ABSTENTION AND PRIMARY JURISDICTION: TWO CHIPS OFF THE SAME BLOCK?—A COMPARATIVE ANALYSIS*

Sidney A. Shapiro†

I

INTRODUCTION

A plaintiff who properly qualifies for federal jurisdiction may not always receive a hearing in federal court. Although the right of the plaintiff to be in federal court is to be respected,[1] other concerns of administering justice sometimes result in the federal courts sending the plaintiff to litigate his claims elsewhere. Two of the most frequently espoused reasons for sending plaintiffs to another decision-maker are the doctrines of abstention and primary jurisdiction.[2]

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* The views herein expressed are those of the author and do not necessarily reflect the views of the Federal Trade Commission.

† Member of the Pennsylvania Bar. Staff Attorney for the Federal Trade Commission. B.S. 1970, J.D. 1973, University of Pennsylvania.

[1] The most frequently cited expression of a qualified plaintiff's right to enjoy federal court jurisdiction is by Chief Justice Marshall:

> It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. . . . Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgement, and conscientiously to perform our duty.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 82, 100 (1821). This right, of course, is still recognized today. Zwickler v. Koota, 389 U.S. 241, 248 (1967). ("Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of federal forum for the hearing and decision of his federal constitutional claims."). *See also* Martin v. Creasy, 360 U.S. 219, 226-29 (1959) (Douglas, J., dissenting in part); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 41-42 (1959) (Brennan, J., dissenting).

The Court also insists that any departures from hearing a plaintiff who is properly in federal court occur only in "special circumstances." Zwickler v. Koota, 389 U.S. 241 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Meredith v. Winter Haven, 320 U.S. 228 (1943).

At the same time the Court has said that since it often retains jurisdiction while abstaining, a plaintiff is not actually denied his right to be in federal court. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964); Harrison v. NAACP, 360 U.S. 167, 177 (1959) ("This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise . . . ."). But given the inconveniences caused the plaintiff by abstention, he is effectively denied that right, making the issue of the validity of abstention an important procedural question. *See* note 16 and accompanying text *infra*.

[2] In McGuire v. Iowa, 320 F. Supp. 243, 245 (S.D. Iowa 1970), the court noted, "In view of the fact [abstention] is necessary as an irreducible minimum to the preservation of a

A. *The Abstention Doctrine*

Basically, abstention is the discretionary decision by a federal court that certain issues properly presented in federal court must be litigated instead in state court.[3] Three principal concerns have led the federal courts to redirect traffic to state courts. Abstention first occurred in equity cases involving both federal constitutional claims and issues of unclear state law. Adhering to the doctrine that the Supreme Court should not pass on constitutional questions unless such adjudication was unavoidable,[4] the Court in the 1941 case of *Railroad Commission v. Pullman Co.*,[5] refused to pass upon the constitutional question presented, reasoning that the unclear question of state law before it might be resolved in a way which would make consideration of the constitutional issue unnecessary.[6]

In the interest of advancing federal-state relationships, the Court thought the state court should decide the state law question. Otherwise, a decision by the federal court on the state law question could later be displaced by a decision of the state court of last resort—a court which was not bound to follow the results of the federal court. The possibility of a state court in effect "overruling" a federal court was thought to be a result which could hardly promote "the reign of law."[7]

A second and separate reason for abstention was established in

strong Federalism, it is doubtful that it will ever completely 'lose its charm.'" Regarding primary jurisdiction it has been said, "[T]his Court [has] recognized . . . that coordination between traditional judicial machinery and these agencies was necessary. . . . The doctrine of primary jurisdiction has become one of the key judicial switches through which this current has passed." Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic 400 U.S. 62, 68 (1970).

[3] 1A J. MOORE, FEDERAL PRACTICE ¶ 0.203[1]-[2] (2d ed. 1974).

[4] *See* note 6 *infra.*

[5] 312 U.S. 496 (1941). In *Pullman,* a Texas regulation that all Pullman cars be under the supervision of a person holding the status of conductor was attacked as discriminatory under the fourteenth amendment since all conductors were white and the cars were previously supervised by porters, all of whom were black. The Texas Railroad Commission's authority to make such an order was unclear under existing Texas law. The Court abstained pending a clarification of that law in state court.

[6] *Id.* at 498. The practice of avoiding premature constitutional decisions has long been followed: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944). *Pullman* merely established that the opportunity of first resolving unclear state law questions was another way to follow the doctrine. *See, e.g.,* Meridian v. Southern Bell Tel. & Tel., 358 U.S. 639 (1959); Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957); Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942); Reid v. Board of Educ., 453 F.2d 238 (2d Cir. 1971); Barrett v. Atlantic Richfield Co., 444 F.2d 38 (5th Cir. 1971); Egner v. Texas City Independent School Dist., 338 F. Supp. 931 (S.D. Tex. 1972); Moyer v. Nelson, 324 F. Supp. 1224 (S.D. Iowa 1971).

[7] 312 U.S. at 500.

Burford v. Sun Oil Co.[8] Again sitting in equity, the Court decided that state law questions relating to the pervasive regulation of local industry by state agencies so intimately involved the interests of a state that the proper procedure would be for a federal court to defer to a state court on these questions.[9] Unlike *Pullman,* no federal constitutional question was involved. The Court, however, placed heavy emphasis upon the expertise of the state court in reviewing the technical questions involved in regulation by the particular state agency.[10]

In *Louisiana Power & Light Co. v. City of Thibodaux,*[11] the Supreme Court articulated a third reason for abstention. The Court determined that a federal court should not decide a state law question where such a decision would disrupt the implementation of politically important programs of a state government.[12] The *Thibodaux* decision was notable on two grounds. First, unlike *Pullman* and *Burford,* the case was nonequitable in nature; thus it eliminated any limitation of the abstention doctrine to equity cases.[13] Second, the case made no suggestion that the state law issue involved must be a technical question relating to complex regulation by a state agency as in *Burford.*[14]

The result of these three decisions has been to establish wide criteria under which abstention may be allowed. The broadness of the criteria has led to significant inconsistency in Supreme Court decisions[15] and thus has made the exact boundaries of abstention uncertain.

The party most directly—and usually adversely—affected by

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[8] 319 U.S. 315 (1943).

[9] *Id.* at 332; *see* text accompanying notes 88-94 *infra.* At issue in *Burford* was the validity of an order of the Texas Railroad Commission granting the appellant a permit to drill oil wells on a certain plot. The Commission had the responsibility under Texas law of organizing the method by which the oil reserves in Texas could best be utilized and protected. The Court decided the order of the Texas Commission should be reviewed in state, rather than federal, court.

[10] 319 U.S. at 326-27; *accord,* Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968).

[11] 360 U.S. 25 (1959).

[12] In *Thibodaux,* the ability of the state to take certain lands through the power of eminent domain was challenged by a land owner. The owner argued that existing state law precluded such a taking. The Court deferred to the Louisiana state courts for an interpretation of the state law.

[13] 360 U.S. at 28; *see* text accompanying notes 111-13 *infra.* Any doubt that *Thibodaux* had ended the law-equity distinction was resolved in Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960), where the federal court had diversity jurisdiction in an action to recover losses claimed to be covered by an insurance policy. *See generally* Comment, *Abstention by Federal Courts Having Jurisdiction by Diversity of Citizenship,* 30 Mo. L. Rev. 460 (1965).

