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# Arthur Miller's Death of a Doctrine or Will the Federal Courts Abstain from Abstaining? The Complex Litigation Recommendations' Impact on the Abstention Doctrine

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Arthur Miller's *Death of a Doctrine* or Will the  
Federal Courts Abstain from Abstaining?  
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## I. INTRODUCTION

"No, you're going to hear the truth—what you are and what I am! . . . The man don't know who we are! The man is gonna know! We never told the truth for ten minutes in this house!"<sup>1</sup> With these words to his parents and brother, Biff seeks to shatter the dual world in which he has lived for so long. The world of the Loman family consists of what actually occurs and the very different description of those occurrences. This duality masks not only their acts of infidelity and failure, but also their meritorious accomplishments. Ultimately, a destructive world full of confusion and delusion results.

Like the duality in Arthur Miller's play, duality exists in the American Law Institute's Complex Litigation Recommendations (hereinafter "Proposal").<sup>2</sup> There is a distinct dichotomy in the Proposal's treatment of the abstention doctrines, on one page praising them and pledging allegiance to them, while on another trivializing and summarily dismissing them. Such split speech results, as it does in Arthur Miller's play, in confusion. Ultimately, the valuable benefits found in the principles of federalism underlying these doctrines may be lost.

Federal court abstention is deeply rooted in American jurisprudence. Despite the supremacy of federal law and judgments in areas in which these are appropriate, federal courts are subject to significant statutory and common law restraints that are designed to preserve the jurisdiction and legitimacy of state courts as the guarantors of federal rights. These restraints have largely evolved through legislative and judicial reaction to concerns over comity and federalism. The jurisdiction sanctioned in *Ex parte Young*<sup>3</sup> and *Home Telephone & Telegraph Co. v. City of Los Angeles*<sup>4</sup> was partly responsible for a major shift in the distribution of power between the states and the nation.<sup>5</sup> This shift did not go unnoticed by Congress or the federal courts.<sup>6</sup> Congressional

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1. ARTHUR MILLER, *DEATH OF A SALESMAN* 130-31 (Viking Press 1949).

2. AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1994) [hereinafter *COMPLEX LITIGATION PROPOSAL*].

3. *Ex parte Young*, 209 U.S. 123 (1908).

4. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913).

5. PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1308 (3d ed. 1988) [hereinafter *HART & WECHSLER*].

6. *Id.*

response essentially was formulated in provisions of the Judicial Code which required federal abstention.<sup>7</sup> These "statutorily-dictated abstention[s]"<sup>8</sup> are embodied in the Anti-Injunction Act,<sup>9</sup> the Tax Injunction Act of 1937,<sup>10</sup> the Johnson Act of 1934,<sup>11</sup> the since-modified Three-Judge Court Act,<sup>12</sup> and the exhaustion requirement in habeas corpus.<sup>13</sup>

Federal deferral to state proceedings has not been achieved only by congressional action. The federal courts themselves have played an important role in limiting their own jurisdiction, not only in the realm sanctioned by *Young* and *Home Telephone*, but also more broadly in the areas of federal question and diversity jurisdiction. Although they have jurisdiction, the federal courts sometimes decline its exercise to allow for state court adjudication. This deferral is most widely observed in the federal common law abstention doctrines.<sup>14</sup> This comment will address these abstention doctrines in the broad categories of *Pullman* abstention, *Burford* abstention, *Colorado River* abstention, and *Younger* abstention.<sup>15</sup> While the varying policies and purposes underlying these various forms of abstention will be more closely examined in the body of this comment, it may be noted here that a unifying thread of

7. *Id.*

8. Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74 n.18 (1984).

9. 28 U.S.C. § 2283 (1982) (prohibiting a federal court from granting an injunction to stay proceedings in a state court "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments").

10. 28 U.S.C. § 1341 (1982) (limiting federal district court jurisdiction to enjoin the assessment, levy, or collection of any tax under state law).

11. 28 U.S.C. § 1342 (1982) (limiting federal district court jurisdiction to enjoin state public utility rate orders).

12. 28 U.S.C. § 2284 (1982) (requiring that a district court panel of three judges be convened to hear actions seeking injunctive relief against allegedly unconstitutional state statutes or administrative orders). A 1913 provision, directing a three-judge federal district court panel to suspend its proceedings whenever a state court stayed proceedings pending state court determination of an action to enforce a statute or order, proved largely ineffectual and was repealed in 1976. See Joseph C. Hutcheson, Jr., Note, *A Case for Three Judges*, 47 HARV. L. REV. 795, 813-25 (1934); Welch Pogue, Note, *State Determination of State Law and the Judicial Code*, 41 HARV. L. REV. 623 (1928).

13. 28 U.S.C. § 2254(b) (1982).

14. Other exceptions to the proper exercise of federal jurisdiction, such as the doctrine of *forum non conveniens*, will not be addressed in this comment.

15. See 17A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 4241 (1986).

deference by the federal courts to litigation in the state courts connects them all.

After presenting an overview of abstention doctrines in the federal courts, this comment will turn to the Proposal and examine its impact, when considered as a whole, on existing abstention doctrines and the underlying principles of federalism. The Proposal provides for the consolidation in one transferee court of cases previously pending in federal or state courts whenever "they involve one or more common questions of fact" and when "transfer and consolidation will promote the just, efficient, and fair conduct of the actions."<sup>16</sup> In so providing, the Proposal professes to respect the "overriding concern" of the "basic principles of federalism and their implications as to the respective roles of state and federal courts."<sup>17</sup> Additionally, the Proposal grants the federal transferee court the power to issue antisuit injunctions enjoining "transactionally related proceedings, or portions thereof, pending in any state or federal court."<sup>18</sup> When deciding "whether an injunction should issue,"<sup>19</sup> the comment to the Proposal encourages the transferee judge to "respect traditional notions of federalism, especially as reflected in the various abstention doctrines."<sup>20</sup>

This comment concludes that the Proposal, although superficially recognizing the importance of federalism concerns underlying the abstention doctrines, actually undermines these concerns through its emphasis on efficiency.

## II. THE ABSTENTION DOCTRINES

### A. *The Underlying Premises*

When seeking to establish a system of government that would allow both federal and state sovereignties to coexist, the Founding Fathers naturally encountered concerns over possible frictions between federal and state systems.<sup>21</sup> A significant area of concern was the judiciary.<sup>22</sup> As Justice Black observed

16. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 3.01(a)(1), (2).

17. *Id.* Ch. 1, b.

18. *Id.* § 5.04(a).

19. *Id.* § 5.04(b).

20. *Id.* § 5.04 cmt. d.

21. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 98 U.S. 281, 285 (1970).

22. *Id.*

in *Atlantic Coast Line*, the Founders addressed those concerns by reserving significant powers to the States:

When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. But those powers that were not surrendered were retained by the States and unless a State was restrained by "the supreme Law of the Land" as expressed in the Constitution, laws, or treaties of the United States, it was free to exercise those retained powers as it saw fit. One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies.<sup>23</sup>

The federal government ensured the maintenance of state judicial systems as well as respect for such state systems through the Judiciary Act of 1789.<sup>24</sup> This Act prevented the lower federal courts from directly reviewing cases from state courts and authorized the Supreme Court to review the decisions of state courts on direct appeal. The beginnings of two essentially separate legal systems thus had their genesis early in this country's history. However, these two systems did not exist without difficulty and friction. As litigants sought to sue in the system that most likely would be favorable to their cause, it became evident that the judiciary would function neither efficiently nor effectively if the courts of both systems "were free to fight each other for control of a particular case. Thus, in order to make the dual system work and 'to prevent needless friction between state and federal courts,' . . . it was necessary to work out lines of demarcation between the two systems."<sup>25</sup>

Several of these "lines of demarcation" were enumerated in the 1789 Act.<sup>26</sup> Other lines were drawn through subsequent legislation. There are three principal statutorily-dictated limits which prevent the state and federal judicial systems from "fighting over" control of a particular case.<sup>27</sup> These are briefly

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23. *Id.*

24. Act of Sept. 24, 1789, 1 Stat. 73.

25. *Atlantic Coast Line*, 398 U.S. at 286 (quoting *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940)).

26. *See, e.g.*, Act of Sept. 24, 1789, §§ 9, 11, 13, 1 Stat. 73.

