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I. INTRODUCTION

The dual state/federal court system contemplated by the United States Constitution has created knotty operative and allocative problems for the federal judiciary. Numerous cases

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"properly within a federal court's jurisdiction include issues or claims against parties that [do] not independently meet the requirements for federal jurisdiction."[1] On the other hand, many issues properly before the federal bench may be more conveniently litigated in state courts. To deal with these realities, the Supreme Court has developed the concepts of "pendent" and "ancillary" (collectively "supplemental") jurisdiction, which permit a federal court to address issues not otherwise within its prescribed jurisdiction. Additionally, various "abstention" doctrines authorize a federal court to decline to exercise its mandated jurisdiction. These developments, taken together, inject a broad element of discretion into the exercise of federal jurisdiction.

The discretionary assertion of federal jurisdiction raises difficult institutional questions: when should a federal court decide questions that, by themselves, do not meet jurisdictional requirements? Is it ever appropriate for a federal court to decline to exercise prescribed jurisdiction? Chief Justice Marshall, writing over 150 years ago in *Cohens v. Virginia*,[2] asserted that the federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given," because the "one or the other would be treason to the [C]onstitution."[3] But, despite the seemingly clear-cut line drawn by *Cohens* (a line never explicitly disavowed by the Supreme Court),[4] the Court has declined to rigidly follow Justice Marshall's dictum. This paper briefly describes the law on supplemental jurisdiction and abstention, and suggests possible legislative solutions to some of the problems arising from the Supreme Court's flexible approach to federal jurisdiction.

II. PENDANT AND ANCILLARY JURISDICTION

A. Background

Many cases filed in federal court, whether founded on diversity[5] or federal question[6] jurisdiction, involve claims which

1. E. CHEMERINSKY, FEDERAL JURISDICTION § 5.4.1, at 275 (1989).
2. 19 U.S. (6 Wheat.) 264 (1821).
3. *Id.* at 404.
4. Chief Justice Marshall's dictum continues to be cited with approval by the modern Court. *E. g.*, New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 109 S. Ct. 2506, 2512 (1989).
5. *See* 28 U.S.C. § 1332 (1982).
6. *See id.* § 1331.

standing alone do not meet federal jurisdictional requirements. Common examples include state law causes of action arising from the same facts as a federal claim or a third-party complaint filed by defendants in a diversity action.[7] The doctrines of pendent and ancillary jurisdiction have been developed to permit federal courts to resolve such claims.

According to traditional terminology, "pendent jurisdiction is exercised over nonfederal claims asserted by a plaintiff as part of a federal question suit."[8] Ancillary jurisdiction, in turn, involves claim or party joinder instituted by a litigant other than the plaintiff.[9] A more inclusive definition, in which pendent jurisdiction is described as a specific instance of ancillary jurisdiction, has also been proposed.[10]

It is doubtful that these technical definitions have significant importance. "A considerable body of recent literature suggests that there is no meaningful distinction between pendent and ancillary jurisdiction,"[11] and the Supreme Court has refused to consider whether "there are any 'principled' differences" between the concepts.[12] As a result, some commentators have suggested that traditional terminology be abandoned in favor of a more generic term, such as "supplemental" or "incidental" jurisdiction.[13] In any event, whether one uses standard phraseology

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7. *See, e.g.*, United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). *See generally* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1444, at nn. 68-79 (1971 & Supp. 1989) [hereinafter WRIGHT & MILLER].

8. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 DUKE L.J. 34, 34 n.1.

9. *Id. See also* E. CHEMERINSKY, *supra* note 1, § 5.4.1, at 276 ("Pendent jurisdiction can be thought of as claims contained in the *plaintiff's complaint* for which there are not independent bases for federal court jurisdiction." On the other hand, "ancillary jurisdiction can be understood as claims that are asserted *after the filing of the original complaint* that do not independently meet the requirements for federal court jurisdiction.") (emphasis in original).

10. *See, e.g.*, E. CHEMERINSKY, *supra* note 1, § 5.4.1, at 276 ("*Ancillary jurisdiction* refers to the authority of a federal court to hear claims that otherwise would not be within federal jurisdiction because the claims arise from the same set of facts as a case properly before the federal court," while pendent jurisdiction is a "specific type of ancillary jurisdiction" invoked when a plaintiff presents a state law claim "aris[ing] from the same facts as [a] federal law claim.") (emphasis in original).

11. Freer, *supra* note 8, at 34 n.1.

12. Aldinger v. Howard, 427 U.S. 1, 13 (1976). *See also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 n.8 (1978) (stating that pendent and ancillary jurisdiction present different aspects of the same problem).

13. *See* Freer, *supra* note 8; Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983); Note, *A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Inci-*

or the moniker "supplemental" jurisdiction, one thing is clear: the federal courts have concluded that pendent and ancillary jurisdiction are vital to "the efficient packaging of litigation in federal court."[14]

Pendent and ancillary jurisdiction are founded upon notions of necessity and judicial economy.[15] Few cases filed in federal district court contain solely issues of federal law, and in some circumstances, issues of state or local law may be dispositive.[16] For this reason, a federal district court could not properly function without the power to resolve all of the issues posed by the cases on its docket.[17] Judicial economy, in turn, "is served by having a matter litigated in one court rather than in two or more tribunals. The splitting of lawsuits increases costs to the parties, wastes social resources, and risks inconsistent verdicts from the different courts."[18] Pendent and ancillary jurisdiction also find support in the language of article III, "which grants jurisdiction over 'cases' rather than over 'questions.' "[19]

B. Doctrinal Development[20]

The Supreme Court created the concepts of pendent and ancillary jurisdiction "without specific examination of jurisdictional statutes" in a line of cases extending back to the middle of the last century.[21] The notion of ancillary jurisdiction was first explicated in *Freeman v. Howe*.[22] There, a federal official seized a parcel of property pursuant to a federal court order. The Court concluded that non-diverse, third-party claimants to

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dental Jurisdiction, 95 HARV. L. REV. 1935, 1937 (1982).

14. Freer, *supra* note 8, at 34.

15. E. CHEMERINSKY, *supra* note 1, § 5.4.1, at 275-76.

16. *E.g.*, Siler v. Louisville & Nashville R.R. Comm'n, 213 U.S. 175, 191 (1909) (Federal question case may be decided "on local or state questions only.").

17. 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3567, at 107 (2d ed. 1984)[hereinafter WRIGHT, MILLER & COOPER].

18. E. CHEMERINSKY, *supra* note 1, § 5.4.1, at 276.

19. 13B WRIGHT, MILLER & COOPER, *supra* note 17, § 3567, at 107. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) ("[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause," even if "other questions of fact or of law may be involved in it.").

20. Because the concepts of pendent and ancillary jurisdiction are so closely related and founded upon the same policy reasons, see *supra* notes 11-19 and accompanying text, their respective doctrinal developments are treated concurrently.

21. Finley v. United States, 109 S. Ct. 2003, 2006 (1989).

22. 65 U.S. (24 How.) 450 (1860).

the property could intervene in the federal action to litigate their claims to the property, notwithstanding the absence of a jurisdictional basis for their suit. According to the Court, the third parties' action was "not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen."[23] An early illustration of pendent jurisdiction is *Siler v. Louisville & Nashville Railroad Commission.*[24] In *Siler*, the plaintiff challenged state regulation of railroad rates as unconstitutional and contrary to state law. The Court concluded that the district court was not limited to a decision of the constitutional issue, but could "decide all the questions in the case," including the plaintiff's state law claim.[25]

Freeman and *Siler*, on their facts, hardly represented extraordinary expansions of federal jurisdiction. Indeed, strong arguments can be made that the holdings in both cases are *necessary*, not merely convenient, to the proper functioning of the federal bench. If federal courts are to have the power over property that is required to effectuate their own judgments (and if the rights of third-party claimants like those in *Freeman* are to be adequately protected), federal courts must be able to hear and determine third-party claims regarding property within federal court control, whether or not an independent jurisdictional basis exists for the claims. *Siler*, in turn, can be justified as an example of a well-established rule that "federal courts generally should decide [a plaintiff's] pendent state law claims before reaching . . . federal constitutional issues."[26]

The Supreme Court, however, did not limit application of the developing doctrines of supplemental jurisdiction to those cases where such jurisdiction was arguably necessary. In *Moore v. New York Cotton Exchange*,[27] the Court expanded the notion of ancillary jurisdiction to encompass a defendant's state law counterclaim because it arose from the same set of facts as the plaintiff's federal law claims. Similarly, in *Hurn v. Oursler*,[28] the Court authorized federal district courts to assert pendent jurisdiction over a plaintiff's state law claims, so long as the case

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23. *Id.* at 460.

24. 213 U.S. 175 (1909).

25. *Id.* at 191.

26. E. CHEMERINSKY, *supra* note 1, § 5.4.2, at 278. *See also* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

27. 270 U.S. 593 (1926).

28. 289 U.S. 238 (1933).

presented a "single cause of action."[29] In neither case was federal jurisdiction over the state law claims a strict necessity; the counterclaim in *Moore* and the state law claim in *Hurn* could have been pursued (albeit inconveniently) in separate state court actions.[30]

The rules announced in those two cases were therefore grounded upon notions of judicial economy and procedural convenience. Supplemental jurisdiction may be justified solely upon such efficiency-based notions.[31] Because supplemental jurisdiction authorizes federal court action not explicitly authorized by a jurisdictional statute, however, its assertion arguably becomes more problematic the further it is removed from the mandate of necessity.[32]

The Supreme Court's expansion of supplemental jurisdiction to accommodate notions of procedural convenience culminated in *United Mine Workers v. Gibbs*.[33] Prior to *Gibbs*, the Court had recognized the authority of federal district courts to decide pendent state law claims if those claims constituted a "single cause of action."[34] In *Gibbs*, the Court found this analysis "unnecessarily grudging."[35] The *Gibbs* Court concluded that "considerations of judicial economy, convenience and fairness to litigants' support a wide-ranging power in the federal courts to decide state law claims in cases that also present federal questions."[36] The Court thus established "a new yardstick for decid-

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29. *Id.* at 245-46.

30. The "inconvenience" of pursuing separate state and federal actions in *Moore* and *Hurn* may well have been significant. Preclusion questions, including the established proscription against splitting a single "cause of action," may have posed significant difficulties in any separate state court action.

31. See 13B WRIGHT, MILLER & COOPER, *supra* note 17 § 3567, at 111-12.

32. *See e.g.*, Finley v. United States, 109 S. Ct. 2003, 2006-10 (1989). Some scholars have questioned whether there is, indeed, real tension between an assertion of supplemental jurisdiction and the underlying jurisdictional statutes. Professor Richard Freer, for one, has asserted that a "statutory basis for supplemental jurisdiction" exists. Freer, *supra* note 8, at 35. According to Professor Freer, Congress has specifically contemplated federal court assertion of supplemental jurisdiction by giving the courts jurisdiction of a "civil action." Congress has simply "delegated to the judiciary the power to define that term." *Id.* at 36.

33. 383 U.S. 715 (1966).

34. *See* Hurn v. Oursler, 289 U.S. 238, 245-46 (1933).

35. United Mines Workers v. Gibbs, 383 U.S. 715, 725 (1966). The lower federal courts had encountered significant difficulties in applying the "cause of action" test established by *Hurn*. "The difficulty with this test, as many commentators noted, was that it centered on the inherently elusive concept of a 'cause of action.'" Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 618 n.6 (1988).

36. *Cohill*, 108 S. Ct. at 618 (quoting *Gibbs*, 383 U.S. at 726).

ing whether a federal court has jurisdiction over a state law claim brought in a case that also involves a federal question."[37] That yardstick permitted federal courts to exercise "jurisdiction over an entire action, including state law claims, whenever the federal law claims and state law claims in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial 'proceeding.' "[38] This new standard was intended "not only to clarify, *but also to broaden*, the scope of federal pendent jurisdiction."[39]

Because the *Gibbs* standard was explicitly established to further "the values of judicial economy, convenience, fairness, and comity,"[40] the Court firmly established pendent jurisdiction as "a doctrine of discretion, not of plaintiff's right."[41] A federal court has the *power* to determine the state law claims if the "common nucleus of operative fact" test is met. That power, however, should be asserted only if it "most sensibly accommodates" the values of judicial economy, convenience, fairness and comity upon which *Gibbs* is erected.[42] Thus, whether or not a given state law claim will in fact be heard in federal court hinges upon the trial court's discretionary judgment that such action will, or will not, promote ultimate values enunciated in *Gibbs*. And, this discretionary authority has turned out to be quite broad. In *Carnegie-Mellon University v. Cohill*[43] a majority of the Supreme Court concluded that federal courts have the authority to remand a removed action back to state court once the jurisdiction conferring federal claims are dropped. This authority exists even though applicable remand statutes, by their express terms, do not grant remand authority in such a situation.[44]

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37. *Id.* at 618.

38. *Id.* (quoting *Gibbs*, 383 U.S. at 725).

39. *Id.* (emphasis added).

40. *Id.* at 619.

41. *Gibbs*, 383 U.S. at 726.

42. *Cohill*, 108 S. Ct. at 618-19.

43. 108 S. Ct. 614 (1988).

44. *Id.* at 622. Once a state-court action has been removed to federal court pursuant to 28 U.S.C. § 1441, the statutory authority of a federal court to remand the action back to state court is seemingly quite limited. 28 U.S.C. § 1447(c) permits remand of any action that "was removed improvidently and without jurisdiction." 28 U.S.C. § 1441(c) similarly permits remand of any claim that is both independently nonremovable and "separate and independent" of the claim providing the basis for removal. Neither statute provided a basis for remand in *Cohill*. Moreover, in Thermtron Prod. Inc. v. Hermansdorfer, 423 U.S. 336 (1976), the Court held that cases may be remanded to state court

Despite the expansive language of *Gibbs*, two recent cases suggest that the exercise of supplemental jurisdiction is not wholly dependent upon the outcome of a discretionary convenience calculation. *Owen Equipment & Erection Co. v. Kroger*[45] and *Finley v. United States*[46] both held that the proper assertion of supplemental jurisdiction over state law claims requires more than probable gains in efficiency. These cases raise the possibility that supplemental jurisdiction can be exerted only if it is "consistent" with explicit jurisdictional grants.[47]

In *Kroger*, the Court held that ancillary jurisdiction would not support a claim by a plaintiff against a non-diverse, third-party defendant.[48] In that case, an Iowa plaintiff filed a diversity action against a Nebraska defendant. The Nebraska defendant impleaded another Nebraska corporation as a third-party defendant, and the plaintiff asserted a direct claim against the third-party defendant. The court then granted summary judgment in favor of the original defendant. On the third day of trial, the third-party defendant revealed that it was a citizen of Iowa, not Nebraska, and moved to dismiss the claim against it for lack of diversity. The trial court and court of appeals refused to dismiss the claim, holding that ancillary jurisdiction supported the plaintiff's claim against the third-party defendant. The Supreme Court rejected that result, concluding that ancillary jurisdiction would be inconsistent with "the specific statute that confers jurisdiction over the federal claim. . . ."[49] The Court wrote,

> [N]either the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case. Congress has established the basic rule that diversity jurisdiction exists under 28 U.S.C. § 1332 only when there is complete diversity. . . . To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command.[50]

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only for reasons authorized by statute.