[14] *See* note 10 and accompanying text *supra.*

[15] *See, e.g.,* cases cited in notes 41-67 and accompanying text *infra.*

the expansion of the abstention doctrine is the plaintiff. Any time abstention is invoked, the plaintiff is relegated to a much longer and costlier law suit.[16] Abstention is therefore characterized by a tension between two opposing concerns: on one hand, the expense and inconvenience to plaintiffs who would otherwise properly be in federal court, and on the other, the advantages of a federal court's being able to defer to a state court for the determination of certain issues.[17]

[16] Once the federal court has abstained, the party is often forced to recommence the action at the bottom of the state court hierarchy and work his way up to the state supreme court. *See, e.g.*, United Services Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965). Occasionally the plaintiff may be shuffled back and forth between various federal and state courts. *See, e.g.*, Government & Civic Employees Organizing Comm. v. Windsor, 116 F. Supp. 354 (N.D. Ala. 1953) (three-judge district court abstains in action by labor union and state employee for judgment declaring unconstitutional and injunction restraining enforcement of Alabama statute (Solomon bill) providing for "forfeiture [of] all rights afforded [public employees] under the State Merit System and employment rights . . . as a result of his public employment." 116 F. Supp. at 355 n.1.), *aff'd*, 347 U.S. 901 (1954); Government & Civic Employees Organizing Comm. v. Windsor, 262 Ala. 285, 78 So. 2d 646 (1955) (in action for declaratory judgment that plaintiff association not labor union as defined in Solomon bill and for injunction against enforcement Alabama Supreme Court affirms lower court holding statute applicable to plaintiff and statute constitutional); Government & Civic Employees Organizing Comm. v. Windsor, 146 F. Supp. 214 (N.D. Ala. 1956) (three-judge district court dismisses with prejudice action to declare unconstitutional and to restrain enforcement of Solomon bill); Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957) (vacating judgment of three-judge district court and remanding to district court to retain jurisdiction "until all efforts to obtain an appropriate adjudication in the state courts have been exhausted." 353 U.S. at 367); American Fed'n of State Employees v. Dawkins, 268 Ala. 13, 104 So. 2d 827 (1958) (court holds not justiciable controversy in action by Government and Civic Employees Organizing Comm.'s successor for judgment declaring Solomon bill unconstitutional).

If the result in the state court does not render unnecessary a decision on the constitutional claim the plaintiff then may return to federal court and have a trial on the merits. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). Thus, it is easy to conclude with Professor Wright that "[e]xperience with [abstention] has been . . . tragic. These cases shuttle back and forth from the state court to the federal court. They go on endlessly." Wright, *Federal Question Jurisdiction, The American Law Institute's Proposals on the Division of Jurisdiction Between State and Federal Courts*, 17 S.C.L. REV. 659, 667 (1965). Some cases may exist in various stages of litigation for a decade or more. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 384 U.S. 885 (1966); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

A current movement to ease this burden seeks to abandon *England* and require federal as well as state claims to be litigated where practical in state court. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371(c)(4) (Tent. Draft No. 6, 1968). Another suggestion is to make greater use of certification. *Id.* § 1371(e).

[17] Professor Kurland has described this tension as the central problem of abstention:

> [Abstention] cases reveal two problems of what I have called "cooperative judicial federalism." The first is how to utilize the special expertise of each of two judicial systems, State and federal. The second is how to economize on the use of the systems so that one lawsuit will suffice to dispose of the problem rather than permitting two with the possibility of conflicting results as well as multiple costs.

Kurland, *Toward A Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 487 (1959).

B. *The Primary Jurisdiction Doctrine*

The development of the abstention doctrine and its effect on plaintiffs have been amply described by the commentators.[18] This Article suggests that a useful way of discussing the current state of the abstention doctrine is to compare abstention to primary jurisdiction. The usefulness of the comparison of the two doctrines lies in their almost identical rationales.

In certain types of cases Congress has granted both a federal agency and a federal court jurisdiction to hear an issue.[19] To deal with this overlap of authority, the federal courts have developed the practice of using their discretionary power to decide that certain issues otherwise properly in federal court must be litigated before a federal administrative agency.[20] Similarly, in cases where abstention is invoked there is concurrent jurisdiction because either the state claims are pendent to federal claims for equitable relief[21] or there is diversity jurisdiction.[22] Thus, in primary jurisdiction and in abstention, the plaintiff enjoys a statutory right to be in federal court.

Moreover, under the primary jurisdiction doctrine, the plaintiff is denied his day in federal court for reasons which are similar to those underlying the abstention doctrine. In *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*,[23] the case originating the doctrine of

[18] *See, e.g.*, 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 19.01-.09 (1958); Kurland, *supra* note 17; Liebenthal, *A Dialogue On England: The England Case, Its Effect on the Abstention Doctrine, and Some Suggested Solutions*, 18 CASE W. RES. L. REV. 157 (1966); Schoenfeld, *American Federalism and the Abstention Doctrine in the Supreme Court*, 73 DICK. L. REV. 605 (1969); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959); Note, *The Federal Abstention Doctrine: An Analysis of Its Present Function and Future Application*, 16 CASE W. RES. L. REV. 937 (1965); Note, *Judicial Abstention From the Exercise of Federal Jurisdiction*, 59 COLUM. L. REV. 749 (1959); Comment, *The Exercise of the Abstention Doctrine and Its Consequences: A Clarification*, 6 DUQUESNE L. REV. 269 (1968); Note, *Doctrine of Abstention: Need of Reappraisal*, 40 NOTRE DAME LAW. 101 (1964); Comment, *The Abstention Doctrine*, 40 TUL. L. REV. 579 (1966).

[19] K. DAVIS. ADMINISTRATIVE LAW § 197, at 664 (1951): "Questions of primary jurisdiction arise only when the statutory arrangements are such that administrative and judicial jurisdictions are concurrent for the initial decision of some questions." *See* Jaffee, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1037-40 (1964).

[20] K. DAVIS, *supra* note 18, §§ 19.01-.09; Jaffee, *supra* note 19; Note, *The Doctrine of Primary Jurisdiction: A Reexamination of Its Purpose and Practicality*, 48 GEO. L.J. 563 (1960).

[21] *See, e.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); *cf.* Siler v. Louisville & N.R.R., 213 U.S. 175 (1909) (in action to enjoin order of railroad commission on constitutional and statutory grounds federal court had jurisdiction because federal questions not merely colorable but raised in good faith and federal court could decide case on local or state questions ouly).

[22] 28 U.S.C. § 1332 (1970). *See, e.g.*, Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

[23] 204 U.S. 426 (1907). The oil company contended that the railroad had extracted an

primary jurisdiction, the Supreme Court decided that if both the federal courts and the Interstate Commerce Commission (ICC) were to decide the reasonableness of railroad tariff rates, the almost inevitable disparity of results would make it virtually impossible for the ICC to fulfill its statutory duty to maintain uniform rates.[24] Therefore, attacks on the reasonableness of tariff rates in federal court were to be referred to the ICC even though the federal court had jurisdiction to hear the issue.

The doctrine was refined by Justice Brandeis in *Great Northern Ry. v. Merchants Elevator Co.*[25] Brandeis did not feel that uniformity in tariff construction *always* required resort to the ICC. When a rate was attacked as unreasonable or unjustly discriminatory, uniformity did require recourse to the Commission since the inquiry was "essentially one of fact and of discretion in technical matters."[26] This was particularly true because this kind of determination could be reached only upon "voluminous and conflicting evidence"—the kind of evidence which could best be dealt with by a body of experts.[27] A federal court, unequipped to decide technical issues of fact, could, by wrongly deciding such questions, interfere with the agency's ability to achieve uniformity of regulation. But when the dispute over a tariff involved not questions of fact, but issues of law, Brandeis argued that the federal courts were competent to decide such questions since neither technical matters nor agency expertise would be involved.[28]

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unjust and unreasonable price for bauling certain shipments of cotton seed. It wanted the Court to declare the existing rates invalid. The Court, bowever, held that the ICC should first decide the validity of the rates.

