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# PRELIMINARY INJUNCTIONS AND ABSTENTION: SOME PROBLEMS IN FEDERALISM

*Michael Wells*†

Suppose a federal district court faces a challenge to state action that presents an unsettled issue of state law, a federal constitutional issue, and a plaintiff who will be irreparably harmed if the state is not immediately enjoined. May the court abstain from a decision on the merits, remand the case to the state courts for resolution of the state law issue, and yet grant a preliminary injunction against the challenged state action? Does it follow from the paucity of reported opinions coupling such interim relief with abstention[1] that such a procedure is inconsistent with the policies underlying the abstention doctrine?[2] Should we rely on the state courts to decide the interim relief question? Are there practical considerations that favor other methods for resolving the interests of the plaintiff, the state, and the federal system? This Article examines these questions and suggests that more extensive use of preliminary relief would not unduly interfere with the purposes of abstention, would help accommodate all the interests at stake in an abstention case, and may be the best available means for serving the goals of abstention.

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[1] *See* Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957); Catrone v. Massachusetts State Racing Comm'n, 535 F.2d 669 (1st Cir. 1976); Reed v. Board of Election Comm'rs, 459 F.2d 121 (1st Cir. 1972); Silverman v. Browning, 359 F. Supp. 173 (D. Conn. 1972), *aff'd mem.*, 411 U.S. 941 (1973); Burks v. Perk, 339 F. Supp. 1194 (N.D. Ohio), *rev'd*, 470 F.2d 163 (6th Cir. 1972), *cert. denied*, 412 U.S. 905 (1973); Maier v. Good, 325 F. Supp. 1268 (N.D.N.Y. 1971); Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970); Sherwood v. Bradford, 246 F. Supp. 550 (S.D. Cal. 1965); *cf.* Glenwal Dev. Corp. v. Schmidt, 336 F. Supp. 1079 (D.P.R. 1972) (preliminary injunction granted despite failure to exhaust administrative remedies, when plaintiff's constitutional rights had been violated).

[2] In this Article the term abstention means the reference of a federal case to the state court for resolution of state law issues, in the hope that a federal constitutional issue will be avoided. Courts sometimes use the term to refer to other situations where the federal court declines to exercise its jurisdiction. *See* Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1147 (1974). In Professor Field's

## I

### ABSTENTION

Abstention is one of several doctrines designed to minimize the conflicts created by the existence of state and federal courts within our federal system.[3] State sovereignty over local matters allows more efficient and responsive government.[4] At the same time, Congress has recognized the need for a system of federal courts to interpret federal law uniformly and to protect federally created rights.[5] In addition, the Supreme Court has said that the federal courts bear the primary responsibility for deciding federal questions.[6]

Often, however, courts confront cases that present both state and federal issues. In such cases, courts must sometimes decide legal questions on which they cannot rule authoritatively. Mistaken interpretations of federal law by state courts can be corrected by Supreme Court review,[7] but a federal court's exegesis of state law cannot be reviewed by a state court.[8] A major problem arises when

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terminology, this Article is about *Pullman* abstention, so named because the doctrine was first fully articulated in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 985-1005 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; C. WRIGHT, LAW OF FEDERAL COURTS §§ 52-52A (3d ed. 1976); Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107 (1974); Liebenthal, *A Dialogue on England: The England Case, Its Effect on the Abstention Doctrine, and Some Suggested Solutions*, 18 W. RES. L. REV. 157 (1966); Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

This Article is not another analysis of the abstention doctrine. It is a discussion of the relationship between abstention and interim relief and draws heavily on the existing literature in its discussion of abstention.

[3] *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938). Other such devices include requirements that litigants exhaust state remedies before going to federal court and the doctrine that federal courts generally will not interfere in state criminal prosecutions. *See generally* Note, Younger *Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U. L. REV. 870, 895 (1975).

[4] *See* Younger v. Harris, 401 U.S. 37, 44 (1971). For a full exposition of the values of federalism, see Wilkinson, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185 (1971).

[5] *See* 28 U.S.C.A. § 1331 (Cum. Supp. 1977) (federal question jurisdiction).

[6] *See* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509-10 (1972); Zwickler v. Koota, 389 U.S. 241, 247-52 (1967); McNeese v. Board of Educ., 373 U.S. 668, 672-74 (1963). *See generally* Field, *supra* note 2, at 1080-84; Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 158-59 (1953).

[7] *See* 28 U.S.C. §§ 1257-1258 (1970); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[8] An injunction, however, can be modified or lifted when the state court rules au-

the federal court faces both an unsettled issue of state law and a difficult question of federal constitutional law.[9] Federal courts do not decide constitutional questions unnecessarily.[10] If the federal court incorrectly decides the state law issue,[11] the court may decide a constitutional issue when it need not do so. In these difficult cases, the Supreme Court has held that the district courts should abstain from immediate decision on the merits; the court should instead remand the case to the state courts for authoritative resolution of the state law issues,[12] while retaining jurisdiction of the controversy.[13] After the state court has ruled, the parties may return to the federal court for adjudication of the federal issues.[14]

## II

## THE CONFLICT BETWEEN PRELIMINARY INJUNCTIONS AND THE GOALS OF ABSTENTION

Abstention serves a number of state and federal interests. By abstaining, the federal court allows state courts to decide state law issues, avoids unnecessary constitutional adjudication, minimizes federal interference with state programs, and shows respect for state courts. Interim relief sometimes conflicts with these policies, but not as much as a failure to abstain.

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thoritatively. *See* FED. R. CIV. P. 60(b)(5); Lee v. Bickell, 292 U.S. 415, 425-26 (1934); Glenn v. Field Packing Co., 290 U.S. 177, 179 (1933). *See generally* Note, *Finality of Equity Decrees in the Light of Subsequent Events*, 59 HARV. L. REV. 957, 963-66 (1946); Comment, *Federal Rule of Civil Procedure 60(b): Standards For Relief from Judgments Due to Change in Law*, 43 U. CHI. L. REV. 646 (1976); Comment, Pierce v. Cook & Co.: *Change in State Law as a Ground for Relief From a Federal Judgment*, 124 U. PA. L. REV. 843 (1976); 62 VA. L. REV. 414, 421 n.45 (1976).

[9] Two recent commentators have suggested that the presence of a federal constitutional question should not be considered a prerequisite to abstention. Bezanson, *supra* note 2, at 1112; Field, *supra* note 2, at 1136-38.

[10] *See* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510 (1972); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941); Siler v. Louisville & N.R.R., 213 U.S. 175, 193 (1909); *cf.* Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (concurring opinion, Brandeis, J.) (rules developed by Supreme Court to avoid decision of constitutional issues).

[11] Before *Pullman*, the Supreme Court had suggested that the district court should try to avoid the constitutional issue by deciding the state law issue first. *See* Cincinnati v. Vester, 281 U.S. 439, 488-89 (1930); Field, *supra* note 2, at 1077 & n.20.

[12] *E.g.*, Harris County Comm'rs Ct. v. Moore, 420 U.S. 77, 83 (1975); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941).

[13] American Trial Lawyers Ass'n v. New Jersey Sup. Ct., 409 U.S. 467 (1973) (per curiam).

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

A. *Avoidance of Constitutional Decisionmaking*

The principle that federal courts should avoid constitutional adjudication[15] is rooted in the inherent conflict between the principles of judicial review and popular sovereignty: courts wish to avoid invalidating laws passed by democratically elected representatives. In order to minimize conflict between the legislative and judicial branches, and avoid public dissatisfaction with the courts which could result from too frequent application of the power of judicial review, courts try to avoid deciding cases on constitutional grounds.[16] The presence in an abstention case of an unsettled and possibly dispositive state law issue and a constitutional issue naturally suggests that the decision should, if possible, rest on state law grounds.