45. 437 U.S. 365 (1978).

46. 109 S. Ct. 2003 (1989).

47. *See Kroger*, 437 U.S. at 377; *Finley*, 109 S. Ct. at 2008-09.

48. *Kroger*, 437 U.S. 365 (1978).

49. *Id.* at 373.

50. *Id.* at 377.

The Court used similar reasoning to reject an invocation of pendent jurisdiction in *Finley v. United States*.[51] *Finley* involved negligence claims against the Federal Aviation Administration (FAA), the City of San Diego, and a public utility arising from the crash of a private airplane. Pursuant to the terms of the Federal Tort Claims Act (FTCA), the federal courts have exclusive jurisdiction of claims against the United States.[52] Rather than pursue separate actions in state and federal court, plaintiff sought to join the state law tort defendants with the federal action against the FAA. As such, the case presented an example of "pendent party" (addition of new parties) rather than "pendent claim" (addition of new claims) jurisdiction.[53] Although there was "ample basis for regarding this entire . . . controversy as a single 'case' and for allowing petitioners to assert additional claims against the nonfederal defendants as they are authorized to do by Rule 20(a) of the Federal Rules,"[54] the Court declined to exercise pendent jurisdiction. "[T]he efficiency and convenience of a consolidated action," wrote Justice Scalia for a five-member majority, "will sometimes have to be foregone in favor of separate actions in state and federal courts."[55]

The Court's reasoning in *Finley* stands in marked contrast to the approach in *Gibbs*. The *Finley* Court was willing to assume that the claims involving the non-federal defendants arose from a common nucleus of operative fact, and that the claims were of the type ordinarily tried together. Indeed, the Court assumed that the assertion of pendent jurisdiction in *Finley* would "pass" the test established in *Gibbs*.[56] Nevertheless, the Court concluded that, in addition to the *Gibbs* inquiry, there must also

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51. 109 S. Ct. 2003 (1989).

52. 28 U.S.C. § 1346(b) (1982).

53. The Court had previously addressed the permissibility of "pendent party" jurisdiction in *Aldinger v. Howard*, 427 U.S. 1 (1976). In *Aldinger*, the Court refused to permit the plaintiff to join a pendent state-law claim against a local governmental entity with her federal action brought under 42 U.S.C. § 1983. *Id.* The decision was based, at least in part, on the Court's then-current view that section 1983 did not contemplate suits against local governments. *Id.* at 15. The Court, moreover, did not completely foreclose the possibility of pendent party jurisdiction, noting that "[o]ther statutory grants and other alignments of parties and claims might call for a different result." *Id.* at 18.

54. *Finley*, 109 S. Ct. at 2013 (Stevens, J., dissenting). Rule 20(a) provides that "[a]ll persons . . . may be joined in one action as defendants if there is asserted against them . . . any right to relief in respect of or arising out of the same transaction. . . ." FED. R. CIV. P. 20.

55. *Finley*, 109 S. Ct. at 2010.

56. *See id.* at 2006-07 (Court assumes, without deciding, that *Finley* passes "the constitutional criterion for pendent-party jurisdiction.").

be "an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim."[57] The "most significant element of 'posture' " in *Finley* was "precisely that the added claims involve[d] added parties over whom no independent basis of jurisdiction exist[ed]."[58] The FTCA, in turn, was found to preclude pendent claims because, by its precise terms, the statute did not admit the possibility of such claims.[59] Federal jurisdiction, the Court concluded, must be "scrupulously confine[d] . . . to the precise limits which the statute has defined."[60]

If the Court continues to apply the *Kroger* and *Finley* analysis to all future supplemental jurisdiction cases, the permissible scope of pendent and ancillary jurisdiction will be decidedly diminished. The "posture" analysis, for example, would suggest that the previously unremarkable assertion of ancillary jurisdiction over compulsory counterclaims and third-party claims[61] is improper if such claims require the joinder of non-diverse parties. Even more dramatic inroads would be made if, in all supplemental jurisdiction cases, the Court were to require "an examination . . . of the specific statute that confers jurisdiction."[62] In *Finley*, the Court found that the language of the FTCA encompasses civil actions "against the United States and no one else."[63] Similar reasoning, applied to other jurisdictional statutes, would have a devastating effect on the availability of supplemental jurisdiction. A strict reading of 28 U.S.C. § 1331, for example, could suggest that the statute encompasses actions "arising under the Constitution, laws, or treaties of the United

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57. *Id.* at 2007 (quoting Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978)).

58. *Id.* at 2007-08.

59. *Id.* at 2008. According to the Court,

> The FTCA, § 1346(b), confers jurisdiction over "civil actions on claims against the United States." It does not say "civil actions on claims that include requested relief against the United States," nor "civil actions in which there is a claim against the United States"—formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions.

Id. (quoting 28 U.S.C. § 1346(b) (1982)).

60. *Id.* at 2009 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)).

61. *See* E. CHEMERINSKY, *supra* note 1, § 5.4.3, at 283-84 (noting that it is now "clearly established" that federal courts possess ancillary jurisdiction over compulsory counterclaims, third-party claims, cross-claims and intervention as of right).

62. *Finley*, 109 S. Ct. at 2007 (quoting *Kroger*, 437 U.S. at 373).

63. *Id.* at 2008.

States" and nothing else.[64] Such a result, of course, would effectively preclude federal courts from resolving, in the name of judicial efficiency, all state and federal claims arising from a "common nucleus of operative fact."[65]

C. *Suggestions for Legislative Action*

The concept of supplemental jurisdiction, aptly nicknamed "the child of necessity and the sire of confusion,"[66] is plainly in transition. Springing from cases where the exercise of pendent or ancillary jurisdiction could be viewed as a strict necessity,[67] supplemental jurisdiction came to be seen as a useful tool in the efficient disposition of related state and federal claims.[68] Recently, however, a majority of the Court has expressed concern that the concept can be too readily invoked to create jurisdiction where Congress has not expressly conferred it.[69] Accordingly, it is not at all clear whether supplemental jurisdiction is properly asserted upon a showing of convenience, or rather whether a stricter showing of necessity or "consistency" with explicit jurisdictional statutes is required.

The preceding question should be clarified by legislative action. The driving force behind the decision in *Finley* is the Court's concern that supplemental jurisdiction permits federal courts to exceed the "precise limits" of congressionally conferred jurisdiction.[70] Legislative action, therefore, would eliminate this

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64. *See* 28 U.S.C. § 1331 (1982).

65. United Mines Workers v. Gibbs, 383 U.S. 715, 725 (1966). The impact of *Finley* on future assertions of supplemental jurisdiction cannot be predicted with any degree of certainty. Justice Stevens' dissent, however, suggests that *Finley* will not be confined to its facts. *See Finley*, 109 S. Ct. at 2020 (Stevens, J., dissenting) ("[T]he Court provides no reason why the joinder of pendent defendants over whom there is no other basis of federal jurisdiction should differ from the joinder of pendent claims and other pendent parties."). And, although the *Finley* Court indicated that it had "no intent to limit or impair" the *Gibbs* analysis, it also noted that "[t]he *Gibbs* line of cases was a departure from prior practice." *Id.* at 2010.

66. Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27, 45 (1963).

67. *See, e.g.*, Siler v. Louisville & Nashville R. R. Comm'n, 213 U.S. 175 (1909); Freeman v. Howe, 65 U.S. (24 How.) 450 (1860).

68. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614 (1988); United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

69. Finley v. United States, 109 S. Ct. 2003 (1989); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978).

70. *Finley*, 109 S. Ct. at 2009 (quoting Healy v. Ratta, 292 U.S. 263, 270 (1934)). The *Finley* Court emphasized that

> [i]t remains rudimentary law that "[a]s regards all courts of the United States

concern. Legislation is also needed to preserve the jurisdictional flexibility necessary to the efficient operation of the federal judicial system.

The rationale of *Gibbs*, which authorizes the assertion of supplemental jurisdiction where state and federal claims are transactionally related and joint litigation is shown to be efficient, is on a collision course with *Finley*. Should the Court insist that future assertions of supplemental jurisdiction be supported by "the text of the jurisdictional statute at issue,"[71] pendent and ancillary jurisdiction would be decidedly circumscribed. In *Finley*, the Court suggested that ancillary jurisdiction was unquestionably proper only in "a narrow class of cases," when a claim, for example, involves "contested assets within the court's exclusive control" or "when necessary to give effect to the court's judgment."[72]

Such a limited role for supplemental jurisdiction is unduly restrictive. Experience has shown that pendent and ancillary jurisdiction are necessary to the efficient operation of the federal bench.[73] Federal courts must have the power to decide state law claims even when not strictly *necessary* to the disposition of a federal claim. A contrary rule would "force . . . substantial federal cases into state courts for adjudication simply because they involved nonfederal issues as well as federal ones."[74]

Legislation could broadly embrace the concept of supplemental jurisdiction. A statute adopting this approach would authorize the assertion of pendent and ancillary jurisdiction in diversity as well as federal question cases, and provide that supplemental jurisdiction extends to the joinder of parties necessary to the disposition of all claims arising from a common nucleus of operative fact. Such a statute could read as follows:

> inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it.* . . . To the extent that such action is not taken, the power lies dormant.

Finley, 109 S. Ct. at 2006 (quoting The Mayor of Nashville v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867)) (emphasis in original).

71. *Finley*, 109 S. Ct. at 2008.

72. *Id.*

73. *See generally* Miller, *Ancillary and Pendent Jurisdiction*, 26 So. TEX. L.J. 1 (1985).

74. Hagans v. Lavine, 415 U.S. 528, 554 (1974) (Rehnquist, J., dissenting). *See* Miller, *supra* note 73, at 4 ("The courts, by recognizing pendent jurisdiction, are effectuating Congress' decision to provide the plaintiff with a federal forum for litigating a jurisdictionally sufficient claim.").

> In any civil action, the district courts may exercise jurisdiction over all claims arising from a common nucleus of operative facts if, in the district court's judgment, resolution of such claims will promote judicial economy, convenience, fairness and comity. Such jurisdiction may extend to any party properly joined in the action pursuant to the Federal Rules of Civil Procedure.

The foregoing statute, the first sentence of which is drawn from the Court's language in *Gibbs*, would effectively codify the doctrine established by that case and overrule the restrictions on supplemental jurisdiction erected by *Finley*. In any civil action properly commenced in federal court, the court would have authority to decide all transactionally related claims provided that such action "most sensibly accommodates [the] range of concerns and values" identified in *Gibbs*; i.e., judicial economy, convenience, fairness and comity.[75] As such, supplemental jurisdiction would remain "a doctrine of discretion, not of plaintiff's right."[76] The second sentence of the statute rejects the notion, established by *Finley*, that the joinder of "pendent parties" is impermissible. Such parties would fall within the supplemental jurisdiction of the federal courts so long as the claim against them can be asserted consistently with the Federal Rules of Civil Procedure.[77]

There are three possible arguments against adopting a statute as broad as the one set out above. First, the statute could be used to evade strict limitations on the availability of diversity jurisdiction. For example, in a case where one defendant is diverse but a second defendant shares the plaintiff's citizenship, the plaintiff might sue the diverse defendant, knowing that his chosen defendant will implead the absent party.[78] Second, difficulties in the construction and application of Rule 19, dealing with the joinder of so-called "indispensable parties," could well be encountered. The statute might be construed as authorizing the joinder of parties under Rule 19(a) that would previously have required analysis, and perhaps dismissal of the lawsuit,

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75. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 619 (1988).

76. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

77. Joinder of additional parties would implicate Rule 14 (Third Party Practice), Rule 19 (Joinder of Persons Needed for Just Adjudication), and Rule 20 (Permissive Joinder of Parties). *See* FED. R. CIV. P. 14, 19, 20.

78. *Cf.* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376-77 (1978) (refusing to extend ancillary jurisdiction over plaintiff's claim against a non-diverse third-party plaintiff because it might encourage collusive invocation of diversity jurisdiction).

under Rule 19(b). This creates yet another avenue for "collusive" invocation of diversity jurisdiction, i.e., the plaintiff simply omits a non-diverse but arguably indispensable party in hopes that the defendant will urge joinder under Rule 19.[79]

Third, while the foregoing problems could be avoided by the careful application of well-established law,[80] a broad supplemental jurisdiction statute would undoubtedly enhance the attractiveness of federal diversity jurisdiction. Such a result is inadvisable because diversity cases distract a scarce resource (federal judicial effort) away from its highest and best use (the decision of federal questions). The diversity plaintiff who is truly interested in judicial economy, convenience and fairness (the fundamental concerns of *Gibbs*) can already litigate all his related claims in a single forum—state court. The caseload of the federal district courts should not be increased simply to grant a diversity plaintiff a second efficient forum.

The preceding concerns, however, are inapplicable when federal question jurisdiction is invoked. "The purpose of pendent and ancillary jurisdiction is to permit a case—one common nucleus of operative facts—to be tried in a single court."[81] Without the availability of supplemental jurisdiction, a federal question plaintiff would often have the choice of splitting his lawsuit between state and federal courts, or simply foregoing the federal forum altogether.

> The doctrine of [supplemental] jurisdiction rests in part on a recognition that forcing a federal plaintiff to litigate his or her case in both federal and state courts impairs the ability of the federal court to grant full relief, . . . and "imparts a fundamental bias against utilization of the federal forum owing to the deterrent effect imposed by the needless requirement of duplicate litigation if the federal forum is chosen."[82]

Therefore, where a plaintiff possesses a right created by federal law and enforceable in federal court, the reasoning of the Court in *Gibbs* is especially compelling. A statute, like the one below, preserves the viability of *Gibbs* in federal question cases:

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79. *See* FED. R. CIV. P. 19.