[24] *Id.* at 440.

[25] 259 U.S. 285 (1922). The issue before the Court was whether a certain shipping charge was proper under tariff rates filed with the ICC. The Court held tbat because of the tecbnical matters involved in construing the tariff, the ICC should decide the issue. *Id.* at 293-94.

[26] *Id.* at 291.

[27] *Id.*

> [W]here the document to he construed is a tariff . . . and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, tbe preliminary determination must be made by the Commission . . . . If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained.

Id. at 292.

[28] *Id.* at 291. Justice Brandeis noted that with respect to the case before him

> no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary.

Id. at 294.

This emphasis on a law-fact distinction was modified thirty years later by *Far East Conference v. United States.*[29] The Court recognized in this decision a more comprehensive reason for primary jurisdiction:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.[30]

In other words, not only is a specialized federal agency more likely to have greater expertise in a particular area, but its organization and procedures may also lend themselves to a more thorough and better informed treatment of the issues.[31]

Thus, the rationale of the primary jurisdiction doctrine, as defined in these cases, is decidedly similar to that of abstention. As in abstention, a major concern is that a decision by a federal court would be an interference with the ability of a governmental unit to carry out a program for which it is responsible. In abstention as well as in primary jurisdiction, the deferral is to a decision-maker possessing greater familiarity with the issues that need to be considered and also having the expertise to deal with the specialized questions involved. And with both doctrines there is a sense of the needs of comity and respect for fellow decision-makers charged with coextensive responsibility.[32]

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[29] 342 U.S. 570 (1952). The case involved an antitrust suit by the United States against an association of steamship companies whose members were alleged to be jointly setting rates. The rates set by the association had been approved by the predecessor of the Federal Maritime Board. The Court held that before a decision on the antitrust violations could be made, certain questions, requiring the particular expertise of the Maritime Commission, would have to be decided.

[30] *Id.* at 574-75.

[31] The Supreme Court has also emphasized the importance of federal agencies as policy-enforcing bodies:

> [T]he . . . question presented is whether effectuation of the statutory purposes of [an Act require an agency to] first pass on the . . . dispute . . .; this, in turn, depends on whether the question raises issues of . . . policy which ought to be considered by the [agency] in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act.

United States v. Western Pac. R.R., 352 U.S. 59, 65 (1956).

[32] Professor Davis has written that "[t]he principal reason behind the doctrine [of primary jurisdiction] is recognition of the need for orderly and sensible coordination of the work of agencies and the courts." 3 K. DAVIS, *supra* note 18, § 19.01, at 5. It likewise has been observed that primary jurisdiction "is not technically a question of 'jurisdiction' but rather a matter of judicial self-restraint in conformance with comity and a healthy respect

C. *The Basis for Comparison*

Since the rationales behind the doctrines of abstention and primary jurisdiction are basically similar, the situations in which the two doctrines are employed can be expected to be at least generally analogous. To the extent that there are differences in application, the question arises whether those differences result from the nature of each respective doctrine or from an inconsistency in one of the doctrines.[33] Thus, primary jurisdiction provides a useful benchmark against which to gauge the consistency and suitability of the abstention doctrine as it has developed.[34] In the following discussion, primary jurisdiction will be so used.

II

ABSTENTION AND PRIMARY JURISDICTION: A COMPARATIVE ANALYSIS

Whether a federal court will abstain in a given case depends upon whether the case fits within one or more of the categories of precedent where abstention has been thought to be appropriate. In *Pullman*-type cases, a court must be seeking to avoid a potentially unnecessary constitutional decision by first having an unclear state law question decided.[35] In *Burford*-type cases, the court must be trying to avoid interfering with a complex and technical scheme of state regulation.[36] And in *Thibodaux*-type cases the court must be

for the statutory authority of the administrative agency." Weidberg v. American Airlines, Inc., 336 F. Supp. 407, 409 (N.D. Ill. 1972).

[33] The principal difference between the doctrines does not affect this method of analysis. In abstention, the final authority on the state law question referred to the state court is the highest state court. However, in primary jurisdiction, decisions by an agency on questions sent to it are subject to review by the appropriate federal court. Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958). That review may be limited in certain antitrust cases. *See* note 70 *infra*. But since the principal concern here is with the criteria used to send questions to concurrent decision makers, this difference is not important.

[34] In part, the usefulness of primary jurisdiction as a touchstone derives from what appears to be fairly general agreement about its nature. According to one commentator,

> [t]he heart of the doctrine of primary jurisdiction is not at all controversial. Indeed, few aspects of administrative law have been so systematically and satisfactorily developed. The cases on primary jurisdiction . . . form a coherent body of law, unusually free from confusion or inconsistency.

3 K. DAVIS, *supra* note 18, § 19.01, at 6. Of course, there are some differences of opinion about the limits of the doctrine. *See* note 70 *infra*. But it is the *basic* doctrine which is primarily used for comparison purposes. Where the certainty of primary jurisdiction is in doubt, that doubt is noted where it is likely to have an effect upon the comparison with abstention.

[35] *See* text accompanying notes 5-7 *supra* and note 39 *infra*.

[36] *See* text accompanying notes 8-10 *supra* and notes 88-94 *infra*.

concerned with federal interference with politically important state programs.[37]

To assist in determining whether any of these factors exist in a particular case, the Supreme Court has attempted to set guidelines for the different types of abstention. The guidelines for abstention in *Pullman*-, *Burford*-, and *Thibodaux*-type cases are discussed below. In each instance, a comparison with primary jurisdiction is used to evaluate the viability of the guidelines set by the Court.

A. *The Unclear State Law Question*

The general *Pullman* requirement that a court must be seeking to avoid the unnecessary decision of a constitutional question is a clear limitation which has provided courts with few problems.[38] Consequently, it will not be discussed. However, the requirement in *Pullman* that there must be "an uncertain issue of state law"[39] has not proven to be as free of problems. It is with this question that the case law has been concerned.[40]

The requirement that there be present an unclear issue of state law raises the essential question of when a state law question is clear enough to be decided by a federal court. Supreme Court cases provide no absolute answer. Confusion often arises because what appears to be a clear or unclear state law question to some of the Justices appears to be the opposite to other Justices. Moreover, what sometimes appears to be a clear or unclear state law question to all of the Justices appears to be the very opposite to many outsiders.

For example, in *Lake Carriers Association v. MacMullen*,[41] the Supreme Court found the terms of the Michigan Watercraft Pollution Control Act of 1970 "far from clear in particulars that go to the foundation of [appellant's] grievance."[42] Thus, the Court held that abstention was proper in order to allow the Michigan courts to determine the validity of the appellant's contention that the state's

[37] *See* text accompanying notes 11-14 *supra* and notes 109-16 *infra*.

[38] The question of whether or not the plaintiff alleges both federal constitutional and state law claims should pose no problem to a court. Depending on the nature of the state claim, the court should easily be able to determine if the constitutional question can be avoided. *Cf.* Wright, *supra* note 18, at 820.

[39] Harman v. Forssenius, 380 U.S. 528, 534 (1965). Without such an unclear question, the reason for deferring to the state court disappears since there would no longer exist the possibility that a federal court decision would be displaced by a later state court decision. *See* text accompanying notes 5-7 *supra*.

[40] *See* notes 41-67 and accompanying text *infra*.

[41] 406 U.S. 498 (1972).