Interim relief may conflict with this policy, for a grant of such relief rests in part on a judicial evaluation of the merits of the plaintiff's case. Of course, courts also weigh the hardship to the plaintiff if relief is denied, compare this hardship to the plaintiff with the defendant's hardship if relief is granted, and evaluate the effect of relief on the public interest.[17] Preliminary rulings do not bind the court when it decides the merits.[18] But to the extent that even a tentative constitutional judgment interferes with the operation of a state program, the policy against overturning state legislation on constitutional grounds seems to be abrogated. The harm, however, is not so great as when a court refuses to abstain. The decision is preliminary and may ultimately be changed. Moreover, the state issue may be decided in a manner that eliminates the need for a final constitutional ruling.[19]

B. *State Courts Deciding Issues of State Law*

A more significant objection to preliminary constitutional rulings is that they may harm the federalism interest in having state

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[15] *See* cases cited in note 10 *supra*.

[16] *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH 111-33 (1962).

[17] *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); Banks v. Trainor, 525 F.2d 837, 841 (7th Cir. 1975), *cert. denied*, 424 U.S. 978 (1976); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2948, at 430-31 (1973); Nussbaum, *Temporary Restraining Orders and Preliminary Injunctions—The Federal Practice*, 26 SW. L.J. 265, 273 (1972).

[18] *See* Industrial Bank v. Tobriner, 405 F.2d 1321, 1323-24 (D.C. Cir. 1968). *See generally* Nussbaum, *supra* note 17, at 278.

[19] Interference with existing state policy—not violation of the rule prohibiting unnecessary constitutional inquiry—presents the more serious problem resulting from constitutional review of state programs. The relation of interim relief to interference with state programs is discussed in the text accompanying notes 30-34 *infra*.

courts decide state law issues.[20] State courts should decide questions of state law because they are sovereign over state law.[21] They are likely to be more sensitive to the purposes underlying state law;[22] they are more familiar with the evolution of state law issues; and they, more than the federal courts, will have to deal with the effects of precedent they create.

When a federal court grants interim relief based on the probability of the plaintiff's ultimate success on a constitutional claim, and perhaps even when relief is based on the probability of success on a state law cause of action,[23] the state court may well take these preliminary determinations as an indication of how the federal court will ultimately rule on the merits. The preliminary ruling might be perceived by the state court as an attempt to force it to decide state law questions in accordance with the federal court's intimations, or risk having the federal court hold the state law unconstitutional.[24] Whether this effect is intended or not, it seems inconsistent with the principle that state courts should decide issues of state law.[25] The circumstances under which the determination is made exacerbate the harm. Since the ruling is only preliminary, the federal court need not fully articulate the principles on which its ruling rests; consequently, the federal court's preliminary decision may be poorly reasoned and unduly ambiguous. Since it is necessarily based on a hurried examination of the issues, the federal court may reach a wrong result; a state court may then distort its interpretation of state law to conform to this initially incorrect decision.

These objections should be considered whenever interim relief is at issue and preliminary determinations of law must be made, but they need not bar relief in all cases. The decision to issue a preliminary injunction rests in the sound discretion of the trial

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[20] The principle is expressed in many Supreme Court opinions, some of which are collected in Field, *supra* note 2, at 1084 n.53.

[21] *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938).

[22] *See generally* Bezanson, *supra* note 2, at 1116; Field, *supra* note 2, at 1117-18.

[23] *E.g.*, Alexander v. Thompson, 313 F. Supp. 1389, 1398-99 (C.D. Cal. 1970); *cf.* Catrone v. Massachusetts State Racing Comm'n, 535 F.2d 669, 672 (1st Cir. 1976) (remanding case with directions to abstain from deciding state law question but allowing preliminary injunctive relief).

[24] *Cf.* United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965) (federal court retention of jurisdiction rendered state court judgment an advisory opinion, in violation of judicial function).

[25] At the same time, a plaintiff is required to tell the state court of his federal claims, so that the court can construe state law in light of those claims. *See* Government Employees v. Windsor, 353 U.S. 364, 366 (1957).

court, with all relevant factors balanced in arriving at the decision.[26] If the hardship to the plaintiff absent relief would be substantial and the harm to the defendant minimal, courts may grant interim relief without determining the likelihood of the plaintiff's success on the merits, as long as the plaintiff has raised substantial questions presenting fair grounds for litigation.[27]

In many abstention cases it is not necessary for courts to make a tentative decision on the merits.[28] For instance, a plaintiff may attack a state statute that prevents him from doing something important to him—voting, using his land as he wants, exhibiting a motion picture—in a case presenting difficult legal issues. If the case involves only a few plaintiffs who attack the statute only as applied to them, a preliminary injunction will have limited impact on the state's ability to enforce its law. Moreover, an injunction may be limited to the plaintiff even when the statute is attacked on its face.[29] If the plaintiff would be greatly harmed in the absence of an injunction and if the state is required only to make a narrow and temporary exception to its legislative policy rather than abandon it completely, the balance of hardships may weigh so heavily in the plaintiff's favor that no preliminary determination on the merits need be made.

### C. *Avoidance of Unnecessary Interference with State Programs*

When a federal court invalidates a state program on state law grounds, but would uphold the program against constitutional

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[26] Banks v. Trainor, 525 F.2d 837, 841 (7th Cir. 1975), *cert. denied*, 424 U.S. 978 (1976); O. FISS, INJUNCTIONS 168 (1973). *But see* Canal Auth. v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974) (four factors termed "prerequisites"); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 298 (D. Mass. 1975) (probable success treated as a prerequisite). Also noteworthy is Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975), in which the Supreme Court suggested that a plaintiff wishing to enjoin criminal proceedings must show irreparable harm and probability of success.

[27] *E.g.*, William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205-06 (2d Cir. 1970), *noted in* 71 COLUM. L. REV. 165 (1971); Smoake v. Fritz, 320 F. Supp. 609, 612 (S.D.N.Y. 1970); Palmigiano v. Travisono, 317 F. Supp. 776, 787 (D.R.I. 1970). *See generally* 11 C. WRIGHT & A. MILLER, *supra* note 17, § 2948, at 453-54.

[28] *E.g.*, Manard v. Miller, 53 F.R.D. 610 (E.D. Va. 1971); Smoake v. Fritz, 320 F. Supp. 609 (S.D.N.Y. 1970).

[29] *Cf.* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (dictum) (preliminary injunction against state prosecutions during pendency of declaratory judgment action would operate solely for plaintiffs' benefit). The question whether final injunctive relief should be granted only to the plaintiff, or against any enforcement of a statute, is unsettled. *See* O. FISS, INJUNCTIONS 484-88, 499-504 (1972); Field, *supra* note 2, at 1094 n.89.

challenge, and state courts later uphold the program under state law, the federal court has unnecessarily interfered with the state program. Here, abstention would have made the interference unnecessary.[30] Preliminary relief also interferes with a state program before the resolution of any legal issues. If the state ultimately prevails on the merits, the relief is unnecessary in the sense that the plaintiff never had a legal right to it.