80. *See, e.g.*, 28 U.S.C. § 1359 (1982) ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.").

81. E. CHEMERINSKY, *supra* note 1, § 5.4.2, at 282-83.

82. Finley v. United States, 109 S. Ct. 2003, 2021 (1989) (Stevens, J., dissenting) (quoting Aldinger v. Howard, 427 U.S. 1, 36 (1976) (Brennan, J., dissenting)).

> In any civil action arising under the Constitution, laws, or treaties of the United States, the district courts may exercise jurisdiction over all claims arising from a common nucleus of operative fact if, in the district court's judgment, resolution of such claims will promote judicial economy, convenience, fairness and comity. Such jurisdiction may extend to any party properly joined in the action pursuant to the Federal Rules of Civil Procedure.

Such a statute would preserve the availability of supplemental jurisdiction in federal question cases where it is most advisable. In diversity cases, a plaintiff usually has the choice of a single forum in which he or she can conveniently pursue all claims, both state and federal.[83] Federal question litigants, on the other hand, enjoy no such option. Unless the proposed statute is adopted, it appears that the analysis of the Supreme Court in *Finley* might overtake *Gibbs* with the result that federal question litigants would be forced to pursue separate but related actions in both state and federal courts. Such a result is unwise, and should be avoided by adoption of legislation similar to that set forth above.

III. ABSTENTION

A. Background

"Abstention" refers to judicially created doctrines which "justify either rejection or postponement of the assertion of federal court power even though Congress has vested jurisdiction in the federal courts to hear the cases in question."[84] The grounds upon which a federal court might order abstention are varied. Abstention may be ordered (1) where clarification of state law might avoid a federal constitutional ruling (commonly called *Pullman* abstention);[85] (2) where decision of an unclear issue of state law in a diversity case might threaten important state interests (commonly called *Thibodaux* abstention);[86] (3) where an

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83. This assertion may not be true only in the rare instances where he or she may have state and federal claims over which the federal court has exclusive jurisdiction.

84. M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 233 (1980). *See also* New Orleans Pub. Serv. v. Council of New Orleans, 109 S. Ct. 2506, 2512-13 (1989); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 15, 20-21 (1987); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236-37 (1984); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 815, 817 (1976).

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

86. *See* Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

assertion of federal jurisdiction might interfere with important state administrative goals (commonly called *Burford* abstention);[87] (4) where there are simultaneously pending state court proceedings (commonly called *Younger* abstention);[88] and (5) where there are duplicative state and federal court proceedings (commonly referred to as *Colorado River* abstention).[89] As these brief descriptions demonstrate, abstention doctrine covers a welter of concerns regarding the proper allocation of federal judicial power.

The "central policy question concerning abstention is whether the Court was justified in fashioning these doctrines."[90] Consideration of this policy question requires analysis of whether the Court has the constitutional authority to order abstention, and whether the abstention doctrine the Court has enunciated is sound. There is no single answer to these inquiries and the various responses proposed by the commentators have themselves provoked substantial controversy. However, even a cursory review of the literature demonstrates that neither the foundation nor the wisdom of abstention doctrine stands secure.

Under article III, Congress creates the lower federal courts[91] and specifies their jurisdiction.[92] And, it has long been established that "[t]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."[93] But, despite this well established principle, abstention doctrine permits federal courts to decline the exercise of congressionally conferred jurisdiction. This, of course, raises the fundamental question whether the judiciary has the "authority

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Thibodaux abstention may be more properly classified as a category of *Burford* abstention. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 52, at 308 (4th ed. 1983) [hereinafter WRIGHT].

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

88. *See* Younger v. Harris, 401 U.S. 37 (1971).

89. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

90. E. CHEMERINSKY, *supra* note 1, § 12.1, at 594.

91. *See* U.S. CONST. art. III, § 1.

92. Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850).

93. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2513 (1989) (quoting Chicot County v. Sherwood, 148 U.S. 529, 534 (1893)). *See also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[T]his Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should.").

to ignore the dictates of valid jurisdictional . . . statutes."[94] Professor Redish, for one, has forcefully argued that abstention doctrine "could be characterized as a judicial usurpation of legislative authority, in violation of the principle of separation of powers."[95]

The wisdom of abstention doctrine is as questionable as its constitutional footing. It has become commonplace for commentators to criticize abstention, which often requires numerous round trips by litigants between state and federal courts,[96] as inefficient and wasteful.[97] But, even apart from the costs abstention extracts from individual litigants, abstention—on its own terms—raises substantial doubts as to its legitimacy. Abstention is frequently invoked in the interest of comity, federalism and due regard for state interests.[98] Congress, however, has specifically provided for federal court abstention in those areas where the need to further federalism and prevent undue intrusion on the states has seemed especially compelling.[99] Whether additional, judicially created abstention doctrines are necessary is

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94. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 72 (1984). *See also* Comment, *Preclusion Concerns as an Additional Factor When Staying a Federal Suit in Deference to a Concurrent State Proceeding*, 53 FORDHAM L. REV. 1183, 1184, 1188-90 (1985).

95. Redish, *supra* note 94, at 76.

96. Professor Wright described the effect of abstention in *Government & Civil Employee Organizing Comm., CIO v. Windsor*, 116 F. Supp. 354 (N.D. Ala. 1953): "[A]fter five years of litigation, including two trips to the Supreme Court of the United States and two to the highest state court, the parties still had failed to obtain a decision on the merits of the statute." Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815, 818 (1959). *See also* Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 TEX. L. REV. 211, 221 (1961) ("As a result of this doctrine, individual litigants have been shuffled back and forth between state and federal courts, and cases have dragged out over eight- and ten- year periods.").

97. *See* WRIGHT, *supra* note 86, § 52, at 305; Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1140 (1977). *See also* Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975); Baggit v. Bullitt, 377 U.S. 360, 375-79 (1964); Clay v. Sun Ins. Office, 363 U.S. 207, 228 (1960)(Douglas, J., dissenting) ("Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice.").

98. *See generally New Orleans Pub. Serv.*, 109 S. Ct. at 2513-16.

99. *See, e.g.*, 28 U.S.C. § 2283 (1982) (The Anti-Injunction Act provides that a federal court "may not grant 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."); 28 U.S.C. § 1341 (1982) (The Tax Injunction Act provides that the "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."); 28 U.S.C. § 1342 (1982) (The Johnson Act provides that the federal courts may not enjoin utility rates set by state and local regulatory agencies).

questionable. It can be forcefully argued that "the interests of federalism [are] sufficiently protected by existing statutorily-dictated abstention."[100]

B. Doctrinal Development

Because of the diverse doctrinal foundations for the various abstention doctrines, the judicial evolution and current status of each doctrine will be separately stated. We start with *Pullman* abstention.

1. Pullman *abstention*

Pullman abstention originated with the well-known case of *Railroad Commission of Texas v. Pullman.*[101] There, the Texas Railroad Commission issued a regulation that, in effect, required the Pullman Company to place a white employee in charge of all sleeping cars.[102] One of the allegations in the suit was that the regulation constituted racial discrimination in violation of the fourteenth amendment. The United States Supreme Court concluded that the district court erred in considering the merits of the constitutional question because of an unresolved state law question—whether the Railroad Commission had authority to issue the regulation in the first place. Thus, *Pullman* stands for the proposition that "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided."[103] This enables the federal courts to "avoid both un-

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100. Redish, *supra* note 94, at 74. Another commentator added,

> Congress, in the interest of federalism, has dictated federal court abstention in certain cases. See, e.g., The Tax Injunction Act, 28 U.S.C. § 1341 (1982); The Johnson Act, 28 U.S.C. § 1342 (1982); 28 U.S.C. § 2254(b) (1982); The Anti-Injunction Act, 28 U.S.C. § 2283 (1982); The Three-Judge Court Act, 28 U.S.C. § 2284 (1982). These acts constitute express legislative limits on the exercise of federal judicial power. There is little reason to suspect that Congress intended additional limits to be self-imposed by the judiciary.

Comment, *supra* note 94, at 1189 n.16.

101. 312 U.S. 496 (1941).

102. *Id.* at 497-98. By its terms, the regulation required a conductor—not merely a porter—on all sleeping cars. "In Texas, at this time, conductors were white and porters were black." E. CHEMERINSKY, *supra* note 1, § 12.2.1, at 595.

103. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984). For other sources interpreting *Pullman* in the same manner, see Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 508 (1985) (O'Connor, J., concurring); United Fence & Guard Rail Corp. v. Cuomo, 878 F.2d 588, 595 (2nd Cir. 1989).

necessary adjudication of federal questions and needless friction with state policies. . . ."[104]

Justice Frankfurter, the author of *Pullman*, articulated three justifications for abstention. First, he argued that abstention avoids needless friction between state and federal courts by giving state courts the opportunity to interpret unclear state law. "Few public interests," he wrote, "have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies."[105] Second, Justice Frankfurter suggested that abstention reduces the likelihood that the federal court's interpretation of state law will be "supplanted by a controlling decision of a state court."[106] State courts, not federal courts, control the growth and development of state law, and Justice Frankfurter asserted that the "reign of law is hardly promoted if an unnecessary ruling of a federal court is . . . supplanted by a controlling decision of a state court."[107] Finally, the Court argued that abstention properly avoids unnecessary decision of constitutional questions. The constitutional issue never arises in this case if the Railroad Commission had no authority to issue the discriminatory regulation.[108]

The reasoning proffered by Justice Frankfurter has not been well received in academia. Professor Field even suggests that *Pullman* may *increase* rather than *decrease* state/federal friction.[109] Professor Field's view has merit. Although a federal court deciding an unclear issue of state law may reach a different conclusion from the one ultimately propounded by state courts, any "friction" is minimal because the state court decision, not the federal opinion, controls. And, if the state courts ultimately agree with the federal courts, there is no friction at all. *Pullman*, by contrast, poses a serious risk of state/federal discord: a state administrative regulation upheld by a state court on state law grounds may be ultimately invalidated by a federal court on constitutional grounds. Such a result is certain to pro-

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104. *Hawaii Hous. Auth.*, 467 U.S. at 236.

105. *Pullman*, 312 U.S. at 500.

106. *Id.* at 500. *See also* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236-37 (1984); Guiney v. Roache, 833 F.2d 1079, 1081 (1st Cir. 1987); Pharmaceutical Soc'y of the State of New York, Inc. v. Lefkowitz, 586 F.2d 953, 956 (2nd Cir. 1978).

107. *Pullman*, 312 U.S. at 500.

108. *Id.* at 501.

109. *See* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1090-92 (1974).

duce more tension than if the federal court had simply decided the constitutional question in the first instance.[110]

The remaining justifications for *Pullman* abstention are equally problematic. Avoiding erroneous constructions of state law is a dubious foundation for abstention. Federal courts hearing diversity cases must routinely determine uncertain issues of state law,[111] even though their efforts may constitute a "forecast" rather than a "determination" of state law. Finally, while the avoidance of unnecessary constitutional rulings may be a wise prudential restriction on the exercise of federal jurisdiction, it hardly mandates abstention. This interest could be furthered simply by encouraging federal courts to decide the state law claim first and thus reach the constitutional question only if essential to the disposition of the case.[112]

In addition to the difficulties inherent in its analytical foundation, *Pullman* has posed significant problems in implementation. There remains marked confusion regarding when *Pullman* is appropriately invoked; and, once invoked, the resulting shuffle between federal and state courts has provoked considerable procedural turmoil.

Although the Supreme Court has repeatedly suggested that abstention may be ordered only when (1) substantial uncertainty surrounds the meaning of state law and (2) a reasonable possibility exists that clarification of state law by a state court may eliminate the need for a federal constitutional ruling,[113] the lower courts disagree on the circumstances where abstention is appropriately ordered.[114] The Second Circuit has ruled that ab-

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110. *See id.* at 1090.

111. *See, e.g.*, Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

112. *Cf.* Smith, *Pennhurst v. Halderman: The Eleventh Amendment, Erie and Pendent State Law Claims*, 34 BUFFALO L. REV. 227, 238 (1985) ("[W]ell-established prudential considerations guiding federal courts would usually require that the state law claim be considered first and that the federal claim not be reached unless the state law fails to provide a remedy."); Swingen, *Federal Court Interpretation of the Washington Obscenity Statute—Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794 (1985), 61* WASH. L. REV. 1237, 1238 (1986) ("When a federal court litigates a case involving a federal constitutional question with a threshold question of unclear state law, the presiding judges must first decide how the state's highest court would rule on the state law issues.") (footnote omitted).

113. *See, e.g.*, Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83-84 (1973); Kuspor v. Pontikes, 414 U.S. 51, 54 (1973); Baggit v. Bullitt, 377 U.S. 360, 375 (1964).

114. This is due, at least in part, to the fact that the "Supreme Court has offered relatively little guidance about how unclear the state law must be or how great the possibility has to be that the state court ruling might avoid a federal constitutional decision." E. CHEMERINSKY, *supra* note 1, § 12.2.1, at 599.

stention is appropriately ordered if state law is uncertain, the federal issue depends upon the construction of the disputed state law, and a reasonable construction of state law would avoid the federal issue.[115] The Fifth Circuit appears to go much further, authorizing abstention where determination of an unclear question of state law might avoid a constitutional question *or* where federal review poses a risk of substantial friction with a state program.[116] This latter formulation authorizes abstention *solely* to avoid state/federal friction.

Once *Pullman* abstention is ordered, vexing procedural issues arise. The federal court commonly stays its proceedings, directs the parties to file an action in state court, but retains jurisdiction of the case. Because the case remains on the federal docket, however, some state courts have refused to entertain a state suit on the ground that it constitutes a request for an advisory opinion.[117] In such jurisdictions, the Supreme Court has authorized federal district courts to dismiss the federal action "without prejudice so that any remaining federal claim may be raised in a federal forum after the [state] courts have been given the opportunity to address the state law questions in this case."[118] This "form over substance" solution to the advisory opinion problem has difficulties of its own.

> One must wonder whether this alternate procedure will really satisfy the state court's concerns. So long as the matter can return to federal court—whether or not it remains on the docket while the case is in state court—the state is not issuing the final decision in the case.[119]

After the parties have obtained a state-court judgment, *Pullman* contemplates that the litigation may return to federal court for final determination of the constitutional issues. This result requires alteration of traditional preclusion rules. The state court decision, in short, is not necessarily determinative, as evidenced by *England v. Louisiana State Board of Medical Examiners*.[120]

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115. McRedmond v. Wilson, 533 F.2d 757, 761 (2d Cir. 1976); *accord* D'Iorio v. County of Delaware, 592 F.2d 681, 686-91 (3d Cir. 1978); Canton v. Spokane School Dist. No. 81, 498 F.2d 840, 845 (9th Cir. 1974).