27. The statutory branch of the habeas corpus exhaustion requirement, 28 U.S.C. § 2254(b) (1982), and the Three-Judge Court Act, 28 U.S.C. § 2284 (1982), will be omitted from this discussion as their relation to the instant topic is tangential at best.

treated here to provide a foundation for analysis of the judicially created lines of demarcation.

### 1. *The Anti-Injunction Act*

The Anti-Injunction Act prohibits a federal court from granting "an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."<sup>28</sup> Commentators have argued that the true intent of this Act, originally passed in 1793 and broadly revised in 1948, was to authorize sound judicial discretion in protecting the federal courts and the exercise of their subject matter jurisdiction.<sup>29</sup> However, the exceptions within the Anti-Injunction Act have been construed narrowly by the Supreme Court.<sup>30</sup>

The Anti-Injunction Act was passed and revised on the assumption that duplicative federal and state proceedings are permissible.<sup>31</sup> "Staying proceedings," for the purposes of this Act, includes enforcing state judgments and enjoining litigants from proceeding in state court.<sup>32</sup> Enjoining litigants from beginning state proceedings is not covered by the Act since no state "proceedings" then exist.<sup>33</sup>

28. 28 U.S.C. § 2283 (1982).

29. William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330 (1978); see also Comment, *Federal Court Stays of State Court Proceedings: A Reexamination of Original Congressional Intent*, 38 U. CHI. L. REV. 612, 613 (1971) ("Congress in 1793 did not intend to prevent stays effected by writs other than injunction, and that Congress specifically approved the use of the [common-law] writ of certiorari to stay state proceedings."). This view of the Anti-Injunction Act seems to support the "implied delegation rationale" justifying the judicially-created abstention doctrines. See *infra* part II.B.5.

30. See generally *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 148 (1987) (urging a strict and narrow interpretation); *South Carolina v. Regan*, 465 U.S. 367, 377 n.14 (1984); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970) (holding ban of injunctions is absolute unless the case falls within one of the three express exceptions); *Alton Box Bd. Co. v. Esprit De Corp.*, 682 F.2d 1267, 1272 (9th Cir. 1988); Comment, *Texaco Inc. v. Pennzoil: Some Thoughts on the Limits of Federal Court Power Over State Court Proceedings*, 54 FORDHAM L. REV. 767, 796 (1986) (noting that the *Younger* court "overturned the federally issued injunction . . . without reaching the question of whether § 1983 was an expressly authorized exception to the Anti-Injunction Act").

31. *Stanton v. Embrey*, 93 U.S. 548, 554 (1877); see also *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922) (holding that "[e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court").

32. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 555 (1972).

33. *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *Ex parte Young*, 209 U.S. 123 (1908); *Roth v. Bank of the Commonwealth*, 583 F.2d 527 (6th Cir. 1978).

To fall within the Act's "expressly authorized" exception, an act of Congress either must explicitly authorize such an exception or create a federal right or remedy which cannot be enjoyed fully or protected completely without a stay of a state court proceeding.<sup>34</sup> Federal civil rights cases, for example, meet the standard of the "expressly authorized exception"; similarly, 42 U.S.C. § 1983 has been held to expressly authorize an injunction of state proceedings.<sup>35</sup> Thus the whole range of state criminal proceedings is, in theory, subject to a potential federal injunction, which in turn has led to the tendency to narrowly construe the various abstention doctrines in order to permit the state courts to proceed.

The "protect or effectuate its judgments," or relitigation, exception authorizes a federal court which has already entered a binding judgment on an issue to enjoin state proceedings seeking an inconsistent result.<sup>36</sup> Entitlement to an injunction under this exception turns on the preclusive effect of the federal decree.<sup>37</sup> Issue preclusion triggers the relitigation exception. However, despite language in *Chick Kam Choo v. Exxon Corp.*<sup>38</sup> urging a "strict and narrow" interpretation applicable only to "claims or issues which . . . actually have been decided by the federal court,"<sup>39</sup> there is a split of authority among the

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*cert. dismissed*, 442 U.S. 925 (1979); *McSurely v. Ratliff*, 282 F. Supp. 848, 853 (E.D. Ky. 1967), *appeal dismissed*, 390 U.S. 412 (1968); *cf. Hicks v. Miranda*, 422 U.S. 332, 347-48 (1975) (holding that where criminal defendants had been charged and contraband "had been declared to be obscene and seizable by the Superior Court," a federal order returning contraband seized in preparation for state criminal prosecution "interfered with the pending criminal prosecution," which was considered "pending" despite the fact that "no state criminal proceedings [had been brought] against appellees by name"); *Brooks v. Briley*, 274 F. Supp. 538, 553 (M.D. Tenn. 1967), *aff'd*, 391 U.S. 361 (1968) (holding that arrest and issue of a warrant constitute "proceedings" and thus could be enjoined).

34. *Mitchum v. Foster*, 407 U.S. 225, 236 (1972).

35. *Id.*

36. *United States v. International Bd. of Teamsters*, 907 F.2d 277, 280-81 (2d Cir. 1990) (affirming injunction barring collateral lawsuits by non-parties to consent decree in any other forum where such actions posed significant risk of subjecting consent decree to inconsistent interpretations); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974) (noting the possibility of conflicting orders from state and federal courts sufficient to warrant injunctive relief against state court under Anti-Injunction Act).

37. *Huguley v. General Motors Corp.*, 52 F.3d 1364, 1370 (6th Cir. 1995) (examining whether state claims fall within preclusive effect of prior federal judgment).

38. 486 U.S. 140 (1988).

39. *Id.* at 148.



circuits as to whether claim preclusion also triggers the relitigation exception.<sup>40</sup>

The "necessary in aid of jurisdiction" exception applies when "some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."<sup>41</sup> There are several cases applying this exception to prevent interference with the settlement of complex litigation.<sup>42</sup>

## 2. *The Johnson Act*

The Johnson Act of 1934<sup>43</sup> prohibits federal district courts from enjoining state public utility rate orders if all four of the following criteria are satisfied:

- (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
- (2) The order does not interfere with interstate commerce; and
- (3) The order has been made after reasonable notice and hearing; and,
- (4) A plain, speedy and efficient remedy may be had in the courts of such State.<sup>44</sup>

## 3. *The Tax Injunction Act*

Congress limited federal district court jurisdiction over a second major subject matter through the Tax Injunction Act of 1937.<sup>45</sup> This legislation was enacted, as was the Johnson Act, in response to what was viewed as an unwarranted expansion of federal jurisdiction in the aftermath of *Ex Parte Young*.<sup>46</sup> This Act restricts federal district court jurisdiction to enjoin

40. See *Western Sys., Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992) (discussing the differences between the circuits).

41. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970).

42. See *Carlough v. AMCHEM Prods., Inc.*, 10 F.3d 189, 204 (3d Cir. 1993) (finding injunction appropriate where prospect of settlement was imminent in asbestos class action); *Lou v. Belzberg*, 834 F.2d 730, 740 (9th Cir. 1987) (recognizing propriety of injunction "where the state proceedings would impair seriously pending settlements").

43. 28 U.S.C. § 1342 (1982).

44. *Id.*

45. 28 U.S.C. § 1341 (1982).

46. HART & WECHSLER, *supra* note 5, at 1339.

“the assessment, levy or collection of any tax under State law” if “a plain, speedy and efficient remedy may be had in the courts of such State.”<sup>47</sup> The key element prohibiting an injunction under the Johnson Act and the Tax-Injunction Act is the availability of a plain, efficient, and speedy remedy in the state courts.<sup>48</sup> The Supreme Court has stated that the exceptions under the Tax Injunction Act “must [be] construed narrowly” and the Court will often bend over backwards to find state remedies adequate.<sup>49</sup>

*B. The Judicial Abstention Doctrines and  
Their Underlying Policies*

*1. Pullman abstention*

The first of the judicially-created abstention doctrines was crafted by the Supreme Court in the *Pullman* case.<sup>50</sup> The complaint of the African-American Pullman porters alleged that an order from the Texas Railroad Commission requiring conductors (who were white) to be in charge of sleeping cars discriminated against African-Americans in violation of the Fourteenth Amendment.<sup>51</sup> The Supreme Court required the lower federal court to abstain from deciding the case until a state court settled uncertain state law issues.<sup>52</sup> The basis for the decision was the policy of avoidance of unnecessary decisions of constitutional questions.<sup>53</sup> Justice Frankfurter added that the “exercise of wise discretion” justified a restraint of authority “because of ‘scrupulous regard for the rightful independence of the state governments’ and for the smooth working of the federal judiciary,” and because

[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. . . . This use of equitable powers is a contribution of the courts in furthering the harmonious relation

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47. *Id.*

48. *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

49. *California v. Grace Brethren Church*, 457 U.S. 393, 413 (1982); see *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981) (finding a state remedy adequate when plaintiff alleged property assessment at more than 300% the statutory limit and despite a usual two-year delay in tax refund actions).