Although the effects of granting interim relief and refusing to abstain are somewhat similar, the two situations are different in important ways. First, granting interim relief causes a less serious disruption of state programs than does a refusal to abstain. There should be only a short time between preliminary relief and disposition on the merits. The length of the delay is largely in the hands of the state courts, to whom the issue of state law will have been referred and who presumably are sensitive to the harm caused the state by delay. When a court refuses to abstain, invalidates state action on state law grounds, and is upheld on appeal, the state must bring a new suit in state court in order to overturn the judgment.[31]

Second, granting preliminary relief does not require a judgment on the merits of a state law claim. If the federal court refuses to abstain and decides the case, state officials and citizens are likely to conform their conduct to the federal court's decision. In contrast, because interim relief involves no binding decision on the merits, state officials and citizens unaffected by the decree need not alter their actions to conform to the court's order.[32]

Third, the comparative harm to the plaintiff and to the defendant must be balanced in deciding whether to grant preliminary relief.[33] If the harm to the state defendant would be great, interim relief can be denied even if the plaintiff's harm is also great. In contrast, final relief cannot be denied a plaintiff who has proven his case on the merits.[34]

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[30] *See* Field, *supra* note 2, at 1090 n.80.

[31] There may be circumstances when no state suit can be brought. *See* Field, *supra* note 2, at 1094 n.89.

[32] *Cf.* Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (injunctive relief affected only federal plaintiffs involved; state remained free to prosecute others who violate challenged statute).

[33] *See* text accompanying note 17 *supra*.

[34] The decree can be shaped to take account of state interests, however. *See* Reynolds v. Sims, 377 U.S. 533, 586-87 (1964); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 767-70 (E.D.N.Y. 1973); Bezanson, *supra* note 2, at 1113 n.35.

D. *Respect for State Courts*

Abstention also serves the policy of showing respect for the state courts' ability to decide claims capably and fairly.[35] But the policy is more easily stated than explained; in practice, the "policy" has only as much substantive content as courts choose to give it.[36] The "policy" might mean only that federal courts should respect the ability of state courts to decide state law, an indisputable proposition. For our purposes, however, we must decide whether this "policy" requires respect for state court handling of federal constitutional claims, a threshold question in determining whether federal interim relief ought to be available in these cases. If respect for state courts includes respect for the state courts' ability to handle federal constitutional claims, then state courts should also be able to determine the appropriateness of interim relief on those claims.

Recently, the Supreme Court has held that great deference is owed to state courts in situations somewhat analogous to, yet distinguishable from, the *Pullman*[37] abstention at issue here.[38] In *Younger v. Harris*,[39] it held that a federal court should not enjoin a pending state prosecution, except in extraordinary circumstances,[40] even when the federal plaintiff asserts that the proceeding violates federal constitutional rights. In post-*Younger* cases, the Court has held that a district court should not issue a declaratory judgment on the constitutionality of a law under which a pending

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[35] *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433, 443 (1971) (dissenting opinion, Burger, C.J.); Norman v. Duval County Sch. Bd., 361 F. Supp. 1167, 1175 (M.D. Fla. 1973); Bezanson, *supra* note 2, at 1131-32; Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591, 676-78 (1975); *cf.* Huffman v. Pursue, Ltd., 420 U.S. 592, 600-01, 605-09 (1975) (state courts may legitimately decide constitutional issues arising in civil litigation); Younger v. Harris, 401 U.S. 37, 44 (1971) (restraint of federal equity courts from interfering with state prosecutions rooted in federalism and respect for state institutions); Bonner v. Circuit Ct., 526 F.2d 1331, 1336 (8th Cir. 1975) (state judiciary fully competent to decide constitutional questions); Bezanson, *supra* note 2, at 1121-27, 1135, 1139 (state courts sometimes provide more reliable forum for deciding federal issues).

[36] [T]he possibility of [federal-state] friction has not become an important factor in defining the scope of the abstention doctrine [because] "friction" argues for dismissal rather than abstention [and because] a "friction" analysis cannot be used to limit the abstention doctrine; without a significant possibility of federal-state friction there may be no reason to dismiss a case, but abstention may still be proper.

Note, *supra* note 2, at 620.

[37] Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[38] *See* note 2 *supra*.

[39] 401 U.S. 37 (1971).

[40] Such prosecutions may be enjoined only when they are brought in bad faith, for the purpose of harassment, or in other extraordinary circumstances. *Id.* at 54.

prosecution has been brought,[41] enjoin prosecutions brought after a federal action is filed but before substantial proceedings on the merits have taken place in federal court,[42] or enjoin civil proceedings if they are related to enforcement of state criminal laws.[43]

These cases are explained in part by the federal courts' traditional reluctance to interfere with criminal prosecutions.[44] But the cases also rest on respect for the ability of state courts to decide issues of federal constitutional law.[45] Most recently, in *Juidice v. Vail*,[46] the Court significantly weakened its civil/criminal distinction, extending the principles of *Younger* to state contempt proceedings against a judgment debtor. While noting that a state's interest in this context may not be as strong as its interest in criminal proceedings, the Court recognized that "interference with the contempt process not only 'unduly interfere[s] with the legitimate activities of the State' . . . —but also 'can readily be interpreted "as reflecting negatively upon the state courts' ability to enforce constitutional principles." ' "[47] The impact of this decision may be felt in *Pullman* abstention cases as well. Implying that state courts are as competent as federal courts to decide federal constitutional issues, the Court established the basis for federal deference to state courts whenever such issues are joined with unsettled state law questions. The rationale of *Juidice* thus arguably undermines all federal interim relief.

## III

### The Countervailing Policy of Federal Court Protection of Federal Rights

Although the *Juidice* decision indicates a willingness to expand the scope of *Younger* abstention, the Court once again refused to abandon all limitations on that doctrine. The reason may be that

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[41] Samuels v. Mackell, 401 U.S. 66 (1971).

[42] Hicks v. Miranda, 422 U.S. 332 (1975).

[43] Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

[44] Younger v. Harris, 401 U.S. 37, 43-44 (1971); *see* Whitten, *supra* note 35, at 629-39.

[45] *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 600-01, 605-09 (1975); Younger v. Harris, 401 U.S. 37, 44-45 (1971). The *Younger* line of cases has produced much commentary. *See, e.g.*, Maraist, *Federal Intervention in State Criminal Proceedings:* Dombrowski, Younger, *and Beyond*, 50 Tex. L. Rev. 1324 (1972); Whitten, *supra* note 35; Note, *supra* note 3.

[46] 97 S. Ct. 1211 (1977).

[47] *Id.* at 1217-18 (quoting Younger v. Harris, 401 U.S. 37, 44 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975)). Nevertheless, the court refused to hold explicitly that *Younger* applied to all civil litigation. 97 S. Ct. at 1218 n.13. *See* Trainor v. Hernandez, 97 S. Ct. 1911, 1919 n.8 (1977). *See generally* Huffman v. Pursue, Ltd., 420 U.S. 592, 607 (1975).

the Court has recognized not only those state interests favoring state court adjudication, but also countervailing considerations favoring federal adjudication. In recent cases, the Court has held that a person who is not the subject of a pending state proceeding may bring a declaratory judgment action in order to test a law's constitutionality,[48] and that a person who has not yet violated a state law may obtain a preliminary injunction against its enforcement during the pendency of his federal suit.[49] Thus, the Court has accommodated the principle that respect for state proceedings requires deference with the principle that federal courts bear primary responsibility for matters arising under federal law, including adjudication of federal questions[50] and protection of federal rights.[51]

This latter principle has received more attention where the strong state interest in pending prosecutions is not a factor. Thus, in *Pullman*-type cases, abstention should be ordered only for the purpose of allowing state courts to determine state law, and not to give state courts the power to decide federal constitutional questions.[52] The federal court should retain jurisdiction in order to protect the plaintiff's interests while the case remains in state court[53] so that the parties may return to it for resolution of the federal issues.[54]

Two distinct considerations underlie the principle that federal courts bear primary responsibility for matters arising under federal law. First, our system of federalism benefits from such an allocation of judicial power. Just as state courts are more familiar with state law and more sensitive to state policy, so federal courts are more familiar with federal law and policy. The federal judiciary is

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[48] Steffel v. Thompson, 415 U.S. 452, 462-65 (1974).