[42] *Id.* at 511.

water purification standards were contrary to federal standards and were therefore void.[43] The two dissenting Justices came to a directly opposite conclusion, finding the Michigan statute "not ambiguous."[44]

In a prior case, *Reetz v. Bozanich*,[45] the Court had agreed that abstention was required. The opinion was unanimous even though the Alaskan fishing laws at issue appeared to be quite clear.[46] Yet in *Wisconsin v. Constantineau*,[47] the Court did not allow abstention because there was "no ambiguity" in the Wisconsin statute under consideration.[48] Dissenting, Chief Justice Burger complained, "It is no answer to contend that there is no ambiguity in the Wisconsin statute and hence no need to abstain; in *Reetz* the Alaskan statute could not have been more plain . . . ."[49]

Thus, the mere statement that for a federal court to abstain in a *Pullman* situation there must be "an uncertain issue of state law"[50] is not useful. No consistent approach to the rule has been taken by the individual members of the Court or by the Court as a whole.

In addition to the Supreme Court's inconsistency, there is a second factor affecting the question of when an issue of state law is unclear. The Court has generally been unwilling to refer ambiguous state statutes to a state court if the state statute "is not fairly subject to an interpretation which will avoid or modify the federal constitutional question."[51] This doctrine developed in cases involving civil rights[52] and the first amendment.[53] Because of the impor-

[43] *Id.* at 512.

[44] *Id.* at 514 (Powell, J., dissenting). Chief Justice Burger joined in this dissent.

[45] 397 U.S. 82 (1970).

[46] At issue was an Alaskan statute which limited the granting of commercial salmon fishing licenses to specifically defined groups of persons—*i.e.*, those who had "previously held a . . . license for [a] specific salmon registration area" or who had "for any three years, held a commercial fishing license and while so licensed actively engaged in commercial fishing in [a] specific area." *Id.* at 83. Since the appellee did not qualify under these provisions, he attacked the statute as a denial of equal protection. The Court found the above seemingly clear portions of the statute sufficiently ambiguous to require the district court to abstain.

[47] 400 U.S. 433 (1971).

[48] *Id.* at 439. The Wisconsin statute at issue in the case allowed a city police chief to post a notice in all retail liquor stores in his city stating that the appellee could not be sold liquor because she exhibited in her excessive drinking certain traits specifically enumerated in the statute. *Id.* at 434. Because the statute had no provision for notice or hearing, it was held to deny the appellee due process of law. *Id.* at 437.

[49] *Id.* at 442 (Burger, C.J., dissenting).

[50] Harman v. Forssenius, 380 U.S. 528, 534 (1965).

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

[52] *See, e.g.*, Harman v. Forssenius, 380 U.S. 528 (1965) (in action challenging constitutionality of statute which restricted voting, district court did not abuse discretion by declining

tant nature of these rights,[54] the Court has often taken the position that the delay involved in a referral to a state court would be so detrimental to a plaintiff that abstention would be inappropriate in light of the small chance that a state court interpretation could save the statute from being declared unconstitutional.[55]

Thus, the requirement of an unclear state law question has been tempered by considerations of the nature of the wrong asserted by plaintiff and the likelihood that the statute can be so modified as to avoid a constitutional question. Similar considerations may help to explain the inconsistent approach taken by the Court in recent cases.[56]

In *Lake Carriers Association v. MacMullen,* the Supreme Court emphasized that "[t]he paradigm case for abstention arises when the challenged statute is susceptible of 'a construction by the state courts that would avoid or modify the [federal] constitutional question.' "[57] Since the Michigan courts had not yet had an opportunity to construe the statute, the Court felt they should be given this opportunity.[58] The lack of any prior review of the state statute

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to abstain); Griffin v. County School Bd., 377 U.S. 218 (1964) (importance of issues in school desegregation case required decision rather than abstention); McNeese v. Board of Educ., 373 U.S. 668 (1963) (challenge to racial segregation in schools litigable in federal court); Turner v. Memphis, 369 U.S. 350 (1962) (abstention unnecessary because legality of segregation in public restaurants foreclosed by previous decisions). *But see* Askew v. Hargrave, 401 U.S. 476 (1971) (lower court relied on wrong precedents in declining to abstain in action challenging constitutionality of state law limiting *ad valorem* taxes for school purposes); Harrison v. NAACP, 360 U.S. 167 (1959) (district court should have abstained in action alleging discriminatory state statutes).

[53] *See, e.g.,* Zwickler v. Koota, 389 U.S. 241 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Bagget v. Bullitt, 377 U.S. 360 (1964).

[54] We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.

Zwickler v. Koota, 389 U.S. 241, 248 (1967), *quoting* Stapleton v. Mitchell, 60 F. Supp. 51, 55 (D. Kan.), *appeal dismissed per stipulation sub nom.,* McElroy v. Mitchell, 326 U.S. 690 (1945). *See* McNeese v. Board of Educ., 373 U.S. 668, 674 n.6 (1963).

[55] In Zwickler v. Koota, 389 U.S. 241, 251 (1967), the Court declared: "[I]t is the duty of a federal court to decide the federal question . . . . Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."

[56] For an alternative explanation of the Court's inconsistency see Kurland, *supra* note 17, at 488. Kurland suggests that the difficulty arises "in no small part from the fact that the utilization of the two judicial systems for the expertise which each possesses does not have an equal appeal to all members of the Court." *Id.*

[57] 406 U.S. 498, 510 (1972), *quoting* Zwickler v. Koota, 389 U.S. 241, 249 (1967).

[58] *Id.* at 511-12. The Court specifically noted:

The Michigan Watercraft Pollution Control Act of 1970 has not been construed in any Michigan court. . . . We do not know, of course, how far Michigan courts will go in interpreting the requirements of the state . . . Act in light of the federal Water Quality Improvement Act and the constraints of the United States Constitution. But

was also emphasized in *Reetz v. Bozanich* where the Court noted that "the provisions of the Alaska Constitution at issue have never been interpreted by an Alaskan court."[59] And Chief Justice Burger, dissenting in *Wisconsin v. Constantineau,*[60] thought the lack of any prior state review should have changed the majority's decision not to abstain even though the statute involved was clear.[61]

Besides this respect for comity, the requirement of an unclear state law has also been tempered by consideration of the other reasons for abstention.[62] In *Reetz* the Court was faced with a typical *Pullman*-type situation in which it was trying to avoid deciding an unnecessary constitutional question. Yet Justice Douglas, writing for the Court, in addition to relying on *Pullman* also relied upon the rationale of *Thibodaux,*[63] without citing it, by emphasizing the importance to Alaska of its fishing and game laws.[64] This strengthened the Court's belief that an Alaskan court should first be allowed to pass on the state questions involved in the case.[65]

What these cases make clear is that the requirement of state law uncertainty is relative. It is variously influenced by comity, by the nature of the rights involved, and by the other reasons for abstention.[66] Because of the variability of such influences, the rule is uncertain and prediction of outcomes is difficult.

> we are satisfied that authoritative resolution of the ambiguities in the Michigan law is sufficiently likely to avoid or significantly modify the federal questions appellants raise to warrant abstention . . . .

Id.

[59] 397 U.S. 82, 86 (1970).

[60] 400 U.S. 433 (1971).

[61] According to the Chief Justice, it seemed to be "a very odd business to strike down a state statute, on the books for almost 40 years, without any opportunity for the state courts to dispose of the problem. . . ." *Id.* at 440 (Burger, C.J., dissenting).

[62] *See* note 17 *supra.*

[63] 397 U.S. 82 (1970).

[64] *Id.* at 87. *Thibodaux* ordered abstention in those cases in which a federal court decision would seriously disrupt politically important state programs. *See* text accompanying notes 11-14 *supra* and notes 109-16 *infra.* Justice Douglas used similar language in *Reetz:* "The constitutional provisions relate to fish resources, an asset unique in its abundance in Alaska. The statute and regulations relate to that same unique resource, the management of which is a matter of *great state concern.*" 397 U.S. at 87 (emphasis added).