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

51. *Id.* at 497.

52. *Id.* at 500.

53. *Id.* at 498.

between state and federal authority without the need of rigorous congressional restriction of those powers.<sup>54</sup>

While these federalism concerns were only briefly mentioned in *Pullman*, the Supreme Court expounded upon them in *Louisiana Power & Light Co. v. City of Thibodaux*.<sup>55</sup> The Court "made explicit what was only suggested in *Pullman*, namely, that the one type of federal-state friction abstention seeks to avoid results from *erroneous* state law decisions by federal courts. Apparently, because state and federal litigants receive disparate treatment, such error creates friction by preventing uniform application of state law."<sup>56</sup>

Thus was born the rule of *Pullman* abstention: when there is a federal constitutional issue whose presentation might be avoided or significantly altered<sup>57</sup> by resolution of an uncertain state law question,<sup>58</sup> the federal court should abstain.<sup>59</sup>

## 2. Burford abstention

Another form of abstention—*Burford* abstention—arose to address considerations of comity when issues of state law ap-

54. *Id.* at 500-01 (citations omitted).

55. 360 U.S. 25 (1959).

56. James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1081 (1994) (citations omitted).

57. Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 401 (N.D.N.Y. 1987) ("[T]he state law must be susceptible of an interpretation that . . . would materially alter the nature of the constitutional questions raised.").

58. Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971) (holding that the state statute must contain ambiguity).

59. Houston v. Hill, 482 U.S. 451, 468 (1987); Harman v. Forssenies, 380 U.S. 528, 534-35 (1965). Subsequent cases also require an examination of other factors, such as whether injunctive relief is sought against state officials based on state law, see Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106 (1984), whether an adequate state remedy is available to the plaintiff, see Dombrowski v. Pfister, 380 U.S. 479, 484-86 (1965), and whether a single state proceeding is likely to resolve the dispute, see Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964); see also Virginia v. American Booksellers Ass'n, 484 U.S. 383, 395 (1988) (stating that if "the state will decline to defend a statute if it is read one way and where the nature and substance of plaintiffs' constitutional challenge is drastically altered if the statute is read another way, it is essential [to have] the benefit of the law's authoritative construction from the" state court); City of Houston v. Hill, 482 U.S. 451 (1987), appeal dismissed, cert. denied, 483 U.S. 1001 (1987) (holding that abstention was not appropriate in a civil rights case where the need for immediate federal intervention existed). But see Georgevich v. Strauss, 772 F.2d 1078, 1094 (3d Cir. 1985), cert. denied, 475 U.S. 1028 (1988) (holding that if full and effective relief can be granted by the state court, the "possibility of delay alone" does not prohibit abstention).

pear to be peculiar and unique, such as with natural resources, and when the state has created administrative schemes to deal with such issues.<sup>60</sup> *Burford* was an action seeking a federal injunction against a Texas Railroad Commission order which granted a neighboring leaseholder a permit to drill new wells.<sup>61</sup> *Burford* invoked both federal question and diversity jurisdiction.<sup>62</sup> Texas had provided that all cases involving drilling rights were to be handled by one state court in order to prevent inconsistencies and confusion.<sup>63</sup> The Supreme Court held that the action should have been dismissed because of the presence of unique state interests in gas and oil, as well as a scheme of public administration equipped with a unified system of review to ensure consistent interpretation and implementation of state policy.<sup>64</sup>

*Burford* abstention in a diversity case involving uncertain state law and important state interests and policies is generally inappropriate unless the interests are peculiar and unique, such as eminent domain or water rights.<sup>65</sup> *New Orleans Public Service Inc. v. Council of City of New Orleans*<sup>66</sup> (*NOPSI*) served to clarify this by holding that the focus in applying *Burford* abstention was to be on federalism concerns and that abstention should be ordered only when significant questions of local law or policy transcending the case at bar are implicated.<sup>67</sup>

This federalism focus is clear from the majority's opinion in *NOPSI*, which explained that the case was properly dismissed by the lower court because the dispute "so clearly involve[d] basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to

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60. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

61. *Id.* at 316-17.

62. *Id.* at 317.

63. *Id.* at 326.

64. *Id.* at 333.

65. See *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). *But cf.* *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959) (stating that a federal court must exercise diversity jurisdiction if properly invoked in a state eminent domain case). See generally *Meredith v. Winter Haven*, 320 U.S. 228, 236-38 (1943) (reviewing numerous applications of abstention when federal law turns on interpretation of local law).

66. 491 U.S. 350 (1989).

67. *Id.* at 361-64; see also *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 814-15 (1976) (discussing the requirement that there be significant questions of local law or policy for *Burford* abstention to be appropriate).

consider them."<sup>68</sup> The exercise of equitable discretion would prevent federal-state "friction," especially, emphasized Justice Douglas in concurrence, friction "generated by the federal court's continuous and hovering presence as an additional *policymaking* player in the Texas regulatory regime."<sup>69</sup> Justice Douglas noted that the Texas courts

may at times be the senior and dominant member of [the federal/state court] partnership if they perform the functions which Texas law places on them. The courts do not sit merely to enforce rights based on orders of the state administrative agency. They sit in judgment on that agency. That, to me, is the crux of the matter. If the federal courts undertook to sit in review, so to speak, of this state administrative agency, they would in effect actively participate in the fashioning of the state's domestic policy. That interference would be a continuing one, as the opinion of the Court points out. Moreover, divided authority would result. Divided authority breeds friction. . . .<sup>70</sup>

As Douglas's statements indicate, the federalism concerns in *Burford* were an overriding factor in the *NOPSI* decision.

Interestingly, a recent case demonstrates the continued vigor, or at least the minor renaissance,<sup>71</sup> of *Burford* abstention. In 1990, the Supreme Court held in *Tafflin v. Levitt*<sup>72</sup> that since Congress was not unmistakably clear in subverting the heavy presumption of dual court sovereignty, the state courts have not been divested of their jurisdiction over civil RICO claims.<sup>73</sup> This characterization caused the Court to conclude that the federal courts are not required to hear these cases but may invoke *Burford* abstention in appropriate cases.<sup>74</sup>

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68. *Burford*, 319 U.S. at 332.

69. *Id.* at 335 (Douglas, J., concurring).

70. *Id.*

71. The Hart and Wechsler text points out that the "Supreme Court has not invoked *Burford* abstention since" *Alabama Public Service Commission v. Southern Railroad*, 341 U.S. 341 (1951). HART & WESCHLER, *supra* note 5, at 1364.

72. 493 U.S. 455 (1990).

73. *Id.* at 459.

74. *Id.* at 458; *see also* *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986); *Roy v. Verchereau*, 619 F. Supp. 1323 (D. Vt. 1985) (stating that labor disputes are an excellent example of local problems in which federal intervention is inappropriate).

### 3. Younger abstention

It will be recalled that under the Anti-Injunction Act<sup>75</sup> a federal court may enjoin a state court proceeding when, inter alia, Congress expressly permits an injunction. Additionally, *Mitchum v. Foster*<sup>76</sup> held that Congress intended § 1983 actions to be exceptions to the Anti-Injunction Act, thus granting the federal courts the constitutional and statutory power to enjoin state proceedings.<sup>77</sup> It is generally in a situation such as this, in which the plaintiff seeks to enjoin a state proceeding based on the unconstitutionality of state law, that *Younger* abstention is applied.<sup>78</sup>

In *Younger v. Harris*<sup>79</sup> the Supreme Court encountered a plaintiff charged under a California law which was alleged to be constitutionally defective.<sup>80</sup> The plaintiff sought an injunction in federal court against his criminal prosecution under this allegedly unconstitutional law.<sup>81</sup> Although the district court enjoined the state proceeding, the High Court reversed, calling the injunction "a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."<sup>82</sup>

Thus, *Younger* abstention prevents a federal court, even in an effort to protect federal constitutional rights, from enjoining a pending state criminal proceeding. However, notwithstanding *Younger*, if there is bad faith harassment,<sup>83</sup> such as repeated prosecution without any valid ground, or if a proceeding or statute is flagrantly and patently violative of express constitutional prohibitions,<sup>84</sup> or if there are other extraordinary circumstances,<sup>85</sup> an injunction may issue.

