-

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Changing Role of the Federal Judiciary, 47 N.Y.U. L. REV. 841, 841-45 (1972).

[108] *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) ("federalism has taken on a new meaning of late"); Hufstedler, *supra* note 107, at 846-50; Comment, *Developments in the Law — Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135 (1977) [hereafter Comment, *Section 1983*].

[109] Brennan, *supra* note 108, at 502-03. This view emerged after the Civil War when disadvantaged or unpopular minorities sought protection in the federal courts instead of state courts. *See* Comment, *Section 1983*, *supra* note 108, at 1135.

[110] An earlier form of this view of federalism prevailed in the pre-Civil War era, when states were viewed as primary centers of political and economic life and as protectors against the dangers of tyranny by the federal government. *See* Comment, *Section 1983*, *supra* note 108, at 1135-38.

[111] *See, e.g.*, Moore v. Sims, 442 U.S. 415, 423-35 (1979); Steffel v. Thompson, 415 U.S. 452, 460-63 (1974); *see also* Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 684-87 (1981). *But see* Wells, *supra* note 100, at 60 (arguing that Supreme Court case law does not support distinguishing between cases in which comity requires deference to state court adjudication of constitutional claims and those in which it does not, and concluding that the Court uses the concept of comity to obscure the lack of principled reasons for its forum allocation decisions).

ducing the role of federal courts as adjudicators of federal constitutional rights in certain instances.[112]

By associating *Pullman* and *Burford* with either of the general views of federalism described above, the doctrines enable the federal courts to examine whether they should act on cases within their statutory jurisdiction. Some cases may then be reassigned to state courts. As views about the proper roles of federal and state courts change, the use of *Pullman* and *Burford* expands or contracts. When use of *Pullman* and *Burford* expands, greater numbers of cases entitled to federal court jurisdiction are shifted to the state courts for adjudication. When the doctrines' use contracts, greater numbers of cases remain in the federal courts.

The history of *Pullman* and *Burford* over the past thirty years supports the premise that abstention has paralleled the prevailing interpretation of federalism. The Warren Court era, marked by the belief in the role of federal and state courts as dual guardians of the people's rights, allowed enormous federal intervention in state activity.[113] Abstention during that period reached an all-time low.[114] The Burger Court, in contrast, has revitalized the abstention doctrines in accordance with its deference to state court adjudication of cases in which states have a strong interest.[115]

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[112] *See, e.g.*, Koury, *supra* note 100, at 660; Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1110 (1977).

[113] Monaghan, *The Burger Court and "Our Federalism"*, 43 LAW & CONTEMP. PROBS. 39, 43-44 (1980); *see also* T. MASON, *supra* note 51, at 241-43, 259-68. As Professor Mason points out, this intervention resulted in a backlash against judicial activism during the Warren Court era. In 1958, the chief justices of 48 states voted 36 to 8 to support a resolution condemning judicial policymaking "without proper restraint." In 1962, the Council of State Governments proposed three constitutional amendments that would have severely cut back on Supreme Court power. *Id.* at 243.

[114] *See* D. CURRIE, *supra* note 22, at 625-26 (observing that in each of seven cases decided between 1962 and 1967, the Supremė Court managed to distinguish *Pullman* and avoid abstention); Note, *Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967) [hereafter Note, *Federal Question*].

[115] Professor Currie has pointed to a cluster of cases decided in the early 1970's as indicating renewal of the abstention doctrines' strength in the Supreme Court. D. CURRIE, *supra* note 22, at 626; *see, e.g.*, Manard v. Miller, 405 U.S. 982 (1972) (affirming without opinion an order abstaining in an attack upon refusal to register students to vote where they attended school); Askew v. Hargrave, 401 U.S. 476 (1971) (remanding for reconsideration an action attacking as discriminatory against poorer counties a state law limiting local school taxes for educational purposes); Reetz v. Bozanich, 397 U.S. 82 (1970) (reversing refusal to abstain for construction of state constitutional provision regarding fish resources).

Federal judges' tendency to share the political and philosophical viewpoints of the party in power at the time of their appointment accentuates abstention's ebb and flow. If the President appoints a large number of judges sharing a view of federalism requiring greater deference to state adjudication, those judges are likely to be increasingly sensitive to the pleas of litigants that a particular area is of such great local concern that the federal courts ought not interfere.[116] Similarly, should a view of federalism based on dual protection return, with federal intervention perceived as a necessary protection for the citizens of the states, abstention will likely contract.[117]

IV. Ramifications of the Alliance Between Abstention and Popular Federalism

This Article has focused on describing the variations and confusion in abstention decisions, and on analyzing the significance of those decisions on the exercise of federal jurisdiction in constitutional cases. Specifically, the tendency of federal courts to associate abstention doctrines with a broad policy of federalism results in balancing state and federal interests in deciding whether to exercise jurisdiction.

The next step is to examine whether the detrimental effects of this judicial "fine tuning" of federal jurisdiction are significant enough to warrant restriction. Such an evaluation requires considering the respective roles of state and federal courts in constitutional cases. Having evaluated the roles of the respective courts, the Article next considers the effects of fluctuation in use of the abstention doctrines.

Professor Koury sees the rejuvenation of the abstention doctrines as part of a "pervasive pattern of limiting the availability of federal courts to vindicate federal rights." Koury, *supra* note 100, at 660; *see also*, Neuborne, *supra* note 112, at 1130-31. *But see* Wells, *supra* note 100, at 73-74 (contending that while the recent Supreme Court cases could indicate retrenchment in role of lower federal courts in adjudicating constitutional claims, the Court is not bent on constricting federal court access for individuals with constitutional claims); *see also* Monaghan, *supra* note 113, at 43-50 (arguing that while the Burger Court may have a restrictive view of federal court authority to vindicate constitutional and statutory rights when state officials are alleged to have violated them, this tendency presents a minor concern). Professor Monaghan concludes that the Court has not in any sense seriously curtailed federal court access to vindicate constitutional claims.

[116] To some degree, this is already borne out by the wide array of areas courts have deemed of local concern or as posing sensitive issues of policy into which federal courts ought not enter. *See supra* text accompanying notes 92-96.

[117] The reduced importance of abstention during the Warren Court era seemingly favors this view. *See supra* text accompanying note 113-14.

A. Comparing the Roles of State and Federal Courts in Cases Susceptible to Abstention

Although the Supreme Court has long expressed the belief that federal courts are the primary guardians of constitutional rights,[118] this has not always been the case. Prior to Reconstruction and the enactment of civil rights statutes such as section 1983, state courts were the true protectors of the people's individual civil liberties.[119] While the constitutional theory giving state courts such preeminence was rejected long ago, the primacy of the federal courts in such matters is not etched in stone.[120] Evaluating the arguments marshalled by both defenders and skeptics of the role of federal courts in constitutional litigation is therefore necessary.

The Supreme Court's view of federal courts as primary guardians of constitutional rights stems from the important historic role those courts played in protecting federal rights in the Reconstruction era.[121] The Reconstruction legislation and the soon-to-follow grant of general federal question jurisdiction placed the lower federal courts between the states and the people — at least for federal constitutional claims.[122] Notwithstanding initial skepticism as to whether Congress truly meant to assign this protective role to the federal courts,[123] the federal courts slipped comfortably into their new niche by the early twentieth century. By that time they consistently exercised federal jurisdiction in cases brought by corporate plaintiffs challenging state regulatory policies.[124]

Despite the large role federal courts played in protecting federal rights in past eras, some argue that a jurisdictional structure designed

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[118] *See, e.g.*, Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (Congress assigned federal courts a paramount role in protecting constitutional rights).

[119] H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY & PRACTICE, CASES AND MATERIALS (1984); Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 166 (1984).

[120] *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973).

[121] *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496, 502-08 (1982); Steffel v. Thompson, 415 U.S. 452, 464 (1974); Mitchum v. Foster, 407 U.S. 225, 238-39 (1972); Monroe v. Pape, 365 U.S. 167, 171 (1961), *rev'd on other grounds*, Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1927); Ziegler, *Reassessment of* Younger, 1983 DUKE L.J. 987, 1020.

[122] F. FRANKFURTER & J. LANDIS, *supra* note 121, at 64-65.

[123] *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), (holding that the 14th amendment was not meant to radically change the relationship between state and federal governments, and that privileges and immunities of state citizenship rather than federal citizenship protected basic civil rights).

[124] Neuborne, *supra* note 112, at 1106-08.

to ensure a federal forum for constitutional claims is no longer relevant or necessary.[125] State judges are competent and educated; state procedure is well developed and consistent with federal due process guarantees. If state courts can handle cases raising constitutional claims as well as the federal courts, federal courts may have no overriding reason to exercise their statutory jurisdiction.