[65] "A state court decision here . . . could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritation in the federal-state relationship." 397 U.S. at 86-87.

[66] See note 16 *supra.* In addition to the already existing influences, Chief Justice Burger would like to see another considered—the wise use of judicial resources:

> I quite agree that there is no absolute duty to abstain—to stay our hand—until the state courts have at least been asked to construe their own statute, but for me it is the negation of sound judicial administration—and an unwarranted use of a limited judicial resource—to impose this kind of case on a . . . federal district court. . . .

The suitability of the rule can therefore be called into question. To the extent it is uncertain, it offers only limited guidance to lower courts. To the extent it is based on variable factors, its application can depend on the predilections of individual judges. For example, the use of the doctrine by the Supreme Court has tended to be cyclical.[67] A perspective on whether these disadvantages are unavoidable or whether a clearer rule could be fashioned may be gained by a comparison with the criteria developed for applying primary jurisdiction.

There is no one exact test used for primary jurisdiction. Instead, courts are instructed that "[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."[68] Under this test, the reasons for primary jurisdiction[69] result in its use in two principal categories of cases.[70] First, in cases where rates, rules, or practices are attacked as

> This Court . . . should not be subject to the added pressures of non-urgent state cases which the state courts have never been called on to resolve.

Wisconsin v. Constantineau, 400 U.S. 433, 443 (1971) (Burger, C.J., dissenting). One court has followed this suggestion (Alberda v. Noell, 322 F. Supp. 1379 (E.D. Mich. 1971)), but another has flatly rejected it (Garvin v. Rosenau, 455 F.2d 233 (6th Cir. 1972)).

A summary of all the factors which have influenced the Court is found in Schoenfeld, *supra* note 18.

[67] "During the 1950's and 1960's the doctrine of abstention seemingly was confined within narrow limits . . . . But, the last two Terms of the [Supreme] Court have witnessed the rejuvenation of the full implications of the *Pullman* doctrine." Reid v. Board of Educ., 453 F.2d 238, 241-42 (2d Cir. 1971). For a description of the cycle which occurred in the field of civil liberties see Schoenfeld, *supra* note 18, at 606-18; Comment, *I Used to Love You but It's All Over Now: Abstention and the Federal Courts' Retreat from Their Role as Primary Guardians of First Amendment Freedoms*, 45 S. CAL. L. REV. 847 (1972).

[68] United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956); *see* Locust Cartage Co. v. Transamerican Freight Lines, Inc., 430 F.2d 334 (1st Cir. 1970), *cert. denied*, 400 U.S. 964 (1970).

[69] *See* text accompanying notes 23-31 *supra*.

[70] The categories are further described in Fremlin, *Primary Jurisdiction and the Federal Maritime Commission*, 18 HASTINGS L.J. 733, 743-46 (1967); 33 OHIO ST. L.J. 209, 213-14 (1972).

There is a third category of cases. Under some regulatory schemes, statutes provide that agency approval of certain actions, such as common rate fixing, exempts such actions from the antitrust laws. In cases where these actions are attacked as violating the antitrust laws, the agency must first be given the opportunity to decide whether the practice attacked is subject to, or exempt from the antitrust laws before the federal court can act. *See, e.g.*, Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 220, *modified*, 383 U.S. 932 (1966); Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963); Laveson v. Trans World Airlines, Inc., 471 F.2d 76 (3d Cir. 1972). One commentator has summarized this category as follows:

> The doctrine is invoked when activity prohibited by the antitrust laws may arguably be immunized by the regulatory statute, and an administrative determination of that issue is required before the question of antitrust liability is resolved.

Fremlin, *supra*, at 789.

unreasonable or discriminatory, the appropriate administrative agency is usually permitted to initially decide the question.[71] The rationale here is that these situations involve an examination of issues particularly known to and appreciated by the agency.

Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic[72] is illustrative of this first category. A group of marine carriers refused to pay a revised charge to the Marine Terminal Association for cargo left on the pier beyond a certain time because the demurrage fee had not been approved by the Federal Maritime Commission. They insisted that the old charge, agreed on by a conference of carriers and the Terminal Association, was proper. The district court stayed the proceedings to allow the Federal Maritime Commission to rule on the reasonableness of the new tariff.[73] The Supreme Court upheld the action, reasoning that the situation presented

> an almost classic case for engaging the doctrine [of primary jurisdiction] . . . . Just five years earlier, the [Federal Maritime]

Primary jurisdiction is also applicable in antitrust cases based on the "normal" reasons for the doctrine. Whenever a court decision in an antitrust case would affect the agency's ability to regulate either because the reasonableness of a rate is at issue, or because the question involved is technical, the question is first referred to the agency. After the agency's decision, the antitrust questions are then considered. Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958); *cf.* Maddock & Miller, Inc. v. United States Lines, 365 F.2d 98 (2d Cir. 1966).

Some commentators have expressed displeasure over such use of primary jurisdiction in antitrust cases. They feel that the purposes behind the antitrust laws should have a higher priority than the regulatory purposes behind primary jurisdiction and, unless this priority is respected, antitrust enforcement will suffer. *See, e.g.*, Jaffe, *Primary Jurisdiction Reconsidered. The Anti-Trust Laws*, 102 U. PA. L. REV. 577 (1954); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954). For an opposing viewpoint see 3 K. DAVIS, *supra* note 18, § 19.06, at 36-38.

This continuing debate (*see* Latta, *Primary Jurisdiction in the Regulated Industries and the Antitrust Law*, 30 U. CIN. L. REV. 261 (1961)) does not affect the basic rationale of primary jurisdiction, but only its application in the face of a competing interest in the antitrust laws. And since it is the basic rationale of primary jurisdiction, and not its limits in antitrust cases, which is being compared to abstention, the debate does not affect the present analysis.

[71] *See, e.g.*, Danna v. Air France, 463 F.2d 407 (2d Cir. 1972) (dismissal for failure to state claim upon which relief could be granted affirmed in absence of prior finding by CAB of statutory violation in action alleging youth fares violated Federal Aviation Act of 1958); McCleneghan v. Union Stock Yards Co., 298 F.2d 659 (8th Cir. 1962) (primary jurisdiction doctrine properly applied and district court properly refused jurisdiction over part of private antitrust action alleging "pen" assignment discriminatory under Packers and Stockyards Act); Lichten v. Eastern Airlines, Inc., 189 F.2d 939 (2d Cir. 1951) (in action against airline for loss of jewelry court of appeals affirmed district court holding airline's tariff rules part of contract between parties and court without jurisdiction to grant relief to plaintiff until CAB found rules unlawful or administrative remedies exhausted).

[72] 400 U.S. 62 (1970).

[73] *Id.* at 65.

> Commission approved the very agreement that established [these rates] . . . and the scope of this same agreement was the subject of the present dispute. The Commission was uniquely qualified to consider the dispute in light of the overall policies concerning . . . carrier vessels . . . .[74]

However, the doctrine is not applicable if a rule is not attacked as unreasonable or discriminatory, because then the issues involved are usually nontechnical.[75] This was the case in *CAB v. Modern Air Transport, Inc.*[76] The Civil Aeronautics Board (CAB) sought to enjoin Modern from exceeding its authorized frequency and regularity of flights. Modern argued that primary jurisdiction required that the CAB first take action. The Court of Appeals for the Second Circuit, however, countered that the doctrine was "not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule."[77]

The second category of cases is characterized by the presence of "technical" questions. Although in most instances courts will retain jurisdiction of a controversy which calls merely for legal conclusions, they will decline to do so if the issues involved are technical in nature. When technical questions peculiarly within the

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[74] *Id.* at 68-69.

