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Certification Statutes: Engineering a Solution to Pullman Abstention Delay

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Certification Statutes: Engineering a Solution to *Pullman* Abstention Delay

When a litigant in federal court challenges a state action as being contrary to the federal Constitution, the federal court will avoid reaching those constitutional issues if some other means of disposing of the case is available.[1] If the challenged state action is invalid under applicable state law, the federal court will dispose of the case on state law grounds and refrain from deciding the federal question.[2] When the state law is unclear, however, the determination of whether the challenged state action violates state law is difficult for the federal court to make.

The *Pullman* abstention doctrine, formulated in *Railroad Commission of Texas v. Pullman Co.*,[3] attempts to resolve this problem by allowing federal courts to abstain from deciding such cases until the parties have had an opportunity to obtain a state court decision on the state issues involved.[4] In this way, the state court decides the state issues and the federal court avoids deciding a federal constitutional question prematurely or unnecessarily. For if the state court should hold the state action invalid as a matter of state law, there would be no need for the federal court to pass on the federal constitutional question.[5]

Two policy concerns underlie the *Pullman* abstention doctrine.

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1 *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

2 *Id.* This is commonly known as the *Siler* doctrine, derived from Siler v. Louisville & N.R.R., 213 U.S. 175 (1909). In *Siler*, the Court held that the interest of avoiding unnecessary constitutional adjudication requires that the federal court turn first to issues of state law:

> Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record.

Id. at 193.

3 312 U.S. 496 (1941).

4 In general, the federal court abstains from deciding the case but retains jurisdiction. The parties then seek a declaratory judgment from the state courts on the state law issues. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 52, at 306 (4th ed. 1983). Dismissal without prejudice may be ordered where retention of jurisdiction would interfere with obtaining a state court decision. Harris County Comm'rs Court v. Moore, 420 U.S. 77, 88 n.14 (1975).

5 C. WRIGHT, *supra* note 4, § 52, at 304.

First, it advances the vital policy of judicial review that dictates against unnecessary resolution of federal constitutional issues.[6] Second, since the federal courts defer to state courts on questions of state law, the *Pullman* doctrine promotes federalism.[7] Nevertheless, *Pullman* abstention does exact a price. Abstention inevitably leads to long delays and substantial increases in litigation costs.[8] Moreover, the delay which results from an abstention order can often operate to deny a plaintiff his constitutional rights.[9] And if these rights rise to the level of "fundamental rights," the possibility of "denial through delay" becomes critically threatening to the litigant.[10]

To prevent this delay, twenty-four states and Puerto Rico have

6 *Id.* § 52, at 306. The policy that constitutional issues should not be decided unnecessarily draws support from Chief Justice Marshall's concept of judicial review as being a reluctant power exercised only because the Court must decide cases brought before it in conformity with the Constitution. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). There are also more pragmatic considerations for this policy of self-restraint. Judicial review is inconsistent with pure majority rule, and conflicts between the judiciary and the democratic system may result in popular disapproval of court action. The policy of strict necessity in disposing of constitutional issues is a useful device that helps assure that judicial review does not take place gratuitously. For an excellent discussion of this policy, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 93-94 (2d ed. 1983). *See also* Rescue Army v. Municipal Court, 331 U.S. 549 (1947).

7 *See* C. WRIGHT, *supra* note 4, at 305.

8 Professors Lillich and Mundy note that when a federal court abstains, the litigants bring a separate action, often for declaratory judgment, in the appropriate state court—normally the state court of general jurisdiction. In effect, the case is transferred from a federal to a state trial court where the state law questions (and possibly, in a pendent jurisdiction case, the federal contentions) are presented. Since the ultimate purpose of abstention is to secure an authoritative determination of state law, the litigants must then proceed to the final appellate court through the required tiers of the state judiciary, unless that court has original jurisdiction over the particular case. Thus, the litigants are subject to the cost and delay of a separate suit in the state court system. This delay may be magnified if the propriety of abstention was litigated in the federal system prior to the separate state action. The delay is also increased when the case returns to the federal district court for final adjudication subject to further federal appellate review. Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888, 890 n.22 (1971). In a number of cases abstention has led to delays of many years before the case was finally decided on its merits. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 384 U.S. 885 (1966) (six years); Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951) (seven years), noted in C. WRIGHT, *supra* note 4, § 52, at 305. Other cases have limped to an inconclusive end, *see, e.g.*, United States v. Leiter Minerals, Inc., 381 U.S. 413 (1965)(case dismissed as moot eight years after abstention ordered).

9 Many courts have expressed concern that in some cases the delay caused by abstention may effectively deny plaintiffs their constitutional rights. *See, e.g.*, Zwickler v. Koota, 389 U.S. 241, 252 (1967); Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964); Badham v. United States Dist. Court for the N. Dist. of Cal., 721 F.2d 1170, 1172 (9th Cir. 1983).

10 The Supreme Court has demonstrated a reluctance to order abstention in cases involving certain civil rights claims, such as voting rights, Harman v. Forssenius, 380 U.S. 528, 537 (1965), racial equality, Griffin v. County School Bd., 377 U.S. 218, 228-29 (1964) and first

enacted certification statutes[11] which permit federal courts, in certain circumstances, to certify doubtful state law questions directly to that state's highest court.[12] While the certification procedure does not completely eliminate the delay in deciding a case, the delay is usually substantially shorter than that incurred after an abstention order.[13] The certification procedure, therefore, provides a means by which a federal court can protect a plaintiff's fundamental rights without sac-

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amendment rights of expression, Procunier v. Martinez, 416 U.S. 396 (1974); *but see* Harrison v. NAACP, 360 U.S. 167 (1959); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

Recognizing the tension inherent in the *Pullman* abstention doctrine, the American Law Institute, in AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 48, 49 (1969), proposed a modification of the doctrine through a new statute the heart of which would be contained in 28 U.S.C. § 1371(c):

> A district court may stay an action, otherwise properly commenced in or removed to a district court under this title, on the ground that the action presents issues of State law that ought to be determined in a State proceeding, if the court finds: (1) that the issues of State law cannot be satisfactorily determined in the light of the State authorities; and (2) that abstention from the exercise of federal jurisdiction is warranted either by the likelihood that the necessity for deciding a substantial question of federal constitutional law may thereby be avoided, or by a serious danger of embarrassing the effectuation of State policies by a decision of State law at variance with the view that may be ultimately taken by the State court, or by other circumstances of like character; and (3) that a plain, speedy, and efficient remedy may be had in the courts of such State; and (4) that the parties' claims of federal right, if any, including any issues of fact material thereto, can be adequately protected by review of the State court decision by the Supreme Court of the United States.