A comparison of the "parity"[126] or technical competency of the federal courts versus state courts is difficult at best and impossible at worst. Without significant empirical research, the comparisons are based on very general observations. The question becomes even more difficult when its focus is not the desirability of federal adjudication of constitutional cases in general, but rather, federal adjudication of constitutional cases containing state law issues substantial enough to trigger abstention.

Applying *Pullman* and *Burford* abstention to shift cases bearing on local interests to the state courts may unduly diminish the number of cases handled by the federal courts. Notwithstanding the *England* doctrine, which was meant to cure any potential erosion of federal jurisdiction in *Pullman* abstention cases, many *Pullman* and all *Burford* cases never return to federal court.[127] Sending these cases to state courts lessens the federal courts' role in deciding cases containing important and difficult constitutional issues.[128] Were abstention not invoked, the federal courts would undoubtedly choose to decide some of these cases on federal constitutional grounds. Courts would certainly decide others on state grounds to avoid the constitutional question.

If abstention makes federal courts less involved in deciding and articulating constitutional law issues, the body of federal law is impoverished. While the district courts' decisions are neither uniform nor infallible, they are a persuasive pool of suggestions from which the circuit courts can draw. The circuit courts clearly play a most important role in developing federal policy regarding constitutional law. Like the dis-

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[125] *Cf.* City of Columbus v. Leonard, 443 U.S. 905 (1979), *reh'g denied*, 444 U.S. 887 (1979) (Rehnquist, J., Burger, C.J., and Blackmun, J., dissenting) (urging reconsideration of *Monroe*'s holding that the federal remedy provided by § 1983 is supplemental to the state remedy in case involving exhaustion of administrative remedies).

[126] Professor Neuborne brought the term "parity" into use in this context. *See* Neuborne, *supra* note 112, at 1121.

[127] Field, *supra* note 80, at 590; *cf.* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 122 (1984) (noting that in suits against state officers, federal claims are commonly brought in state court or are bifurcated, and noting the bifurcation typical of *Pullman*).

[128] Neuborne, *supra* note 112, at 1119.

trict courts, the circuits often lack uniformity, but they provide relatively quick review of trial decisions in areas in which they possess considerable expertise. The Supreme Court cannot perform this review function for decisions coming up from state courts due to its narrow capacity for factual review, its crowded docket, and because some state court decisions rest on adequate and independent state grounds.[129]

Apart from the contribution of lower courts to formulation of uniform and persuasive federal policy regarding constitutional rights, the fact-finding capacity of federal courts is often considered a significant advantage over state courts. This preeminence led to the evolution of the *England* procedure in 1964.[130] However, if many litigants cannot afford to return to federal court, or are unwilling to endure two trials, it becomes pertinent to evaluate the continuing validity of the claim that federal fact-finding is superior.

Even if state and federal judges are equally competent,[131] the federal jury, which is traditionally drawn from a broader pool than the state jury, may militate in favor of initial federal fact-finding. Whether broad jury pools are advantageous to constitutional claims depends on the geographic area from which the pool is drawn. A state jury drawn from an urban area may consist of more sophisticated and perhaps more desirable jurors than a jury drawn from a broader pool comprised of both rural and urban jurors. Also, in certain cases a jury from outside a tightly knit and perhaps biased urban area might be more advantageous than a state court jury drawn from the insular urban area. In short, probably no uniform advantage, either in terms of competency on the bench, or in terms of the jury's breadth, accrues to a federal court litigant.

Another feature urged in favor of federal adjudication of constitutional cases is the relative independence of federal judges from political

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[129] Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268, 311-19 (1969).

[130] England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964).

[131] Professor Neuborne asserts that in comparing state and federal courts, the most critical comparison is between federal district and state trial courts. He believes that the technical competence of federal district judges is one factor that demonstrates their superiority over state trial judges. Professor Neuborne concludes that competency of state appellate judges is roughly comparable to that of district court judges, but he is unwilling to concede parity. Neuborne, *supra* note 112, at 1116-24. Professors Fink and Tushnet conclude that on balance Neuborne seems right in asserting that the present set of federal judges is preferable to state judges, but recognize such a preference as "contingent" on numerous variables. H. FINK & M. TUSHNET, *supra* note 119, at 16-17.

power. Unlike state court judges, who face tremendous pressure in the face of antimajoritarian decisions,[132] federal judges enjoy life tenure. Congress clearly did not consider the insulation of federal judges important enough to mandate exclusive federal jurisdiction in constitutional cases. However, the current jurisdictional statutes permit litigants to invoke the power of federal judges rather than state judges when, among other qualities, insulation from political forces appears desirable.

The features delineated above, while not overwhelmingly favoring federal court superiority in constitutional litigation, at least indicate legitimate reasons for concern about potential erosion of federal jurisdiction in constitutional cases. However, even if one believes in complete parity between state and federal courts, still other considerations undercut current application of *Pullman* and *Burford* abstention.

Pullman and *Burford* represent judicial efforts to tailor jurisdiction, and therefore raise the question of the propriety of judicial modification of jurisdictional grants. Since section 1983 and its accompanying jurisdictional provisions were adopted during an era when state courts were not trusted, perhaps federal courts ought to modify the exercise of their jurisdiction to comport with modern realities. Given the increased sophistication of highly structured state and local governments, perhaps giving state courts greater opportunity to resolve local problems is proper.

This argument's weakness lies in part in the difficulty of ascertaining which cases to shift into state court jurisdiction. Even absent the "bad" motivations of using abstention to avoid difficult issues or lighten the caseload,[133] criteria are lacking by which to determine state interests in

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[132] The willingness of state supreme courts to extend the protections of their own constitution beyond the guarantees of the federal constitution indicates that, even absent life tenure, state judges often exercise considerable independence. Brennan, *supra* note 108, at 495. However, even if a state court is willing to adopt antimajoritarian positions, the justices are often subject to intense political pressure that may lead to modification of their views or to their recall, resignation, or eventual replacement. *See, e.g.*, Wells, *supra* note 100, at 68; *see also*, Wald, *Retain All the Justices*, L.A. Times, Aug. 9, 1985, § 2, at 5, col. 3; Wald, *Partisan Politics in Supreme Court Vote Is Dangerous*, L.A. Times, Aug. 8, 1985, § 2, at 5, col. 5; Wald, *A Justice is No Popularity Contest*, L.A. Times, Aug. 7, 1985, § 2, at 5, col. 3; *The Wrong Message*, L.A. Times, June 3, 1985, § 2, at 4, col. 2 (calling the movement to deny reconfirmation of California Chief Justice Rose Bird "an assault on the judiciary and the judicial process"). The same political pressure plagues the judges of the vast majority of states at both the trial and appellate levels. *See* S. ESCOVITZ, JUDICIAL SELECTION & TENURE 17-42 (1973).

[133] *See, e.g.*, Field, *supra* note 80, at 602-04; McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims* (pt. 2), 60 VA.

particular cases. Allowing federal judges to do this on a case by case basis, as appears to occur,[134] relegates certain disfavored constitutional claims to state courts. Thus, the selection process lacks content-neutrality.[135] Basing the forum selection on judges' perceptions about the underlying strength of state or local interests does not result in any firm policy based on administrative or procedural concerns.[136]

Apart from the difficulties inherent in judicial modification of statutory jurisdiction, one must question whether such modification will permanently undermine the federal forum presumption in civil rights cases brought pursuant to section 1983. While state courts' hostility to federal rights has greatly diminished, as recently as the 1960's such hostility was evident in many jurisdictions.[137] However receptive today's state courts are to federal rights, hostility may some day exist again, particularly as new frontiers of constitutional law and difficult issues develop. If the abstention doctrines dilute the federal forum presumption when state and local interests are implicated, it may be difficult to restore that presumption when it is truly needed.

Another consideration in evaluating the judicial modifications of statutory jurisdiction occurring in abstention cases is whether courts should allow litigants unfettered forum selection as long as jurisdictional grants support their choice. In our current system, which generally allows plaintiffs to choose their forum, self-interest should motivate a jurisdictional choice designed to maximize protection of the asserted

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L. REV. 250, 266 (1974).

[134] *See supra* note 92.

[135] Neuborne, *supra* note 112, at 1106.

[136] This case by case selection may also be deemed a judicial usurpation of Congress' right to control jurisdiction, thus violating the separation of powers. For a discussion of this thesis, see Redish, *supra* note 4, at 75-79.