[75] *See, e.g.,* W.P Brown & Sons Lumber Co. v. Louisville & N.R.R., 299 U.S. 393, 397 (1937); Texas & P. Ry. v. Gulf, C. & S.F. Ry., 270 U.S. 266, 273-74 (1926); Illinois Cent. R.R. v. Mulberry Hill Coal Co., 238 U.S. 275, 282-83 (1915); Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121, 131-32 (1915); Pennsylvania R.R. v. International Coal Mining Co., 230 U.S. 183, 196-97 (1913); Crain v. Blue Grass Stockyards Co., 399 F.2d 868 (6th Cir. 1968); Corneli Seed Co. v. Union Pac. R.R., 263 F.2d 127 (9th Cir. 1958); United States v. Sumter County School Dist., 232 F. Supp. 945 (E.D.S.C. 1964); ICC v. Shippers Coop., Inc., 196 F. Supp. 8, 10 (S.D. Cal. 1961), *aff'd,* 308 F.2d 888 (9th Cir. 1962). As Justice Lamar stated in Pennsylvania R.R. v. Puritan Coal Mining Co., *supra* at 131-32,

> [i]n a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission . . . .
>
> But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage.

[76] 179 F.2d 622 (2d Cir. 1950).

[77] *Id.* at 624. The court added:

> Our present case is one involving the violation of a lawful regulation of the Board, rather than one requiring expert appraisal of the reasonableness of a company action. The Board . . . has granted an exemption for non-certified carriers and has set out the standards with which the carrier must comply . . . .
>
> Unless we deliberately shut our eyes to the criteria thus so clearly stated by the Board, we can have no question that defendant has been giving service which is . . . not authorized. . . .

Id. at 625.

field of expertise of an administrative agency arise courts generally defer to the agency.[78]

For example, in *United States v. Western Pacific R.R.*,[79] three railroads sued the United States to recover the difference between tariff rates actually paid and those allegedly owed on certain shipments of Army steel bomb cases containing napalm. The carriers claimed that they were entitled to payment at rates established in a tariff filed with the ICC for "incendiary bombs." The government claimed that since the bomb cases did not contain the fuses required to ignite them, the applicable rate was for "gasoline in steel drums."[80] Although the case called only for a legal conclusion as to which tariff applied, the Court invoked primary jurisdiction because "a determination of the meaning of 'incendiary bomb' . . . involves factors 'the adequate appreciation of which' presupposes an 'acquaintance with many intricate facts of transportation.' "[81] Such facts included "[c]omplex and technical cost-allocation and accounting problems" involved in setting a tariff rate to cover the "elaborate safety precautions necessary to carry [bomb cases] in safety."[82]

In contrast to *Western Pacific* is the approach taken by the First Circuit in *World Airways, Inc. v. Northeast Airlines, Inc.*[83] The case called for a legal conclusion whether World Airways was authorized by its certificate of authority on file with the CAB to fly certain charter flights.[84] The court disagreed with the airline's assertion that the legal questions involved technical problems which should be considered by the CAB and held that none of the problems involved required "administrative expertise" for their solution.[85]

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[78] *See, e.g.*, Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285 (1922); United States v. Great Northern Ry., 337 F.2d 243 (8th Cir. 1964). *See generally*, Lewers, *Primary Jurisdiction and the Royalty Owner: A Misapplied Doctrine*, 23 Sw. L.J. 454, 472-77 (1969).

[79] 352 U.S. 59 (1956).

[80] *Id.* at 60-61.

[81] *Id.* at 66.

[82] *Id.*

[83] 349 F.2d 1007 (1st Cir. 1965), *cert. denied*, 382 U.S. 984 (1966).

[84] *Id.* at 1008-09.

[85] *Id.* at 1011. The court stated its position as follows:

> The appellants say that the grants of . . . authority for charter trips . . . "[raise] issues of fact not within the conventional experience of judges . . . requiring the exercise of administrative discretion." We see the case in a different light. . . . The language of the certificate is clear . . . . The answer depends on whether the contract violates this exclusion and requires an analysis of the contract. The analysis, interpretation, construction, and application of contracts are within judicial competence and, at least in the case before us, require no administrative expertise for a solution.

Thus, the rule for application of primary jurisdiction has come to be stated in terms closely tied to its purposes. In contrast, the unclear state law test for application of the abstention doctrine offers no real guide on its face. Because of the influence of equity and comity upon it, the test is of limited usefulness in predicting whether a court will abstain in a given case.[86] The primary jurisdiction rule is easily followed; the unclear state law rule is not.

What is necessary in dealing with abstention, therefore, is a recoguition similar to that which already seems to be present in cases dealing with primary jurisdiction—*i.e.*, that the rules guiding application of the doctrine must be grounded in its purposes. The presence of unclear state law should no longer be routinely cited as a sufficient reason for invoking or rejecting abstention. Instead, courts should acknowledge that the clearness of the law has been balanced against other specific concerns of abstention.[87]

Explicit recognition and treatment of *all* principal factors involved in abstention and not just unclear state law will result in at least a minimum amount of guidance for future decisions. Different weight given to these factors by different courts may lead to divergent outcomes. But at least these differing outcomes can be understood as resulting from the nature of the abstention doctrine instead of flaws in its application.

B. *Complex and Pervasive State Regulatory Schemes*

In *Burford v. Sun Oil Co.*,[88] the Supreme Court was asked to enjoin an order of the Railroad Commission of Texas permitting

Id.; *accord,* Louisiana & A. Ry. v. Export Drum Co., 359 F.2d 311 (5th Cir. 1966); CAB v. Aeromatic Travel Co., 341 F. Supp. 1271 (E.D.N.Y. 1971). *Cf.* 45 N.Y.U.L. REV. 560 (1970).

[86] *See* notes 51-56 and accompanying text *supra.*

[87] The proposed codification of the abstention doctrine, ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371(c) (Tent. Draft No. 6, 1968), lists both the requirement of an unclear state law question in § 1371(c)(1) and the reasons for abstention in § 1371(c)(2), but does not admit to a balancing of the two.

The fact that some sort of balancing takes place is recognized and approved of in Keilin, *Abstention From Jurisdiction: Accommodation or Abdication?* 23 ARK. L. REV. 412, 429 (1969). Keilin does not recognize that the failure to explicitly acknowledge the balancing, especially in cases where the state law appears to be clear, beclouds the doctrine of abstention. He does suggest, however, that an analysis similar to that used in primary jurisdiction cases is appropriate for abstention.

Professor Wright, on the other hand, proposes that, within broad limits, the decision to abstain should be left to the discretion of the district courts. Wright, *supra* note 18, at 825-26. The boundaries which Wright would set include cases "where a federal constitutional question is intermingled with unsettled questions of state law." *Id.* at 826. Here again, the problem is that what is considered to be unsettled state law is in part determined by other influences. A clearer conception of abstention would result if the presence of these factors were acknowledged by decision makers.

[88] 319 U.S. 315 (1943).

the drilling and operation of certain oil wells in the East Texas Oil Field. The Court observed that "[t]he order under consideration is part of the general regulatory system devised for the conservation of oil and gas in Texas, an aspect of 'as thorny a problem as has challenged the ingenuity and wisdom of legislatures.' "[89]

In deciding whether a federal court sitting in equity should exercise its jurisdiction to hear the question,[90] the Supreme Court first took notice of the nonlegal complexities involved in analyzing the rules of the Commission.[91] The Court also observed the special method by which Commission orders were reviewed in the Texas courts. All review was concentrated in one court to avoid the confusion of conflicting results by different state courts. Moreover, the court responsible for all review had as much power as the Commission itself since the court tested by trial de novo the reasonableness of all Commission orders.[92]

Given these circumstances, and given that the questions at issue so clearly involved "basic problems of Texas policy,"[93] the Court concluded that the Texas courts should be given the first opportunity to consider the case:

> The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. . . . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.[94]

The *Burford* situation is highly analogous to that facing the courts in primary jurisdiction cases. For all practical purposes, the reviewing state court in the Texas regulatory scheme was a part of the administrative agency. It had the same powers as the agency and enjoyed special expertise in a complicated and complex area.[95]

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[89] *Id.* at 318.