Subdivision (d) provides that the district court shall retain jurisdiction pending a prompt determination on the merits in the state court, after which federal review shall be restricted to review in the Supreme Court. Consistent with the Institute's view that fundamental rights deserve the highest protection, subdivision (g) provides that there will be no abstention in actions claiming discrimination based on race, creed, color, or national orgin.

11 Some states have adopted the certification process by court rule rather than by statute. For the sake of brevity, this note will use the term "certification statute" to mean certification statute or court rule.

12 The following jurisdictions have adopted a certification procedure by statute or court rule: Alabama, ALA. R. APP. P. 18; Colorado, COLO. APP. R. 21.1; Florida, FLA. APP. R. 4.61; Georgia, GA. CODE ANN. § 24-4536 (1981); Hawaii, HAWAII SUP. CT. R. 20; Indiana, IND. APP. R. 15(o); Iowa, IOWA CODE ANN. §§ 684A.1-684A.11 (West Supp. 1983); Kansas, KAN. STAT. ANN. §§ 60-3201-60-3212 (1983); Kentucky, KY. R. CIV. P. 76.37; Louisiana, LA. SUP. CT. R. 12; Maine, ME. R. CIV. P. 76B; Maryland, MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601-12-609 (1984); Massachusetts, MASS. R. SUP. JUD. CT. 1:03; Minnesota, MINN. STAT. ANN. § 480.061 (West Supp. 1984); Mississippi, MISS. R. SUP. CT. 46; Montana, MONT. SUP. CT. R. 6; New Hampshire, N.H. APP. R. 21; North Dakota, N.D. R. APP. P. 47; Oklahoma, OKLA. STAT. ANN. tit. 20, §§ 1601-1613 (West Supp. 1983); Puerto Rico, P.R. SUP. CT. R. 27; Rhode Island, R.I. SUP. CT. R. 6; Washington, WASH. REV. CODE ANN. §§ 2.60.010-2.60.900 (West Supp. 1984); West Virginia, W. VA. CODE §§ 51-1A-1-51-1A-12 (1981); Wisconsin, WIS. STAT. ANN. §§ 821.01-821.12 (West Supp. 1983); Wyoming, WYO. R. APP. P. 11.01-11.07.

13 *See* Lillich & Mundy, *supra* note 8, at 908.

rificing the important demands of federalism or the strong policy of judicial review which cautions against premature constitutional adjudications.[14]

However, before the certification procedure can be a truly effective solution to the problem of delay in fundamental rights cases, more states must not only adopt, but streamline certification so that certified questions in fundamental rights cases receive priority in the state courts. Giving priority to fundamental rights cases would further reduce the delay, which, given the importance of the rights asserted, demand that the delay be held to an absolute minimum.

Part I of this note explores the development of the *Pullman* abstention doctrine and discusses the policies underlying the doctrine, including the factors which the federal courts have required to justify its application. Part II analyzes current certification procedures, emphasizing their ability to reduce delay in cases involving important civil rights. Part III discusses some of the problems associated with the certification process, suggests statutory language which can prevent these problems, and urges universal adoption of certification procedures.

I. The *Pullman* Abstention Doctrine

A federal court faced with doubtful questions of state law in a federal constitutional case may abstain from the exercise of its jurisdiction to permit state court adjudication of the state law claims. This abstention permits an authoritative determination of state law, promotes federalism, and prevents premature constitutional decisions.[15] At the same time, however, this abstention policy often exacts a high price from litigants—delay and additional cost.[16]

The concept of federal court abstention stems from the Supreme Court's landmark decision in *Railroad Commission of Texas v. Pullman Co.*[17] In *Pullman*, the Supreme Court set forth the principle that, when controlling state law was uncertain, the federal court may hold the case in abeyance, retain jurisdiction, and direct the parties to proceed through state courts to a decision on the state issues.[18]

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14 *See* Bellotti v. Baird, 428 U.S. 132, 151 (1976); notes 76-91 *infra* and accompanying text.

15 *See* notes 4-5 *supra*.

16 *See* note 8 *supra*.

17 312 U.S. 496 (1941).

18 *Id.* at 501-02. For an extensive analysis of the *Pullman* abstention doctrine, see Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

In *Pullman*, railroad porters[19] challenged an order of the Texas Railroad Commission requiring that all sleeping cars operated by railroads in Texas be in the charge of a Pullman conductor. Prior to the Commission's order, trains with only one sleeping car had been in the charge of a porter instead of a conductor. Porters were black, conductors white. The porters attacked the order on the grounds that it violated Texas law, and the commerce, due process, and equal protection clauses[20] of the federal Constitution. The Texas statute empowering the Commission with railroad supervision made it "the duty of the said Commission . . . to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads . . . and to prevent any and all other abuses in the conduct of their business . . . ."[21] A three-judge district court held that the statute did not authorize the Commission to issue the order as the correction of an "abuse."[22] Accordingly, the court enjoined enforcement of the Commission's order on that ground.[23]

On direct review, the Supreme Court held that the district court should have abstained from deciding the case. The Texas law, according to the Court, was "far from clear."[24] In the Court's assessment, the statute's language did not permit a confident determination of whether the Commission's order was within its purview since the statute provided little guidance concerning the limits of the Commission's power to correct "abuses."[25] Moreover, Texas decisions interpreting the statutory language did not clarify the issue. The Court reasoned that a federal court that routinely decided state law issues ran a high risk of deciding those questions erroneously.[26] The potential for error was clear. If the federal district court in *Pullman* erroneously held that the Railroad Commission's order was authorized, it would needlessly reach the federal constitutional questions.[27] If the federal court erroneously held that the order was not authorized by the statute, it would avoid for the moment decid-

19 The original complainants were the Pullman Company and affected railroads. The porters intervened as complainants. 312 U.S. at 498.