116. Stephens v. Bowie County, 724 F.2d 434, 435 (5th Cir. 1984).

117. *E.g.*, United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965).

118. Harris County Comm'rs Court v. Moore, 420 U.S. 77, 88-89 (1975).

119. E. CHEMERINSKY, *supra* note 1, § 12.3, at 614-15.

120. 375 U.S. 411 (1964).

In *England*, the plaintiffs presented both their state and federal challenges to the state court after the federal district court had ordered abstention. After unsuccessful appeals to the state court of appeals and the Louisiana Supreme Court, plaintiffs sought to return to federal court. The district court dismissed the case on res judicata grounds because all issues had been decided by the state courts. The United States Supreme Court reversed. The Court found "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court . . . can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."[121]

The procedure established by *England*, while not inherently complicated, nevertheless creates its own muddles. Litigants may choose to present their entire case to the state court, including the constitutional claims. In that event, the litigants lose their right to return to federal court.[122] On the other hand, if the litigants expressly reserve the right to return to federal court, the state court judgment will not be res judicata of the federal claim.[123] But determining whether the parties have reserved the right to return to federal court may prove difficult, especially if the federal constitutional issues have been pressed on the state court in an attempt to influence its state law determination.[124]

England's procedure, moreover, vastly increases litigation costs. Following a federal court's abstention, "the plaintiffs must commence a new law suit in state trial court, . . . usually without getting any priority on crowded state dockets, before the state issue is settled. . . . [Only then] they can return to the federal system for resolution of federal issues, with attendant appeals."[125] Needless to say, the procedure from start to finish may, and often does, take many years. The procedure may deter litigants "from seeking a federal forum in the first instance, or it may, once abstention is ordered, induce them to cut their costs by presenting all issues to the state court for decision and waiving their right to return to federal court on federal issues."[126]

Because of the difficulties engendered by *England*, the

121. *Id.* at 415.
122. *Id.* at 419.
123. *Id.* at 421-22.
124. *See generally* M. REDISH, *supra* note 84, at 256-57.
125. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 591 (1977).
126. *Id.*

American Law Institute (ALI) has recommended that litigants simply be precluded from returning to federal court once *Pullman* abstention has been ordered. So long as adequate state procedures exist for the resolution of all questions presented by a case, both state and federal, the ALI would make the state court decision dispositive.[127] The ALI proposal has not been adopted, perhaps in part because its implementation would eviscerate one of the catechisms frequently invoked to support *Pullman* abstention: i.e., that *Pullman* merely represents the "postponement" and not the "abdication" of federal jurisdiction.[128]

2. Thibodaux *Abstention*

Pullman abstention is based, at least in part, on the notion that federal courts should not be required to make a "forecast" regarding the status of unclear state law.[129] Such reasoning, however, seemingly would not support abstention in a diversity case.

> Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine.[130]

But, despite the principle announced in *Meredith v. Winter Haven*,[131] the Court has concluded (in a confusing line of cases) that abstention is nevertheless appropriate in certain diversity cases. In two arguably inconsistent opinions handed down the same day, the Court declared that abstention may be appropriate in a diversity case if the case presents an unclear question of state law intimately involved with "sovereign prerogative."[132]

In *Louisiana Power and Light Co. v. City of Thibodaux*,[133] the city initiated a state-court eminent domain proceeding against the defendant power company, a Florida corporation.

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127. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 48-51 (1969).

128. Allen v. McCurry, 449 U.S. 90, 101 n.17 (1980); Harrison v. NAACP, 360 U.S. 167, 177 (1959).

129. *See* Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 499-500 (1941).

130. Meredith v. Winter Haven, 320 U.S. 228, 236 (1943).

131. 320 U.S. 228 (1943).

132. Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959); Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 192 (1959).

133. 360 U.S. 25 (1959).

The defendant removed the suit to federal court where it challenged the city's legal authority to condemn its property. The district court, on its own initiative, stayed the federal proceedings to permit Louisiana courts to address the unsettled question of sovereign power. The Supreme Court affirmed the decision to abstain, reasoning that abstention was appropriate to permit state courts to address an unclear question of state law "intimately involved with sovereign prerogative."[134]

In *Allegheny County v. Frank Mashuda Co.*,[135] however, the Court held that "the fact that a [diversity] case concerns a State's power of eminent domain" does not necessarily mandate abstention.[136] As in *Thibodaux*, the plaintiff in *Mashuda*, also challenged the scope of a city's eminent domain power. But, unlike *Thibodaux*, state eminent domain law was clear and unambiguous. Justice Brennan, writing for the majority, concluded that abstention was inappropriate. Abstention, he wrote, is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," and state exercise of eminent domain powers does not warrant special deference by the federal courts.[137] "[E]minent domain is no more mystically involved with 'sovereign prerogative' " than other state law issues commonly adjudicated by federal courts.[138] Because of the conflicting opinions in *Thibodaux* and *Mashuda*, it is uncertain whether abstention is appropriately ordered in diversity cases. If one assumes that the differing result in the two cases is justified by the fact that state law was unclear in *Thibodaux* but well-established in *Mashuda*,[139] some guidance can be gleaned from the cases; i.e., "federal courts should abstain in diversity cases if there is uncertain state law *and* an important state interest that is 'intimately involved' with the government's 'sovereign prerogative.' "[140] The only other Supreme Court decision to address *Thibodaux* abstention seemingly sup-

134. *Thibodaux*, 360 U.S. at 28.

135. 360 U.S. 185 (1959).

136. *Id.* at 191-92.

137. *Mashuda*, 360 U.S. at 188-89.

138. *Id.* at 192.

139. Justice Stewart and Justice Whittaker cast the deciding votes in *Thibodaux* and *Mashuda*—they were the only two justices in the majority of both cases. Justice Stewart explicitly stated that the difference between the two cases was the presence or absence of unclear issues of state law. *Thibodaux*, 360 U.S. at 31 (Stewart, J., concurring).

140. E. CHEMERINSKY, *supra* note 1, § 12.2.2, at 607.

ports this formulation.[141] The lower federal courts, however, "are substantially divided over when abstention is appropriate in diversity cases."[142]

One final note regarding *Thibodaux* abstention should be mentioned. Some scholars question whether *Thibodaux* qualifies as a separate line of abstention doctrine, or rather is merely a discrete example of *Burford* abstention.[143] As will be developed below, federal courts invoke *Burford* abstention to prevent interference with important state regulatory interests. If this classification is accurate, *Thibodaux* and *Mashuda* are merely examples of when a state's regulatory interest in the exercise of eminent domain powers justifies federal court abstention.

3. Burford *Abstention*

A third context in which federal courts have declined to exercise jurisdiction because of unclear state law is exemplified by *Burford v. Sun Oil Co.*[144] The "general thrust" of *Burford* abstention can be summarized by saying that a federal court should abstain when necessary "to avoid needless conflict with the administration by a state of its own affairs."[145] However, any attempt at defining the class of cases in which *Burford* abstention is proper would lack precision.[146] Indeed, *Burford* has been accurately described as "a confused and cryptic corner in the law of federal jurisdiction."[147]

In *Burford*, the Supreme Court concluded that the federal

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141. In *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593 (1968), the Court summarily held, in a brief per curiam opinion, that the district court should have abstained from deciding a state law water issue. The question involved, whether Kaiser Steel had the right to appropriate water located on property owned by the W.S. Ranch Co., was found to be "truly novel." *Id.* at 594. Therefore, because "[t]he state law issue . . . in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources," the Court found abstention appropriate in the interests of "[s]ound judicial administration." *Id.*

142. E. CHEMERINSKY, *supra* note 1, § 12.2.2, at 608 (citing United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir.), *cert. denied*, 377 U.S. 935 (1964); Miller-Davis Co. v. Illinois State Toll Highway Auth., 567 F.2d 323 (7th Cir. 1977)).

143. *See, e.g.*, WRIGHT, *supra* note 86, § 52, at 308-11 ("It may be that [*Thibodaux* and *Mashuda*] are only further examples of when Burford-type abstention is appropriate.").

144. 319 U.S. 315 (1943).

145. WRIGHT, *supra* note 86, § 52, at 308.

146. *Id.*

147. Comment, *Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the* Burford *Doctrine*, 46 U. CHI. L. REV. 971, 1006 (1979).

district court should have dismissed a diversity suit filed by Sun Oil Company to challenge an order of the Texas Railroad Commission granting Burford permission to drill four oil wells. The Court found that federal court action was inappropriate both because of the complexities of state oil and gas regulation,[148] and also because of the existence of an expert administrative agency charged with the administration of the state regulatory scheme.[149] State court review of the Commission's decisions, moreover, was found to be "expeditious and adequate."[150] Because conflicts in the interpretation of state oil and gas law would be "dangerous to the success of state policies," the Court held that "a sound respect for the independence of state action requires the federal equity court to stay its hand."[151]

The *Burford* decision, considered alone, "provides little guidance as to how uncertain . . . state law must be or what kinds of state procedures and interests would justify . . . abstention."[152] In *Alabama Public Service Commission v. Southern Railway*,[153] the Supreme Court seemingly expanded *Burford* to cover *any* state law issue of "local interest." There, the plaintiff railroad filed a diversity suit against the Public Service Commission, arguing that the Commission's refusal to permit discontinuance of two local trains violated the Takings Clause. As in *Burford*, regulation of the Commission's orders was concentrated in a single state court. The Court concluded that the federal action should have been dismissed. The regulation of local train service, the Court reasoned, was "primarily the concern of the state."[154] Because the case presented an essentially local problem where "adequate state court review of an administrative order based upon predominantly local factors is available," the

148. The Court noted that "[s]ince the oil moves through the entire field, one operator can not only draw the oil from under his own surface area, but can also, if he is advantageously located, drain oil from the most distant parts of the reservoir." *Burford*, 319 U.S. at 319. Accordingly, the Court concluded that oil and gas resources could be most effectively regulated by a single judicial entity. *Id.*

149. *Id.* at 333-34 ("The State provides a unified method for the formation of policy and determination of cases by the [Railroad] Commission and by the state courts."). *Id.*

150. *Id.* at 334.

151. *Id.*

152. E. CHEMERINSKY, *supra* note 1, § 12.2.3, at 609.

153. 341 U.S. 341 (1951).

154. 341 U.S. at 346 (quoting North Carolina v. United States, 325 U.S. 507, 511 (1945)).

Court held that "intervention of a federal court is not necessary for the protection of federal rights."[155]

Read for all it is worth, the decision in *Alabama Public Service Commission* "could be used to justify abstention whenever there is a federal constitutional challenge to a state administrative decision that also could be reviewed in state court."[156] Such a result would broadly prevent federal court review of state administrative actions. Perhaps most importantly, it would preclude filing an action under 42 U.S.C. section 1983 unless and until all possible state administrative remedies had been exhausted. The Supreme Court, however, has to date rejected such a broad interpretation of *Burford*.[157]

Because of the paucity of Supreme Court precedent applying *Burford* (*Alabama Public Service Commission* and *Burford* itself are the only cases that have applied it), the precise contours of this abstention doctrine it established are unclear. The lack of clear guidance has, in turn, left the lower courts in considerable disarray.[158] Commentators have asserted that *Burford* abstention is appropriate where there is *both* "unclear state law" *and* a "need to defer to complex state administrative procedures."[159] The Court's most recent pronouncement in the area,

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155. *Id.* at 349.

156. E. CHEMERINSKY, *supra* note 1, § 12.2.3, at 610. Another commentator stated,

> In *Burford* and *Alabama Public Service Commission v. Southern Railway*, the United States Supreme Court emphasized that the state scheme of judicial review is an integral part of the regulatory process established by the state and that in determining the adequacy of the state review procedure, the federal courts should look at the state system as a whole. The courts, therefore, must be particularly careful before condemning a state system of judicial review as inadequate.

Lakusta, *California Supreme Court Review of Decisions of the Public Utilities Commission—Is the Court's Denial of a Writ of Review a Decision on the Merits?*, 39 HASTINGS L.J. 1147, 1166-67 (1988) (footnotes omitted).

157. *See* McNeese v. Board of Educ., 373 U.S. 668 (1963) (plaintiffs in a school desegregation case need not first exhaust available state administrative relief); Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978) (abstention not required in challenge to state regulation governing the availability of marriage licenses; "there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy").

158. Some lower courts require a showing that federal court review would disrupt a coordinated state regulatory scheme. *E.g.*, Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092, 1096 (9th Cir. 1976). Others permit *Burford* abstention simply if the matter at issue is shown to be of "local interest." *E.g.*, Tennyson v. Gas Serv. Co., 506 F.2d 1135, 1143 (10th Cir. 1974). *See generally* Comment, *supra* note 147, at 980-88.

159. E. CHEMERINSKY, *supra* note 1, § 12.2.3 at 608. *See also* WRIGHT, *supra* note 86, § 52, at 311 (*Burford* appropriate where the state "has a unified scheme for review of its administrative orders and federal intervention . . . would have a disruptive effect on

however, seems to go beyond this synthesis and broaden the reach of *Burford*. Just this past Term, the Court suggested that *Burford* abstention is appropriate either when unsettled state law issues are of transcendent importance *or* when federal review "would be disruptive of state efforts to establish . . . coherent policy."[160]

One important procedural feature of *Burford* abstention should be noted. Unlike *Pullman* and *Thibodaux* abstention where (at least in theory if not always in practice)[161] the federal court retains jurisdiction, outright dismissal is ordered under *Burford*. Outright dismissal is thought to be "appropriate" because the federal court is "defer[ing] to avoid interference with state activities."[162]

4. Younger *abstention*

There is "no more controversial" federal jurisdictional issue than the abstention doctrine erected by the Supreme Court in *Younger v. Harris*.[163] *Younger* established that a federal court may not enjoin a pending state criminal proceeding, except in extraordinary circumstances.[164] This bare holding is unremark-

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the state's efforts to establish a coherent policy on a matter of substantial public concern."). *But see* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1153-54 (1974) (the presence of unclear state law is not a requirement for *Burford* abstention).

160. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2514 (1989) (quoting Colorado River Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)). The Court wrote,

> Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Id. (quoting *Colorado River*, 424 U.S. at 814).

161. *Cf.* Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975) (authorizing dismissal under *Pullman* if necessary to permit filing of state court action).

162. WRIGHT, *supra* note 86, § 52, at 308. It should be noted that outright dismissal does not solve many of the problems associated with abstention as litigants may be able to return to federal court on certain circumstances. *See supra* text accompanying notes 120-28.

163. 401 U.S. 37 (1971). *See* 17A WRIGHT, MILLER & COOPER, *supra* note 17, § 4251, at 180 (2d ed. 1988).

164. *See* Samuels v. Mackell, 401 U.S. 66, 69 (1971) (stating that *Younger* held that "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal court suit except in very unusual situations, where necessary to pre-

able; the Court had previously concluded that "courts of equity in the exercise of their discretionary powers should . . . refus[e] to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent."[165] *Younger*, however, has not been confined to federal court interference with pending criminal prosecutions. Indeed, the Court has ordered *Younger* abstention both in state civil actions and also in state administrative proceedings.[166] This expansion of *Younger*, which "leave[s] crucial constitutional law issues in state court, subject only to the relatively remote chance of review by the United States Supreme Court,"[167] has prompted heated debate.

The Court crafted its opinion in *Younger v. Harris*, at least in part, to respond to a flood of cases prompted by its earlier decision in *Dombrowski v. Pfister*.[168] In *Dombrowski*, the Court authorized federal courts to enjoin state prosecutions if maintenance of the state action "chilled" first amendment rights.[169] Following *Dombrowski*, many litigants concluded

> that every person prosecuted under state law for conduct arguably protected by the First Amendment could, by murmuring the words "chilling effect," halt the state prosecution while a federal court, ordinarily of three judges, passed on the validity of the statute and the bona fides of the state law enforcement officers.[170]

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vent immediate irreparable injury").

165. Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943).

166. *See* Penzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (federal court should have deferred on comity grounds to pending state *civil* proceedings); Ohio Civil Rights Comm. v. Dayton Christian Schools, 477 U.S. 619, 633 (1986) (Younger abstention is applied "to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim."); Rizzo v. Goode, 423 U.S. 362 (1976); Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225, 1229 (4th Cir. 1989) ("The doctrine of Younger abstention has progressed over the past two decades to protect state criminal proceedings, and state administrative process from premature federal interference.").

167. E. CHEMERINSKY, *supra* note 1, § 13.1, at 623.

168. 380 U.S. 479 (1965).

169. The *Dombrowski* Court reasoned that when state "statutes . . . have an overbroad sweep, as is here alleged, the hazard of loss or substantial impairment of . . . precious [first amendment] rights may be critical," and therefore the "assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded." *Id.* at 486.

170. 17A WRIGHT, MILLER & COOPER, *supra* note 17, § 4251, at 185.

As a result, litigants flooded federal courts with hundreds of cases seeking injunctions of state court proceedings,[171] and the cases "went in every possible direction."[172] The opinion in *Younger* stemmed the flow of these cases.

The plaintiff in *Younger* had been indicted for distributing leaflets in violation of the California Criminal Syndicalism Act. In reliance upon *Dombrowski*, he brought a federal court action to enjoin enforcement of the California statute. A three-judge district court entered an injunction, finding the statute unconstitutionally vague and overbroad. The Supreme Court, in an opinion by Justice Black, reversed. Justice Black reasoned that injunctive relief was inappropriate because of the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[173] This aspect of *Younger* represents little more than a return to the established rule, exemplified by decisions such as *Douglas v. City of Jeannette*,[174] that courts of equity should refuse to enjoin pending criminal proceedings except in extraordinary circumstances.[175]

Younger, however, was not grounded solely on principles of equity. Justice Black wrote that the result in *Younger* was "reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions."[176] Justice Black capsulized the meaning of "a proper respect for state functions" in the phrase "Our Federalism."[177] According to Justice Black, "Our Federalism"

> does not mean blind deference to "States' Rights" any more

171. E. CHEMERINSKY, *supra* note 1, § 13.2, at 625.

172. 17A WRIGHT, MILLER & COOPER, *supra* note 17, § 4251, at 185.

173. Younger v. Harris, 401 U.S. 37, 43-44 (1971).

174. 319 U.S. 157, 163 (1943).

175. The *Younger* Court identified three extraordinary circumstances that might justify federal injunctive relief: bad faith prosecution, prosecution under patently unconstitutional laws, and unavailability of an adequate state forum. *Younger*, 401 U.S. at 45, 53-54. Litigants, however, have rarely—if ever—been able to establish entitlement to injunctive relief under these exceptions. *See, e.g.*, Fiss, *supra* note 96, at 1115 ("[T]he universe of bad-faith-harassments claims that can be established is virtually empty."); E. CHEMERINSKY, *supra* note 1, § 13.4, at 653 (noting that since *Younger*, the Court has not once applied the "patently unconstitutional" exception to legitimize federal court interference of pending state proceedings).

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

177. *Id.*

> than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is 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 endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[178]

In *Samuels v. Mackell*,[179] a case decided the same day as *Younger*, the Supreme Court refined and expanded the *Younger* rule. The Court in *Samuels* held that federal courts may not grant declaratory relief to a plaintiff who is subject to a pending state criminal proceeding. The Court later clarified, however, that where no criminal prosecution is pending, both declaratory and injunctive relief may be awarded.[180]

An important early expansion of *Younger* involved the breadth of federal deference to "pending" state actions. In *Hicks v. Miranda*,[181] a state criminal prosecution was filed the day *after* a federal declaratory action had been filed. The Supreme Court nevertheless ordered the federal action dismissed. The Court reasoned that "where state criminal proceedings are begun against the federal plaintiff after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger* should apply in full force."[182] Although the exact import of this holding is unclear, leading commentators in the area of federal jurisdiction conclude *Hicks* means that "once a state criminal

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178. *Id.*

179. 401 U.S. 66 (1971).

180. Wooley v. Maynard, 430 U.S. 705 (1977) (upholding issuance of a permanent injunction in the absence of pending state proceedings); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (authorizing preliminary injunctive relief in the absence of pending state action); Steffel v. Thompson, 415 U.S. 452 (1974) (authorizing declaratory relief when no criminal proceedings are pending). Whether a federal court should ever grant injunctive, rather than declaratory, relief is not entirely clear. Justice Rehnquist, writing for the Supreme Court in *Doran*, strongly suggested that the entry of an injunction is generally inappropriate because of the availability of "milder" declaratory relief. *See Doran*, 422 U.S. at 931 ("At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary."). However, the Court's subsequent action in *Wooley*, *supra*, suggests that injunctive relief can in fact be awarded.

181. 422 U.S. 332 (1975).

182. *Id.* at 349.

prosecution is filed, federal courts may not decide issues properly before the state court, unless it has already done so."[183] *Hicks*, in short, gives state prosecutors substantial power to "abort a federal action by commencing state court proceedings immediately after the federal action is filed."[184] Critics have accordingly charged that the decision "laid waste the century-old canon of federalism that the filing of an action in state court could not oust a federal court first obtaining jurisdiction of the case."[185]

The Court's first major expansion of *Younger* beyond the context of state criminal proceedings came in *Huffman v. Pursue, Ltd.*[186] There, state officials obtained a civil judgment closing an adult theater for one year on the ground that the exhibition of obscene films constituted a nuisance. Rather than appeal that judgment through the state court system, the theater owners sought a federal injunction on first amendment grounds. The district court entered the injunction, but the Supreme Court reversed. Justice Rehnquist, writing for the majority, concluded that *Younger* applied because the civil nuisance proceeding was "more akin to a criminal prosecution than are most civil cases" and federal interference in the state proceeding was "likely to be every bit as great as it would be were this a criminal proceeding."[187] Three dissenting justices, led by Justice Brennan, argued that the deference accorded state criminal proceedings by *Younger* was unwarranted in the civil context. Criminal proceedings are preceded by "steps designed to safeguard . . . against spurious prosecution—arrest, charge, information, or indictment," while civil actions are commenced with the mere filing of a complaint.[188] Application of *Younger* in the civil context, Brennan argued, permits state prosecutors to "strip" a litigant "of a forum and a remedy that federal statutes were enacted to assure him."[189]

Although *Huffman* suggested that *Younger* abstention

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183. 17A WRIGHT, MILLER & COOPER, *supra* note 17, § 4253, at 228 (quoting Note, *Federal Court Intervention in State Criminal Law Proceedings When Changes Are Brought After Filing of the Federal Complaint*, 37 OHIO ST. L.J. 205, 214-15 (1976)).

184. *Id.* § 4253, at 231.

185. Soifer & Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1192 (1977).

186. 420 U.S. 592 (1975).

187. *Id.* at 604.

188. *Id.* at 615 (Brennan, J., dissenting).

189. *Id.*

might be confined to civil proceedings "akin to a criminal prosecution,"[190] the Court has not so restricted the doctrine. Instead, the Court has applied *Younger* to a broad range of civil proceedings. Indeed, the Court's decisions suggest that *Younger* may well be applicable to *any* state court litigation implicating "important state interests."[191] *Younger*, for example, probably applies to all pending civil enforcement actions in which the state is a party.[192] *Younger* also applies to pending civil litigation between private parties, provided that the suit implicates some "important state interest."[193] *Younger*, finally, implicates more than the activities of state courts. *Younger* applies to pending state administrative proceedings as well.

In *Middlesex County Ethics Committee v. Garden State Bar Association*,[194] the Supreme Court concluded that the district court properly dismissed a constitutional challenge to state bar disciplinary rules because a disciplinary proceeding in state court was pending against the plaintiff attorney. The Court extended *Younger* based on the now-established rationale that an important state interest (regulation of the state bar) was involved.[195] That the state administrative bodies involved appar-

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190. *Id.* at 604.

191. Middlesex County Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423, 432 (1982). *But see* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2517-18 (1989).

192. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 444 (1977) (applying *Younger* to state court attachment proceeding brought to recover state welfare benefits; "[t]he principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, brought by the State in its sovereign capacity"); Moore v. Sims, 442 U.S. 415, 425-26 (1979) (applying *Younger* to a child custody proceeding initiated by a state agency despite the fact that the federal constitutional challenge to state procedures arguably could not be raised in the pending state proceeding; "abstention is appropriate unless state law clearly bars the interposition of the constitutional claims").

193. Juidice v. Vail, 430 U.S. 327, 335 (1977) (refusing federal injunction against state court contempt order even though the state litigation involved only private parties; "the contempt process, through which it vindicates the regular operation of its judicial system . . . lies at the core of the administration of a State's judicial system"); Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 14 (1987) (holding that federal courts may not enjoin a state court requirement that litigants post a bond pending appeal; "[s]o long as . . . challenge[d statutes] relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand").

194. 457 U.S. 423 (1982).

195. *Id.* at 432-34.

ently lacked the authority to decide the attorney's constitutional claims did not seem to trouble the Court.[196]

In a later decision, the Supreme Court seemingly limited the circumstances in which administrative abstention is appropriate to those cases where the state forum can indeed dispose of the constitutional claim. In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,[197] the Court held that the district court should not have abstained from deciding a first amendment constitutional claim because of a pending proceeding before the Ohio Civil Rights Commission. The Court explained that *Younger* applies to state administrative proceedings only "so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim."[198]

The final scope of *Younger* abstention is not yet clear.[199] The logic of the foregoing cases certainly suggests that *Younger* may well apply to *all* pending state judicial and administrative proceedings, whether or not the state itself is a party, at least so long as some nominally "important state interest" can be identified. Although the Court has asserted that its opinions do not sweep so broadly,[200] Justice Brennan, for one, has questioned whether the Court is merely postponing announcement of that result.[201] If that is indeed the ultimate outcome of *Younger* doctrine, it represents a fundamental alteration in the allocation of judicial power between state and federal courts. *Younger* would

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196. *Middlesex*, 457 U.S. at 435 (without finding that the state bar *could* resolve a constitutional challenge, the Court merely concluded that "[s]o long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain").

197. 477 U.S. 619 (1986).

198. *Id.* at 626.

199. Some commentators have expressed concern that *Younger* might preclude federal court review of state executive action. *See* E. CHEMERINSKY, *supra* note 1, § 13.3.5, at 648-51 (arguing that *Younger* might "limit a federal court's ability to adjudicate constitutional challenges to state and local executive conduct"). This possible expansion of *Younger* now seems unlikely. In New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2519 (1989), the Supreme Court wrote that "[w]hile we have expanded *Younger* beyond criminal proceedings, and even beyond proceedings in courts, we have never extended it to proceedings that are not 'judicial in nature.' " This appears to be a clear signal that *Younger* will not preclude judicial review of the unconstitutional actions of state executive officers. E. CHEMERINSKY, *supra* note 1, § 13.3.5, at 650.

200. *E.g.*, Moore v. Sims, 442 U.S. 415, 423 n.8 (1979) ("we do not remotely suggest 'that every pending proceeding between a State and a federal plaintiff justifies abstention' "); Juidice v. Vail, 430 U.S. 327, 336 n.13 (1977).

201. *Juidice*, 430 U.S. at 345 (Brennan, J., dissenting).

oust federal courts from the decision of federal statutory and constitutional questions any time there existed a concurrently pending state proceeding in which the federal court plaintiff could raise the federal claim. Such a result, in short, would abrogate the long-established rule that "[t]he right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied."[202]

The Supreme Court has hinted it does not intend to press *Younger* to these extremes. In *New Orleans Public Service, Inc. v. Council of New Orleans* (*NOPSI*), which is the most recent decision on point, the Court concluded that *Younger* does not "require[] abstention in deference to a state judicial proceeding reviewing legislative or executive action."[203] In that case, the New Orleans City Council entered an order refusing New Orleans Public Service, Inc. (NOPSI) full reimbursement for its share of costs incurred in the construction of a nuclear power plant, despite a contrary (and under federal law controlling) order of the Federal Energy Regulatory Commission (FERC). The City Council's order became the subject of both state and federal litigation, where NOPSI argued that the FERC order preempted the Council's action. Both the federal district court and federal court of appeals abstained under *Younger* and *Burford*. The Supreme Court reversed.

The Court's analysis in *NOPSI* is a departure from its previous *Younger* opinions. The Court did not hinge application of *Younger* upon whether the pending state litigation involved an "important state interest" mandating abstention.[204] Instead, the Court established categories of cases "to which *Younger* applies."[205] The categories identified by the Court included "civil enforcement proceedings" and "proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions."[206] The state proceeding in-

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202. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2513 (1989) (quoting Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909)).