[90] *Id.*

[91] *Id.* at 323.

[92] *Id.* at 326-27.

[93] *Id.* at 332.

[94] *Id.* at 333-34; *accord,* Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949).

[95] 319 U.S. at 326.

[T]he Texas courts are working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry. . . . [T]he orders of the Commission are tested for "reasonableness" by trial de novo before the court . . . and the court may on occasion make a careful analysis of all the facts of the case in reversing a Commission order. . . . The court has fully as much power as the

Where a state court is viewed in this way, deferral to it is similar to deferral to a federal agency under the primary jurisdiction doctrine. Both types of deferral turn on the technical expertise of the "agency" and its familiarity with the problems involved. Likewise, the same goal of achieving uniform rulings is present in both approaches. In fact, the Supreme Court regards the two as being so similar that, in at least one decision, it has cited *Burford* as general authority for primary jurisdiction.[96] Thus, if consistency is valued, *Burford* stands on solid analytical ground.

Few of the cases following *Burford* have involved a state court so closely related to a state agency that it could be considered a part of it.[97] Thus, the *Burford* rule has gradually become more generalized. The rule retains the requirement that there be a possibility of serious interference with a complex regulatory scheme, but no longer requires the special relationship of the state court to the agency. The federal courts have become concerned only with whether the aggrieved party has available adequate state judicial review.[98]

This change weakens the analogy between *Burford* abstention and primary jurisdiction because there is no longer any special

> Commission to determine particular cases, since . . . it can either restrain the leaseholder from proceeding to drill, or, if the case is appropriate, can restrain the Commission from interfering with the leaseholder. The court may even formulate new standards for the Commission's administrative practice and suggest that the Commission adopt them.

Id.

[96] Order of Ry. Conductors v. Pitney, 326 U.S. 561, 567 (1946).

[97] *See, e.g.*, Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952); Hander v. San Jacinto Junior College, 325 F. Supp. 1019 (S.D. Tex. 1971); Bonanza Airlines, Inc. v. Public Service Comm'n, 186 F. Supp. 674 (D. Nev. 1960).

[98] *See, e.g.*, Allegheny Airlines, Inc. v. Pennsylvania Pub. Util. Comm'n, 319 F. Supp. 407 (E.D. Pa. 1970), *aff'd*, 465 F.2d 237 (3d Cir. 1972), *cert. denied*, 410 U.S. 943 (1973). The district court noted:

> As [abstention] applies to disputes between private parties and state administrative agencies, the primary thrust of the doctrine is that where an order of the state agency predominantly affects local matters, if there is available to the aggrieved party adequate state judicial review, the federal courts should [abstain] . . . .

319 F. Supp. at 413.

Compare Holmes v. New York City Housing Authority, 398 F.2d 262, 267 (2d Cir. 1968), where the lack of a specially designated court to review agency decisions was used to distinguish the case from *Burford*. *See generally* Liebenthal, *supra* note 18, at 163-64.

The dropping of the requirement of a specialized state court was largely influenced by the result in Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951), discussed in text accompanying notes 100-06 *infra*. The emphasis on whether there is adequate review in state courts has developed as a result of the fact that *Burford*-type abstention requires dismissal of the case by the federal court. Compare *Pullman*-type abstention where jurisdiction is usually retained (*e.g.*, Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 222-23 (1966)), and where a plaintiff's federal claims may be saved for a federal court (*e.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964)).

emphasis on the technical expertise of the reviewing court. Yet, federal courts appear to retain the belief that state courts can deal more knowledgeably than the federal bench with complex state regulatory schemes.[99] To the extent this is true, the analogy between abstention and primary jurisdiction is still applicable and the wisdom of deferring to the state court is supported by the comparison.

C. *Politically Important State Programs*

Alabama Public Service Commission v. Southern Ry.,[100] established a new rationale for abstention which led finally to *Louisiana Power & Light Co. v. City of Thibodaux.*[101] This rationale substantially alters the analogy between *Burford* and primary jurisdiction.

In *Alabama Public Service Commission,* the plaintiff railroad asked for an injunction to void an order by the Alabama Commission prohibiting the railroad from discontinuing certain intrastate passenger routes.[102] The Supreme Court reversed a district court decision granting the injunction and held that the district court should have abstained.

Although noting that "intrastate rail service is 'primarily the concern of the state,' "[103] the Court made no claim that it faced a complicated situation like that in *Burford* involving a unified state regulatory scheme for a technically complex industry.[104] Nevertheless, citing *Burford* as authority, the Court concluded that since "adequate state court review . . . [was] available . . . intervention of a federal court [was] not necessary for the protection of federal rights,"[105] and that therefore, "the usual rule of comity must govern."[106]

[99] *See* notes 97 & 98 *supra; cf.* Public Utility Comm'n v. United Airlines, Inc., 346 U.S. 402 (1953).

[100] 341 U.S. 341 (1951). The result was largely foreshadowed by Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949).

[101] 360 U.S. 25 (1959).

[102] 341 U.S. at 342.

[103] *Id.* at 346.

[104] The Court noted in *Burford* that because of the technical interrelationship between various land owners in an oil field, where the amount of oil drawn by any one land owner necessarily affects the amount available to anyone else, a unified regulatory scheme was necessary and any decision affecting one owner necessarily affected all the others. 319 U.S. at 318-30. Moreover, the determination of what oil could be drawn by an owner was fraught with "non-legal complexities" and complicated by the "sheer quantity of exception cases." 319 U.S. at 323, 324. In contrast the Court in *Alabama Pub. Serv. Comm'n* faced only the issue "of balancing the loss . . . from continued operations of [two] trains . . . with the public need for that service." 341 U.S. at 347-48.

[105] 341 U.S. at 349. This difference between *Burford* and *Alabama Pub. Serv. Comm'n* is not always recognized. *See, e.g.,* Press v. Pasadena Ind. School Dist., 326 F. Supp. 550, 554-55 (S.D. Tex. 1971).

[106] 341 U.S. at 350.

Thus, as long as a state forum for asserting federal rights exists, *Alabama Public Service Commission* requires that orders of state regulatory agencies be reviewed in that state forum. This is not because of the technical or complex nature of the problems involved, but because the purposes of federalism[107] are better served by local state review. Thus, the court moved beyond the reasons behind *Burford* to adopt a rationale based on comity.[108]

This rationale was further developed in *Louisiana Power & Light Co. v. City of Thibodaux.*[109] The Power and Light Company, in a case removed to federal court on diversity grounds, challenged the authority of the city to expropriate its land through eminent domain. A state statute on its face appeared to allow such action; however, it had been interpreted by the Louisiana Attorney General to forbid the taking.[110] The district court abstained and the Supreme Court affirmed.

The Court was not bothered that prior abstention cases had been in equity, because those cases "did not apply a technical rule of equity procedure."[111] Rather, the Court viewed the cases as reflecting "a deeper policy derived from . . . federalism."[112] Given this broader basis, abstention in this case was proper because

> [t]he considerations that prevailed in conventional equity suits for avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court.[113]

Moreover, the Court indicated that abstention would avoid the

[107] *See* note 112 and accompanying text *infra*. The term "federalism" is used to refer to the influences of comity.