20 The fourteenth amendment challenges were that the order was unjust and arbitrary and that it discriminated against blacks.

21 312 U.S. at 499 n.1.

22 *Id.* at 499.

23 Pullman Co. v. Railroad Comm'n, 33 F. Supp. 675 (W.D. Tex. 1940).

24 312 U.S. at 499.

25 *Id.*

26 *Id.*

27 If the court then held the order constitutional, the ultimate disposition of the controversy would also be erroneous.

ing the constitutional questions, but only at the risk of improvidently enjoining an ostensibly valid state program. Moreover, if the state courts subsequently exposed the error by deciding the state question differently, the federal decision may be reopened,[28] possibly leading to litigation of the federal constitutional questions. Based on these considerations, the Supreme Court concluded in *Pullman* that only by staying the federal action and directing the parties to the state judicial system could a federal court "avoid [both] the waste of a tentative decision [and] . . . the friction of a premature constitutional adjudication."[29]

In addition to promoting federalism and avoiding premature constitutional rulings, the abstention doctrine also gives procedural meaning to the doctrine formulated in *Erie Railroad v. Tompkins*,[30] which requires federal courts to use applicable state law, including state decisional law, in deciding substantive state law issues.[31] When the federal court abstains, the federal action is stayed. This gives the litigants an opportunity to proceed in the state court to secure a declaratory judgment of the state law issue.[32]

Pullman abstention by a federal court is not absolute but de-

28 *See, e.g.*, Lee v. Bickell, 292 U.S. 415 (1934); Glenn v. Field Packing Co., 290 U.S. 177 (1933).

29 312 U.S. at 500.

30 304 U.S. 64 (1938).

31 *Id.* at 78; *see* Roth, *Certified Questions from the Federal Courts: Review and Re-Proposal*, 34 U. MIAMI L. REV. 1, 5 (1979).

32 Since retention of jurisdiction is usually ordered in *Pullman*-type cases, the Supreme Court has defended abstention on the grounds that abstention "does not, of course, involve the abdication of federal jurisdiction but only the postponement of its exercise." Harrison v. NAACP, 360 U.S. 167, 175 (1959). Professor Wright notes that the implementation of this has led to a complicated procedure. *See* C. WRIGHT, *supra* note 4, § 52, at 306-07. The Court first required that the federal constitutional objections be presented to the state court so that it may consider the issues of state law in light of the constitutional claims. Government and Civic Employees Org. Comm., CIO v. Windsor, 353 U.S. 364, 366 (1957). The problem was that if the state court should decide the federal issues, on ordinary principles of res judicata, this would be a binding determination subject to review only in the Supreme Court, and there would be nothing left for the federal court to decide in the exercise of the jurisdiction it had retained. Since the Supreme Court cannot hear most cases tendered it, this would mean that many litigants would never have a hearing in a federal court even though they were asserting claims based on federal law. In England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964), the Supreme Court observed that the possibility of review in the Supreme Court is an inadequate substitute for a district court adjudication to which the litigant has a statutory right. The Court then announced the new rule that although a litigant may submit all aspects of the case for a binding adjudication by the state court, he is not required to do so. Any party may make, on the state record, a reservation to the disposition of the entire case by the state courts, by informing them that that he is exposing his federal contentions only as a matter of information, and that he intends to return to the federal court for disposition of the federal contentions. *Id.* at 421-22.

pends on the facts of the particular case.[33] Historically, abstention has always been the exception and never the rule.[34] Moreover, abstention is discretionary with the court.[35] Although the facts of a given case may justify abstention, the federal court need not abstain if in its judgment applying the doctrine would cause delay and expense out of proportion to any interests which might be served by invoking abstention.[36] The federal courts have identified three factors which together justify *Pullman*-type abstention: (1) the complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open; (2) such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and (3) the possibly determinative issue of state law is doubtful.[37]

In addition to these three requirements, the federal courts have recently begun to develop a fourth requirement which would apply in voting rights cases and perhaps in cases involving other fundamental rights. In *Badham v. United States District Court for the Northern District of California*,[38] the Court of Appeals for the Ninth Circuit held that "abstention orders in cases involving voting rights require special consideration."[39] The *Badham* plaintiffs, registered voters in several congressional districts in California, challenged a California congressional redistricting bill on several state and federal constitutional grounds.[40] A three-judge district court had abstained from deciding the case after determining that the case met the three-pronged test required for *Pullman* abstention.

First, the district court in *Badham* held that the case touched on a sensitive issue of social policy because reapportionment is an area in which state courts are encouraged to require and formulate valid plans.[41] Second, the court determined that federal constitutional adjudication could be avoided or altered by a definitive ruling on the

33 *See, e.g.*, Badham v. United States Dist. Court for the N. Dist. of Cal., 721 F.2d 1170, 1174 (9th Cir. 1983).

34 In Meridith v. Winter Haven, 320 U.S. 228, 236 (1943), the Supreme Court held that mere difficulty in determining the state law was not a sufficient justification for abstention.

35 *See Badham*, 721 F.2d at 1174.

36 *Id.*

37 *See, e.g.*, *id.* at 1172; C-Y Development Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983); Canton v. Spokane School Dist. No. 81, 498 F.2d 840, 845 (9th Cir. 1974).

38 721 F.2d 1170 (9th Cir. 1983).

39 *Id.* at 1172.

40 *Id.* at 1171.