[137] UNITED STATES COMM'N ON CIVIL RIGHTS, LAW ENFORCEMENT, A REPORT ON EQUAL PROTECTION IN THE SOUTH (1965); *see, e.g.*, Schoenfeld, *American Federalism and the Abstention Doctrine in the Supreme Court*, 73 DICK. L. REV. 605, 635 (1969) (suggesting that the Supreme Court's reluctance to abstain during this era stemmed from its experience with state court hostility toward protection of the civil rights of blacks); UNITED STATES COMM'N ON CIVIL RIGHTS, *supra*, at 57-83 (documenting official response to assertion of constitutional rights by blacks as manifested in the form of judicial and legislative efforts to prohibit constitutionally protected activity, discrimination and arbitrariness in setting bail, in sentencing, and in handling of juveniles). The Commission encountered instances in which bail in civil rights cases was set at the statutory maximum, and far exceeded the amount set in non-civil rights cases. *Id.* at 71. Other instances of abuse by state judges are cited, including a finding by a federal district court that a county judge and other local officials had "arbitrarily and capriciously" fixed bail for the purpose of financially harassing the defendants or the sponsor of the sit-ins in which defendants participated. *Id.* at 74-75.

claims.[138]

When state courts offer procedural advantages, or when state courts have genuine expertise and the federal claims are truly secondary, litigants may choose to file in state court. Those litigants who select federal courts and possess substantial constitutional claims will do so for either of two reasons. First, they may perceive that the rights they are asserting will receive heightened consideration or a more impartial hearing in federal court. Second, the litigants may believe that, irrespective of outcome, the federal courts offer distinct tactical or procedural advantages. Distinguishing between these two classes of cases is probably not possible. Thus, if Congress allows litigants to choose a forum perceived as more favorable, the courts must tolerate those cases that seek a federal forum for its tactical or procedural advantages.

A final question is whether the constitutional cases subject to *Pullman* and *Burford* abstention raise constitutional issues significant enough to merit the time and effort necessary for a federal forum. Unlike cases based solely on a federal claim such as the first amendment, many abstention cases have significant implications for issues of importance to state and local interests. However, the cases in which courts perceive such state or local interests also involve federal issues.[139] It is therefore appropriate to ensure at least that if abstention applies, it does not apply in a manner that ignores or de-emphasizes federal interest in particular subjects.

B. Practical Significance of Expansion and Contraction in Use of Abstention Doctrines on Constitutional Adjudication

Although the issue of equivalency of state and federal courts is difficult, powerful reasons exist to protect the availability and use of a federal forum in constitutional cases subject to abstention. Thus, this section will consider the significance of abstention's current ebb and flow on the availability of a federal forum.

Even if the importance of a federal forum for cases subject to abstention is acknowledged, *Pullman* abstention should, in theory, do nothing to defeat that availability. This is because the *England* procedure, allowing litigants to reserve their right to return to federal court following *Pullman* abstention, should allow the litigants to return to federal court without any claim or issue preclusion based on prior state pro-

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[138] *See, e.g.*, H. FINK & M. TUSHNET, *supra* note 119, at 17.

[139] Under current application of *Pullman* and *Burford*, federal courts make these judgments on a case by case basis.

ceedings.[140] In addition to *England*, some states have enacted certification procedures enabling federal courts to certify a question of unclear state law to the state's highest court for decision, thus eliminating the costs and time normally entailed in seeking an authoritative state ruling on an issue of state law.[141] However, neither *England* nor certification procedures have significantly impacted the effects of abstention and neither is a panacea for abstention's problems.

The *England* doctrine has a certain theoretical appeal, but it has been criticized extensively. Justice Douglas, dissenting in *England*, called the doctrine a trap for the unwary because if a reservation of the federal claims was not asserted through words or conduct in state court, a litigant might return to federal court only to find the federal claims barred by res judicata.[142] Justice Douglas believed that litigants, in addition to being "ground down slowly by the passage of time and the expenditure of money in state proceedings," would find their ultimate remedy in federal court to be "an illusory one."[143] Others have criticized *England* on similar grounds.[144]

In the years following the *England* decision, litigants may have learned to avoid the traps alluded to by Justice Douglas. However, even if the jurisdictional division contemplated by *England* worked perfectly, the procedure still leads to duplicative and costly litigation. Parties desiring a forum for their federal claims face the ordeal of two

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[140] England v. Louisiana State Bd. of Medical Examiners, 395 U.S. 411, 415-17 (1964) (Black, J., concurring in part and dissenting in part); *see also* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 619-20 (1981).

[141] In 1945 Florida became the first state to statutorily adopt such a procedure. Justice Frankfurter praised the Florida statute in Clay v. Sun Ins. Office, Ltd., 363 U.S. 207, 212 (1960). Ironically, as the dissenters observed, Florida had never formulated rules for application of the statute. *Id.* at 226. For a thorough history of the evolution of certification procedures, see C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4248 (1969) and C. WRIGHT, A. MILLER & E. COOPER, SUPPLEMENT TO FEDERAL PRACTICE AND PROCEDURE (1986).

[142] *England*, 375 U.S. at 433-35.

[143] *Id.* at 436-37.

[144] *See, e.g.*, Field, *supra* note 111, at 697. Professor Field observes that if litigants wish to preserve the federal forum, they must be willing to undergo the time commitment and expense of two trials. This time delay may be even greater if the abstention order comes late in the course of the federal proceedings. *Id.* at 697-98. In formulating its proposed changes to the Judicial Code, the A.L.I. concluded that the collateral relitigation model embodied by *England* is too time consuming. The A.L.I. would have excepted certain civil rights cases from abstention and abandoned *England*. *See* A.L.I. STUDY, *supra* note 101, § 1371(d) and Commentary at 286. For further discussion of the study, see *infra* text accompanying notes 180-91.

separate trials — a venture entailing untold time and expense. Further, because *England* contemplates that the federal district courts will find the facts pertinent to the federal claims, federal litigation may duplicate the state court litigation.[145] As the costs associated with civil litigation continue to skyrocket, the prospect of conducting two trials is increasingly unwelcome and unrealistic. This prospect may lead parties to settle for state court relief rather than undertake the burden of two separate trials.[146]

Certification of state law questions by the federal courts to the state's highest court is at first blush a practical alternative to the cumbersome *England* procedure because it obviates the need for a trial on the merits in state court and subsequent appeals.[147] While nearly half the states provide a statutory mechanism for certification,[148] certification appears rarely used by the federal courts as a substitute for *Pullman* abstention. It is unclear whether this is attributable to the restrictiveness of some certification statutes[149] or to the perception by some courts

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[145] Bator, *supra* note 140, at 618-19.

[146] *See* Field, *supra* note 80, at 591.

[147] Lehman Bros. v. Schein, 416 U.S. 386 (1974); Clay v. Sun Ins. Office, Ltd., 363 U.S. 207, 212 (1960). *But see Lehman Bros.*, 416 U.S. at 394 (Rehnquist, J., concurring) (arguing, in the context of a diversity case, that certification increases litigation time and expense beyond that entailed in federal court adjudication of a state law issue).

[148] States that have enacted certification procedures include: Alabama, ALA. R. APP. P. 18; Colorado, COLO. APP. R. 21.1; Florida, FLA. STAT. ANN § 25.031 (West 1974); Georgia, GA. CODE ANN. § 15-2-9 (1985); Indiana, IND. CODE ANN. § 33-2-4-1 (West 1983); Iowa, IOWA CODE ANN. §§ 684A-684.11 (West 1986); Kansas, KAN. STAT. ANN. § 60-3201-60-3212 (1983); Kentucky, KY. R. CIV. P. 76.37; Louisiana, LA. REV. STAT. ANN. § 13:72.1 (West 1983); Maine, ME. REV. STAT. ANN. tit. 4, § 57 (1979); Maryland, MD. CTS. & JUD. PROC. CODE ANN. § 12-601-12.609 (1984); Massachusetts, MASS. RULES OF SUP. JUD. CT., Gen. Rule 1:03; New Hampshire, N.H. REV. STAT. ANN. § 502-A:17-a (1983); North Dakota, N.D. R. APP. P. 47; Oklahoma, OKLA. STAT. ANN. tit. 20, § 1601-1612 (West 1987); Oregon, OR. REV. STAT. tit. 3, §§ 28.200-28.255 (1983); Rhode Island, R.I. SUP. CT. R. 6; Washington, WASH. REV. CODE ANN. § 2.60.010-2.60.900 (1987); West Virginia, W. VA. CODE §§ 51-1A-1-51-1A-12 (1981); Wisconsin, WIS. STAT. ANN. §§ 821.01-821.12 (West Supp. 1986); Wyoming, WYO. R. APP. P. 11.01-11.07. The procedures differ in their terms. Some, such as that of Indiana, IND. APP. R. 15(o), allow the United States Supreme Court and the federal circuit courts to certify questions to the Indiana Supreme Court. Others, such as COLO. REV. STAT. § 78 (1984), COLO. APP. R. 21.1(a), will accept certifications from all federal courts and the United States Court of Claims as well.

[149] *E.g.*, in states that do not allow a district court to certify questions, only abstention decisions that are appealed are candidates for certification. *See, e.g.*, Dome Condominium Ass'n v. Goldenberg, 442 F. Supp. 438 (S.D. Fla. 1977) (certification statute

that it is better to simply remit the entire case to a state court rather than to formulate certified questions.