[49] Doran v. Salem Inn, Inc., 422 U.S. 922, 930-31 (1975).

[50] *See, e.g.*, cases cited in note 6 *supra*.

[51] *See* Steffel v. Thompson, 415 U.S. 452, 464, 473-74 (1974); Zwickler v. Koota, 389 U.S. 241, 251 (1967); Dombrowski v. Pfister, 380 U.S. 479, 488-91 (1965); Baggett v. Bullitt, 377 U.S. 360, 375-79 (1964); McNeese v. Board of Educ., 373 U.S. 668, 672-74 (1963); Harrison v. NAACP, 360 U.S. 167, 177-78 (1959); *cf.* American Trial Lawyers Ass'n v. New Jersey Sup. Ct., 409 U.S. 467 (1973) (per curiam) (federal court abstention to permit determination of state law issue, but jurisdiction retained to preserve federal claims).

[52] *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964); Field, *supra* note 2, at 1080 & n.34.

[53] *See* American Trial Lawyers Ass'n v. New Jersey Sup. Ct., 409 U.S. 467 (1973) (per curiam); Harrison v. NAACP, 360 U.S. 167, 179 (1959). *See also* Harris County Comm'rs Ct. v. Moore, 420 U.S. 77, 88 & n.14 (1975).

[54] Both parties may agree to litigate federal questions in state court. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-19 (1964).

likely to produce a more uniform body of federal law than fifty state systems.[55] These concerns, however, appear irrelevant to the question of interim relief. The federal court can decide federal questions in a *Pullman*-type case whether or not interim relief is granted.

The second consideration underlying the policy that federal courts should have primary responsibility for deciding federal questions is more relevant to the interim relief issue. Plaintiffs have a legitimate interest in having a federal forum available to protect federal rights. This plaintiff interest finds support in the tenure and salary provisions of Article III, which aim to insure that federal judges remain faithful to the Constitution and free of executive and legislative influence;[56] in many statements by the Supreme Court that the federal courts are primarily responsible for the protection of federal rights;[57] and in the existence of federal jurisdiction over cases arising under federal law but presenting only questions of fact.[58] Just as the independence and national outlook of federal judges make them more sensitive to federal rights when evaluating laws and finding facts,[59] those factors should also make federal courts more sensitive to the plaintiff's federal rights when deciding whether or not to grant interim relief. If the plaintiff is forced to present his request for interim relief to the state court, he is denied a federal forum for the protection of his claimed federal right, even though the federal court remains available to decide federal legal questions and associated questions of fact.

To summarize, interim relief can conflict with some of the policies on which the abstention doctrine rests. However, the conflicts are far fewer than when courts refuse to abstain altogether. Interim relief necessarily interferes with a state's program. Granting interim relief because of a court's evaluation of probable success on the merits may conflict with policies favoring state court

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[55] *See* Mishkin, *supra* note 6, at 158-59.

[56] *See* THE FEDERALIST Nos. 78, 79, 81, at 505-10 (A. Hamilton) (Belknap Press ed. 1961); *cf.* Note, *supra* note 2, at 608, 609-10 (life-tenured federal judges, rather than periodically elected local judges, are likely to remain objective in emotionally-charged cases, such as those involving civil rights). Presumably, familiarity with federal law and uniformity of decision could be achieved without tenure and salary protection. As Hamilton argues, those provisions are designed to assure that judges will not be pressured into favoring government interests over individual rights.

[57] *See, e.g.*, cases cited in note 51 *supra*.

[58] *See* Mishkin, *supra* note 6, at 169-76.

[59] *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); *cf.* HART & WECHSLER, *supra* note 2, at 1051-53 (basis of diversity jurisdiction discussed).

resolution of state issues and the avoidance of decision on constitutional grounds. At the same time, however, granting such relief would not show lack of respect for state court decisionmaking, since federal courts bear the primary responsibility for protection of federal rights. Federal courts do not offend state courts by doing their duty.

## IV

### ALTERNATIVES TO INTERIM RELIEF

Given the conflict between the plaintiff's interest in federal protection of his federal rights and the state interests harmed by interim relief, one might expect the courts to develop standards for granting preliminary injunctions in cases appropriate for abstention but in which the plaintiff asserts that he will suffer irreparable harm absent such relief. Although some courts have attempted to establish such standards,[60] most have ignored the possibility of granting interim relief in these cases. Two other responses have been more popular.

The Supreme Court has indicated that the harm to the plaintiff from delay should be considered as a factor in the decision to abstain. Accordingly, some courts refuse to abstain when the delay occasioned by abstention would unduly harm the plaintiff.[61] Other courts tend to view the presence of an unsettled issue of state law as automatically triggering abstention, and refuse even to consider the possibility of interim relief.[62]

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[60] *See* cases cited in note 1 *supra*. These cases are discussed in Part V *infra*.

[61] *See, e.g.*, Harris County Comm'rs Ct. v. Moore, 420 U.S. 77, 83 (1975); Pike v. Bruce Church, Inc., 397 U.S. 137, 140 n.3 (1970); Harman v. Forssenius, 380 U.S. 528, 537 (1965); Dombrowski v. Pfister, 380 U.S. 479, 491-92 (1965); Baggett v. Bullitt, 377 U.S. 360, 375-79 (1964); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329 (1964); Griffin v. County Sch. Bd., 377 U.S. 218, 229 (1964); Daniel v. Waters, 515 F.2d 485, 492 (6th Cir. 1975); Mengelkoch v. Industrial Welfare Comm'n, 442 F.2d 1119, 1126-27 (9th Cir. 1971); Long Island Vietnam Moratorium Comm. v. Cahn, 437 F.2d 344, 347 (2d Cir. 1970), *aff'd mem.*, 418 U.S. 906 (1974); Rodos v. Michaelson, 396 F. Supp. 768, 776 (D.R.I.), *rev'd on other grounds*, 527 F.2d 582 (1st Cir. 1975); Dempsey v. McQueeny, 387 F. Supp. 333, 339-40 (D.R.I. 1975); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 766-67 (E.D.N.Y. 1973); Marin v. University of P.R., 346 F. Supp. 470, 478 (D.P.R. 1972); Midwest Video Corp. v. Campbell, 250 F. Supp. 158, 162-63 (D.N.M. 1965).