41 *Id.* at 1176-77.

state constitutional claim.[42] The redistricting bill had been subjected to substantial changes which, if valid, would make the plan more cognizable under the federal Constitution. The plaintiffs had also challenged these "changes" as violations of the state constitution because they were implemented by the Secretary of State rather than the state legislature. The district court held that a decision on this state law issue would determine whether it would review the reapportionment plan with or without the challenged changes.[43] This could avoid or alter the federal constitutional issue because *with* the changes the plan had a population deviation percentage below that which the Supreme Court had found constitutional.[44] However, *without* the changes the plan had a population deviation which came closer to deviations found violative of the federal Constitution.[45]

Finally, the district court held that the case satisfied the third prong of *Pullman*, doubtfulness of the state law issues.[46] The Supreme Court had said that a state law issue is doubtful if it is "susceptible" to an interpretation that would avoid or modify the federal constitutional question.[47] According to the district court, the state law in *Badham* was susceptible to such an interpretation. The court stated:

> The legality of the Secretary of State's implementation of the changed reapportionment bill is an issue of first impression in California. No California case law or state statute provides a clear answer. . . . Since Elections Code § 3000 may be "susceptible" of an interpretation that would modify the federal constitutional question, the third prong of the *Pullman* test is satisfied.[48]

Having determined that the three-pronged test of *Pullman* had been satisfied, the district court abstained, retaining jurisdiction to resolve whatever federal issues remained after the state court's adjudications.[49]

The Ninth Circuit affirmed the district court's abstention order.[50] The court of appeals, however, alluded to a fourth requirement in the *Pullman* test that ought to apply in voting rights cases:

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42 *Id.* at 1177.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.* at 1177-79.

47 Babbitt v. Farm Workers, 442 U.S. 289, 306 (1979); Bellotti v. Baird, 428 U.S. 132, 146-47 (1976).

48 721 F.2d at 1178-79. The district court opinion is unreported except as an appendix to the circuit court opinion. Thus, cites to the district court opinion will be cites to 721 F.2d.

49 *Id.* at 1179.

50 *Id.* at 1171.

independent consideration of the effect the abstention order delay would have on the plaintiffs' voting rights.[51] Because the district court had held that the plaintiffs could return to the federal court if they were unable to obtain a sufficiently swift adjudication of state claims in the state courts, the court of appeals affirmed.[52]

Significantly, the court of appeals addressed the "delay factor" requirement at some length. The court rejected the plaintiffs' contention that *Pullman* abstention may *never* be applied in voting rights cases, noting that "there is no *per se* civil rights exception to the abstention doctrine."[53] The court, however, expressed its concern regarding the special dangers inherent in applying abstention in voting rights cases, noting that delay in voting rights cases is "particularly insidious."[54] Other courts, including the Supreme Court, have said that the dangers posed by an abstention order are particularly evident in voting rights cases.[55] The *Badham* court, however, goes beyond mere concern in fashioning a solution which arguably adds a fourth prong to the traditional three-pronged test for *Pullman* abstention:

> The fundamental importance of the right to vote and the special dangers posed to that right by delay require a different approach to abstention orders in voting rights cases. We need not decide whether this different approach is in essence a separate requirement or merely a background against which to apply the traditional three-part test. We do hold that before abstaining in voting cases a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote. Although we are mindful of the important principles of federalism implicit in the doctrine of abstention, these principles may be outweighed in an individual case by

51 *Id.* at 1173.

52 *Id.* at 1174.

53 *Id.* at 1172 (quoting C-Y Development, 703 F.2d at 381); *accord* Duncan v. Poythress, 657 F.2d 691, 697 (5th Cir. 1981) ("An alleged denial of voting rights does not, in itself, constitute a 'special circumstance' which automatically precludes federal court abstention."), *cert. granted*, 455 U.S. 937, *cert. dismissed*, 103 S. Ct. 368 (1982).

54 *Id.* at 1173. This is because, as the court explained, in a redistricting case the court's failure to act before the next election forces voters to vote in an election which may be constitutionally defective. Although a subsequent court may strike down the apportionment plan, there is no procedure for removing from office the officials elected under the defective plan. Moreover, these officials may acquire advantages of incumbency that may be difficult for their opponents to overcome in future elections held under a constitutionally valid plan. *Id.*

55 *See* Harman v. Forssenius, 380 U.S. 528, 537 (1965) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (The right to vote is fundamental because it preserves all rights.)); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (Even the most basic rights are illusory if the right to vote is undermined.).

> the countervailing interest in ensuring each citizen's federal right to vote.[56]

Although the *Badham* court limits the application of the "additional prong" to voting rights cases, the court's reasoning would seem to apply with equal force to cases involving other "fundamental rights" such as free speech and freedom from racial discrimination. Extending this reasoning into the arena of all fundamental rights would indeed make the *Pullman* test four-pronged. Furthermore, since abstention orders often involve lengthy delays, many courts in fundamental rights cases would either refuse to abstain or fashion a remedy which could, in effect, produce the same result. The *Badham* case illustrates this problem. The district court in *Badham* recognized that the delay inherent in the abstention order alone could restrict the plaintiff's voting rights.[57] At this point, the court had two choices. The court could refuse to abstain, thereby sacrificing the interests of federalism, including the policy against premature constitutional adjudications, in order to preserve the plaintiffs' voting rights. Alternatively, the court could abstain from deciding the case, pending a sufficiently swift adjudication of the state claim in the state courts, the course chosen by the district court in *Badham*. If the court exercised the latter option, and the state adjudications were not swift, the result would be the same as if the court had refused to abstain in the first instance. The court would sacrifice federalism in favor of the plaintiff's constitutional rights. Thus, either choice ultimately risks a federal adjudication of the doubtful state law issues.

In sum, if a federal court in its *Pullman* analysis independently considers the effect of delay on the plaintiff's constitutional rights, it engages in a balancing test—weighing the interests to be promoted by abstention, federalism and avoidance of premature constitutional adjudications, against the interest to be served by reaching the case's merits, preservation of the plaintiff's constitutional rights. Ultimately, under traditional abstention doctrine, the court must choose to promote one interest and to sacrifice the other. The delay inherent in the abstention order forces the court to make this choice; certification procedures can reduce that delay and thus limit the extent of the necessary sacrifice.