Thus, although *England* and certification statutes theoretically mitigate *Pullman*'s potential erosion of federal jurisdiction, they appear not to have much impact. Neither doctrine has any effect when courts invoke *Burford* abstention, because *Burford* contemplates completely abandoning federal jurisdiction.[150] In sum, the effects of an overbroad application cannot be stemmed by existing procedures in either *Pullman* or *Burford* abstention.

While overbroadly applying *Pullman* and *Burford* may erode federal jurisdiction, as described above, excessively contracting the use of abstention may also be damaging. As noted, courts contract their use of *Pullman* and *Burford* when the predominant view of federalism accepts and encourages abundant participation of the federal courts in protecting the rights of citizens.[151] Courts adhering to this view of federalism may believe that federal intervention in matters significantly impacting state citizens is both appropriate and necessary, and the contraction in use of abstention reflects this belief.[152] Regardless of the propriety of extensive federal intervention, experience indicates that it can lead to a visible tension between the state and federal judiciaries[153] in addition to considerable hostility on the part of state governments.[154] In certain instances, abstention would provide a means of alleviating this tension.

It does not follow, however, that failing to abstain will necessarily trouble the relations between state and federal courts, at least in present times. Indeed, a federal court's erroneous failure to abstain would probably minimally impact the relationship between state and federal judiciaries. This reduced importance of abstention in maintaining comity is attributable to a series of decisions emanating from the Court which, by

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unavailable to federal district courts).

[150] *Burford*'s premise is that federal court adjudication would disrupt state efforts to administer and adjudicate matters of special interest and importance to states. *See, e.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976). *See generally* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 141, at § 4245. Unlike a constitutional claim subject to *Pullman* abstention (as modified by *England*), a federal district court will not try the constitutional claim raised in an action subject to *Burford* abstention. If the parties seek review of the state court decision on the federal claim, that review must come from the United States Supreme Court. *Burford*, 319 U.S. at 334.

[151] *See supra* text accompanying notes 113-14.

[152] *See supra* text accompanying notes 116-17.

[153] *See supra* note 111.

[154] *Id.*

heightening standing and case and controversy requirements, narrowly circumscribe the type and availability of injunctive relief that the federal courts may award.[155]

Thus, the Court has rendered the intrusive structural injunctive relief awarded in past eras[156] a virtual impossibility in many modern cases. However, given the malleability of federal law, excessive refusals to abstain may some day provoke discord between the state and federal judiciaries. Efforts to provide tangible boundaries to abstention should thus guard not only against excessive expansion in use of the doctrines, but also against excessive contraction.

V. Evaluation of Theories That Would Limit the Scope of *Pullman* and *Burford*

This Article has analyzed the effects of *Pullman* and *Burford* in cases raising constitutional claims. As applied, the abstention doctrines lack sufficiently concrete boundaries. As a result of the ambiguity surrounding *Pullman* and *Burford*, courts often base their abstention decisions on federalism principles concerning the proper allocation of cases between state and federal courts. This section considers representative theories that might minimize or eliminate the difficulties posed by current applications of *Pullman* and *Burford*.

Proposed limitations of *Pullman* and *Burford* are familiar subjects of both the scholarly literature and the judicial decisions about abstention. Those discussed in this section represent possible approaches ranging from wholesale or selective exemption from abstention of cases raising constitutional claims to adopting a procedural method for deciding abstention issues that would ensure that abstention occurs only in those cases that would further its policies.

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[155] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974); *see also* Fiss, *supra* note 73, at 1150. Injunctive relief in *Pullman*-type cases may also be curtailed by the Supreme Court's decision in Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), which held that the 11th amendment prohibits federal courts from enjoining state officials to obey state law. *See* Werhan, Pullman *Abstention After* Pennhurst: *A Comment on Judicial Federalism*, 27 Wm. & Mary L. Rev. 449, 485-99 (1986) (arguing *Pullman*'s flexibility makes the doctrine a moderate vehicle for furthering judicial federalism).

[156] *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 378 (M.D. Ala. 1972), *aff'd sub nom*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (court issued emergency orders detailing specific minimum standards for mental institution).

A. Exemption of Cases Raising Constitutional Issues From Pullman *and* Burford

The notion of eliminating *Pullman* and *Burford* entirely in cases raising substantial constitutional issues rejects any possibility of meaningful changes in applying the doctrines. Its premise is that the only way to ensure that the federal courts fulfill their "unflagging obligation" to exercise the jurisdiction granted them by Congress[157] is to deny them the discretion to do otherwise.

Because this exemption would apply only in cases raising constitutional claims, abstention principles would remain intact when federal jurisdiction is founded only on diversity.[158] The exemption would, however, effectively abolish *Pullman* because all *Pullman* cases must present a constitutional issue that could be avoided through abstention. *Burford* also would be eliminated when the litigants raise a constitutional claim.

Although the federal courts have specifically rejected arguments exempting constitutional litigation brought pursuant to section 1983 from abstention under *Pullman* and *Burford*,[159] fairly strong support exists for such exemption. General support exists in the Supreme Court cases recounting the primary role of the federal courts in enforcing and vindicating constitutional rights.[160] The legislative history of section 1983, on which the Court has relied extensively in its efforts to assess the federal courts' role in various aspects of civil rights litigation, offers further support.[161] The Supreme Court recently relied upon section 1983's legislative history in disallowing any requirement of exhaustion

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[157] *Ex parte* Young, 209 U.S. 123, 143 (1908); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (dictum).

[158] Thus, what would remain is the group of cases exemplified by County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) and Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). For a discussion of the applicability of abstention in diversity cases, see, *e.g.*, Gowen & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEX. L. REV. 194 (1964); Comment, *Abstention by Federal Courts Having Jurisdiction by Diversity of Citizenship*, 30 MO. L. REV. 460 (1965).

[159] *See, e.g.*, Bellotti v. Baird, 428 U.S. 132 (1976); Reetz v. Bozanich, 397 U.S. 82 (1970); C-Y Dev. Co. v. City of Redlands, 703 F.2d 375, 381 (9th Cir. 1983); Lewellyn v. Gerhardt, 513 F.2d 184, 187 (7th Cir. 1975); Romero v. Coldwell, 455 F.2d 1163, 1167 (5th Cir. 1972).

[160] *See supra* text accompanying note 118.

[161] The Court has examined legislative history as a guide to ascertaining statutory intent in a vast number of cases. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980); Monell v. Department of Social Servs., 436 U.S. 658 (1978); Monroe v. Pape, 365 U.S. 167 (1961).

of administrative remedies.[162] In prior years, the same legislative history justified rejecting any requirement that litigants resort to state judicial remedies prior to suing under section 1983.[163]

Despite the federal courts' refusal to recognize that their no-exhaustion decisions could militate in favor of a similar no-abstention rule, the arguments are worthy of consideration. Indeed, the Supreme Court's refusal in *Patsy v. Florida Board of Regents*[164] to require exhaustion of administrative remedies as a prerequisite to suit under section 1983 revitalized the arguments.

Monroe v. Pape,[165] decided in 1961, established that litigants need not resort to state judicial remedies prior to filing an action for relief under section 1983 in federal court. In *Monroe*, Justice Douglas interpreted section 1983's legislative history to mean that a federal remedy for civil rights violations was entirely supplemental to any state judicial remedy that the plaintiff might pursue.[166] Although some thought it self-evident that the legislative history would require the same no-exhaustion rule for state administrative remedies,[167] the Court made no definitive ruling on the issue until 1982 in *Patsy*.

In *Patsy*, the Court rejected arguments that exhausting administrative remedies would "further the goal of comity and improve federal-state relations by postponing federal-court review until after the state administrative agency had passed on the issue."[168] Relying in part on section 1983's legislative history,[169] the Court held that the policy rationales offered for requiring administrative exhaustion could not override legislative intent rejecting exhaustion requirements in section 1983 actions.

The Court's refusal to require either administrative or judicial exhaustion lends strong support for an exemption from abstention in civil rights cases. While the differences between abstention and exhaustion are significant enough to warrant their recognition as separate doc-

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[162] Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982).

[163] Monroe v. Pape, 365 U.S. 167 (1961).

[164] 457 U.S. 496.

[165] 365 U.S. 167.

[166] *Id.* at 183.

[167] *See* McNeese v. Board of Educ., 373 U.S. 668 (1963); Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1206 (1968). *But see* Ryckman, *supra* note 7, at 393-94.

[168] *Patsy*, 457 U.S. at 512.