[62] *See, e.g.*, Neal v. Brim, 506 F.2d 6, 11 (5th Cir. 1975); First Am. Bank & Trust Co. v. Ellwein, 474 F.2d 933, 934-35 (8th Cir. 1973) (by implication); Harris v. Samuels, 440 F.2d 748 (5th Cir.), *cert. denied*, 404 U.S. 832 (1971); Wymbs v. Republican State Exec. Comm., 378 F. Supp. 1136 (S.D. Fla. 1974); Baker v. Baker, 368 F. Supp. 651, 652 (E.D.N.C. 1973); United Artists Corp. v. Proskin, 363 F. Supp. 406, 408-09 (N.D.N.Y 1973); Alwin Constr. Co. v. Lufkin, 360 F. Supp. 1119 (D. Conn. 1973); South Cutler Bay,

A. *Ignoring the Plaintiff's Harm From Delay*

The latter approach, under which the court ignores the problem of delay, may be illustrated by three cases: *Manard v. Miller*,[63] *McMillan v. Board of Education*,[64] and *United Artists Corp. v. Proskin*.[65] In *Manard*, college students attending school in Virginia claimed that their right to register and to vote in their college communities was violated by a statute that required prospective voters to prove domicile. The district court granted a temporary restraining order allowing the students to register provisionally pending resolution of the case. Later the court decided to abstain. The reason for abstention is unclear from the opinion. As the dissent notes,[66] state law appeared clear. The court may have thought some ambiguity existed, however, for it instructed the plaintiffs to attempt to register and to appeal any adverse decisions in the state courts. Without further explanation, the court dissolved its temporary restraining order and voided the provisional registrations. The dissenting judge disagreed with both the lifting of the temporary restraining order and the decision to abstain. The dissent argued that the right to vote was of "a fundamental nature,"[67] and noted that the delay caused by abstention could unnecessarily prejudice that right, since the next election was imminent. The dissent also pointed out that the cost to the state of allowing provisional voting by the plaintiffs[68] was estimated to be $12,000. The substantive issues could be decided and the validity of those votes determined before the winners of the election took office. Because such a valuable right was at stake, because the cost to the state was small, and because, in his view, the plaintiffs had shown a likelihood of success on the merits, the dissenting judge contended that provisional voting was appropriate interim relief even if abstention were ordered.[69]

*United Artists Corp. v. Proskin*[70] is an analytically similar case. The plaintiff wanted to enjoin the state from enforcing an obscen-

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Inc. v. Metropolitan Dade County, 349 F. Supp. 1205, 1208-09 (S.D. Fla. 1972); McMillan v. Board of Educ., 331 F. Supp. 302, 310 (S.D.N.Y. 1971); Manard v. Miller, 53 F.R.D. 610 (E.D. Va. 1971), *aff'd mem.*, 405 U.S. 982 (1972); *cf.* Albertson v. Millard, 345 U.S. 242, 245 (1953) (dissolving temporary restraining order against enforcement of Michigan Communist Control Act pending state court action).

[63] 53 F.R.D. 610 (E.D. Va. 1971), *aff'd mem.*, 405 U.S. 982 (1972).

[64] 331 F. Supp. 302 (S.D.N.Y. 1971).

[65] 363 F. Supp. 406 (N.D.N.Y. 1973).

[66] 53 F.R.D. at 613 (dissenting opinion, Merhige, J.).

[67] *Id.* at 614.

[68] It appears that about 1,500 persons would have provisionally voted. *See id.* at 615.

[69] *Id.* at 614.

[70] 363 F. Supp. 406 (N.D.N.Y. 1973).

ity law against a planned exhibition of the movie, "Last Tango in Paris." The court abstained on *Pullman* grounds, because state law was unclear. Here, as in *Manard*, the court lifted a temporary restraining order and denied further preliminary relief without weighing the interests at stake once the decision to abstain had been made. Had the court treated the propriety of interim relief as a separate issue, the plaintiff's first amendment rights would have been given some weight. As it was, only the state interest in enforcement of the obscenity law, the federalism interest in state court decision of state law questions, and the federal court interest in avoiding constitutional adjudication received attention.

Some cases where the court abstains and denies interim relief reach results that are hard to fault. *McMillan v. Board of Education*[71] is an example of an abstention case where a grant of interim relief would have been inappropriate. The plaintiff there challenged the constitutionality of a law that, under one construction, limited to $2000 the amount a board of education could pay to a private school for the education of a handicapped child. Since the statute was ambiguous and no state court had yet construed it, the district court abstained. The court denied motions for interim relief with no further discussion. In this case a preliminary injunction might have required the state to make an unexpected expenditure of funds already allocated to other state programs, thus upsetting the state budgeting process. A court should be understandably reluctant to issue an order causing a substantial disruption of state programs before the plaintiff has proved the merits of his federal cause of action.

What is most striking about *Manard*, *United Artists*, and similar cases,[72] is that before making the decision to abstain the court made a preliminary evaluation of the merits and granted a temporary order, yet dissolved the order after abstaining.[73] Thus, to the extent that granting the temporary restraining order required consideration of the case on the merits, abstention interests in avoiding constitutional adjudication and promoting state court decision of state law issues may already have been damaged before the court lifted the temporary restraining order. Similarly, the state's interest in continuing its program without interruption had

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[71] 331 F. Supp. 302 (S.D.N.Y. 1971).

[72] *E.g.*, Neal v. Brim, 506 F.2d 6, 9-11 (5th Cir. 1975); Harris v. Samuels, 440 F.2d 748, 752-53 (5th Cir.), *cert. denied*, 404 U.S. 832 (1971).

[73] The criteria for granting a temporary restraining order are essentially the same as those governing preliminary injunctions. *See* 11 C. WRIGHT & A. MILLER, *supra* note 17, § 2951, at 507-10.

already been weighed in the balance against the plaintiff's interest and had been found wanting.

Cases where the court has not yet granted interim relief are less compelling. No evaluation of the merits and no weighing of equities has taken place. Even so, the harm that might befall the state's interests should be a factor in the balance and not a reason for refusing to balance. A court should refuse relief only when state interests outweigh the plaintiff's interest. In practice, however, the strength of the different interests varies with the case. The voting registration question in *Manard* is a good example of a case where the state's interest is slight in comparison with the plaintiff's. *United Artists* may be a closer case if we assume the state's interest in prohibiting arguably obscene movies is stronger than its interest in spending $12,000 on provisional voting. The chief problem with the cases is not that the balance should have been struck differently, but that the opinions do not show any consideration of the plaintiffs' interests.

Judges who look only to abstention criteria seem to believe that abstention is incompatible with interim relief. Only that premise could support their reliance on abstention to deny an injunction. But the premise is weak. Abstention rests on no hard and fast rules. It is an equitable doctrine whose application lies in the sound discretion of the district court.[74] It is a means to achieve certain goals. Although interim relief interferes with some goals served by abstention, it advances other goals of the federal system. A blanket rule against interim relief elevates abstention policies over the principle that federal courts bear primary responsibility for protection of federal rights. The Supreme Court has never held that the Constitution dictates such an ordering of policies.[75]

### B. *Consideration of Harm Caused by Delay in Making the Abstention Decision*

Other courts take the harm from delay into account in making the abstention decision itself.[76] Delay is generally recognized as the

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[74] *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941). *See also* Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815 (1959).

[75] In fact, it has at least twice approved the concept of interim relief, although without discussing the issues raised in this Article. *See* Harrison v. NAACP, 360 U.S. 167, 176-79 (1959); Leiter Minerals, Inc. v. United States, 352 U.S. 220, 226-28 (1957); *cf.* Reynolds v. Sims, 377 U.S. 533, 586-87 (1964) (district court properly declined to act until legislature had had opportunity to adopt acceptable apportionment scheme) (discussed in note 101 *infra*).

[76] *See* cases cited in note 61 *supra*.

chief price paid for the benefits of abstention.[77] It seems reasonable to conclude that the benefits should be foregone when the costs are too high. But courts that follow this approach fail to see that often interim relief can cut the costs of delay without foregoing many of the benefits of abstention.