56 721 F.2d at 1173.
57 *Id.* at 1174.

II. Certification of Doubtful Questions of State Law: Reducing the Delay

Strong policy concerns underlie the *Pullman* abstention doctrine. The doctrine, however, invariably causes delay—delay which can effectively deny a plaintiff his constitutional rights.[58] When these rights are fundamental rights, the decision whether or not to abstain is crucial.[59] Federal courts could avoid this difficult decision and at the same time reduce delay by using a certification procedure, rather than abstention, for resolution of the uncertain state law questions. The delay could be further reduced if the certification statutes required that state courts give priority on their dockets to certified questions in fundamental rights cases.[60]

A. *The Process of Certification*

Certification to state high courts of doubtful state law questions is a relatively recent development. Until 1965, only Florida had an established certification procedure, and that had been used only occasionally.[61] Today, twenty-four states and Puerto Rico have certification procedures.[62] Certification statutes vary among the states. The majority of those states with certification statutes permit certification by the federal trial and appellate courts; other states authorize certification only by the courts of appeal and the Supreme Court.[63] Most states require that the certified question be such that it *could be* determinative of the case.[64] Some states, however, require that the certified question *must* be determinative of the case.[65] All states re-

58 *See* note 9 *supra*.

59 *See* note 10 *supra*.

60 Whether certified questions are to be given docket priority in state courts is a question not covered in the statutes or rules. Professors Lillich and Mundy indicate that the problem is less acute in smaller states where there is no large backlog of cases. However, the situation would be quite different in states with large caseloads, like New York and California. As Professors Lillich and Mundy observe, unless priority is given in jurisdictions with large caseloads, the desired effect of minimizing delay in the certification process will be impaired. Lillich & Mundy, *supra* note 8, at 909.

61 *See id.* at 888.

62 *See* note 12 *supra*.

63 The apparent reason for restricting the certification process to the appellate courts is to limit the total number of certificates. Nevertheless, requiring litigants to proceed to the appellate courts *before* seeking certification hinders the certification process from achieving a satisfactory reduction in delay.

64 This language is necessary to prevent the state court's answer to the certified question from being merely an advisory opinion. *See* notes 97-104 *infra* and accompanying text.

65 This language is too restrictive. In complex litigation, it may be impossible to determine whether the question is in fact determinative of the case.

quire that the certifying court be satisfied that no controlling precedent exists in the decisions of the receiving state's highest court or intermediate appellate courts.[66]

The American Law Institute has approved the certification technique,[67] and the Commissioners on Uniform State Laws have adopted a Uniform Certification of Questions of Law Act.[68] Professor Moore has noted that "[t]he advantages of certification . . . [over

66 This language, in effect, states the prerequisite for federal court abstention in the first instance. *See* note 12 *supra* and accompanying text.

67 *See* Lillich & Mundy, *supra* note 8, at 888.

68 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 106-07 (1967).

UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT

SECTION 1. *Power to Answer.* The [Supreme Court] may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a United States District Court [or the highest appellate court or the intermediate appellate court of any other state], when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the [Supreme Court] [and intermediate appellate courts] of this state.

SECTION 2. *Method of Invoking.* This Act may be invoked by an order of any of the courts referred to in section 1 upon the court's own motion or upon the motion of any party to the cause.

SECTION 3. *Contents of the Certification Order.* A certification order shall set forth (1) the questions of law to be answered; and (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

SECTION 4. *Preparation of the Certification Order.* The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the [Supreme Court] by the clerk of the certifying court under its official seal. The [Supreme Court] may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the [Supreme Court], the record or portion thereof may be necessary in answering the question.

SECTION 5. *Costs of Certification.* Fees and costs shall be the same as in [civil appeals] docketed before the [Supreme Court] and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

SECTION 6. *Briefs and Argument.* Proceedings in the [Supreme Court] shall be those provided in [local rules or statutes governing briefs and arguments].

SECTION 7. *Opinion.* The written opinion of the [Supreme Court] stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court of the certifying court and to the parties.

SECTION 8. *Power to Certify.* The [Supreme Court] [or the intermediate appellate courts] of this state, on [its] [their] own motion or the motion of any party, may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

abstention] . . . are obvious: the litigants save time and money and judicial resources, both state and federal, are conserved."[69]

The Supreme Court approved the procedure in 1960 in *Clay v. Sun Insurance Office, Ltd.*,[70] where the Court instructed the court of appeals to avail itself of Florida's certification procedure.[71] The court of appeals had previously decided a federal constitutional question but failed to decide two nonconstitutional points of Florida law which alone could have resolved the case.[72] In remanding the case, Mr. Justice Frankfurter wrote favorably of the certification process:

> [A]s the Court of Appeals indicated, it could not, on the available materials, make a confident guess how the Florida Supreme Court would construe the statute. The Florida Legislature, with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision.[73]

Since *Clay*, the Supreme Court and the federal courts have employed the available certification procedures.[74] The courts have based their approval of the certification procedures on the relatively shorter de-

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SECTION 9. *Procedure on Certifying.* The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

SECTION 10. *Severability.* If any provision of this Act or the application thereof to any person, court, or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 11. *Construction.* This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 12. *Short Title.* This Act may be cited as the Uniform Certification of Questions of Law Act.

SECTION 13. *Time of Taking Effect.* This Act shall take effect . . .

69 1A J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE, ¶ 0.203[5], at 2145 (2d ed. 1982).

70 363 U.S. 207 (1960).

71 *Id.* at 212.

72 *Id.* at 209-10.

73 *Id.* at 212.