[169] The Court relied also on the legislative history of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997-1997j (1982). Section 1997e of that Act creates a limited exhaustion requirement for adult prisoners.

trines,[170] the two are in reality quite similar in policy and result. Courts perceive the policy of federalism as justification for both exhaustion requirements and abstention. In addition, application of either doctrine leads to the same result — cases otherwise subject to immediate adjudication in federal courts are transferred to state courts.[171]

If the policies and results of abstention and exhaustion are analogous, then the Supreme Court's analyses in *Monroe* and *Patsy* indicate that abstention is no more acceptable in section 1983 actions than are exhaustion requirements. *Pullman*, because it requires pursuing state remedies as a precondition to federal court jurisdiction, is inconsistent with *Monroe*.[172] *Burford* is inconsistent with *Patsy* in requiring resort to state administrative processes and complete forfeiture of a federal court trial.[173] The Court's rationale in *Patsy*, that considerations of comity and federal-state relations embodied in exhaustion cannot displace the immediate exercise of federal jurisdiction over civil rights actions, applies with equal strength to abstention in civil rights actions.

While such a civil rights exception would ensure a federal forum for federal constitutional claims, several drawbacks diminish this option's attractiveness. First, a civil rights exception assumes that *Pullman* and *Burford* abstention are always inappropriate when constitutional claims are present, and removes all discretion to refer cases meeting certain criteria to state courts. Given the breadth of section 1983, and its provision of a cause of action for nearly any constitutional violation committed "under color of law,"[174] the federal courts would consis-

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[170] *See, e.g.*, Note, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 565-66 (1975) (arguing that exhaustion requirements are considered jurisdictional prerequisites, whereas abstention reflects a policy decision to defer or relinquish the jurisdiction that the court already possesses; author also notes that exhaustion is most often said to relate to fulfillment of administrative remedies, whereas abstention relates to completion of state judicial remedies).

[171] *See, e.g.*, Hufstedler, *supra* note 107, at 860 ("[e]xhaustion of state remedies is abstention under an assumed name"); Ryckman, *supra* note 7, at 396 ("Abstention may be the name, but exhaustion is the game.").

[172] *Cf.* Wells, *supra* note 100, at 80-81. *But see* Field, *supra* note 4, at 1131-34 (arguing that *McNeese* and other cases do not support an exception for civil rights cases).

[173] Field, *supra* note 4, at 1162-63; Ryckman, *supra* note 7, at 413 n.205.

[174] Since Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) (holding that the jurisdictional provision for § 1983, 42 U.S.C. § 1343, would support claims for deprivation of both property and individual liberty claims), courts have held virtually any constitutional violation meeting the other elements of § 1983 actionable. *But see, e.g.*, Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir.), *cert. denied*, 469 U.S. 834 (1984) (holding commerce clause violations not actionable under § 1983).

tently adjudicate an extremely wide range of constitutional claims. The courts would have to tolerate risks posed by erroneous and disruptive federal decisions on state law issues. In short, the exemption would eliminate any buffer between the state and federal courts provided by abstention.

The Court's opinion in *Patsy* recognizes the difficulties in grounding a decision regarding exhaustion of administrative remedies on the legislative history of section 1983.[175] Grounding an exception from abstention on section 1983's legislative history is equally problematic. The Congress enacting section 1983 had no experience with either abstention or exhaustion as they exist today. Further, even if the Congress that enacted section 1983 did intend to provide immediate and undiluted federal court access, there is no simple answer as to how much weight courts should give that intent.[176]

Finally, completely eliminating any federal discretion to abstain may reflect an overly narrow understanding of the federal system. Notwithstanding jurisdictional mandates, the federal courts exercise enormous discretion in screening their cases.[177] Accepting the need for some discretion and focusing on imposing meaningful limitations on the exercise of that discretion in the context of abstention is perhaps more realistic.

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[175] *Patsy*, 457 U.S. at 507:

> We recognize, however, that drawing such a conclusion from this history alone is somewhat precarious: the 1871 Congress was not presented with the question of exhaustion of administrative remedies, nor was it aware of the potential role of state administrative agencies. Therefore, we do not rely exclusively on this legislative history in deciding the question presented here.

[176] *See, e.g.*, Bator, *supra* note 140, at 622 n.49 (criticizing statutory construction methods that, if woodenly and anachronistically read, can be interpreted to provide "an absolute right of access to the federal courts. . . . As is true of all legislation, it is a major problem of interpretation how to fit the new enactment into this pre-existing texture. . . .").

[177] This discretion pervades virtually every jurisdictional issue facing federal courts. With respect to jurisdiction under 28 U.S.C. § 1331, the federal courts developed rules that limit their jurisdiction. *See, e.g.*, Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (well-pleaded complaint rule). In the context of pendent jurisdiction, the federal courts have reserved the discretionary right to dismiss cases falling within their jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Even the Supreme Court exercises discretion in the context of its mandatory appellate jurisdiction. Weiner, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954) ("It is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari.") (quoting Chief Justice Warren).

B. Regulating Pullman *and* Burford *Through Focusing on Substantive Claims Raised*

If abstention under *Pullman* or *Burford* is acknowledged as proper and necessary in certain cases raising constitutional issues, exempting all civil rights cases is undesirable. Even if an unqualified exemption is rejected, however, abstention might still be regulated by formulating rules based on the nature of the constitutional claim or the subject matter presented by a particular case. Congress[178] or the federal courts themselves could formulate rules regulating abstention on the basis of the substantive claim raised. Of these two alternatives, legislation is preferable. It should communicate the jurisdictional allocations in concrete, precise form,[179] and at the same time eliminate the need for federal judges to make a discretionary selection of cases exempt from, or subject to, abstention.

The rules themselves could take two forms. They could make particular cases exempt from abstention, or they could determine that cases raising certain types of constitutional claims or involving particular subject matter are best decided by state courts.

1. Exemption of Particular Claims from Abstention

The proposal of the American Law Institute (ALI) in its *Study of the Division of Jurisdiction Between State and Federal Courts*[180] is a concrete illustration of proposed legislation that would exempt cases from abstention based on the nature of the constitutional questions they raise. This legislation, while permitting *Pullman* abstention under certain conditions,[181] would have forbidden abstention in actions "to re-

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[178] Congress has already dictated abstention by statute in various subject areas. *See, e.g.*, the Anti-Injunction Act, 28 U.S.C. § 2283 (1982); The Tax Injunction Act, 28 U.S.C. § 1341 (1982); The Johnson Act, 28 U.S.C. § 1342 (1982).

[179] As Professor Field observed, "[o]ne of the first things we teach entering law students is the importance of clarity in rules governing courts' jurisdiction." Field, *supra* note 111, at 683; *see also* Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 187 (1969) (the division of jurisdiction should enable a lawyer of reasonable ability to tell with fair assurance whether a particular court has jurisdiction). Clarifying the rules relating to discretionary postponement or abandonment of jurisdiction through abstention would be a positive step.

[180] A.L.I. STUDY, *supra* note 101, § 1371, at 48-50.

[181] The ALI provided that

> [a] district court may stay an action, otherwise properly commenced in or removed to a district court under this title, if the court finds:
>
> (1) that the issues of State law cannot be satisfactorily determined

dress, the denial, under color of any State law, statute, ordinance, regulation, custom or usage, of the right to vote, or of the equal protection of the laws, if such denial is alleged to be based on race, creed, color or national origin."[182] The ALI based its selection of exempt actions on the perception that there is an especially strong national interest in providing a federal forum for such cases.[183]

Although the ALI proposal was never adopted, a number of federal courts exhibit a similar approach to abstention in constitutional cases. They express a reluctance to abstain in certain types of civil rights cases. This reluctance to abstain is seemingly broader than the ALI proposal. Courts exhibit hesitation not only as to the ALI's two subject areas, but also as to cases involving the first amendment or even section 1983 cases generally.[184] The courts' approach is narrower than the ALI proposal in that they do not categorically exempt all cases of a particular type. Despite these differences, the courts' approach resembles the ALI's because both focus on the nature of the federal constitutional claim raised in deciding whether abstention is appropriate.

2. Requiring Abstention in Cases Raising Certain Substantive Claims or Involving Certain Subject Matter

Apart from excluding cases from abstention based on content of certain constitutional claims, designating claims or subject matter that state courts could best decide might make abstention more tangible. The ALI proposed such an approach to deal with cases currently subject to *Burford* abstention[185] and would have required a stay of action

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> in the light of the State authorities; and (2) that abstention from the exercise of federal jurisdiction is warranted either by the likelihood that the necessity for deciding a substantial question of federal constitutional law may thereby be avoided, or by a serious danger of embarrassing the effectuation of State policies by a decision of State law at variance with the view that may be ultimately taken by the State court, or by other circumstances of like character; and (3) that a plain, speedy, and efficient remedy may be had in the courts of such State; and (4) that the parties' claims of federal right, if any, including any issues of fact material thereto, can be adequately protected by review of the State court decision by the Supreme Court of the United States.

Id. at 49.

[182] *Id.* § 1371(g), at 50.

[183] *Id.* at 297.

[184] *See supra* note 83; *see also* Note, *Federal Question*, *supra* note 114, at 607 (civil rights cases, while "sensitive," are the least likely candidates for abstention).