203. *Id.* at 2518.

204. *Id.* at 2517-18. *Cf.* Middlesex County Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423, 432 (1982). The Court noted that an important state interest, the regulation of utility rates, was in fact implicated in the state proceeding. *NOPSI*, 109 S. Ct. at 2516. The Court wrote, "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Id.* (quoting Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983)).

205. *Id.* at 2517.

206. *Id.* at 2517-18. The Court identified the decisions in *Huffman*, *Trainor* and

volved in *NOPSI*, "a state judicial proceeding reviewing legislative or executive action,"[207] did not fit within either category specified, and abstention was therefore not required. "NOPSI's suit," the Court concluded, did not involve "interference with ongoing judicial proceedings against which *Younger* was directed."[208]

The opinion in *NOPSI* may be welcomed by those who have expressed fears that *Younger*, as expanded and applied by the Court, represents a broad and unwarranted abdication of federal jurisdiction.[209] It plainly indicates that the Court is currently unwilling to let the reasoning of its earlier opinions reach their logical conclusion, i.e., ouster of the federal courts whenever a parallel state action is pending. The opinion, however, is ultimately unsatisfying as an analytical matter.

Although the *NOPSI* Court identifies categories of civil actions where "*Younger* applies,"[210] it remains unclear precisely *why* those categories of state proceedings merit special deference by the federal courts. Is it because, as the Court has previously indicated, the identified categories of cases involve important state interests? If so, why doesn't Louisiana's vital interest in the regulation of utility rates, an interest expressly recognized by the Court,[211] merit similar deference? Or, if an important state interest is insufficient to warrant *Younger* abstention, as the opinion in *NOPSI* plainly indicates, what factors *do* merit federal court deference? *NOPSI* gives little, if any, discernible guidance in its categorical approach to *Younger* abstention.

5. Colorado River *abstention*

The decision in *Colorado River Water Conservation District v. United States*,[212] has the broadest potential sweep of any judicially created abstention rule. Unlike previous abstention doctrines, which are founded upon prudential concerns,[213] *Colo-*

Moore as involving "civil enforcement proceedings" and the decisions in *Juidice* and *Pennzoil* as examples of the second category. *Id.*

207. *Id.* at 2518.

208. *Id.* at 2520.

209. *See, e.g.*, Soifer & Macgill, *supra* note 185, at 1174.

210. *NOPSI*, 109 S. Ct. at 2517.

211. *Id.* at 2516.

212. 424 U.S. 800 (1976).

213. The main prudential concerns previously discussed are the need to avoid unnecessary constitutional decisions (*Pullman*), the desire to defer resolution of unclear state law issues to state courts (*Pullman* and *Thibodaux*), and judicial hesitancy to in-

rado River abstention is founded primarily upon notions of judicial economy. *Colorado River* abstention raises the question "whether a federal court may stay or dismiss an action on the sole ground that there is a similar action pending in state court in which the controversy between the parties can be resolved."[214] In essence, this type of abstention merely serves "the convenience of the federal courts, or to put a more prepossessing name on it, [it serves] to avoid duplicative litigation."[215] But notwithstanding the possible sweep of the doctrine, it has been accorded a relatively restricted scope.[216]

Generally, under *Colorado River*, a federal court may not abstain simply because a duplicative action is pending in state court.[217] The rationale behind this general rule is obvious. If federal courts were required to abstain every time plaintiffs filed duplicative state-court proceedings, defendants in federal court could defeat federal jurisdiction and thus remove cases from federal to state court.[218] The toll this rule exacts, however, can be significant. Parties involved in litigation in one forum (state or federal) often have the opportunity,[219] as well as the incentive,[220]

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trude upon important state administrative or judicial schemes (*Burford* and *Younger*).

214. WRIGHT, *supra* note 86, § 52, at 315. *See also* Planned Parenthood League of Mass. v. Bellotti, 868 F.2d 459, 462 (1st Cir. 1989); Rosser v. Chrysler Corp., 864 F.2d 1299, 1307 (7th Cir. 1988); American Int'l Underwriters v. Continental Ins. Co., 843 F.2d 1253, 1255-56 (9th Cir. 1987) (duplicative litigation is a factor to be considered in abstention determinations). *But cf.* Evanston Ins. Co. v. Jimco, Inc., 844 F.2d 1185, 1190, 1192 (5th Cir. (1988) (the court noted that "the general principle is to avoid duplicative litigation, but the pendency of a state court action is ordinarily no bar to proceedings concerning the same matter in the Federal Court having jurisdiction, because federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them").

215. WRIGHT, *supra* note 86, § 52, at 315.

216. *See, e.g.*, Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1 (1983).

217. *See, e.g.*, Stanton v. Embrey, 93 U.S. 548, 554 (1877) ("[T]he pendency of a prior suit in another jurisdiction is not a bar . . . even though the two suits are for the same cause of action."); McClellan v. Carland, 217 U.S. 268 (1910).

218. E. CHEMERINSKY, *supra* note 1, § 14.4, at 659. *See also* Redish, *supra* note 94, at 96-98.

219. For example, although a state court defendant with a federal defense cannot remove the state court action to federal court, see Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) (applying the "well pleaded complaint" rule in the removal context), the same litigant may be able to file a separate federal question action. *See* Gulfstream Aerospace Corp. v. Mayacamas Corp., 108 S. Ct. 1133, 1144 (1988) (noting that a party can bring a separate federal action rather than remove a state action to federal court).

220. "Parties might bring a reactive suit because they perceive that the other forum would be more sympathetic to their claims; because of the strategic and tactical advantages available in the other forum; or because the second court system might offer a

to file reactive suits in the parallel forum. As a result, both state and federal courts may be faced with overlapping litigation involving the same parties and claims. Allowing simultaneous litigation, moreover, leads to incredible waste since only one of the jurisdictions will eventually resolve the dispute.[221] In other words, once the state court has decided the issues in the litigation, the federal court must give that determination res judicata effect, and is thus required to terminate its proceedings.[222] Considerations of judicial economy, therefore, militate strongly in favor of some form of abstention to avoid duplicative suits.[223]

The Supreme Court in *Brillhart v. Excess Insurance Co.*[224] suggested one possible ground for federal court abstention in the face of duplicative state litigation. In *Brillhart*, a federal district court had dismissed a diversity suit seeking a declaratory judgment on the ground that similar litigation was pending in state court. The Supreme Court affirmed, expressly noting that abstention was appropriate because of the discretionary nature of declaratory relief.[225] The Court also suggested that, at least in the context of diversity suits, abstention was likewise appropriate to further sound notions of judicial economy. "Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not gov-

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speedier resolution for the dispute." E. CHEMERINSKY, *supra* note 1, § 14.1, at 657-58.

221. *Id.* § 14.1, at 659.

222. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 277 (1988). The Court in Allen v. McCurry, 449 U.S. 90 (1980), noted that while the common law and policies supporting res judicata dictated that preclusive effect be given to other federal court decisions, it was Congress which had "specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so . . . ." *Id.* at 95-96. In addition to the waste of judicial resources, rules of preclusion create "the potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first . . . ." Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 547-48 (1983).

223. There is one clearly established ground upon which a federal court can decline jurisdiction because of a pending state action. "[I]n cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem* . . . the state or federal court having custody of such property has exclusive jurisdiction to proceed." Donovan v. City of Dallas, 377 U.S. 408, 412 (1964). The *Donovan* rule avoids inconsistent dispositions of property. Outside this narrow area, however, there are no "other rules to prevent duplicative litigation in state and federal courts." E. CHEMERINSKY, *supra* note 1, § 14.2, at 661.

224. 316 U.S. 491 (1942).

225. *Id.* at 495. *See* 17Á WRIGHT, MILLER & COOPER, *supra* note 17, § 4247, at 118-20 (noting that the "special nature of declaratory judgments" may support abstention in declaratory judgment actions).

erned by federal law, between the same parties."[226] Following the decision in *Brillhart*, a "trend emerged that in diversity cases federal courts would abstain out of deference to duplicative concurrent state proceedings."[227] Expansion of *Brillhart*, however, was halted by the Court's decisions in *Colorado River Water Conservation District v. United States*,[228] and *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*[229] In those cases the Court declared that abstention to avoid duplicative litigation is appropriate only in limited, exceptional circumstances.

In *Colorado River*, the United States brought suit in federal court seeking a declaration of its water rights. The federal suit involved over 1,000 defendants, many of whom were already parties to a state court proceeding involving the same water rights. The Court, in an opinion by Justice Brennan, emphasized that "[g]enerally . . . 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court . . . .' "[230] Justice Brennan therefore cautioned that the "circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention."[231] Nevertheless, the Court concluded that a federal court could stay its hand if the interests of sound judicial administration clearly outweighed the "virtually unflagging obligation" to exercise jurisdiction.[232] Specifically, the Court stated that federal courts should consider difficulties arising from concurrent state and federal jurisdiction over the same res, the relative inconvenience of the federal forum, the need to avoid piecemeal litigation, and the order in which the state and federal proceedings were filed.[233] The Court found that the preceding factors, applied to the water rights dispute then before the bar, justified abstention. The Court's anal-

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226. *Brillhart*, 316 U.S. at 495.

227. E. CHEMERINSKY, *supra* note 1, § 14.2, at 662-63 (citing cases).

228. 424 U.S. 800 (1976). This is the case, cited at the beginning of this subsection, from which the name *Colorado River* abstention was derived.

229. 460 U.S. 1 (1983). *See generally* M. REDISH, *supra* note 84, at 253.

230. *Colorado River Water Conservation Dist.*, 424 U.S. at 817 (quoting McClelland v. Carland, 217 U.S. 268, 282 (1910)).

231. 424 U.S. at 817.

232. *Id.*

233. *Id.* at 818-19.

ysis, however, was so broad and multifactored that the opinion gave little concrete guidance for the resolution of future cases.[234]

"[W]ithin a few years after the Court decided *Colorado River*, the lower federal courts were in disarray."[235] Some courts declined to abstain "in the absence of 'exceptional circumstances,' while others indicated that *Colorado River* might have freed them to clear their dockets merely because a parallel, and thus duplicative, state court action had been filed."[236] The subsequent decision in *Will v. Calvert Fire Insurance Co.*[237] added to the confusion. There, Justice Rehnquist, writing for a four-justice plurality, suggested that *Colorado River* had indeed broadened a district court's discretion to dismiss a federal action because of pending state litigation. "[A] district court," Justice Rehnquist wrote, "is 'under no compulsion to exercise [its] jurisdiction' where the controversy may be settled more expeditiously in the state court."[238] Four other justices, led by Justice Brennan, asserted that Rehnquist's approach improperly disregarded the fundamental teaching that *Colorado River* abstention was "rare" and limited to exceptional circumstances.[239] Justice Blackmun cast the deciding fifth vote, with the result that the Court remanded the case for the court of appeals to apply *Colorado River.*

The Court attempted to resolve the confusion regarding the scope of *Colorado River* abstention in the case of *Moses Cone Hospital v. Mercury Construction Corp.*[240] There, the Moses

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234. One commentator has capsulized the Court's reasoning as follows:

> The Court concluded that the adjudication of water rights is best conducted in "unified proceedings," such as those provided under the state's law. In ruling in favor of abstention, the Court noted the absence of any proceedings in the federal district court other than the filing of the complaint; the case's potentially extensive implications for water rights in the state; the proximity of the state court and the distance of the federal court to the water site; and the existing participation by the United States government in ongoing state proceedings. Together, these factors constituted exceptional circumstances warranting abstention.

E. CHEMERINSKY, *supra* note 1, § 14.2, at 664. Such reasoning, of course, is exceedingly broad. The Court's opinion, moreover, gave no clear indication which of the factors, either singly or in combination, resulted in a finding of "exceptional circumstances."

235. Sonenshein, *Abstention: The Crooked Course of* The Colorado River," 59 TUL. L. REV. 651, 667 (1985).

236. *Id.*

237. 437 U.S. 655 (1978).

238. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662-63 (1978) (citation omitted) (quoting Brillhart v. Excess Ins. Co., 316 U.S. 491, 494 (1942)).

239. *Id.* at 673 (Brennan, J., dissenting).

240. 460 U.S. 1 (1983).

Cone Memorial Hospital instituted a state court action seeking a declaration that its contract with Mercury was not subject to arbitration. Mercury responded by filing a federal court suit to compel arbitration under the Federal Arbitration Act. The federal district court stayed its proceedings pending the outcome of the state litigation. The court of appeals reversed and the Supreme Court affirmed. Justice Brennan firmly reiterated the view that abstention to avoid duplicative litigation was appropriate only in truly exceptional cases and urged careful balancing of the factors identified in *Colorado River*. Justice Brennan wrote that a federal court's "task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction."[241] Instead, "the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction."[242] The Court also noted that the presence of a federal question weighs heavily against federal court abstention.[243]

Since the decision in *Moses Cone*, the Supreme Court has consistently declared that *Colorado River* abstention is limited to "exceptional cases."[244] The possibility, suggested by *Brillhart*, that—at least in diversity cases—judicial economy justifies a broader abstention rule has apparently been foreclosed. Nevertheless, "many lower courts continue to order abstention when there are parallel proceedings pending in state courts. The frequency of such abstention reflects the absence of agreement as to how exceptional the circumstances must be in order to warrant abstention."[245]

C. Suggestions for Legislative Action

The propriety of judicially mandated abstention remains an open question. The decision to abstain presents difficult questions regarding when, and upon what conditions, a federal forum should be available for litigation of federal issues notwithstanding available state proceedings. The debate "centers on . . . two themes, separation of powers and federalism."[246] Critics of abstention essentially argue that the Court created abstention doc-

241. *Id.* at 25-26.
242. *Id.*
243. *Id.* at 23-26.
244. *See, e.g.*, Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545 (1983).
245. E. CHEMERINSKY, *supra* note 1, § 14.3, at 668-69 (1989) (footnote omitted).
246. *Id.* § 13.1, at 622.

trines to usurp traditional legislative prerogatives.[247] By contrast, those who support, in whole or in part, the abstention doctrines enunciated by the Court generally assert that abstention rules are well grounded in notions of comity and the traditional doctrine of a court of equity to refuse injunctive relief.[248]

Several noted commentators have supported outright abolition of judicially created abstention. Professor David Currie, for example, has written that *Pullman* abstention creates a "Bleak House aspect that in my mind is too high a price to pay for the gains in avoiding error, friction, and constitutional questions."[249] Martin Redish, in turn, notes the extreme costs imposed by all of the judicially created abstention doctrines and argues that "the interests of federalism" are already adequately served by legislatively mandated abstention, such as the Anti-Injunction Act.[250] Adopting these arguments as its foundation, abolition of all judicially mandated abstention could be accomplished by the following statute:

> Except where otherwise required by an act of Congress, no federal court may abstain from exercising expressly conferred jurisdiction.