Admittedly, interim relief is not always a solution to the problem of delay. In some cases, reaching the merits may be the only way to protect the federal rights at stake. For example, in *Baggett v. Bullitt*[78] the plaintiffs sought a declaratory judgment that two Washington state statutes requiring teachers and other state employees to take oaths of allegiance as a condition of employment were unconstitutional. The district court abstained from ruling on one of the oaths because the state courts had never construed the statute prescribing the oath. The Supreme Court held that abstention was improper under the circumstances and declared the oath unconstitutionally vague. In rejecting abstention, the Court distinguished two kinds of unsettled state law questions. On the one hand were cases that "principally concerned the applicability of the challenged statute to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation."[79] In such cases abstention might be proper. The oath at issue in *Baggett*, however, was "not open to one or a few interpretations, but to an indefinite number."[80] A single adjudication could eliminate a small part of the vagueness, but the plaintiffs would still be unable to define "the range of activities in which they might engage in the future."[81] For example, the oath required a promise that the employee "will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."[82] A single adjudication could determine only whether specific conduct, *e.g.*, criticizing democratic government, fell within the proscription, but not whether any other action, such as refusing to salute the flag, was also proscribed. The costs of continuous adjudication that abstention would

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[77] *See* Field, *supra* note 2, at 1085-86, 1129-30; Note, *supra* note 2, at 606-07.

[78] 377 U.S. 360 (1964). *See also* Procunier v. Martinez, 416 U.S. 396, 401 & n.5 (1974); Dombrowski v. Pfister, 380 U.S. 479, 490-91 (1965).

[79] 377 U.S. at 376-77.

[80] *Id.* at 378.

[81] *Id.*

[82] *Id.* at 362 (quoting 1931 Wash. Laws ch. 103).

entail were too high given the statutes' inhibition of first amendment freedoms. Deciding the merits, rather than granting interim relief, seems the appropriate response to the vagueness problem in *Baggett*. Granting interim relief to an individual plaintiff does little to remedy the harm from delay when many state adjudications would be needed to fully eliminate constitutional questions.[83]

The delay issue has played a role in deciding whether to abstain in cases raising no first amendment issues. In *New York State Association for Retarded Children, Inc. v. Rockefeller*,[84] the plaintiffs challenged on constitutional grounds the conditions at a state school for the retarded. The court conceded that state law might provide a sufficient remedy for the harms complained of, but chose to reach "complex" constitutional questions anyway.[85] The court weighed "the importance of the right alleged to be impaired and the harm inflicted by delay" against the abstention interest in not "impinging on the federal-state relation."[86] Because abstention would delay vindication of the patients' rights, and because during the delay there was "a real probability of serious physical harm" to the patients,[87] the court refused to abstain.

The court could not easily have avoided the choice between plaintiff and abstention interests posed in *Retarded Children*. Preliminary relief would have caused serious dislocations in the state's allocation of resources. Such dislocations are hard to justify without a ruling on the merits. In cases of this sort, a court should abstain entirely or decide the merits. The problem is to determine which approach is better, and the answer may depend on the court's evaluation of the competing interests. In *Retarded Children*, the court's choice to decide on the merits is defensible, given the imminent danger to the patients.

Interim relief seems inappropriate in cases like *Baggett* and *Retarded Children*. But courts also cite delay as a reason for reaching the merits in cases where the delay caused by abstention is not unusually great, and when the requested relief consists merely in halting state interference with the plaintiff's activities. In *Pike v. Bruce Church, Inc.*,[88] for example, a company that harvested crops in Arizona, but packed them in California, challenged Arizona's

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[83] *See* Bezanson, *supra* note 2, at 1142-44; Note, *supra* note 2, at 611-13.

[84] 357 F. Supp. 752 (E.D.N.Y. 1973).

[85] *Id.* at 758, 766-68.

[86] *Id.* at 766.

[87] *Id.* at 767.

[88] 397 U.S. 137 (1970).

attempt to force it to build a cannery in Arizona. Since the Arizona officials intended to prevent the plaintiff from carrying its ripe crops across the border unless the cannery was built, the crops would have been lost absent quick relief. The Supreme Court said that the "emergency situation" thus created helped to justify a refusal to abstain, even though state law was unclear.[89] By contrast, in *Reetz v. Bozanich*,[90] an Alaska law restricting fishing deprived plaintiff fishermen of their livelihood. The district court refused to abstain on the ground that delay would irreparably harm the plaintiffs. The Supreme Court reversed, holding that the delay was the price the plaintiffs must pay to gain the benefits of abstention to the federal system.[91]

## V

### Interim Relief: The Middle Ground

In cases like *Pike* and *Reetz*, interim relief, rather than refusal to abstain or abstention coupled with condolences for the plaintiff, may offer courts the most appropriate response. Interim relief can and should accommodate both the policies served by abstention and the plaintiffs' interests in vindicating constitutional rights. Interim relief provides an ideal solution in cases where abstention ought to occur but where plaintiffs' interests are also strong, for it avoids completely ignoring one important interest. Moreover, in the long run, use of interim relief should advance abstention policies, for courts may feel freer to abstain if they can simultaneously protect the plaintiff during the delay.

Interim relief may also help achieve another goal. Vague abstention standards and varying evaluation of plaintiff and state interests have caused courts to reach inconsistent results on abstention questions. Thus, in *United Artists Corp. v. Harris*,[92] state courts had already construed an obscenity statute, but recent Supreme Court decisions had suggested that the statute might be unconstitutional. The court abstained so that the state court could reconstrue the statute in light of the Supreme Court opinions.[93] By contrast, the court in *Long Island Vietnam Moratorium Committee v. Cahn*[94]

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[89] *Id.* at 140 n.3.
[90] 397 U.S. 82 (1970).
[91] *Id.* at 86-87.
[92] 363 F. Supp. 857 (W.D. Okla. 1973).
[93] *Id.* at 861-62.
[94] 437 F.2d 344 (2d Cir. 1970), *aff'd mem.*, 418 U.S. 906 (1974).

refused to give the state courts even a single chance to construe a flag salute statute in striking it down as overbroad.[95] Interim relief in such cases could eliminate the necessity for making stark value choices and the inconsistencies that arise when courts value competing interests differently.[96] Both *United Artists* and *Moratorium Committee* provided good cases for interim relief coupled with abstention.[97] The federal courts could have protected the plaintiffs while awaiting definitive state court interpretations around which to frame informed constitutional inquiries.

A. *Interim Relief in the Courts*

Despite the attractions of interim relief, courts have refrained from using it. A few cases, however, suggest its usefulness. The Supreme Court has tacitly approved of interim relief in abstention cases at least twice, and lower courts have occasionally used the procedure. In *Leiter Minerals, Inc. v. United States*,[98] Leiter, relying on a state statute, brought suit in state court against the lessees of mineral rights from the United States, claiming that it owned the rights. The United States then brought suit in federal court to quiet title to the mineral rights and to obtain a preliminary injunction against the state suit. The government argued that Leiter had misconstrued the statute and that if Leiter's construction were correct, the statute would be unconstitutional. The Court held that the district court should abstain to permit statutory construction in a state court declaratory judgment action. In addition, it enjoined the pending state proceeding in order to prevent the possibility of inconsistent state and federal judgments.