[185] A.L.I. STUDY, *supra* note 101, § 1371(b) and Commentary at 287-88.

in any case brought to "enjoin, suspend, or restrain the operation of, or compliance with," any order pertaining to "conservation, production, or use of minerals, water, or other like natural resource of the State."[186]

As with the proposed exemption of certain types of civil rights cases, some courts have implemented this principle through judicial decision.[187] Certain commentators[188] have viewed selecting cases in which abstention would often be appropriate as permissible and even desirable. To the extent that courts implement this channeling of cases toward state courts, their decisions include an array of issues well beyond the limited statutory channeling contemplated by the ALI. Thus, certain types of constitutional challenges are prone to abstention. These include, for example, many challenges made to government conduct affecting property, whether in the context of urban planning or rent control.[189] Also included to some degree are challenges that will have a large monetary impact on the states, such as those involving health care[190] or state administration of penal institutions.[191] Courts rarely explicitly address whether these categories reflect a judgment that the constitutional claims presented are less in need of a federal forum than other claims, or simply a decision that the subject matter of that particular suit is better suited to decision in state courts.

3. Evaluation of Regulation Based on Substance

Although the ALI proposals illustrate means of imposing greater structure on abstention, it is the de facto, apparently unconscious, application of similar rules by the federal courts that is pertinent in evalu-

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[186] *Id.* The ALI modeled this stay provision after the Johnson Act, 28 U.S.C. § 1342 (1982), which applies to rate orders.

[187] *See supra* text accompanying notes 90-96.

[188] *See, e.g.*, Ryckman, *supra* note 7, at 397 ("The question of whether to invoke *Pullman* abstention ought to be considered in most land use cases in federal court . . . ."). "If the state law issues involve transcendent state programs, the broader federalism concerns of *Burford* abstention should require the court to dismiss the case, thus avoiding federal interference with important state policies." *Id.* at 441. *But see* Note, *Federal Question*, *supra* note 114, at 611 (observing that "to arrange the clauses of the Constitution into a hierarchy of importance does not seem a fitting judicial task").

[189] *See supra* note 92; *see also* Ryckman, *supra* note 7, at 408 (observing that some § 1983 zoning cases now fall in the "most likely" category).

[190] *See, e.g.*, New York State Ass'n for Retarded Children, Inc. v. Carey, 727 F.2d 240, 245 (2d Cir. 1984); Brooks v. Walker County Hosp. Dist., 688 F.2d 334 (5th Cir. 1982); Ibarra v. Bexar County Hosp. Dist., 624 F.2d 44 (5th Cir. 1980).

[191] *E.g.*, Manney v. Cabell, 654 F.2d 1280 (9th Cir. 1980) (class action challenging conditions of confinement at juvenile facility).

ating these theories.[192]

The theory limiting abstention in certain types of cases clearly shares certain characteristics of the theory channeling cases toward abstention based on the substance of the claim raised, yet the approaches differ in significant respects. In comparing their respective capacities to provide meaningful limitations on abstention doctrines, the theory exempting cases from abstention based on substance seems more workable than the theory channeling cases concerning particular subject matter or certain constitutional claims toward state court jurisdiction.

Courts could apply either theory if they could identify groups of cases raising particular claims in which a federal forum is singularly important or unimportant. But principled decisionmaking about which cases to include in each category is itself a major stumbling block. Identifying cases exempt from abstention is probably easier than identifying cases to channel toward abstention. For example, exempting constitutional claims receiving heightened scrutiny on the merits would ensure availability of an immediate federal forum for a core of cases generally raising important constitutional issues. Explicitly selecting claims that are probably subject to abstention would be far more difficult. Essentially, the lower courts have attempted to make such selections through focusing on "sensitive" or "local" interests.[193] The lack of any principled means of selecting claims fitting this description remains problematic unless very narrowly formulated.

Beyond the consideration of how well each of the approaches copes with the current judicial confusion regarding abstention, several other factors are also important and may militate against even a workable exemption from abstention based on substance of the claims raised. The first consideration is whether focusing on the claim's substance as a means of structuring abstention is consistent with the procedural nature of *Pullman* and *Burford*. The justifications for abstention — such as

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[192] Because Congress has adopted neither the A.L.I. proposal for *Pullman* and *Burford* nor any other proposal, it is more meaningful to focus on judicially fashioned substantive limitations on abstention. Regarding the merit of the A.L.I. proposal, a statutory approach is preferable to any judicially fashioned limitations on abstention because it is more concrete. *But see* Currie, *supra* note 129, at 316 (arguing that the A.L.I.'s general provision for *Pullman* abstention encompasses cases that also fit within the exception for certain types of civil rights cases).

My principal disagreement with the A.L.I. proposal is that it attempts to exempt cases from abstention based on substance. In this regard it suffers from the same flaws inherent in judicially fashioned exemptions based on substance. *See infra* text accompanying notes 194-97.

[193] *See supra* note 91.

avoidance of constitutional questions and decision of unclear state law by federal courts — are not tied to particular substantive claims. If the justifications for abstention are genuine and compelling, they are no less important in cases raising discrimination issues than in cases raising other substantial constitutional issues.[194] Concomitantly, if courts view *Pullman* and *Burford* as subordinate to the need for immediate federal adjudication when litigants raise certain substantive claims, any notion that *Pullman* and *Burford* are content-neutral is dispelled.

In addition to the problems identified above, both of the exceptions based on substance are at odds with the neutrality of the section 1983 cause of action under which most of the constitutional claims are raised. The Supreme Court long ago abandoned the policy of restricting civil rights jurisdiction only to cases implicating individual liberties.[195] As currently interpreted, section 1983 allows the redress of a vast number of colorable constitutional claims without regard to substantive content.[196] While some of these claims may receive increased scrutiny on the merits, theoretically they should receive the same treatment in terms of federal forum access.[197]

Equally problematic is the inevitable assumption of both theories that federal judges, acting without the benefit of legislation, and in contradiction of Congress' grant of federal question jurisdiction, should make decisions as to which cases are most worthy of immediate court access. This assumption is deeply troubling because it leaves federal jurisdiction over constitutional claims subject to changing tides of judicial opinion. This is the very discretion which, in its present form, leads to abstention based on prevailing views of federalism.

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[194] If the policies furthered by *Pullman* abstention cannot be taken at face value, courts must seriously consider whether to permit continued use of the doctrine. If they are genuine, an exception based on substance as detailed herein would exempt from abstention cases such as *Pullman* itself. Of course, the courts could continue to operate as they do presently. The present approach is to profess reluctance in certain civil rights cases, and to note the absence of an exception in those cases in which courts wish to abstain. But this course of decision, while allowing flexibility, provides no certainty of federal jurisdiction in constitutional cases. *See supra* text accompanying notes 100-17.

[195] *See supra* note 174.

[196] *Id.*

[197] Differentiating between particular types of actions may be justifiable when considering whether a federal court must abstain from interfering with a pending state proceeding. There, the state courts already have an interest in adjudicating a particular dispute. This interest may, in some instances, militate in favor of the federal courts refusing to exercise jurisdiction. *See* Younger v. Harris, 401 U.S. 37 (1971).

C. Other Limitations on Abstention

Professor Field, in her seminal article on *Pullman* abstention, made numerous suggestions for interpreting *Pullman* and *Burford*.[198] One suggestion, which appears procedural in nature, is of particular interest in light of the continued tendency of the federal courts to misunderstand *Pullman* and *Burford*'s policies. Professor Field, concerned that courts would apply *Pullman* in unwarranted circumstances, proposed that district judges should forecast how they planned to rule on the merits of a particular dispute prior to making an abstention decision. In the event that all conditions of *Pullman* were met, but the district judge's decision would not disrupt important state policies or programs, abstention would not be required.[199]

Professor Field proposed that federal courts should dismiss a case only when a state has indicated clearly the importance of its interest in a particular area by establishing specialized tribunals providing uniform and expert review of regulatory agency decisions.[200] This interpretation, although amply supported by *Burford* itself, would require much more specificity when applying *Burford* abstention than lower court decisions often evidence.[201]

Each of these proposals would, if implemented, reduce the risk of applying *Pullman* and *Burford* in an unwarranted manner. In addition, the basic content-neutrality of Professor Field's *Pullman* proposal makes it less problematic than the proposals based on substantive con-

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[198] *See generally* Field, *supra* note 4. Attempting to summarize the depth of Professor Field's suggestions would do an injustice to her work. Among Professor Field's suggestions were that when *Pullman* abstention would avoid constitutional adjudication, a court should balance against that interest facts calling for swift constitutional decision, *id.* at 1129-34; that courts abandon the requirement that a case must contain a federal constitutional issue in cases in which federal decision will interfere with state programs, *id.* at 1136-38; that *Pullman* apply only in suits to enjoin state action, *id.* at 1138-43; that states should have the ability to prevent abstention by consenting to federal decision of the case, *id.* at 1143-44. Further suggestions are set forth in a subsequent article. *See* Field, *supra* note 80, at 605-06.