The preceding legislation, however, would hardly be welcomed by all. The Supreme Court's attempt to allocate judicial power between the state and federal court systems enjoys significant scholarly support.[251] Even Martin Redish concedes "[i]t may well be that, if Congress were to consider the matter today, it would choose to structure abstention much as the federal courts have."[252] Moreover, the various abstention doctrines may well mask concerns more akin to notions of justiciability and prudence, rather than jurisdiction. For example, it is not far-

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247. *See generally* Redish, *supra* note 94.

248. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2513 (1989) (asserting that abstention doctrine merely involves the "federal courts' discretion in determining whether to grant certain types of relief").

249. Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 317 (1969).

250. Redish, *supra* note 94, at 74. *See also* Zeigler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the* Younger *Doctrine from a Modern Perspective*, 19 U.C. DAVIS L. REV. 31 (1985); Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59 (1981).

251. *See, e.g.*, Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

252. Redish, *supra* note 94, at 115.

fetched to conclude that the decision in *Pullman* resulted from the Court's reluctance in 1941 to decide a sweeping and, at that time, explosive issue regarding the reach of the fourteenth amendment's ban on racial discrimination. A flat legislative rejection of all judicially created abstention doctrine, therefore, might simply provide an incentive for the Court to alter existing justiciability doctrines (such as ripeness and standing) to deal with prudential concerns now resolved under an abstention analysis.[253]

When one considers the arguments favoring abstention, outright abolition of these judicially created doctrines appears unwarranted. The preceding explication of the Supreme Court's abstention doctrines, however, does demonstrate that there are identifiable shortcomings in the various abstention rules that merit legislative clarification or correction. Accordingly, the following suggestions for legislative action are addressed to the discrete problems raised by each type of abstention.

1. Pullman *abstention*

Pullman abstention has created substantial difficulties in two broad areas. First, it is unclear precisely when *Pullman* abstention is appropriately ordered;[254] and second, the procedures contemplated by *Pullman* have imposed dramatic costs upon litigants. Difficulties in both areas could be ameliorated by legislative action defining when *Pullman* abstention is properly invoked and mediating the costs and procedural difficulties caused by the decision to abstain.

In order to confine abstention to those cases when it is truly necessary to avoid undue state/federal friction, legislation should provide that *Pullman* abstention is appropriate only where federal decision of state law would disrupt important state policies.[255] Moreover, because of the devastating effect that abstention may have on the resources of the parties and a litigant's ability to press important constitutional claims, the decision to abstain should be made discretionary.[256] The district

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253. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2517-18 (1989) (noting the close association between ripeness and abstention doctrines).

254. There is continuing uncertainty in the courts of appeals regarding the showing necessary to invoke *Pullman* abstention. *Compare* McRedmond v. Wilson, 533 F.2d 757, 761 (2d Cir. 1976) *with* Stephens v. Bowie County, 724 F.2d 434, 435 (5th Cir. 1984).

255. *See* Field, *supra* note 109, at 1126-29.

256. Under current law, it is not clear whether *Pullman* abstention is discretionary

courts also should be directed to exercise that discretion by considering both the importance of the constitutional claim presented and the impact abstention might have on the parties' access to federal courts.[257]

Finally, to alleviate the procedural squabbles and costs associated with sending a case to sometimes reluctant state courts, the statute should authorize federal courts to certify state law questions directly to the appropriate state court.[258] An example of such a statute follows:

> (1) A federal district court may, in its discretion, abstain from deciding a federal constitutional issue if
>
> > (a) Decision of the federal constitutional issue depends upon the construction of state law; and
> >
> > (b) There is substantial uncertainty regarding the meaning or interpretation of the state law; and
> >
> > (c) An erroneous interpretation of the state law would disrupt important state policies; and
> >
> > (d) The state law is fairly subject to an interpretation that will render unnecessary a ruling on the federal constitutional issue.
>
> (2) In exercising its discretion under subsection (1), the district court must consider
>
> > (a) The importance of the constitutional issue presented; and
> >
> > (b) Whether a decision to abstain will effectively preclude a litigant's access to a federal forum.
>
> (3) If the district court exercises its discretion to abstain under subsection (1), it shall certify the question of state law upon

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or mandatory. *Compare* City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 640 (1959) (suggesting that abstention is mandatory) *with* Baggett v. Bullitt, 377 U.S. 360, 375 (1964) (treating abstention as a discretionary doctrine).

257. [I]f there are sensitive constitutional rights, such as voting and freedom of speech, which will be harmed by delay, abstention should be avoided. Similarly, if abstention will have a devastating effect on the parties, precluding continuation of the litigation or forcing them to completely forgo access to the federal courts, the court should consider this in deciding whether to abstain.

E. CHEMERINSKY, *supra* note 1, § 12.3, at 603.

258. The Court itself has noted that a certification procedure saves "time, energy, and resources and helps build a cooperative judicial federalism." Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). *See also* Virginia v. American Booksellers Ass'n., Inc., 108 S. Ct. 636, 644 (1988).

which abstention is ordered to an appropriate state court for prompt resolution.

2. Thibodaux *abstention*

As with *Pullman* abstention, commentators have been highly critical of *Thibodaux* abstention:[259]

> Critics contend that so long as diversity jurisdiction continues to exist, federal courts must decide such cases that are properly before them. The argument is that abstention is inconsistent with the very rationale behind diversity jurisdiction: the importance of providing a neutral federal forum when litigants are from different states.[260]

However, due to the limited and confusing guidance provided to date by the Supreme Court regarding abstention in diversity cases, it is difficult to frame a precisely tailored statute dealing with *Thibodaux*. Fortunately, such legislation may be unnecessary. As noted above, some scholars contend that *Thibodaux* is merely a specific instance of *Burford* abstention.[261] To the extent that this characterization is accurate, legislation clarifying the application of *Burford* should also alleviate difficulties under *Thibodaux*. Such legislation is proposed below.

3. Burford *abstention*

"Abstention under *Burford* has not been widely invoked, and there has been very little Court discussion of the meaning of the doctrine in recent years."[262] Legislation dealing with the difficulties presented by *Burford*, therefore, may not be exceedingly important. Nevertheless, the *Burford* doctrine enunciated by the Court remains unclear and the decisions of the lower courts are "not entirely consistent."[263] Legislation could usefully clarify the law in this area by defining the circumstances in which *Burford* abstention applies.

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259. *E.g.*, Gowen & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEX. L. REV. 194 (1964).

260. E. CHEMERINSKY, *supra* note 1, § 12.2.2, at 608. *See also* Finch v. Mississippi State Medical Ass'n, Inc., 585 F.2d 765, 777 (5th Cir. 1978); Miller-Davis Co. v. Illinois State Toll Highway Auth., 567 F.2d 323, 326 (7th Cir. 1977).

261. *E.g.*, WRIGHT, *supra* note 86, § 52, at 308-10.

262. P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 523 (1987). Since 1987, only New Orleans Pub. Serv. v. Council of New Orleans, 109 S. Ct. 2506 (1989), has addressed *Burford* abstention.

263. WRIGHT, *supra* note 86, § 52, at 312.

A carefully drafted legislative standard would also restrict *Burford*'s potential to emasculate the availability of a federal forum. Congress has established the federal courts as the "*primary* and powerful reliances" for the vindication of federal rights.[264] As noted above, a broad reading of *Burford* (based upon the Court's decision in *Alabama Public Service Commission*) might well prevent litigants from resorting to a federal forum if there was an available state administrative or judicial procedure for resolution of a federal complaint. That result would be avoided by a statute limiting *Burford* to circumstances where a state has a significant interest in an area of special local concern, and where federal intervention would unduly interfere with the development of coherent state policy. Such a statute, suggested by Professor Martin Redish[265] and drawn in part from the Court's own explication of *Burford*,[266] would provide the following:

> Where timely and adequate state court review is available, a district court may decline to interfere with the proceedings or orders of state administrative agencies if
>
> (a) the state regulatory scheme is detailed and complex; and
>
> (b) the exercise of federal jurisdiction would require the court to immerse itself in the technicalities of the state scheme; and
>
> (c) the exercise of federal jurisdiction would be disruptive of state efforts to establish coherent policy with respect to a matter of substantial public concern to the state.

4. Younger *abstention*

The core holding of *Younger v. Harris*, i.e., a federal court should enjoin an on-going state criminal prosecution only in "extraordinary circumstances,"[267] is grounded on traditional principles of equity[268] and prevents federal interference with perhaps the most important exercise of state sovereign preroga-

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264. Steffel v. Thompson, 415 U.S. 452, 464 (1974).

265. M. REDISH, *supra* note 84, at 246.

266. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2514 (1989).

267. Younger v. Harris, 401 U.S. 37, 53 (1971).

268. *Cf.* Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943) (refusing to enjoin pending state criminal prosecution on traditional equitable grounds).

tive—enforcement of state criminal law.[269] Accordingly, while there are critics who suggest that abstention is inappropriate even on the facts of *Younger*,[270] legislative abrogation of this aspect of *Younger* abstention is not plainly warranted. The Court's broad extension of *Younger* beyond the criminal context, however, raises issues that indeed merit legislative attention.

To begin with, the Court's extension of *Younger* beyond the criminal context conflicts with congressionally mandated jurisdictional and abstention principles. The most obvious and heavily criticized example of *Younger's* overextension involves the interaction of *Younger* with the Anti-Injunction Act and 42 U.S.C. section 1983.[271] The Anti-Injunction Act, a legislatively mandated abstention rule designed to further the same interests of federalism and comity upon which *Younger* is erected, nevertheless permits federal court injunctions where "expressly authorized by Act of Congress."[272] One of the express exceptions to the Anti-Injunction Act is 42 U.S.C. section 1983.[273] Although "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people . . . to protect the people from unconstitutional action under color of state law,"[274] the Supreme Court has erected *Younger* abstention as an independent obstacle to section 1983 litigation.[275] *Younger*, in short, operates to frustrate an assertion of federal jurisdiction authorized by Congress, notwithstanding an express congressional determination that abstention is inappropriate. As a result, *Younger* as applied today calls for legislative modification simply to preserve Congress' constitutional authority to delineate the jurisdiction of the lower federal courts.

Moreover, the *Younger* doctrine needs substantial doctrinal clarification. Professor Michael Wells has suggested that, in ex-

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269. *Cf.* Huffman v. Pursue, Ltd., 420 U.S. 592, 614 (1975) (Brennan, J., dissenting) (noting that the calculus of state/federal interests differs in the criminal and civil contexts).

270. *See, e.g.*, Redish, *supra* note 94; Ziegler, *supra* note 250.

271. *See, e.g.*, Soifer & Macgill, *supra* note 185, at 1174.

272. 28 U.S.C. § 2283 (1982). Section 2283 provides that a "court of the United States may not grant 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." *Id.*

273. *See* Mitchum v. Foster, 407 U.S. 225, 242 (1972).

274. *Id.*

275. Younger v. Harris, 401 U.S. 37, 54 (1971).

plicating *Younger* doctrine, the Supreme Court makes "arbitrary distinctions between cases, assigning some to federal courts and others to state courts" using "comity as a device to obscure the lack of good reasons for those distinctions."[276] According to Wells, *Younger* will continue to spawn ad hoc jurisdictional limitations for the lower federal courts.[277] Continuation of this course seems unwise. While "Our Federalism" occupies "a highly important place in our Nation's history and its future,"[278] the Court's decisions explicating "Our Federalism" also demonstrate "the difficulty in turning a slogan into workable and understandable legal rules."[279] This evident difficulty, by itself, provides a compelling ground for legislative action.

Finally, the *Younger* rules announced by the Court place undue emphasis upon deference to state judicial and administrative proceedings and too little emphasis upon important, countervailing federal interests. Justice Black, in writing the Court's opinion in *Younger*, stressed that the doctrine he announced did "not mean blind deference to 'States' Rights' any more than it [meant] centralization of control over every important issue in our National Government and its courts."[280] Rather, *Younger* requires "sensitivity to the legitimate interests of both State and National Government."[281] Yet the rules pronounced by the Court under *Younger* rarely give federal interests any weight at all. With the possible exception of the recent decision in *NOPSI*,[282] the Court's *Younger* decisions applying the absten-

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276. Wells, *supra* note 250, at 60.

277. *Id.* The Court has been unable to explicate workable rules for determining when federal deference to state proceedings should be granted. The bulk of the Court's opinions suggest that such deference is required any time the litigation includes an "important state interest." *See supra* notes 191-93 and accompanying text. The possible reach of that analysis, of course, is exceedingly broad: *any* state proceeding implicates "important state interests" almost by definition—whether that interest be the substantive enforcement of state policy, *see* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), or the proper operation of the state judicial or administrative forum, *see* Juidice v. Vail, 430 U.S. 327 (1977); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987). Although the Supreme Court has recently indicated that the foregoing analysis is not limitless and that *Younger* applies only to certain categories of cases, *see* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506 (1989), the Court has failed to provide any guidance as to why deference *is required* for "civil enforcement proceedings" *but not* for state judicial review of "legislative or executive action." *Id.* at 2517-18. This uncertainty will spawn substantial confusion in future cases.

278. *Younger*, 401 U.S. at 44-45.