Admittedly *Leiter Minerals* is an odd case. The federal government is rarely a party in an abstention case, and the problem giving rise to interim relief seldom involves the possibility of inconsistent judgments but rather the harm caused the plaintiff by delayed vindication of his federal rights. Even so, *Leiter* shows how such a

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[95] 437 F.2d at 347-50.

[96] *See generally* Field, *supra* note 2, at 1135 n.167. Professor Field suspects that the views of members of the Supreme Court on the merits may influence the degree of uncertainty they demand of state law before they abstain. *See also* Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 602 & nn.51, 52 (1977).

[97] In *United Artists* itself the court separated the injunction issue from the abstention issue and decided there was no irreparable harm. 363 F. Supp. at 861-63. The case points out the different weight given to individual and state interests by different courts. The *United Artists* court's rejection of interim relief reminds us that even if courts were more sensitive to the possibility of reconciling individual and state interests, they would not always choose to do so.

[98] 352 U.S. 220 (1957).

procedure can simultaneously advance several desirable goals: the state courts decided the state law issue and the Court avoided a constitutional question.[99] The parties were neither required to litigate two lawsuits at once nor forced to conform their conduct first to a state judgment and then to a possibly inconsistent federal judgment.

In *Harrison v. NAACP*[100] the Court abstained from ruling on the constitutionality of Virginia statutes regulating legal activities of the NAACP because the statutes had not yet been construed by the state courts. But the Court recognized that enforcement could jeopardize the NAACP's first amendment rights and cause "great and immediate irreparable injury."[101] The state had assured the Court that it would not prosecute under the statutes until the state litigation was finished. The Court said that if the promise were not kept, "the District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the [NAACP] while this case goes forward."[102] Analytically, this case is like *Leiter* and other injunction-plus-abstention cases, except that here the state did voluntarily what it otherwise would have been forced to do.

Lower courts, recognizing the advantages of interim relief where both plaintiff interests and abstention interests are strong,[103]

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[99] The case was ultimately dismissed as moot. United States v. Leiter Minerals, Inc., 381 U.S. 413 (1965).

[100] 360 U.S. 167 (1959).

[101] *Id.* at 178. The Court eventually struck down the statute. *See* NAACP v. Button, 371 U.S. 415 (1963). In Reynolds v. Sims, 377 U.S. 533 (1964), the reapportionment case, the Court again recognized the value of interim relief, albeit not in the abstention context. The district court had provisionally reapportioned the legislative districts in Alabama, but had left to the legislature the task of drawing permanent lines. The district court retained jurisdiction to review the legislative reapportionment. The Supreme Court commended this procedure. *See* 377 U.S. at 586-87. Since the district court found the existing apportionment unconstitutional before granting provisional relief, the case does not involve abstention. But the state's interest in drawing district lines is akin to the state's abstention interest in deciding unsettled issues of state law: "[L]egislative apportionment is primarily a matter for legislative consideration and determination." 377 U.S. at 586. *See also* Bezanson, *supra* note 2, at 1113 n.35 (discussing Scott v. Germano, 381 U.S. 407 (1965)).

[102] 360 U.S. at 179. *See also* Baxter v. Ellington, 318 F. Supp. 1079, 1089 (E.D. Tenn. 1970); Silver v. Jordan, 263 F. Supp. 627, 629 (C.D. Cal. 1966), *second complaint dismissed*, 320 F. Supp. 1169 (C.D. Cal. 1970); Woodard v. Carteret County, 252 F. Supp. 268, 270 (E.D.N.C. 1966); Division 1287, Amal. Ass'n of Street Employees v. Dalton, 206 F. Supp. 629, 634 (W.D. Mo. 1962). These cases suggest that interim relief may be granted at a future time if the circumstances warrant it.

[103] In the *Younger* context, see *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 163-66 (1975), which suggests that the chief cost of *Younger* abstention is the inhibitory effect of state proceedings on the exercise of first amendment rights by persons who have

have used it in a variety of contexts: where the state sought (1) to condemn the plaintiff's property;[104] (2) to discharge civil service employees where damage to reputation was threatened;[105] (3) to prevent a lawyer from representing a client in a pending suit;[106] and (4) to bar a student from attending school until he had been immunized,[107] or had cut his sideburns.[108] In other cases courts have abstained and denied interim relief, but only after examining the relief issue on its merits and being unpersuaded by the plaintiff's arguments.[109] Thus, interim relief coupled with abstention is not entirely unknown.

Courts that treat abstention and interim relief as separate issues go a step beyond those that ignore any harm to the plaintiff occasioned by abstention and those that consider such harm in deciding the abstention question. But courts that have used or considered preliminary injunctions have not merely recognized that the relief issue should be kept separate from the abstention issue. Often they have treated the relief issue as though there were no relation between interim relief and abstention, not recognizing that injunctive relief can hurt abstention policies. Thus, their grants of interim relief have been based on the plaintiff's risk of harm and his chances for success on the merits. The only countervailing abstention policy that courts have considered is the harm to the state from interference with its program, a customary part of any inquiry into interim relief.

A more refined approach would separate the abstention and relief issues, but consider the harm to abstention policies in decid-

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not yet been arrested. It further suggests that this cost could be avoided and the state interest in prosecution accommodated at the same time, if the federal court were to grant an injunction against future nonjudicial enforcement of the statute until the constitutional issue is settled.

[104] Sherwood v. Bradford, 246 F. Supp. 550 (S.D. Cal. 1965).

[105] Burks v. Perk, 339 F. Supp. 1194 (N.D. Ohio), *rev'd*, 470 F.2d 163 (6th Cir. 1972), *cert. denied*, 412 U.S. 905 (1973). The court of appeals thought the state law was clear and constitutional. It also disapproved of federal interference in dealings between municipalities and their employees. The court did not directly attack the use of preliminary relief in conjunction with abstention.

[106] Silverman v. Browning, 359 F. Supp. 173 (D. Conn. 1972), *aff'd mem.*, 411 U.S. 941 (1973).

[107] Maier v. Good, 325 F. Supp. 1268 (N.D.N.Y. 1971).

[108] Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970).

[109] *See, e.g.*, Ament v. Kusper, 370 F. Supp. 65, 67-69 (N.D. Ill. 1974); N.D.D. Inc. v. Faches, 367 F. Supp. 465, 467 (N.D. Iowa 1973); United Artists Corp. v. Harris, 363 F. Supp. 857, 863 (W.D. Okla. 1973); MTW, Inc. v. City of Milwaukee, 327 F. Supp. 990, 992-93 (E.D. Wis.), *supplemented*, 330 F. Supp. 1281 (E.D. Wis. 1971); Silver v. Jordan, 263 F. Supp. 627, 629 (C.D. Cal. 1966), *second complaint dismissed*, 320 F. Supp. 1169 (C.D. Cal. 1970).

ing the relief issue. The damage to abstention interests in granting interim relief may be indirect and subtle, and may seem to weigh lightly against a plaintiff's immediate and substantial interest in avoiding irreparable harm. Even so, sensitivity to abstention interests could change the result when the interim relief issue is close, and should at least force courts to fully justify any grant of relief.

A case illustrating clumsy use of the technique of combining interim relief with abstention is *Alexander v. Thompson*.[110] High school authorities issued a dress code prohibiting students from wearing sideburns below the ears. The plaintiff was suspended from school when he violated the code. The district court abstained but enjoined the authorities from keeping the student from attending school. The court questioned the constitutionality of the suspension[111] and recognized that the plaintiff would be greatly harmed if he could not attend school until the case was finally decided.[112] But most of the opinion was devoted to an analysis of the unsettled state law issue of whether local authorities were authorized to make such rules. After analyzing the state issue, the court said: "When the California courts have an opportunity, [section] 1052 of the Education Code predictably will be construed in a manner consistent with the foregoing analysis and found wanting to support the sideburns regulations promulgated by defendants."[113] Later the court said: "A state court decision in this case . . . will unquestionably do substantial justice and permit the plaintiff to obtain the relief he seeks here."[114] In short, the federal court told the state court how to decide the case.