[199] *See* Field, *supra* note 4, at 1126-29.

[200] *See id.* at 1156-60. Professor Field notes, however, that even if a state had demonstrated a commitment to uniformity and expertise, this would not necessitate abstention. The federal courts could evaluate clarity of state law and complexity of the issues. *Id.*

[201] As Professor Field notes, "the administrative abstention [*Burford*] doctrine has not been limited, in its application by lower courts, to cases in which the state had concentrated review of an agency's determinations in a single court or group of courts, let alone to those in which the factual situation appeared especially complex and within the reviewing body's expertise." *Id.* at 1157.

tent or subject matter. Professor Field's *Burford* proposal leaves the states discretion in identifying areas of particular concern to them, yet requires significant manifestations of state intent in order to justify abstention.[202] The requirement of greater state specificity seems a fair compromise given the potentially broader range of *Burford* subject matter under the Field theory.

The major drawback of Professor Field's *Pullman* proposal is that it is a fairly complex and burdensome procedure — enough so that others have surmised it was truly a suggestion designed to lead to *Pullman*'s ultimate abandonment.[203] In many cases the decision to abstain precedes any true analysis of the merits. Thus, once a district judge determines that state law is in fact unclear enough to warrant *Pullman* abstention and that she can avoid constitutional adjudication by deciding the state issue, projecting how the court would rule on the merits may be futile.

If the proposal for limiting *Pullman* is truly so complex that courts will not use it, it can have little impact on the continuing problematic application of *Pullman* and *Burford*. The proposed limitation of *Burford*, while sound in and of itself, will not curb the courts' tendency to associate *Pullman* and *Burford* with interchangeable goals and policies unless *Pullman* is also given meaningful limits.

VI. A Proposal for Clarifying Abstention Analysis

This Article has explored the sources of inconsistency in lower court abstention decisions, and has concluded that such inconsistency is attributable to the amorphous nature of the Supreme Court's abstention guidelines.[204] As a result, courts use *Pullman* and *Burford* abstention as a means of effectuating jurisdictional policy consistent with their

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[202] *See supra* note 199. The requirement of state manifestations of intent to adjudicate matters that the state considers of particular concern is consistent with both *Burford* and *Alabama PSC*.

[203] *See* D. Currie, *supra* note 22, at 629-30:

> While a judge might justly recoil from applying the suggested standards, if their distinctions and subdistinctions are not deemed worth the energy they require, then *Pullman* abstention should not be perpetuated at all. For it simply does not seem worth imposing abstention's costs on the parties to order it more broadly than when a functional analysis . . . would suggest it is likely to serve a significant purpose.

(quoting Field, *supra* note 4, at 1135). Professor Field suggests in a later article that she would resolve the problems of abstention by holding that the doctrine should no longer be followed. *See* Field, *supra* note 111, at 698.

[204] *See supra* text accompanying notes 77-99.

views of federalism.[205] Abstention thus leads federal district and circuit courts to play a reduced role in formulating constitutional law in some eras, and an expanded role in others.[206]

Abstention today is limited by somewhat random decisions as to which types of cases federal courts should hear and which types of cases to channel toward state courts. Part V examined this approach's weaknesses when it is implemented by judicial decisions.[207]

Short of eliminating judicially fashioned abstention altogether, ensuring absolute consistency and integrity in abstention decisions is impossible. Yet the appropriate bases for abstention certainly could be clarified in a manner that would reduce the lower courts' tendency to identify *Pullman* and *Burford* with popular federalism.

A. Criteria to Consider in Pullman *and* Burford *Abstention Decisions*

Although eliminating abstention would be both logical and consistent with the Supreme Court's approach to exhaustion of remedies in section 1983 cases,[208] there is little likelihood that this will take place. If abstention is to exist, the basic characteristics of the *Pullman* and *Burford* doctrines should remain intact. Changes in applying the doctrines should consist principally of guidance as to what criteria the courts should not consider.

Thus, courts should confine *Pullman* abstention to those instances in which the underlying and potentially dispositive question of state law is so unclear that federal courts would run a substantial risk of error in deciding it, and deciding the case on a state ground would avoid the risk of a premature decision of a constitutional question. *Burford* should apply only when the state has, through its legislature, manifested its desire to oversee a particular area within its legitimate regulatory powers by establishing a mechanism for administrative and judicial review.[209] Courts should apply both doctrines without regard to the sensitivity or the local character of an issue.

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[205] *See supra* text accompanying notes 108-12.

[206] *See supra* text accompanying notes 113-17.

[207] *See supra* text accompanying notes 193-97.

[208] *See supra* text accompanying notes 162-76.

[209] *See* Field, *supra* note 4, at 1154-63.

1. Application of Suggested Change

This Article has examined the uncertainty involved in inquiring into issue sensitivity or local concern. Would the character of the abstention decisions change if these considerations were removed from the question? Would the results in actual cases be different or somehow "better"?

In contemplating whether the character of abstention decisions would change if courts were not permitted to consider issue sensitivity or the local nature of an issue or concern, it is important to recognize that abstention would continue to exist. *Pullman* and *Burford* could operate to facilitate respect for state control over state law, state resources, and programs of specific and unique local interest. Yet any deference would be delimited by the narrow criteria that would serve as permissible bases for abstention.

While the criteria for *Pullman* and *Burford* abstention do not, by their terms, address comity between state and federal courts, they clearly allow courts to apply the doctrines in a manner furthering that result.[210] Adding an explicit deference to state and local concerns to the criteria in which such deference is implicit may skew the balance toward allocating cases to state court jurisdiction. The overwhelmingly subjective concerns for state and local interests may tend to overpower or permeate a court's decision on the other abstention criteria — the only ones even moderately conducive to objective legal analysis.

The issue sensitivity consideration should be eliminated even in those circuits, like the Ninth Circuit, that use absence of issue sensitivity in a manner that limits abstention. The same lack of definition and inconsistency that lead courts to give too much deference to the state interest may lead courts to give too little consideration to state concerns. More importantly, *Pullman* and *Burford* can serve their intended purposes without this overly subjective and malleable analytical component.

Whether eliminating any focus on issue sensitivity or local concern would make a difference in the actual outcome of abstention decisions is difficult to predict. Most courts view issue sensitivity as one of at least three criteria of abstention, and with its elimination, they would base their decisions on the criteria remaining. But eliminating issue sensitivity should change the analysis by which courts reach abstention decisions by eliminating the likelihood that courts will find state law unclear because they believe that the suit's subject matter is better left to the state courts.

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[210] *See supra* text accompanying notes 106-07.

2. Examining the Analysis in Concrete Terms

The shift in focus proposed is illustrated by considering the analysis of several district and circuit court cases. The first of these is *Vinyard v. King*,[211] in which a state employee brought suit alleging that the termination of her employment deprived her of a constitutionally protected property interest. The district court found state law unclear and ordered *Pullman* abstention. The court stated that consideration of the issues "would entail a severe intrusion into a sensitive area of state law."[212] On appeal, the Tenth Circuit reversed, finding a clear standard regarding creation of legal property rights although the state supreme court had never addressed that particular set of facts.[213] The circuit court emphasized that, even if state law were unclear, "no important State policies would be interrupted by an erroneous district court decision," and that abstention therefore would serve no purpose in avoiding friction between federal and state policies.[214]

The differences in the courts' viewpoints and their conclusions, while ostensibly explained by differing views on the issue of clarity of state law, were in reality colored by the courts' differing perceptions about the sensitivity of state issues. In particular, it appears that the district court's strong feeling that its decision would be intrusive led it to decide the question of clarity in favor of abstention.[215]

In a case such as *Vinyard*, the quality of analysis would improve if federal courts could direct their efforts to determining if state law is sufficiently unclear, under Supreme Court guidelines,[216] that they should not proceed. Clearly even if courts focused solely on uncertainty of state law, disagreement would still exist among courts. Some might even abuse abstention. These problems will plague abstention decisions as long as abstention is judicially fashioned. However, courts might approach abstention questions without the directed and explicit deference to state and local entities that issue sensitivity may promote.

In some cases the question of issue sensitivity predominates to the point that other criteria are not simply permeated, but are ignored altogether. In *Heritage Farms, Inc. v. Solebury Township*,[217] for example,

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[211] 655 F.2d 1016 (10th Cir. 1981).

[212] *Id.* at 1020 (quoting district court's order of abstention).

[213] *Id.* at 1019-20.

[214] *Id.* at 1020.

[215] *Id.*

[216] *See supra* text accompanying notes 32-49.