75. 28 U.S.C. § 2283 (1982); see also discussion *supra* part II.A.1.

76. 407 U.S. 225 (1972).

77. *Id.* at 236.

78. See *Wooley v. Maynard*, 430 U.S. 705, 711 (1977); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 95 (1935).

79. 401 U.S. 37 (1971).

80. *Id.* at 38-39.

81. *Id.*

82. *Id.* at 41.

83. See *Hicks v. Miranda*, 422 U.S. 332, 350-51 (1975); *Cameron v. Johnson*, 390 U.S. 611, 612 (1968); *Dombrowski v. Pfister*, 380 U.S. 479, 487-89 (1965).

84. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Watson v. Buck*, 313 U.S. 387, 402 (1941); *Younger v. Harris*, 401 U.S. 37, 53-54 (1971). But see *Trainor v. Hernandez*, 431 U.S. 434, 446-47 (1977).

85. See *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that being held in jail pending trial without judicial determination of probable cause constituted an ex-

While *Younger* has its primary application in criminal cases, the Supreme Court has subsequently expanded the application of *Younger*'s restriction against enjoining pending state proceedings to civil actions and administrative proceedings involving important state interests.<sup>86</sup>

*Younger* abstention highlights the traditional notions of equity, which required the court to refrain from acting if there existed an adequate remedy of law and if the petitioning party was not threatened with irreparable injury.<sup>87</sup> The *Younger* doctrine also "serves to prevent a multiplicity of suits where a single action will adequately protect the rights asserted."<sup>88</sup> Possibly most importantly, this judicially-created deferral prevents federal muddling in state proceedings, thus serving the "vital" interests of comity and "Our Federalism."<sup>89</sup>

In *Younger*, the Court highlights these two deciding factors—comity and federalism. The Court defines "Our Federalism" in the following manner:

[a] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism" . . . .<sup>90</sup>

The Court proceeds to explain that this concept of "Our Federalism" represents

a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always

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traordinary circumstance); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (finding pecuniary interest of members of Alabama Board of Optometry to be a special circumstance permitting an injunction against the proceeding before the Board).

86. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12-14 (1987); *Juidice v. Vail*, 430 U.S. 327, 335-36 (1977).

87. *Younger*, 401 U.S. at 43-44.

88. Georgene M. Vairo, *Interrelationship of Federal and State Litigation*, C842 ALI-ABA 1167, 1174 (1993).

89. *Id.*

90. *Younger*, 401 U.S. at 44.

endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.<sup>91</sup>

The principles of comity and "Our Federalism" obviously dominate the *Younger* decision.

#### 4. Colorado River abstention

In contrast to the federalism-promoting doctrine of equitable restraint underlying *Younger* and *Burford* abstention, and the policy of avoiding constitutional adjudication supporting *Pullman*, the foundation of *Colorado River*<sup>92</sup> abstention is sound judicial administration.<sup>93</sup> *Colorado River Water Conservation District v. United States* involved a dispute over water rights.<sup>94</sup> The United States brought the action in federal court but was a defendant in a parallel state action over the same rights.<sup>95</sup> The Supreme Court held that "dismissal cannot be supported under [the] doctrine [of abstention] in any of its forms" simply because there is a related and parallel action pending in state court.<sup>96</sup> In ordering abstention, the Court created an abstention doctrine to be used under exceptional circumstances in the interest of "[w]ise judicial administration."<sup>97</sup> The Court enumerated the following factors to be considered when deciding whether an exceptional circumstance exists:<sup>98</sup>

- 1) the first court to assume jurisdiction;
- 2) the relative conveniences of the forums;
- 3) whether there is a high desirability of avoiding piecemeal litigation;
- 4) the manner in which jurisdiction was obtained;

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91. *Id.*

92. *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976).

93. *Id.* at 817.

94. *Id.* at 804.

95. *Id.* at 806.

96. *Id.* at 813; see also *Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922) ("Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court."); *Stanton v. Embrey*, 93 U.S. 548, 554 (1877) ("[P]endency of a prior suit is not a bar to a subsequent suit in a circuit court or in the court below, even though the two suits are for the same cause of action.").

97. *Colorado River*, 424 U.S. at 817 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

98. *Id.* at 818-19 ("No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required.").



- 5) the adequacy of the remedies in the respective courts;<sup>99</sup>
- 6) whether federal law governs the action.<sup>100</sup>

Despite the exacting examination of these factors and the narrow construction of *Colorado River* by the Supreme Court,<sup>101</sup> the circuit and district courts have found numerous "exceptional circumstances."<sup>102</sup>

##### 5. *Propriety of the abstention doctrines*

Scholars have argued that the judicially created abstention doctrines are appropriate limitations on the express grants of federal jurisdiction on the basis of the history leading to the passage of such federal jurisdictional statutes.<sup>103</sup> The brief analysis of jurisdiction-limiting statutes above<sup>104</sup> demonstrates Congress' intent to recognize the background of judicial abstention when enacting statutes for federal deferral to state proceedings through restrictions on the exercise of federal jurisdiction. As one commentator argues, the judicially created abstention doctrines are allowed, despite express grants of jurisdiction from Congress, because

these statutes were themselves passed against the background of a large body of standing law on matters of substance, remedy, and jurisdiction. . . . The fact that a given remedial doctrine is not explicitly mentioned therefore does not automatically mean that the new statute was intended wholly to supersede it.<sup>105</sup>

Therefore, when Congress enacted the federal jurisdictional statutes,<sup>106</sup> it did so "against a well"<sup>107</sup> of the courts' equitable discretion to decline jurisdiction when certain compelling

99. *Id.*

100. This sixth factor is clearly added by *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1, 24 (1983). There have been additional factors suggested by various commentators, yet the above six are those clearly used by the Court. See HART & WESCHLER, *supra* note 5, at 1451-52.

101. See *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 236 (1984); *Moses H. Cone*, 460 U.S. at 2; *Colorado River*, 424 U.S. at 813.

102. For an extensive sampling, see cases cited in Vairo, *supra* note 88, at 1179.

103. See Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

104. See discussion *supra* part II.A.1-3.

105. See Bator, *supra* note 103, at 622 n.49.

106. See discussion *supra* part II.A.1-3.

107. To quote a colloquial phrase of Professor C. Douglas Floyd.

reasons for doing so were present. Congress understood that a grant of jurisdiction was not a mandate but rather an authorization to hear cases that would not upset the delicate balance of power within the dual-court system.

Although subject to debate,<sup>108</sup> commentators have argued that the judicially created abstention doctrines are proper exercises of judicial power since the abstention doctrines are in harmony with legislatively created abstentions. This conclusion accords with Professor Bator's view. Although disagreeing with this line of thinking, Professor Redish describes this view, which he terms the "implied delegation rationale," in the following manner:

One might argue that federal court jurisdiction . . . contains an implied authority to modify or limit the exercise of that jurisdiction in order to avoid friction within the federal system. Congress cannot foresee all conceivable federalism tensions that might arise in specific exercises of federal jurisdiction, the argument would proceed, and therefore it is reasonable to assume that Congress would allow the federal courts to modify or limit their jurisdiction when they find such dangers. It is indeed not uncommon for Congress to provide broad delegations of authority to the federal judiciary to make law. In *Textile Workers Union v. Lincoln Mills*, for example, the Supreme Court held that what seemed to be merely a broad jurisdictional statute vested in the federal courts the power to develop—wholly without congressional guidance—a substantive federal common law of labor relations. Similarly, the broad language of section 1 of the Sherman Act has been construed as an effective delegation of legislative authority to the judiciary to develop a common law of restraint of trade. Moreover, the implied delegation argument asserts, if Congress were unhappy with any existing form of partial abstention, it would legislatively revoke it. The failure to do so, combined with reenactment of the relevant substantive and jurisdictional legislation, the argument posits, reveals an implicit congressional acceptance and ratification of such judge-made limitations.<sup>109</sup>

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108. Compare Bator, *supra* note 103 and David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) and Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985) with Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) and Redish, *supra* note 8.