74 *E.g.*, Zant v. Stephens 456 U.S. 410 (1982); Bellotti v. Baird, 428 U.S. 132 (1976); Lehman Brothers v. Schein, 416 U.S. 386 (1974); Aldrich v. Aldrich, 375 U.S. 249 (1963); Dresner v. City of Tallahassee, 375 U.S. 136 (1963); Trail Builders Supply Co. v. Reagan, 430 F.2d 828 (5th Cir. 1970); Gaston v. Pittman, 413 F.2d 1031 (5th Cir. 1969); Martinez v. Rodriquez, 410 F.2d 729 (5th Cir. 1969); Moragne v. States Marine Lines, Inc., 409 F.2d 32 (5th Cir. 1969), *rev'd on other grounds*, 398 U.S. 375 (1970); Hopkins v. Lockheed Aircraft Corp., 394 F.2d 656 (5th Cir. 1968); Life Ins. Co. of Va. v. Shifflet, 380 F.2d 375 (5th Cir. 1967); Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963); Sun Ins. Office v. Clay, 319 F.2d 505 (5th Cir. 1963).

lay encountered as compared with the longer delay commonly resulting from use of the traditional abstention order.[75]

B. *The* Bellotti *Decision: Certification and Fundamental Rights—the Importance of Reducing Delay*

In *Bellotti v. Baird*,[76] the Supreme Court considered an appeal from a three-judge district court decision holding a Massachusetts abortion statute unconstitutional.[77] The Court found *Pullman* abstention applicable but directed the district court to certify the controlling question of statutory interpretation to the Supreme Judicial Court of Massachusetts pursuant to Massachusetts' certification statute.[78] Significantly, the Court's decision of whether to decide the merits of the appeal or to order abstention was influenced by the fact that the delay resulting from abstention would be reduced by the use of Massachusetts' certification procedure.[79] Indeed, the Court implied that but for the availability of the certification procedure, it would have reached the merits of the constitutional issue.[80] The *Bellotti* opinion encourages the district courts to utilize certification to reduce the traditional sacrifices associated with *Pullman* abstention.[81]

The statute questioned in *Bellotti* governed the type of consent, including parental consent, required before an abortion could be performed on an unmarried woman under the age of eighteen.[82] The appellees brought a class action suit challenging the statute as a violation of the fourteenth amendment due process and equal protection clauses. The state courts had not yet construed the statute. The district court held the statute unconstitutional because it created a "parental veto" over the performance of abortions on minor children even when a minor was capable of giving informed consent.[83] The court permanently enjoined the statute's operation.[84] By implication, the court denied the appellant's motion that the court abstain from deciding the issue pending an authoritative construction of the statute by the Massachusetts Supreme Judicial Court.[85] The

75 *See, e.g.*, *Bellotti*, 428 U.S. at 150.
76 428 U.S. 132 (1976).
77 *Id.* at 140-43.
78 *Id.* at 151.
79 *Id.* at 150-51.
80 *Id.* at 151.
81 1A J. MOORE, *supra* note 69, at 2145-46.
82 428 U.S. at 134-35.
83 *Id.* at 140.
84 *Id.* at 133.
85 *Id.* at 134.

Supreme Court vacated the judgment and remanded the case for certification of the state law questions.[86]

The Supreme Court reasoned that the Massachusetts statute could be interpreted as simply preferring parental consultation and consent while simultaneously allowing a minor capable of giving informed consent to obtain a court ordered abortion without parental consent.[87] The Court said that the statute thus read would be fundamentally different from a statute which created a "parental veto."[88] Therefore, the constitutional issue would be presented in a substantially different posture. Accordingly, the Supreme Court held that the district court should have abstained from deciding the constitutional issue and should have certified the statutory ambiguities to the Massachusetts Supreme Judicial Court.[89] In ordering certification, the Court expressed concern that abstention order delay may in effect deprive a plaintiff of her constitutional rights.[90] The Court emphasized the role certification could play in easing the burden of a difficult balancing test between competing equities:

> This Court often has remarked that the equitable practice of abstention is limited by considerations of the delay and expense to which application of the abstention doctrine inevitably gives rise. As we have also noted, however, the availability of an adequate certification procedure does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.
>
> The importance of speed in resolution of the instant litigation is manifest. Each day the statute is in effect, irretrievable events, with substantial personal consequences, occur. Although we do not mean to intimate that abstention would be improper in this case were certification not possible, the availability of certification greatly simplifies the analysis. . . . Insofar as the issue thus ceases to become one of total denial of access and becomes one rather of relative burden, the cost of abstention is reduced and the desirability of that equitable remedy accordingly increased.[91]

Taken together, *Bellotti* and *Badham* illustrate the necessity of certification. The *Bellotti* Court, like the court in *Badham*, had to engage in a difficult balancing test—weighing the interests involved in abstention, federalism and avoidance of a premature constitutional

86 *Id.*
87 *Id.* at 145.
88 *Id.*
89 *Id.* at 151.
90 *Id.*
91 *Id.* at 150-51.

ruling, against the interest involved in deciding the case's merits, preservation of the plaintiffs' civil rights. As the *Bellotti* Court indicated, however, its analysis was greatly simplified by the availability of the certification procedure. The reduction of delay engendered by certification allowed the Court to order abstention (certification is essentially a form of abstention) without seriously jeopardizing the plaintiffs' rights. The *Badham* court, on the other hand, had no recourse to a certification procedure. Accordingly, the *Badham* court had to engage in a difficult balancing test and ultimately choose to promote one interest while sacrificing the other.

III. Drafting the Certification Statute

Despite the appeal of the certification process as a solution to the delay involved in *Pullman* abstention, certain difficulties are associated with its use. Careful drafting of the certification statute can, however, obviate these difficulties and produce a workable certification process which allows the federal courts to protect the policies underlying *Pullman* and, at the same time, preserve the litigant's constitutional rights.