[217] 507 F. Supp. 33 (E.D. Pa. 1980), *rev'd*, 671 F.2d 743 (3d Cir.), *cert. denied*, 456 U.S. 990 (1982).

land owners and developers sought to assert constitutional and state law claims against a township, the board of supervisors, and others based on refusals to grant permits. Without even discussing the clarity of the state law claims, the court invoked both *Pullman* and *Burford* abstention — citing the distinctly local nature of land use and the special sensitivity that surrounds land use issues. The court concluded that "the federalist values behind the doctrine of abstention outweigh competing values presented by the duty of the federal judiciary to hear cases properly before it . . . ."[218] While the court quoted language from Supreme Court cases restating the *Pullman* requirement of lack of clarity, its own analysis was limited to the comment that a "state court hearing those state claims might well dispose of this matter without the need to address federal constitutional issues."[219] The absence of any meaningful analysis of abstention criteria makes clear that the district court's decision was motivated primarily by its belief that federal courts should channel land use cases to state courts.

Not surprisingly, the Third Circuit reversed the district court decision. The court found both *Pullman* and *Burford* inapplicable. Correctly focusing on the criterion of certainty of state law, the court found state law settled. Thus, notwithstanding the potentially dispositive nature of the state law, *Pullman* abstention was inappropriate.[220] The Third Circuit also determined that, absent a uniform and elaborate regulatory scheme, *Burford* abstention was also inappropriate.[221]

Notwithstanding the firm grasp of *Pullman* and *Burford* revealed by the rulings above, the Third Circuit's reasoning faltered when it attempted to address the contention that land use issues were peculiarly suited to abstention. Rather than meeting this issue head on,[222] the Third Circuit decided that plaintiffs had not in fact pleaded a land use case.[223] The court then sought to impress upon the district court the importance of the allegations before it — even going so far as to distinguish the case from *Pullman*, on the ground that allegations of malevolent conduct were quite different from the question of whether a "sleeping car shall be operated . . . [with] a Pullman conductor."[224]

Comparing the district and circuit court decisions in *Heritage Farms*

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[218] *Id.* at 36.

[219] *Id.* at 35.

[220] *Heritage Farms*, 671 F.2d 743, 747 (3d Cir. 1982).

[221] *Id.* at 747-48.

[222] *Id.*

[223] *Id.* at 748.

[224] *Id.*

underscores the potential for confusion and incorrect decisions when courts approach abstention by making decisions about what types of cases properly within federal jurisdiction are more appropriately decided by state courts. In *Heritage Farms*, the Third Circuit possessed sufficient understanding of abstention to reach the right outcome, but in so doing it felt the need to justify the importance of what were concededly substantial federal questions. The court suggested that, in contrast with *Pullman*, the facts alleged justified the immediate exercise of federal jurisdiction.[225] This type of analysis is unnecessary as well as misleading and threatening to federal adjudication of constitutional claims when employed by courts with less comprehension than the Third Circuit of *Pullman* and *Burford*'s proper scope.

Even in those cases in which issue sensitivity is used to limit abstention and is therefore truly supplemental, this criterion is still used to influence the outcome of the abstention decision. The plaintiff in *American Federation of State, County, and Municipal Employees (AFSCME) v. State of Washington*,[226] challenged the Washington state compensation system and alleged sex-based wage discrimination under a comparable worth theory. The district court denied a motion for abstention, stating that the complaint did not "touch a sensitive area of social policy upon which the federal courts ought not to enter . . . ."[227] While the court referred to the *Pullman* criteria of avoiding premature constitutional adjudication and lack of clarity of state law, the court did not even consider whether they were met, preferring to ground its decision on issue sensitivity.[228]

Whether the federal district court should have relinquished jurisdiction in *AFSCME* is not a question dispositively answered from the district court opinion. Even if the court was correct in its result, the analysis is suspect in that the court offered no explanation of nonsensitivity of the issue of comparable worth. Resolving the case in the plaintiffs' favor would have profoundly affected both the state's treasury and the state's public policy, in that plaintiffs sought injunctive relief in the form of enforcement of a nondiscriminatory compensation scheme. The

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[225] *Id.* The court's analysis is particularly disturbing because it minimizes the serious discrimination issues that underlay *Pullman*. *See supra* text accompanying notes 26-29.

[226] 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd on other grounds*, 770 F.2d 1401 (9th Cir. 1985).

[227] *Id.* at 855.

[228] *Id.* at nn.6-7. The district court opinion does not even make clear that a constitutional claim was in issue. The action brought under Title VII of the Civil Rights Act of 1964 was the plaintiff's major claim.

issues posed by the *AFSCME* case were at least as "sensitive" as the myriad other issues courts have decreed "sensitive."

The inconsistency of an approach placing any emphasis on issue sensitivity is brought into even greater relief when comparing *AFSCME* with another Washington decision handed down only seven years before. In *Bell v. Bell*,[229] the plaintiff challenged the constitutionality of the Washington Dissolution of Marriage Act on the ground that it established a discriminatory basis for awarding child custody, child support, and maintenance. The court stated that "in light of the increasing awareness of alleged unfair disparities between the sexes, this case involves a subject touching 'a sensitive area of social policy upon which the federal courts ought not enter . . . .' "[230] While the legal issues in *Bell* were different from those in *AFSCME*, allegations of sex discrimination touching on the way the state handled particular matters of importance to its constituents underlay each case. Differing or changing perceptions of whether these issues are "sensitive" should not result in differing availability of a federal forum.

B. Final Thoughts on the Need for a Change in Abstention Analysis

The proposal outlined above is geared toward limiting the federal district courts' discretion to make abstention decisions based on their own perceptions of federalism. By retaining some judicial discretion in abstention decisions, the federal courts are not shackled by a rigid and unworkable standard. They should, however, approach abstention cognizant that their task is simply to apply the criteria identified and explored by the Supreme Court, and not to make individualized assessments about what cases are best suited for state or federal adjudication.

If the federal courts adopted this approach, the availability of federal courts to hear constitutional claims would be more certain. The certainty of a hearing in federal court does not, of course, guarantee any particular treatment of constitutional claims on the merits, but it strengthens the capacity of federal courts to participate in making constitutional law and in offering an independent forum to litigants with constitutional claims.[231]

If the federal courts are less able to abstain based on subjective criteria such as issue sensitivity, or local concern, they necessarily relinquish

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[229] 411 F. Supp. 716 (W.D. Wash. 1976).

[230] *Id.* at 718 (quoting Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941)).

[231] *See supra* text accompanying notes 127-39.

a degree of their power to avoid controversial issues by referring cases to state courts. They also relinquish the power to keep cases before them that meet the more objective abstention criteria. While some litigants may mourn the passing of this subjective well of discretion, one must remember that it is not, and never was, the role of the lower federal courts to pick and choose their cases in the same way the Supreme Court does.

Inevitably, one faces a choice between placing implicit trust in the federal courts to choose the "right" cases to hear or to send to state courts, or reducing judicial discretion so that abstention from federal jurisdiction is limited to a constant but narrow exception to the exercise of jurisdiction. Ultimately, swings against federal involvement in constitutional decisionmaking pose a greater threat to the protection of federal rights than lower court decisions that are limiting on the merits. The time is ripe for federal courts to reaffirm their commitment to availability of a federal forum for federal claims, undiminished by abstention from the exercise of jurisdiction in all but the narrowest of circumstances.

CONCLUSION

The Supreme Court's guidelines for abstention under *Pullman* and *Burford* convey a sense of what those doctrines should achieve, yet do not communicate precisely when they should apply or what scope courts should give them.[232] As a result, lower courts apply *Pullman* and *Burford* in a manner that effectuates subjective evaluations of the proper allocation of power between the federal and state courts.[233]

The association of *Pullman* and *Burford* with a generalized concept of federalism can result in vast disparities in the availability of federal courts to hear constitutional cases in certain eras.[234] Existing safeguards against the erosion of federal jurisdiction are insufficient to eliminate the threat that an expansion of abstention during certain eras poses.[235]

Short of eliminating abstention altogether, or limiting it by legislation, the discretion of federal courts to refuse to exercise their jurisdiction will remain. However, by eliminating from the abstention decision any consideration of issue sensitivity or local concern, courts can make abstention decisions that are at least somewhat objective. Courts could still base *Pullman* abstention on avoiding premature decisions of con-

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[232] *See supra* text accompanying notes 33-71.
[233] *See supra* text accompanying notes 77-99.
[234] *See supra* text accompanying notes 113-17.
[235] *See supra* text accompanying notes 140-56.

stitutional questions and unclear state law, and *Burford* abstention on a state's demonstrated need for administrative and judicial oversight of a particular area. Such a restriction would effectuate abstention's policies without slanting the decision in favor of state court adjudication. Courts could confine abstention under *Pullman* or *Burford* to a narrow core of cases.

The role of the federal courts in protecting and enforcing constitutional rights should be protected and nourished irrespective of theoretical changes concerning the proper allocations of power between the federal and state systems. While abstention under *Pullman* or *Burford* may well be necessary and appropriate in certain cases, those doctrines are not the proper vehicles for effectuating large-scale changes in the allocation of power between the state and federal judicial systems or state and federal governments.