109. Redish, *supra* note 8, at 80-81. Professor Redish refers to "partial abstention" as that "abstention [which] leaves intact a portion of the jurisdictional grant"

Some commentators have argued that allowing the judiciary to form such buffers between the federal and state systems is wise. As Shapiro points out, there are compelling justifications not only for the existence of the abstention doctrines, but also for allowing the judiciary to create and enforce them:

[S]uggestions of an overriding obligation [to exercise jurisdiction], subject only and at most to a few narrowly drawn exceptions, are far too grudging in their recognition of judicial discretion in matters of jurisdiction. . . . [T]he existence of this discretion is much more pervasive than is generally realized, and . . . it has ancient and honorable roots at common law as well as in equity.

. . . . My point is not that the Constitution expressly "provides" that a grant of jurisdiction carries with it certain discretion not to proceed, or that Congress necessarily "intends" to confer such discretion when it authorizes the exercise of jurisdiction. Rather I submit that, as experience and tradition teach, the question whether a court must exercise jurisdiction and resolve a controversy on its merits is difficult, if not impossible, to answer in gross. And *the courts are functionally better adapted to engage in the necessary fine tuning than is the legislature.*

. . . . A grant of jurisdiction obligates the court to receive and consider the plaintiff's complaint and, on appropriate occasions, to determine whether the ends of justice will be served best by declining to proceed.

At the same time, nothing in our history or traditions permits a court to interpret a normal grant of jurisdiction as conferring unbridled authority to hear cases simply at its pleasure. . . . [W]hen jurisdiction is conferred, I believe there is at least a "principle of preference" that a court should entertain and resolve on its merits an action within the scope of the jurisdictional grant. For this preference to yield in a particular case, the court must provide an explanation based on

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in contrast to "total abstention" which "effectively repeal[s] the statutory structure." *Id.* at 77, 74. He posits other justifications for partial abstention which are essentially variations on this implied delegation rationale. While admitting that this rationale is "conceivable," he rejects it and its corollaries as being "neither theoretically legitimate nor practically realistic" as well as violative of separation-of-powers ideals. *Id.* at 78-104; *see also* *Zwickler v. Koota*, 389 U.S. 241, 248 (1967) (stating that when Congress granted statutory jurisdiction it also "imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum"); Merrill, *supra* note 108.

the language of the grant, the historical context in which the grant was made, or the common law tradition behind it.<sup>110</sup>

Despite deficiencies in the reasons and justifications for the abstention doctrines, they have been accepted by the Supreme Court, at least tacitly accepted by Congress, and appear to be here to stay. The policies of promoting comity and federalism while avoiding friction between the federal and state judicial systems have carried the day.

### III. THE COMPLEX LITIGATION PROPOSAL

The culmination of nearly a decade of work,<sup>111</sup> adoption by the American Law Institute of the Complex Litigation Recommendations<sup>112</sup> marks a vast effort to curb the unwieldiness of complex litigation. The Proposal "establishes new mechanisms and standards for the intra-federal, state-to-federal, federal-to-state, and state-to-state transfer and consolidation of related, yet geographically dispersed, actions, and provides a set of choice-of-law rules for actions that are transferred to a federal court."<sup>113</sup>

Several areas of the Proposal may have an impact on the abstention doctrines as discussed above. The focus of this comment is on the powers in the Proposal that are associated with state-to-federal transfers and consolidations. The primary powers which will impact the abstention doctrines are those relating to removal and antisuit injunctions. The anticipated impact rests largely on the fact that most of the cases removed, transferred, or enjoined will be nondiverse, state law actions.

#### A. *Removal Jurisdiction*

To ensure the just and efficient resolution of complex cases, the Proposal proposes transfer and consolidation of actions involving "one or more common questions of fact."<sup>114</sup> The

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110. Shapiro, *supra* note 81, at 543-45, 574-75 (emphasis added).

111. Professor Arthur R. Miller conducted a Preliminary Study on Complex Litigation in 1985, which effectively began this work, although the Reporters and the Advisory Committee were not appointed until 1988 and although the First Tentative Draft was not presented for discussion until May of 1989. See Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 843 (1994).

112. COMPLEX LITIGATION PROPOSAL, *supra* note 2.

113. Symeonides, *supra* note 111, at 844.

114. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 3.01(a)(1).

Proposal contemplates that the authority to require consolidation will be granted by Congress to a Complex Litigation Panel through the proposed Complex Litigation Statute. In order to "foster consolidation and more efficient and fair treatment of related claims,"<sup>115</sup> the Complex Litigation Panel "may order the removal to federal court and consolidation of one or more civil actions pending in one or more state courts."<sup>116</sup> Before such removal may occur, however, the Panel

shall evaluate . . . (1) the criteria set forth in § 3.01 to determine whether the transfer and consolidation of the cases is warranted and (2) . . . whether removal will unduly disrupt or impinge upon state court or regulatory proceedings or impose an undue burden on the federal courts. When making its determination under subsections (a)(1) and (a)(2), the Complex Litigation Panel should consider factors such as

- a. the amount in controversy for the claims to be removed;
- b. the number and size of the actions involved;
- c. the number of jurisdictions in which the state cases are lodged;
- d. any special reasons to avoid inconsistency;
- e. the presence of any special local community or state regulatory interests;
- f. whether removal and consolidation will result in a change in the applicable law that will cause undue unfairness to the parties; and
- g. the possibility of facilitating informal cooperation or coordination with the state courts in which the cases are lodged.<sup>117</sup>

In order to prevent removal of the action, all of the parties as well as the state judge must agree that removal is improper.<sup>118</sup>

The federalism concerns espoused by the abstention doctrines are implicated, as well as threatened, by this removal provision. The threat posed by the removal statute looms beyond the protective reach of the abstention doctrines in an area where federal courts presently lack jurisdiction. Not unwisely, the Proposal addresses these federalism concerns squarely. The Proposal states that due to the "important federalism issues"

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115. *Id.* § 5.01 cmt. a.

116. *Id.* § 5.01(a).

117. *Id.*

118. *Id.* § 5.01(b).

raised by section 5.01, "the Panel must be especially sensitive to federalism concerns suggesting that removal would not be desirable. Removal may intrude inappropriately on the substantive interests of the state from which the cases are removed. The states always must be respected as politically separate and independent sovereigns."<sup>119</sup> Particularly in the face of the expanding federal jurisdiction proposed by the Proposal, these words must be heeded if the delicate state-federal balance is to be maintained.

While not explicitly stating so, the Proposal's comments espouse the concerns expressed in *Burford*. The Proposal urges that

traditional federal respect for state sovereignty argues strongly for state control over cases arising under state law and respecting local citizens. . . . Similarly, if the activities or conduct involved fall within specific state regulatory interests . . . the desire to defer to the state and allow it to complete its proceedings without federal court interference may caution strongly against removal.<sup>120</sup>

By urging such respect, the Proposal appears to give de facto support to an "abstention" based on the *Burford* rationale: important state interests and policies should be left to the states when a state regulatory scheme is in place to review controversies involving such interests. In fact, the Proposal's endorsement of *Burford* abstention appears clear from the language of section 5.01(a)(2), which requires the Panel to evaluate "whether removal will unduly disrupt or impinge upon state court or regulatory proceedings."<sup>121</sup>

The Proposal also attempts to force state court filings when the majority of the related actions have been filed in parallel state proceedings.<sup>122</sup> This is to be accomplished by a stay of the federal court proceedings until the completion of the state court proceedings.<sup>123</sup> The stay naturally "will have the effect of coercing the federal parties to file in state court."<sup>124</sup> Thus, federalism concerns may be further alleviated.

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119. *Id.* § 5.01 cmt. c.

120. *Id.*

121. *Id.* § 5.01(a)(2).

122. *Id.* § 5.01 cmt. c.

123. *Id.*

124. *Id.*

### B. Reverse Removal

Mention must be made of an entirely new procedure partly designed to avoid the threats to federalism generated "[w]hen substantive state interests are at issue" and "all the actions regardless of where they were filed [are forced] into a consolidated federal court action."<sup>125</sup> The procedure contemplates a federal-to-state transfer mechanism through the enactment of a federal statute and state-to-state transfer through an interstate compact or uniform act.<sup>126</sup>

This reverse removal will occur only under very limited circumstances and only after the requirements for federal transfer are satisfied as a threshold matter.<sup>127</sup> Many federalism concerns raised by these state transfer mechanisms, including concerns about federal imposition on state judicial independence and overburdening of state dockets, may be alleviated by the fact that the consent of the appropriate state judicial authority must be obtained prior to consolidation.<sup>128</sup>

The state transfer section of the Proposal will provide an opportunity for actions with overwhelming state issues, interests, and litigants to have their day in state court. Because the factors allowing for state court consolidation are so demanding, however, consolidation in a state court will occur in only a small number of cases, cases in which state issues predominate. Thus, federalism interests will be protected by the state transfer section only in relatively few cases. Also, however apparent the appeasement of federalism policies may appear in the state transfer provision, the provision's overriding aim "is to increase the ability to promote efficient aggregated proceedings."<sup>129</sup>

The demanding nature of the factors in the state transfer section are too high to permit the substantive and quantitative results necessary to protect the principles of federalism. As the principles of federalism underlying the abstention doctrines are eroded by the Proposal, even in a piecemeal fashion, the threat to the abstention doctrines increases.