279. WRIGHT, *supra* note 86, § 52, at 330.

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

281. *Id.*

282. *See supra* text accompanying notes 203-11.

tion seemingly require federal courts to give way any time there is a pending state proceeding in which a federal question can ostensibly be raised.[283] This aspect of *Younger* has led one commentator to conclude that *Younger* abstention is not based on any sound notion of comity, but rather represents a principle "of unilateral deference to state courts."[284] In other words, "[s]tate judiciaries need not defer to the federal court's interest in deciding constitutional claims that are properly within their jurisdiction, but federal courts must dismiss cases as soon as state litigation is commenced."[285]

The soundness of the foregoing analytical structure is subject to serious question. State courts and state administrative agencies indeed have an important interest in the proper operation of their respective systems, but federal courts retain at least an equal interest in the administration, explication and application of federal law. An abstention doctrine that requires the federal courts to turn any and all issues of national law over to a state forum any time state proceedings are commenced is certainly too broad. The orderly development and application of federal law constitutes an important function served by the lower federal courts. That function, moreover, will become even more vital in future years because Supreme Court review of state court action, which was once nominally required when a state court had invalidated a federal law or upheld a state law against federal challenge, is now entirely discretionary.[286] A federal court faced with an important question of federal law should not decline to exercise its mandated jurisdiction simply because the question before it may also be pending before a state civil or administrative forum.[287]

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283. *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423 (1982); Moore v. Sims, 442 U.S. 415 (1979). It is important to note that the Court has required abstention in deference to state proceedings *even when it was not entirely clear that the federal issue could be raised in the state forum. See Middlesex County*, 457 U.S. at 432-34 (ordering abstention even though there was no indication that the state administrative agency had the authority to resolve constitutional complaints); *Moore*, 442 U.S. at 436-37 (Stevens, J., dissenting) (arguing that abstention was inappropriate because "there is no single pending state proceeding in which the constitutional claims may be raised 'as a defense' and effective relief secured.").

284. E. CHEMERINSKY, *supra* note 1, § 13.3.2, at 637.

285. *Id.*

286. *See* 28 U.S.C. § 1257 (1982), *as amended by* Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662 (establishing the discretionary writ of certiorari as the only means of reviewing state court judgments).

287. The Court's broad extension of *Younger* beyond the criminal context may well

Based on the concerns over *Younger* abstention, legislative limitation of this doctrine appears justified.[288] Such legislation should restate the rule announced in *Younger* that federal courts may not enjoin state criminal proceedings except in extraordinary circumstances where federal action is necessary to prevent irreparable harm. Beyond the criminal context, however, the doctrine should be subjected to defined legislative limits.

Possible limits for *Younger* are suggested by the Supreme Court's own explication of the comity rationale underlying this abstention doctrine. According to the Court, "important state interests" invoke federal deference.[289] Again, such deference should not be a one-way street because *Younger* was never intended to "mean blind deference to 'States' Rights.' "[290] Accordingly, outside the criminal context, *Younger* should not apply where litigants present an important, dispositive question of federal law. This could be accomplished by amending the Anti-Injunction Act to (1) extend its coverage to state judicial and administrative proceedings, and (2) provide that, absent exceptional circumstances, a federal district court may not abstain from deciding a case presenting a dispositive question of federal law solely because state civil administrative or judicial action is pending.[291] Suggested legislation follows:

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represent, as two noted critics have claimed, "an obsessive concern with conflict between the state and national sovereigns." Soifer & Macgill, *supra* note 185, at 1185. These critics charge that the Court's *Younger* rules reflect more solicitude regarding "the structure of the Republic" than with "the rights of people who live in it." *Id.* at 1186.

288. There is some question whether *Younger* may be legislatively modified. Commentators have expressed concern that the decision may announce a constitutional, rather than a prudential rule. *See, e.g.*, E. CHEMERINSKY, *supra* note 1, § 13.2, at 627-28. The Court, however, has never plainly articulated a constitutional foundation for the ruling in *Younger*. Moreover, it appears unlikely that the *Younger* Court believed it was creating a constitutional rule. Justice Black expressly stated that *Younger* was based on "equitable principles," Younger v. Harris, 401 U.S. 37, 54 (1971), and the Court declined to consider whether its result was mandated by the Anti-Injunction Act. *Id.* If the Court indeed announced a new constitutional rather than a prudential rule, it should have so stated and considered the statutory abstention ground before proceeding to the constitutional question. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (Court must *not* consider constitutional rulings if possible).

289. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982).

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

291. The exceptional circumstances exception to the general rule of non-abstention is necessary to preserve the viability of *Colorado River* abstention, discussed below. The limitation of the statute to federal question cases is similarly necessary to permit legislative adoption of a broader *Colorado River* abstention rule in diversity cases. *See infra* notes 301-02 and accompanying text.

> A court of the United States may not grant an injunction to stay criminal proceedings in any state court except in exceptional circumstances when necessary to prevent irreparable harm.
>
> Absent exceptional circumstances, a court of the United States shall not abstain from deciding any case presenting a dispositive question of federal law solely because state administrative or judicial proceedings are pending. Notwithstanding the foregoing, however, a court of the United States may not grant an injunction to stay proceedings in a state court or administrative agency except as expressly authorized by Act of Congress, or when necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

5. Colorado River *abstention*

The Supreme Court has established a clear, if somewhat difficult to apply, test for *Colorado River* abstention: federal courts may defer to duplicative state litigation only in "exceptional circumstances."[292] This exceptional circumstances test appears to be well justified in federal question cases, notwithstanding some disparate applications in the lower courts.[293] Indeed, if district courts were authorized to defer to duplicative state court litigation on any showing less than exceptional circumstances, defendants in federal question cases would have a "powerful tool for defeating federal jurisdiction" because simple filing of a concurrent state court action would effectively remove "cases from federal to state court."[294] Thus, the *Colorado River* exceptional circumstances test necessarily preserves the availability of a federal forum for the decision of federal questions.

The goal of preserving a litigant's right to a federal forum arguably would be better served by a rule that absolutely precluded district court abstention in favor of simultaneously pending state proceedings. Such an approach, however, seems unnecessarily stiff. There are cases, typified by *Colorado River* itself, where simultaneous prosecution of state and federal lawsuits serves no legitimate interest, notwithstanding the presence of a federal question. In these rare circumstances, abstention justifia-

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292. Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 25-26 (1983).

293. *See* E. CHEMERINSKY, *supra* note 1, § 14.3, at 668-69.

294. *Id.* § 14.1, at 659.

bly avoids undue waste of public and private resources. Accordingly, it seems wise to preserve a district court's ability to decline jurisdiction, even in federal question cases, if truly exceptional circumstances exist.[295]

But, despite the wisdom of *Colorado River* in the federal question context, the desirability of the Court's rather strict proscription of abstention in diversity cases remains questionable. *Colorado River*, as noted, sharply limits the circumstances in which a federal court may abstain in the pursuit of judicial economy. And, while this result may be necessary to preserve the availability of a federal forum for the resolution of federal questions, the demands of convenience and judicial economy become more compelling when a federal court confronts state, not federal, issues. In a diversity suit, a federal court in essence sits as another (albeit ostensibly more neutral)[296] state court.[297] In such circumstances, there seems to be little reason to permit two "state" courts to duplicate each other's efforts in the simultaneous prosecution of identical lawsuits.[298] As the Court noted in *Brillhart v. Excess Insurance Co.*,[299] it is "uneconomical as well as vexatious for a federal court to proceed" with a diversity case "not governed by federal law" where another law suit is "pending in a state court presenting the same issues."[300] Indeed, continued federal prosecution of a duplicative diversity action merely diverts district courts from their primary function of applying and explicating federal law.

Based on the foregoing, legislation should be adopted that affirms the *Colorado River* rule in federal question cases, but permits a broader abstention rule in diversity cases. Congress can justify such an outcome by "the interest each level of government has in having its own courts decide its law."[301] When a federal court faces an important federal question, it should ordi-

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295. *See Moses Cone*, 460 U.S. at 1, 23 (noting that presence of a federal question weighs heavily against abstention).

296. *See, e.g.*, E. CHEMERINSKY, *supra* note 1, § 14.3, at 674.

297. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

298. The only apparent grounds upon which such a result could be justified would be the assumption that federal courts invariably do a better job in the even-handed application of state law to litigants of diverse citizenship than do state courts. That assumption, that federal court intervention often prevents state courts from "home towning" non-residents, is questionable at this stage of the nation's development.

299. 316 U.S. 491, 495 (1942).

300. *Id.*

301. E. CHEMERINSKY, *supra* note 1, § 14.4, at 674.

narily decide the issue before it, abstaining in favor of duplicative state proceedings only in exceptional circumstances. In duplicative diversity proceedings, however, the presumption in favor of the federal forum should be reversed, and the federal court should ordinarily stay its proceedings until state court resolution of the state law issues. In fact, a federal court should proceed only upon a showing of "exceptional circumstances justifying concurrent litigation."[302]

The first half of the foregoing proposal, the legislative affirmation of *Colorado River* in cases raising important federal questions, is effectively accomplished by the *Younger* abstention legislation previously proposed.[303] The aforementioned amendment to the Anti-Injunction Act provides that, absent exceptional circumstances, district courts shall not abstain from deciding cases presenting dispositive questions of federal law solely because state administrative or judicial proceedings are pending. This legislation, as noted earlier, limits application of *Younger* abstention to state civil and administrative proceedings. The exceptional circumstances exception, however, is expressly designed to preserve a district court's ability to defer to pending state proceedings if the strict showing of *Colorado River* is met.

An attempt could be made to delineate legislatively those exceptional circumstances that warrant abstention. But such an effort would meet with dubious success at the present time; the Court's own application of the exceptional circumstances test is open textured.[304] The lower courts, moreover, have not been unanimous in their construction and application of the test.[305] In these circumstances, it appears wise to leave the precise contours of the exceptional circumstances exception open for future judicial development in the discrete context of actual cases.

The second half of this *Colorado River* proposal would be effectuated by a statute authorizing the district courts to stay proceedings in diversity actions pending the outcome of the concurrent, duplicative state court proceeding. The statute would authorize a district court to stay the federal diversity proceedings in the face of duplicative state court action,[306] unless a

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302. *Id.*

303. *See supra* text accompanying note 291.

304. *See, e.g.*, The Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818-19 (1976).

305. *See* E. CHEMERINSKY, *supra* note 1, § 14.3, at 669 (citing cases).

306. It is not clear whether a dismissal or a stay is appropriate under *Colorado River*

showing was made that exceptional circumstances warranted continued federal litigation. The precise contours of this exceptional circumstances test is left for judicial development in the context of discrete cases. One exceptional circumstance that should warrant continued federal court litigation, however, is the dilatory filing of a state action after substantial federal litigation for the sole purpose of delaying ultimate resolution of the dispute. Moreover, a factual showing that local prejudices or defects in the state court system would prevent a diverse litigant from receiving a full, fair hearing in state court should also meet the exceptional circumstances test. Legislation expanding the role of *Colorado River* abstention in diversity cases follows:

> Absent exceptional circumstances justifying concurrent litigation, a court of the United States shall stay civil actions brought pursuant to 28 U.S.C. § 1332 pending the outcome of duplicative state civil administrative or judicial proceedings.

IV. Conclusion

The doctrines of supplemental jurisdiction and abstention present the federal courts with a host of interrelated concerns which deal primarily with judicial efficiency and the proper allocation of power between the state and federal judicial systems. This paper has addressed some of the more difficult concerns and proposed corresponding legislative solutions. In the area of supplemental jurisdiction, we have suggested that Congress pass a statute authorizing federal courts, in their discretion, to exercise jurisdiction over claims that are pendant or ancillary to federal questions presented before them.

Legislative resolution of the difficulties presented by the Supreme Court's abstention doctrines is considerably more complex. While some commentators have suggested outright abolition of the abstention doctrines, such action is probably unwarranted. In broad terms, the judicially created abstention rules can be seen as attempts properly to allocate adjudicatory

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abstention. *See, e.g.*, Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 25-26 (1983) (expressly leaving open question whether a federal court should issue a stay or simply dismiss the federal action under *Colorado River*). The Court, however, has suggested that a stay is less objectionable because it permits ultimate federal court resolution of any questions remaining at the conclusion of state court litigation. Deakins v. Monaghan, 484 U.S. 193 (1988) ("[T]he District Court ha[s] no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding.").

functions between state and federal judicial systems. Rather than simply abrogate the Court's abstention attempts, congressional refinements seem more appropriate. This paper has suggested legislation which would (1) clarify application of *Pullman* abstention, and (2) authorize certification of state law questions to state courts. Such legislation would alleviate many of the difficulties now encountered in the shuttling of cases between state and federal courts often incurred in *Pullman* abstention cases.

Thibodaux and *Burford* abstention are two heavily criticized—and unclear—abstention doctrines articulated by the Court. In essence, *Thibodaux* and *Burford* allow deferral of federal jurisdiction in rare instances where a state regulatory scheme is (1) detailed and complex; (2) the exercise of federal jurisdiction would require the court to immerse itself in the technicalities of a state legislative scheme with which it is not familiar; and (3) the exercise of federal jurisdiction would be disruptive of state efforts in an important area. Legislative adoption of a standard enunciating these principles would clarify the law in this area and encourage application of *Thibodaux* and *Burford* abstention in an even-handed and consistent manner.

Younger abstention, originally applied to forbid federal court interference with ongoing criminal proceedings, arguably creates the most problems for federal litigants because of its broad expansion in recent years. The recent expansion of *Younger* to state administrative and civil proceedings undermines the federal judiciary's primary role as the protector of federal rights. To avoid improper expansion of *Younger*, this article suggests that Congress amend the Anti-injunction Act to provide that, absent exceptional circumstances, a court of the United States should not abstain from deciding any case presenting a dispositive question of federal law solely because state administrative or judicial proceedings are pending.

Colorado River abstention, the last abstention doctrine addressed in this article, is invoked solely in the interest of judicial economy. *Colorado River* abstention questions arise in those circumstances when, due to the overlapping nature of state and federal jurisdiction, simultaneous but essentially identical lawsuits are pending in both federal and state forums. In diversity cases, the authors believe that Congress ought to enact a statute which would permit a federal court—absent exceptional circumstances—to abstain from determining a simultaneously pending and overlapping state suit. When a federal court is presented

with a federal question case, however, an entirely different set of circumstances apply. As previously noted, federal courts are the primary guardians of federal rights; thus, a federal litigant should not be deprived of his federal forum simply because of a simultaneously pending state lawsuit. Accordingly, a federal court ordinarily should not abstain from deciding a federal claim solely because of a pending state court suit. This result would be effectively achieved by previously discussed legislation,[307] which provides that district courts should not abstain from deciding a federal question because of pending state judicial or administrative proceedings.

We entertain no illusions that the forgoing proposals, taken together, will alleviate all—or even most—of the perplexing problems posed by the doctrines of supplemental jurisdiction and abstention. Nevertheless, as this article has demonstrated, there are enough areas where ongoing confusion reigns that legislative clarification seems preferable to continued judicial bewilderment.

307. *See supra* text accompanying note 306.