A. *The Problem of Abstractness*

One difficulty with the certification process, which has been noted by some commentators, is that the questions certified are too abstract for judicial resolution. In essence, the criticism is that through the certification process state courts are presented with questions of law devoid of a concrete factual setting.[92]

The problem of abstractness, which stems from the "case or controversy" doctrine,[93] can be resolved by careful drafting of the certification statute. The language of the statute should make clear that

92 See, for example, Kaplan, *Certification of Questions from Federal Appellate Courts to the Florida Supreme Court and Its Impact on the Abstention Doctrine*, 16 U. MIAMI L. REV. 413, 431 (1962), where the author states that questions certified by federal courts would compel the state courts to give an "academic answer . . . which is void of any factual surroundings." This objection has not proved to be a serious problem in actual practice. *See* Lillich & Mundy, *supra* note 8, at 900; Note, *Interjurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 351 n.54 (1963). All certification procedures presently in effect require that, at a minimum, the certified question be accompanied by a statement of facts. New Hampshire, for example, requires "a statement of all facts relevant to the questions certified." N.H. APP. R. 21. Hawaii merely requires "a statement of facts showing the nature of the cause." HAWAII SUP. CT. R. 20.

93 Courts traditionally have refused to give opinions which would only be of academic or hypothetical interest, construing the "case or controversy" requirement to mean actual as opposed to potential disputes. *See* Lillich & Mundy, *supra* note 8, at 901 n.86.

the state court will not answer certified questions unless they are based on findings of fact by the certifying court.[94] Restricting certification to such situations should generate no more abstract questions than cases appealed from lower state courts. Certainly, no one would contend that ordinary appeals from inferior courts present abstract questions of law.[95] The Uniform Certification of Questions of Law Act ("Uniform Act") requires that the certification order set forth "a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the question arose."[96] This language effectively prevents the certification process from generating abstract questions, thus obviating the problem of abstractness in the certification process.

B. *The Problem of Advisory Opinions*

The problem of advisory opinions, like the problem of abstractness, is a facet of the "case or controversy" doctrine. Courts refuse to render advisory opinions because such opinions would be based upon hypothetical situations rather than concrete disputes between adverse parties. Furthermore, very few states have provisions allowing their courts to grant advisory opinions.[97] Therefore, the question arises whether the certification process, in effect, requires the state court to render an advisory opinion.[98] As Professors Lillich and Mundy note, the primary confusion stems from the failure of the drafters to indicate in the certification statutes whether the respective state courts have jurisdiction over the parties in certified question cases.[99] In *In re Elliot*,[100] the Supreme Court of Washington found it implicit in the court's having jurisdiction over the question that it had jurisdiction over the parties. The court thus held that it was not merely giving advice to the federal court.[101] Moreover, the court held that its opinion would be binding upon the parties as res judicata in the state courts and would constitute a binding state

94 *See* Lillich & Mundy, *supra* note 8, at 902 n.93. The authors note that with an existing certification statute this result could be achieved simply by replacing "statement of facts" with "findings of fact" in the statute or rule. *Id.*

95 *Id.* at 902.

96 UNIFORM CERTIFICATION OF QUESTIONS OF LAW ACT § 3 (1967); *see* note 68 *supra*.

97 *See* Lillich & Mundy, *supra* note 8, at 902-03.

98 Several decisions specifically discussing the problem under certification statutes have found such opinions not to be advisory. *See, e.g., In re* Elliot, 74 Wash. 2d 600, 446 P.2d 347 (1968); *In re* Richards, 223 A.2d 827 (Me. 1966).

99 Lillich & Mundy, *supra* note 8, at 904.

100 74 Wash. 2d 600, 446 P.2d 347 (1968).

101 *Id.* at 610, 446 P.2d at 354.

precedent.[102]

A typical certification statute provides for filing of briefs and presentation of oral argument in the receiving state court. The question presented to the state court will thus be framed in a concrete factual setting and the proceeding will be adversary. Accordingly, it is reasonable to read into the certification statute the provision that the parties will be bound under the normal rules of stare decisis and res judicata.[103] However, to avoid confusion, the statute should expressly state that the state court has jurisdiction over the parties for the purposes of the certified question. Moreover, the statute should make clear that the parties will be bound by the determination of the state court.[104] This should dispel the concern that state court judgments in certification cases are merely advisory opinions.

C. *The Problem of What Effect the Federal Court Should Accord the State Court Judgment*

Related to the advisory opinion problem is the problem of what weight the federal court will accord the state court opinion.[105] The problem arises because the certification statute is state law and state law cannot bind a federal court. Thus, although state legislatures may authorize their highest courts to answer certified questions, the weight to be accorded these determinations remains solely a question

102 *Id.* at 610-11, 446 P.2d at 354. The Supreme Judicial Court of Maine also reached this conclusion despite the fact that in other cases the Maine legislature had expressly authorized advisory opinions. *See In re* Richards, 223 A.2d 827, 832-33 (Me. 1966).

103 *See* Lillich & Mundy, *supra* note 8, at 904-05. The authors note that there is a residual philosophical difficulty which cannot be eliminated by drafting. Use of the certification procedure results in part of a single controversy being resolved in federal court and part in state court. Thus, it might be argued that the party electing to have his case determined in a federal forum is being denied, at least partially, the right implicit in the choice of the forum. The short answer to this objection is that the party selects the federal forum subject to the possibility that the court may abstain from deciding some issue.

104 The Uniform Certification of Questions of Law Act ("Uniform Act") does not provide for giving the state court jurisdiction over the parties nor does it suggest what weight ought to be accorded the state court determination. *See* note 68 *supra*. Professors Lillich and Mundy recommend the following addition to § 7 of the Uniform Act: "The answer to the certified question shall be accorded the same determination and precedential force as any other appellate decision of the Supreme Court of this state." Lillich & Mundy, *supra* note 8, at 914.

105 Some state judges fear that the federal court may ignore the state court judgment. *In re* Elliot, 74 Wash. 2d 600, 638, 446 P.2d 347, 370 (1968) (Hale, J., dissenting). Other judges rely on the force of *Erie* to implement the decision. *In re* Elliot, 74 Wash. 2d 600, 446 P.2d 347 (1968); *In re* Richards, 223 A.2d 827 (Me. 1966). See also Lillich & Mundy, *supra* note 8, at 907, where the authors note that reliance on *Erie* seems sufficient in diversity cases because the opinion by the state court would constitute an authoritative statement of the rule of law in that state and the federal court would be bound to follow it. *But see* United Serv. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 860 (Tex. 1965).

of federal law. However, the federal statute[106] implementing the full faith and credit clause, 28 U.S.C. § 1738, requires federal courts to give state court proceedings the same full faith and credit that those proceedings enjoy in the courts of the rendering state.[107] This statute should apply in the certification context.