125. *Id.* Ch. 4 Intro. Note cmt. b.

126. *Id.* cmt. a.

127. *See id.* § 4.01.

128. *Id.* § 4.01(a), cmt. b.; Ch. 4 Intro. Note cmt. d.

129. *Id.* Ch. 4 Intro. Note cmt. a.

*C. Antisuit Injunctions*

Another aspect of the power to consolidate actions is the ability to enjoin related proceedings in other courts. This power is found in section 5.04, Antisuit Injunctions:

- (a) When actions are transferred and consolidated pursuant to § 3.01 or § 5.01, the transferee court may enjoin transactionally related proceedings, or portions thereof, pending in any state or federal court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just, efficient, and fair resolution of the actions before it.
- (b) Factors to be considered in deciding whether an injunction should issue under subsection (a) include
  - (1) how far the actions to be enjoined have progressed;
  - (2) the degree to which the actions to be enjoined share common questions with and are duplicative of the consolidated actions;
  - (3) the extent to which the actions to be enjoined involve issues or claims of federal law; and
  - (4) whether parties to the action to be enjoined were permitted to exclude themselves from the consolidated proceeding under § 3.05(a) or § 5.01(b).<sup>130</sup>

This injunctive power is a necessary and logical aspect of the efficiency theme permeating the Proposal. The power is a crucial component of the broad managerial powers granted to the transferee judge to further the objective of achieving a just, efficient, and fair adjudication of the dispute.<sup>131</sup> Without the power to enjoin related proceedings the transferee court would be fettered with peripheral matters hindering the advancement of the consolidated actions.

The Proposal recognizes the serious federalism concerns raised by the injunctive power.<sup>132</sup> In addressing these concerns, the Proposal initially focuses on the fact that the legislative body will confer the power to enjoin state proceedings and that the first exception of the Anti-Injunction Act allows such

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130. *Id.* § 5.04.

131. *Id.* § 3.06.

132. *Id.* § 5.04 cmt. c.



injunctions based on express congressional authorization.<sup>133</sup> Thus, the Proposal implies that the proposed federal injunctive power is consistent with, and does not upset, the current federal-state balance struck by the legislature in the Anti-Injunction Act. With the passage of the Complex Litigation Statute, the doorway will be opened for injunctions of state court proceedings because of the express exception it contains.

In apparent deference to federalism concerns, the Proposal also suggests that the injunction, if issued, "should be as narrow as possible."<sup>134</sup> The Proposal emphasizes state interests, declaring that "[b]ecause of the serious intrusion caused by an antisuit injunction both on party interests and, when state court litigation is involved, on state interests, the scope of the injunction must be limited to what is necessary to meet the standards of § 5.04(a)."<sup>135</sup> A narrow injunction, such as one focusing only on discovery, for example, may be appropriate where "[a]n injunction against all activity in the related action would not be warranted."<sup>136</sup> In narrowing the injunction in this manner, the Proposal contends that the purposes of the Proposal will be advanced without damaging federalism interests.<sup>137</sup>

In this same vein, the Proposal urges that "because an injunction sometimes will implicate sensitive issues of state sovereignty, and always will impinge on the parties' abilities to control their litigation, it should not issue unless the fullest due process safeguards have been provided."<sup>138</sup> According to the Proposal, these due process safeguards, such as "a detailed factual inquiry and a full opportunity for all affected parties to be heard,"<sup>139</sup> will ensure the recognition and consideration of federalism issues before the injunction is issued.

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133. 28 U.S.C. § 2283 (1982); see also discussion *supra* part II.A.1.

134. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 cmt. a.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

IV. THE COMPLEX LITIGATION PROJECT AND THE  
ABSTENTION DOCTRINES: A FORKED TONGUE—THE DUAL  
TREATMENT REVEALED

In harmony with their expressed concern over federalism, the Proposal mentions the importance of the abstention doctrines. The Proposal addresses the abstention doctrines with particularity in comment d of section 5.01:

The expansion of federal removal jurisdiction under § 5.01 to accommodate complex cases also is tailored to take account of general federalism concerns. Historically, as a matter of comity and federalism, federal courts have declined to exercise jurisdiction over certain cases deemed more appropriate for state court adjudication. Although the scope of abstention doctrines is uncertain, it generally reflects an exercise of judicial self-restraint motivated by a desire to avoid undue intrusion in matters properly within state competence. However, when Congress explicitly grants removal jurisdiction in order to provide an economical and fair forum for multiparty, multiforum disputes, it expresses a federal interest in these cases. To the extent that this expansion of removal jurisdiction might be viewed as undermining the states' traditional role in defining their own substantive law—particularly tort law—that prerogative is not constitutionally immune. Removal under this section fits within the scope of Article III jurisdiction and also may be justified as an exercise of Congress's Article I interstate commerce powers.<sup>140</sup>

Ultimately, especially when combined with other passages of the proposal, this paragraph sends a dual message that undermines the ideals of federalism found in the abstention doctrines.

A. *State versus Federal Interests*

The paragraph quoted above begins by stating that section 5.01 has been "tailored to take account of general federalism concerns."<sup>141</sup> This is in harmony with the lipservice of comment c and the first several paragraphs of comment d. Then a "however" creeps into the paragraph, followed by justifications that overshadow the earlier language and message. In essence,

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140. *Id.* § 5.01 cmt. d.

141. *Id.*

the Proposal contends that a matter is no longer of state interest when Congress deems the matter within its own interests. The judicially created abstention doctrines completely refute this assertion by refusing to exercise jurisdiction over matters that Congress has expressly placed within the jurisdiction of the federal courts. The Proposal strongly implies that once the Complex Litigation Statute is enacted by Congress the federalism concerns and the policies underlying the abstention doctrines fade to the background.

Further seeking to stifle federalism concerns, comment d continues by stating that such concerns "act as an important element in deciding whether a particular grouping of cases could be handled better in the federal or the state courts," but they are "not an absolute barrier."<sup>142</sup> It is doubtful that federalism concerns or the abstention doctrines would ever be viewed as an absolute barrier. However, when treated as mere factors by a proposal which also tries to emphasize their importance, federalism principles are ultimately undermined. As seen below, the placating words ring hollow when the procedures for application are proposed.

*B. Federalism on a Pedestal / Federalism in a Slough: The Dualistic Treatment of the Abstention Doctrines*

The abstention doctrines are heralded in one breath by the Proposal and then subverted in the next. The heralding of federalism principles can also be seen in the treatment of the abstention doctrines in relation to the antisuit injunctions. Subsection (b)(3) of section 5.04 deals with the federalism concerns directly, stating that the court should consider "the extent to which the actions to be enjoined involve issues or claims of federal law."<sup>143</sup>

The abstention doctrines are particularly addressed in the comment on the discretionary factors listed above under section 5.04(b)(1)-(4).<sup>144</sup> The comment to this section requires "the transferee judge to consider whether the actions to be enjoined involve issues or claims of federal law."<sup>145</sup> The comment emphasizes the importance of federalism, specifically mention-

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142. *Id.* § 5.01 cmt. d.

143. *Id.* § 5.04(b)(3).

144. *See supra* text accompanying note 130.

145. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 cmt. d.

ing the embodiment of federalism concerns in the abstention doctrines:

A transferee judge deciding to enjoin state litigation involving predominantly state issues must respect traditional notions of federalism, especially as reflected in the various abstention doctrines. *See* Comment *c*, Reporter's Note 9. Although some federal intrusion on state court proceedings may be necessary to effectuate a solution to the complex litigation problem, great care must be taken to preserve the federal-state balance of power. Before deciding to enjoin a state court proceeding, a federal transferee judge must weigh the benefits of aggregation against the potential intrusion on state sovereignty. The greater the significance of the federal claims or issues involved in the action to be enjoined, the more reasonable it will be to issue the injunction because it would not be unduly intrusive on legitimate state interests. Any intrusiveness would be on the litigation and party interests, which should not be overlooked, but are evaluated under subsections (b)(1) and (b)(4). Conversely, if a case is dominated by state-based claims or issues, enjoining their prosecution in a state court should require a strong finding that the benefits of consolidation in the transferee court would be undermined by allowing that state suit to continue unimpeded. This might be true, for example, if the court found that a particular state action essentially was parallel to one of those in the consolidated proceeding or that the plaintiffs had filed it after the Complex Litigation Panel had issued its order to transfer and consolidate in an effort to engage in a race to judgment or to avoid the governing law chosen under the applicable federal choice of law standards. *See generally* Chapter 6. In the latter event, an injunction may be necessary to ensure the consistent application of the law chosen by the transferee court.<sup>146</sup>

This aspect of the comment dealing specifically with federalism concerns appears to placate any fears one may have regarding the disregard or dismissal of such concerns. The Proposal compels the transferee judge to "respect traditional notions of federalism"; the judge "must" do so.<sup>147</sup> The Proposal demands, with particularity, that the judge examine these "traditional notions of federalism . . . as reflected in the various abstention doctrines."<sup>148</sup> The judge is told that while

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146. *Id.*

147. *Id.*

148. *Id.*

"some federal intrusion" may be required to solve the complex litigation problem, "great care must be taken" to uphold the delicate federal-state balance of power.<sup>149</sup> The scales are to weigh "the benefits of aggregation" on the one side, "potential intrusion on state sovereignty" on the other.<sup>150</sup> The transferee judge is told that in a case "dominated by state-based claims or issues, . . . a strong finding" is "require[d]" that "the benefits of consolidation in the transferee court would be undermined by allowing that state suit to continue unimpeded" before enjoining its prosecution in the state court. Taken in isolation, this paragraph of comment d would go far to alleviate the concerns over the Proposal's treatment of federalism concerns embodied in the abstention doctrines.

However, when read in conjunction with other language of the Proposal, with other treatment of the abstention doctrines, and with the dominating theme of the Proposal, an entirely different impression emerges: the "efficiency" card trumps all others, including the abstention card of the federalism suit. Under this efficiency dominated impression, the Panel and the transferee judge will play their hands.

For example, the Proposal does not pause for a moment before dismissing the federalism concerns raised by creating another exception to the general prohibition against federal injunctions of state actions.<sup>151</sup> The message to Congress, and indirectly to the Panel and transferee judge, is that "[t]he federalism concerns articulated in various abstention doctrines are *merely prudential*. They are binding on the courts by operation of stare decisis, but they do not delimit Congress's ability to regulate the federal courts."<sup>152</sup> This wording discourages the use of the abstention doctrines and is in great contrast to the mandatory-sounding language used above requiring the examination of and heed to the abstention doctrines. The Recommendations' inconsistent treatment of the abstention doctrines sends a mixed message to the transferee judge, with the ultimate effect of down-playing the importance of the abstention doctrines and federalism concerns in general. "One cannot but see such ambivalence as de-emphasizing the legitimate federalism-based role of abstention while stressing the

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149. *Id.*

150. *Id.*

151. *Id.* § 5.04.

152. *Id.* § 5.04 cmt. c (emphasis added).

virtually unchecked exercise of discretion to issue injunctive orders."<sup>153</sup>

### C. *Dismissal of Traditional State Respect*

A larger problem becomes evident from such cursory treatment of the federalism concerns embodied in the abstention doctrines: the lack of respect given by the Proposal to state sovereignty. Congress, and arguably the federal courts, have traditionally respected state sovereignty to a much greater degree than the Proposal does. The Anti-Injunction Act, the Tax Injunction Act, and the Johnson Act are examples of congressional attempts to limit federal court power and jurisdiction in order to prevent serious infringement on state sovereignty. These and other acts of Congress indicate that the abstention policies are not only a matter of judicial, but also of legislative, concern.

The legislative respect of state sovereignty has been furthered by the federal courts through narrow constructions of the exceptions to these statutes<sup>154</sup> and through the restraints found in the abstention doctrines. When congressional and judicial respect for state sovereignty are juxtaposed with the respect espoused by the Proposal, the latter pales in comparison.

By emphasizing the "merely prudential" aspect of the abstention doctrines over the federalism concerns underlying the doctrines, the Proposal seeks to justify their override of the Anti-Injunction Act.<sup>155</sup> They "press" the abstention theory into a new mold while simultaneously giving lip-service to the federalism concerns underlying the statute.<sup>156</sup> Turning abstention theory "on its head," the Proposal uses it "to serve the ends of federalized, consolidated proceedings."<sup>157</sup> Professor

153. Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 290 (1991).

154. *California v. Grace Brethren Church*, 457 U.S. 393, 413 (1982) (stating that the "exception" to the Tax Injunction Act should be narrowly construed); *Mitchum v. Foster*, 407 U.S. 225, 228-29 (1972) (holding, along with *Atlantic Coast Line*, that the Anti-Injunction Act's ban is absolute unless the case falls within one of the three express exceptions); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286-87 (1970); *Stanislaus Food Prods. Co. v. Public Util. Comm'n*, 560 F. Supp. 114 (N.D. Cal. 1982) (finding no exception to the Johnson Act for suits under 42 U.S.C. § 1983).

155. Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169, 213 (1990).

156. *Id.*

157. *Id.*

Mullenix is very critical of this twist on the abstention doctrines and their underlying policies:

Thus, the reformers use abstention theory, which has traditionally been interpreted to permit federal court abdication of jurisdiction in favor of parallel state court proceedings, to justify the denial of state court jurisdiction over complex cases. Rather than using abstention doctrine to restrict the exercise of federal jurisdiction, the reformers press abstention theory into service to expand federal jurisdiction. This is reverse mandatory abstention, and how this serves the ends of federalism and comity is unclear.<sup>158</sup>

#### D. *Efficiency Trumps Federalism*

By treating the abstention doctrines as "merely prudential" and thus moving away from federalism, the Proposal joins voices with those advocating efficiency over federalism.<sup>159</sup> Judge Weinstein's voice is heard in the injunctions preventing all federal and state litigation against two asbestos producers in *In re Joint Eastern and Southern Districts Asbestos Litigation*<sup>160</sup> and *In re Eagle-Picher Industries, Inc.*<sup>161</sup> Judge Weinstein's decision in enjoining these actions "illustrates how the interests of judicial administration can overwhelm competing policies in a balancing test."<sup>162</sup> Such an efficiency emphasis occurs throughout the Proposal and most definitely appears to weigh more heavily in the balance than do other policies and considerations.<sup>163</sup>

The efficiency trend also carries over into the choice of law provisions of the Proposal with the same effect of giving lip

158. *Id.*

159. Some have resigned themselves to this trend as a necessary evil. See Herbert P. Wilkins, *The ALI's Complex Litigation Project: A State Judge's View*, 54 LA. L. REV. 1155, 1158 (1994) (stating that "[a]s a state judge, I have no problem with the fact that the operation of the proposed system will result in cases being taken away from state court jurisdiction on a standard of freer mobility . . . . That will be the inevitable and necessary consequence of the efficient transfer and consolidation of cases by the complex litigation panel").

160. 120 B.R. 648 (E. & S.D.N.Y. 1990).

161. 134 F.R.D. 32 (E. & S.D.N.Y. 1990).

162. Brunet, *supra* note 153, at 289.

163. See *id.* at 290-97 (discussing "recent clashes between efficiency and fairness-premised policies [which] have frequently advanced efficiency while merely accommodating or clearly subordinating fairness"); see also COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.01 cmt. d (employing a circular argument justifying intrusion on parties' rights based on an earlier aspect of the Proposal).

service to state interests while in reality undermining those interests. In the introduction to chapter six, the Proposal states that there were two important considerations weighed in deciding "what choice of law system would be most compatible with the objectives" of the Proposal.<sup>164</sup> These considerations were "whether there is sufficient justification to change the current reliance on state choice of law rules, since any adoption of a federal statutory choice of law code for complex litigation necessarily will intrude on what has been an area governed by state law" and

[i]f a federal statutory approach is thought desirable, . . . whether that approach simply should authorize the federal courts to develop federal common law in the area . . . or whether more precise rules ought to be provided giving greater guidance to the judiciary concerning how to select among competing state interests in providing the controlling legal principles.<sup>165</sup>

The Proposal predictably chose to "intrude on what has been an area governed by state law" and authorize federally mandated choice of law.<sup>166</sup> One commentator feels that this is simply "another assault on state sovereignty":

State sovereignty is a fundamental element of the American constitutional system. The ability of each state to apply its own law in private litigation where it has a real interest in doing so in order to implement the policy reflected in that law is an important attribute of state sovereignty. The regard for state sovereignty, that is so fundamental in our constitutional system and that has been so long recognized by Congress, strongly argues against denying the states the power to apply their own law to advance their own policies and interests, notwithstanding that a mass tort is involved.<sup>167</sup>

After taking this first step of authorizing a federal choice of law rule, the Proposal attempts to soften the blow through "ritual incantations" to the states concerning their rights. The blow is further softened through articulated, but of little ap-

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164. COMPLEX LITIGATION PROPOSAL, *supra* note 2, Ch. 6 Intro. Note.