A more sensitive approach to the reconciliation of interim relief and abstention interests may be found in *Catrone v. Massachusetts State Racing Commission*.[115] A race track owner sought to bar Catrone, a horse trainer, from its race track on the basis of charges of misconduct that had been brought, but not proven, against him.[116] The court abstained because it was unclear under state law whether Catrone could properly be barred from the track.[117] The

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[110] 313 F. Supp. 1389 (C.D. Cal. 1970).
[111] *Id.* at 1399.
[112] *Id.* at 1394-95.
[113] *Id.* at 1397.
[114] *Id.* at 1398.
[115] 535 F.2d 669 (1st Cir. 1976).
[116] *Id.* at 670.
[117] *Id.* at 671.

court went on to grant a preliminary injunction permitting Catrone to go to the track. Balancing interests, the court noted that Catrone's livelihood was at stake and concluded that "[t]he burden upon [the owner] of putting up with his presence at its race track seems minimal compared with that upon Catrone if he is kept out."[118] The court briefly discussed the state law and constitutional issues. Although it expressed no view on the state issue, the court concluded there was "substantial likelihood" that Catrone would win on the constitutional issue, but was quick to warn that it was not deciding that issue.[119]

B. *The Need To Develop Standards for the Use of Interim Relief*

The care with which the *Catrone* court handled the relief issue, and the willingness of other courts to give interim relief without making even a preliminary determination on the merits,[120] may indicate that these courts are aware of the potential conflict between interim relief and abstention policies. But if these courts recognize the conflict, they do not say so in their opinions. As a result, the question of how abstention should affect the interim relief issue has received little attention. Some courts that recognize that interim relief furnishes an alternative to decision on the abstention issue seem to use a balancing test to determine the interim relief question. On one scale they weigh the importance of the rights asserted by plaintiffs and the harm done to them by delay during state court adjudication. For example, a threat to the plaintiff's livelihood or to his right to free exercise of religion might weigh more heavily than the right to exhibit an arguably obscene movie or the right to sell uninspected milk.[121] The plaintiff's interest is weighed against the harm that interim relief would cause to the state program under attack. Thus, the state

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[118] *Id.* at 672.

[119] *Id.* at 671-72.

[120] *E.g.*, Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957); Reed v. Board of Election Comm'rs, 459 F.2d 121 (1st Cir. 1972); Sherwood v. Bradford, 246 F. Supp. 550 (S.D. Cal. 1965). Other courts, however, have made preliminary determinations on the merits. *E.g.*, Catrone v. Massachusetts State Racing Comm'n, 535 F.2d 669, 672 (1st Cir. 1976); Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Cal. 1970); *cf.* Glenwal Dev. Corp. v. Schmidt, 336 F. Supp. 1079 (D.P.R. 1972) (abstention inappropriate where plaintiff's constitutional rights clearly violated).

[121] *Compare* Catrone v. Massachusetts State Racing Comm'n, 535 F.2d 669, 672 (1st Cir. 1976) *and* Maier v. Good, 325 F. Supp. 1268 (N.D.N.Y. 1971), *with* United Artists Corp. v. Harris, 363 F. Supp. 857, 863 (W.D. Okla. 1973) *and* MTW, Inc. v. City of Milwaukee, 327 F. Supp. 990 (E.D. Wis.), *supplemented*, 330 F. Supp. 1281 (E.D. Wis. 1971).

interest may not be so great when the only harm to the state is delay in achieving some objective and not total frustration of the objective itself,[122] or when an injunction could be granted to one plaintiff and not a large group.

The factors these courts balance are the plaintiff and defendant interests that must be weighed in any case where a preliminary injunction is sought.[123] These courts overlook the point that the presence of abstention interests in avoiding unnecessary constitutional decisionmaking and having state courts decide issues of state law should affect the balance. These considerations, of course, work against interim relief. If a balancing approach is adopted to decide whether interim relief is appropriate in individual abstention cases, these abstention interests should be weighed.

Balancing plaintiff, state, and abstention interests, however, is not the only way to deal with the clash between those interests. Upon considering the question of how abstention should affect interim relief, courts may prefer a different approach. They may decide that abstention policies are served well enough by abstention itself, are at most tangentially harmed by interim relief, and should receive no special consideration when the relief issue is decided. Alternatively, they may believe abstention policies are so important that interim relief should not be granted unless, say, the circumstances permit such relief without a tentative determination on the merits. Or they may prefer some other rule.

Just how the issue is handled depends on how courts value plaintiff interests and abstention interests and how much damage they believe interim relief does to abstention interests. For now it is enough to suggest three conclusions: (1) that courts should be more willing to consider interim relief in abstention cases; (2) that courts considering interim relief should recognize its potential for conflict with abstention policies; and (3) that courts should articulate principles to deal with that conflict. Hopefully, this Article will contribute to all three goals.

## CONCLUSION

This Article has tried to show that greater use of interim relief in abstention cases would help courts to accommodate more in-

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[122] Thus, the state's interest in enforcing a criminal statute while a suit is pending may be greater than its interest in condemning a piece of land for its future use. *Compare* United Artists Corp. v. Harris, 363 F. Supp. 857 (W.D. Okla. 1973) *and* N.D.D. Inc. v. Faches, 367 F. Supp. 465 (N.D. Iowa 1973), *with* Sherwood v. Bradford, 246 F. Supp. 550 (S.D. Cal. 1965).

[123] *See* text accompanying note 17 *supra*.

terests than they can when the only choice is between abstention and reaching the merits. Essential to the analysis here is the premise that federal courts are primarily responsible not only for deciding issues of federal law, but also for protecting federal rights. In recent years the Supreme Court has shown increasing regard for the abilities of state courts to safeguard federal rights.[124] If state courts are deemed equally able to protect those rights, there is little point in the federal court hearing the claim for interim relief in an abstention case. The state court would be an equally acceptable forum for decision of the interim relief issue. Continued expansion of the *Younger* doctrine could lead in that direction.

Such an expansion should not be presumed too quickly, however. The Court's holdings restricting federal interference in state proceedings have been accompanied by other cases that provide the careful plaintiff a way to assert his federal claim in federal court.[125] The result is that federal courts remain available for constitutional challenges to state statutes. Moreover, in the *Pullman* abstention context the Court has recently reaffirmed the principle that the federal courts are to retain jurisdiction to hear the federal issues in the case.[126] In light of these developments, and in light of the Court's reliance in *Younger* situations on the presence of pending cases in state court, it seems unlikely that the Court will overturn the principle that federal courts bear primary responsibility for the protection of federal rights in *Pullman* cases. If this prediction is accurate, interim relief will continue to be a viable alternative in the *Pullman* context.

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[124] *See* text accompanying notes 35-47 *supra*.

[125] *See* text accompanying notes 48-49 *supra*. *See also* Mitchum v. Foster, 407 U.S. 225 (1972) (Civil Rights Act held an express exception to the anti-injunction statute).

[126] American Trial Lawyers Ass'n v. New Jersey Sup. Ct., 409 U.S. 467 (1973); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 510 (1972).