In a recent decision, *Migra v. Warren City School District Board of Education*,[108] the Supreme Court reaffirmed the vitality of the federal full faith and credit statute, holding that in the absence of federal law modifying the operation of 28 U.S.C. § 1738, the preclusive effect in federal court of a state court judgment is determined by that state's law.[109] In short, a judgment that is res judicata in the jurisdiction that rendered it is res judicata in all courts, state and federal.[110] Thus, since certification procedures provide that the parties are bound by the state court's determination of the certified question,[111] ordinary rules of res judicata should apply and the federal court will be compelled to treat the judgment as it would any other state court judgment under full faith and credit. The federal court, therefore, could not disregard the state court's answer to the certified question.

D. *The Problem of Delay in the Certification Process Itself*

Finally, in enacting a certification statute, the drafters should recognize that the certification process does not completely eliminate delay. Indeed, burgeoning caseloads in the state courts have pro-

106 28 U.S.C. § 1738 (1976). This statute provides that state judicial proceedings shall have the same full faith and credit in every court within the United States as they have in the courts of the state from which they are taken.

107 U.S. CONST. art. IV, § 1.

108 104 S. Ct. 892 (1984).

109 *Id.* at 896. The Court went on to reject the petitioner's argument that 42 U.S.C. § 1983 (1976 Supp. V) prevents state court judgments from creating a claim preclusive bar. 104 S. Ct. at 898.

110 To the effect that a state court judgment is to be accorded full faith and credit in the federal courts, see Kremer v. Chemical Constr. Co., 102 S. Ct. 1883 (1982); Allen v. McCurry, 449 U.S. 90 (1980) (rejecting the view that state court judgments have no issue preclusive effect in § 1983 suits); Montana v. United States, 440 U.S. 147 (1979); Angel v. Bullington, 330 U.S. 183 (1946).

111 See Note, 45 WASH. L. REV. 167, 174-75 (1970) where the author notes that certification is, in many instances, a technique to be used instead of the abstention procedure. In cases where abstention is ordered, the parties frequently initiate a declaratory judgment action in the state court. Clearly, the declaratory judgment itself affects the legal relations of the parties. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 421 (1964). If the state court response to a certified question is a substitute for the declaratory judgment abstention procedure, it is not unreasonable to suggest it is equivalent in legal effect. Thus, the certification procedures, at least by implication, provide that the parties are bound in a res judicata sense. The statutes should, however, provide for this explicitly. *See* notes 103-04 *supra* and accompanying text.

duced increasingly lengthy time delays in the certification process.[112] These delays must be minimized if certification is to be a valuable alternative to the traditional *Pullman* abstention order.

Although many factors contribute to the length of time a case is pending,[113] congested state court dockets is the most significant factor. Thus, the delay involved in the certification process could be substantially reduced if the certification statute provided docket priority for certified question cases. Not all certified question cases should receive priority however. This would be unfair to litigants whose cases have already been docketed. Rather, certified question cases should receive priority only where delay poses a substantial threat to the litigant's constitutional rights, that is, for example, where the case involves important civil rights.

Currently, the Uniform Act does not provide docket priority for certified questions. Legislative drafters, when adopting the Uniform Act or some similar statute, should therefore consider adding a provision which would permit the state court to grant docket priority at the request of the federal court.[114] In requesting priority, the federal court should consider the nature of the litigant's rights and the danger that delay poses to those rights. In the interest of federalism, however, the certification statute should provide that the final decision on whether to grant docket priority rests in the sound discretion of the state court.[115]

This procedure for determining docket priority should generate neither a rush of requests for priority by the federal courts nor a flurry of denials by the state courts. It is reasonable to suppose that

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112 *See, e.g.*, Roth, note 31 *supra*, at 2; Note, *Supreme Court—Pressures and Priorities*, 53 FLA. B.J. 268, 269 (1979); *Report of the Supreme Court Commission on the Florida Appellate Court Structure*, 53 FLA. B.J. 274, 276 (1979); England & McMahon, *Quantity Discounts in Appellate Justice*, 60 JUD. 442 (1977). As a result, some federal courts have been reluctant to certify questions to the state courts. See, for example, State *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 275-76 (5th Cir. 1976), where the fifth circuit stated that the effect of delay was the determinative factor in the denial of the certification request. *See also* Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 725-26 (1969).

113 See Lillich & Mundy, *supra* note 8, at 908, where the authors list several factors contributing to the length of delay: (1) the number and complexity of the issues involved; (2) the novelty or difficulty of the questions; (3) the number of procedural tactics employed by counsel; and (4) the crowding of court dockets.

114 This could be done by adding a subsection 3 to § 3 of the Uniform Act. For example, "SECTION 3. A certification order shall set forth . . . (3) any request that the certified question receive priority on the docket of the [Supreme Court] and the reasons for such request. The [Supreme Court] in its discretion may deny any such request."

115 *See* note 114 *supra*.

federal and state court judges are sensitive to the burdens that can be placed upon either by an injudicious use of the procedure.

IV. Conclusion

A federal court faced with a *Pullman*-type situation must engage in a difficult balancing test in determining whether or not to abstain. The court must weigh the policies underlying *Pullman*, which militate in favor of abstention, against the interests in protecting the litigant's important constitutional rights, which could be lost through the delay inherent in the abstention order. By reducing delay, the certification process allows the federal court to avoid this difficult balancing test in which the federal court must ultimately choose to promote one interest at the expense of the other. The certification process, however, is not free of problems. But, careful drafting can obviate most of these problems and produce a practicable certification statute. Ultimately, the workability of certification will depend upon the good faith and integrity of the federal and state judiciaries, as well as the ability of the state legislatures to formulate workable certification statutes.

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