165. *Id.*

166. *Id.*; see *id.* §§ 6.01, 6.03.

167. Robert A. Sedler, *The Complex Litigation Project's Proposal for Federally-Mandated Choice of Law in Mass Torts Cases: Another Assault on State Sovereignty*, 54 LA. L. REV. 1085, 1110 (1994).



parent sincerity, federalism concerns which prevent the Proposal from allowing the federal courts to develop their own federal common law in the area due to "states' rights,"<sup>168</sup> federalism "concerns"<sup>169</sup> and "restraints,"<sup>170</sup> "state interests,"<sup>171</sup> and the existence of a "vigorous body of state law."<sup>172</sup> While the Proposal dismisses the choice of law rules established by the states, they at least permit the application of state substantive law.<sup>173</sup> This may be the only "real" triumph for federalism. Once again, conflicting signals are expressed as lip-service is given to federalism while state choice of law rules are thrown out the window. The ultimate result is undermining federalism and, necessarily, the policies underlying the abstention doctrines.

## V. CONCLUSION

The abstention doctrines were created in a dual system of judiciaries in an effort to prevent friction. They were also created in harmony with statutes demanding federal deferral to state courts and against the federal courts' well-established equitable discretion to decline jurisdiction when certain compelling reasons for doing so are present. Although Congress has created exceptions to these statutes, they have been few in number and narrowly construed by the courts. This indicates the importance of the comity and respect due the state system from the federal system as well as the importance of reducing friction between the two systems.

The abstention doctrines have expanded this congressionally created deference to state courts for several reasons. *Pullman* abstention seeks not only to avoid federal constitutional issues but also to allow the state courts to settle uncertainties of state laws. The Court justified *Pullman's* restraint of federal authority "because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary" by avoiding friction with the state judiciary.<sup>174</sup> *Burford* abstention seeks to allow

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168. COMPLEX LITIGATION PROPOSAL, *supra* note 2, Ch. 6 Intro. Note, cmt. c.

169. *Id.* § 6.01, Reporter's Note 4 to cmt. a.

170. *Id.* § 6.01, cmt. c.

171. *Id.*

172. *Id.* Ch. 6, Intro. Note, Reporter's Note 4 to cmt. b; see Friedrich K. Juenger, *The Complex Litigation Project's Tort Choice-of-Law Rules*, 54 LA. L. REV. 907, 922 (1994).

173. *Id.* §§ 6.01(a), 6.03(a).

174. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (citations omit-

the state courts to handle issues involving important local interests when the states have a scheme of public administration in place to deal with these interests. *Younger* abstention often applies to prevent enjoining state proceedings, even when Congress expressly permits an injunction. This type of *Younger* abstention highlights the traditional notions of equity in the vital interests of comity and "Our Federalism." *Colorado River* abstention requires deference to state courts when exceptional circumstances exist that make abstention administratively wise.

The interests underlying the abstention doctrines obviously play an important role in maintaining the delicate balance between federal and state judiciaries. The Proposal appears to understand the important roles these policies have played in our nation's jurisprudence, for the Proposal pays token homage to these principles. The Proposal employs all the right catchphrases when entering areas which may raise federalism concerns, especially those areas espoused by the abstention doctrines. The Proposal begins by stating that "every attempt has been made to ensure that the proposals recommended by the Project are consistent with . . . [the] basic principles of federalism and their implications as to the respective roles of state and federal courts."<sup>175</sup> The Proposal mandates "respect [for] traditional notions of federalism, especially as reflected in the various abstention doctrines" and attention to "the fullest due process safeguards" before issuing an antisuit injunction.<sup>176</sup> If the transferee judge decides that an injunction should issue, "great care must be taken" not to offend the balance of federal-state power and a "strong finding" is "require[d]" that an injunction is necessary to prevent an undermining of the consolidated actions.<sup>177</sup> Similar pro-federalism language is employed when dismissing the prospect of allowing the federal courts to create common law choice of law rules: "states' rights,"<sup>178</sup> federalism "concerns"<sup>179</sup> and "re-

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175. COMPLEX LITIGATION PROPOSAL, *supra* note 2, Ch. 1, Intro. Note.

176. *Id.* § 5.04.

177. *Id.*

178. *Id.* Ch. 6, Intro. Note, cmt. c.

179. *Id.* § 6.01, Reporter's Note 4 to cmt. a.

straints,"<sup>180</sup> "state interests,"<sup>181</sup> and the existence of a "vigorous body of state law."<sup>182</sup>

The lessons intended by Arthur Miller the playwright appear to be lost on Arthur Miller the law professor. Like Willy Loman, the Proposal simultaneously speaks words of contradiction. The above "ritual incantations,"<sup>183</sup> intended to assuage, fail to truly protect federalist principles when viewed with other language addressing federalism in general and the abstention doctrines in particular. For example, the abstention doctrines are summarily dismissed as "merely prudential" in the context of Congress's ability to regulate the federal courts; they are not immune from constitutional and congressional attacks, nor are they an "absolute barrier" to congressional action. This treatment of the abstention doctrines undermines the policies behind the existing federal abstention statutes, the equitable constraints pre-dating those statutes, and the important comity and federalism issues underlying the judicial abstention doctrines.

The message sent to the Complex Litigation Panel regarding traditional federalism policies is mixed, yet the substantive emphasis is placed upon efficiency with the federalism policies being relegated to the position of secondary considerations. Acting upon the Proposal's emphasis, the Panel will likely consolidate and transfer many actions which have traditionally been left to the states. Additionally, the transferee judge will likely follow the Panel's lead and more freely issue antisuit injunctions. As the lubricating policies underlying the abstention doctrines are drained away, the friction so often mentioned in the abstention cases between the federal and state systems is bound to follow.

Under the Proposal, then, federalism principles are a casualty to the overriding goal of efficiency.<sup>184</sup> The price to be paid by the abstention doctrines, and in reality by the states, will be great if the Complex Litigation Statute is adopted. Concerns over manageability and economy, in the name of efficiency, will outweigh historic federalism concerns. With the minimization

180. *Id.* § 6.01, cmt. c.

181. *Id.*

182. *Id.* Ch. 6, Intro. Note, Reporter's Note 4 to cmt. b.

183. Juenger, *supra* note 172, at 922.

184. For other such casualties, such as party autonomy, party interests, and choice of forum (to name but a few), see Brunet, *supra* note 153.

of state interests, the delicate federal-state balance is disrupted, and the abstention doctrines are in danger of becoming relics of the past. These developments will likely first occur in the area of complex litigation, and then as courts create analogies to the complex litigation area, they may slowly move away from the "merely prudential" abstention doctrines in areas where the doctrines have traditionally held sway.

Of course, this may be too ominous a prediction. Federal judges who value state rights and "Our Federalism" may heed what this comment has characterized as the Proposal's "ritual incantations." These judges may very well take great care to preserve the delicate federal-state balance. Especially in the area of removal jurisdiction, the Complex Litigation Panel may focus on the language highlighting federalism concerns and the abstention doctrines, resulting in many cases being adjudicated by state courts. *Burford* abstention in particular may thrive in cases involving the Recommendations' removal jurisdiction. There may even be a new form of abstention developed by the Court in this complex litigation area.

While all the ripples from the Proposal's stone are yet to be seen and felt, caution must be exercised to avoid friction between our two judicial systems. A developing pattern of valuing efficiency while subverting federalism appears to be a warning signal. Before adopting the Proposal's, careful thought and examination must be devoted to ensure that the ripples do not become waves eroding the historic shores of the abstention doctrines on the continent of "Our Federalism."

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