[108] This is a distinction often missed by courts who cite these two cases together or consider them as one. *See, e.g.,* Press v. Pasadena Ind. School Dist., 326 F. Supp. 550, 554-55 (S.D. Tex. 1971); Allegheny Airlines, Inc. v. Pennsylvania Pub. Util. Comm'n, 319 F. Supp. 407, 413 (E.D. Pa. 1970).

[109] 360 U.S. 25 (1959); *accord,* American Airlines, Inc. v. Louisville & Jefferson County Air Bd., 269 F.2d 811 (6th Cir. 1959).

[110] 360 U.S. at 30.

[111] *Id.* at 28. This was not always the view of the Court. Compare Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 53 (1954), where the Court declined to abstain because, unlike the situation in *Burford,* "traditional equitable authority" was not involved.

An interesting result of dropping the equity requirement has occurred in diversity cases where the defendant has raised constitutional defenses. At least one court has abstained to avoid deciding the validity of the constitutional defenses until the plaintiff's state law allegations are clarified by a state court. Chicago, B. & Q.R.R. v. North Kansas City, 276 F.2d 932 (8th Cir. 1960).

[112] 360 U.S. at 28.

[113] *Id.*

necessity of having the federal court make a "dubious and tentative forecast" of state law.[114]

Federal-state friction was to be avoided because eminent domain was "intimately involved with [the] sovereign prerogative" of a state.[115] The Court considered abstention appropriate in any case involving state functions of similar stature:

> The justification for [abstention] . . . lies in regard for the respective competence of the state and federal court systems and for the maintenance of harmonious federal-state relations *in a matter close to the political interests of a State.*[116]

Thus, having articulated its concern for equitable interference by a federal court with state regulatory agencies in *Alabama Public Service Commission,* the Court completed the next logical step. It became concerned in diversity cases with federal interference with state interests. Moreover, the subject of such interference was no longer limited to state regulatory agencies but was extended to any important state program. But the reasons for this concern remained grounded in comity.

Thibodaux, however, was immediately clouded by the decision in *County of Allegheny v. Frank Mashuda Co.*[117] The Mashuda Company, which invoked diversity jurisdiction, challenged a completed eminent domain proceeding on the ground that such action was not allowed by a Pennsylvania statute. Despite its decision in *Thibodaux,* the Supreme Court, by a five-to-four ruling, did not allow abstention. Writing for the majority, Justice Brennan borrowed several of the same reasons he had used earlier in his dissent in *Thibodaux.*

Justice Brennan first indicated that the case clearly did not fall within the *Pullman* rationale for abstention.[118] Nor did the case fall within *Burford* or *Alabama Public Service Commission* categories, because adjudication by a federal court would not involve the potential hazard of disrupting federal-state relations. The Court would

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[114] *Id.* at 29. For a critical examination of the difficulty of predicting state law see Note, *Federal Interpretation of State Law—An Argument for Expanded Scope of Inquiry,* 53 MINN. L. REV. 806 (1969).

[115] 360 U.S. at 28.

[116] *Id.* at 29 (emphasis added). Among the other areas which have been considered "close to the political interests of a state" are water rights in Arizona (Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968)), oil and gas leases in Texas (Barrett v. Atlantic Richfield Co., 444 F.2d 38, 43-44 (5th Cir. 1971)), and a state prison system (Urbano v. Board of Managers of New Jersey State Prison, 415 F.2d 247, 256-57 (3d Cir. 1969)).

[117] 360 U.S. 185 (1959).

[118] *Id.* at 189.

not be applying paramount federal law to prevent state officials from carrying out state domestic policies, nor would it be enjoining the state action.[119] Instead, "[t]he District Court would simply be acting as would a court of the State in applying to the facts of this case . . . settled state policy."[120]

This last argument was bolstered by the clear issue of state law involved in *Mashuda.* The clearness of the question decreased the chances of a "wrong" federal court decision and thus of the possibility that a state program would suffer under a federal court's incorrect interpretation of state law. In contrast, the *Thibodaux* majority had emphasized that the district court was "[c]aught between the language of an old but uninterpreted statute and [a recent] pronouncement of the [state's] Attorney General"[121] and therefore was faced with a difficult state law question.[122]

These two cases suggest the present status of *Thibodaux* abstention. Given the different results in *Thibodaux* and *Mashuda,* it is evident that an unclear question of state law must be present in order to permit abstention.[123] Nevertheless, the cases are similar in that the basis for abstention in both equity and diversity jurisdiction is comity.

No such similar use of comity exists under the doctrine of primary jurisdiction. Instead, the appropriateness of primary jurisdiction turns on whether "the reasons for the existence of the doctrine are present."[124] And those reasons deal only with the

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[119] *Id.* at 189-90.

[120] *Id.* at 190.

[121] 360 U.S. at 30.

[122] To use this unclearness of state law as a reason for abstention, the majority in *Thibodaux* had to distinguish Meredith v. Winter Haven, 320 U.S. 228 (1943), which held that in diversity suits the difficulty of a state law question was not a sufficient ground for abstention. Unfortunately, the *Thibodaux* Court chose a "distinguishing feature" which had nothing to do with the rationale for the *Meredith* decision. The Court indicated that *Meredith* was different since the jurisdiction of the federal court was being challenged and dismissal of the case was at issue. 360 U.S. at 27 n.2. Justice Brennan, in his dissenting opinion, seems correct in noting that *Meredith* "did not turn on any difference between an abstention and a dismissal." 360 U.S. at 38 n.4. *See* Comment, *Abstention Under Delaney: A Current Appraisal,* 49 TEXAS L. REV. 247, 251 (1971).

Thus, the abstention doctrine which has been distilled from these cases leaves unclear the validity of *Meredith.* This fact has left the Fifth Circuit free to create a rationale for abstention which is different from any of the rationales used for abstention thus far by the Supreme Court. *See* notes 143-46 and accompanying text *infra.*

[123] A recent court of appeals decision cites the unclear law question in *Thibodaux* as the feature distinguishing it from *Mashuda.* Hill v. Victoria County Drainage Dist. No. 3, 441 F.2d 416, 418 (5th Cir. 1971).

[124] United States v. Western Pac. R.R., 352 U.S. 59, 64 (1956); *see* cases cited in notes 68-74 and accompanying text *supra.*

actual advantages gained by referring a problem to an agency.[125] Although an agency might have a strong interest in a particular program, the court does not defer to the agency solely on that basis.

In light of this primary jurisdiction test, which stresses whether the advantages of the doctrine will result, the soundness of *Alabama Public Service Commission* can be assessed. Based on a comparison with primary jurisdiction cases, or even with *Burford* itself, the "comity reasons" appear weak. If the state program is not complex or pervasive, there is probably only a small chance that a federal court will seriously interfere with the program by making an "incorrect" decision. Although it is quite possible that the local court is more familiar with the issues involved, that advantage would seem small in nontechnical, noncomplex fields where the state law question need not be unclear.[126]

Primary jurisdiction cases which have recognized that the complexity and pervasiveness of a program are important elements in deciding whether it is necessary to defer to an administrative agency support this analysis. In *United States v. Radio Corporation of America*,[127] an antitrust suit, the key issue was whether primary jurisdiction applied, requiring certain questions to be decided by the Federal Communications Commission. The Supreme Court noted that in general, when certain issues fall within a particular agency's field of expertise, federal courts should refer such issues to the agency in order not to adversely affect its ability to regulate.[128] But this rationale, said the Court, did not apply when there was no delicate or complex scheme of regulation involved.[129]

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[125] *See* cases cited in notes 68-74 and accompanying text *supra*.

[126] Some courts have recognized that in *Alabama Pub. Serv. Comm'n*-type cases the probability of federal court interference with the state program may be small. *See, e.g.*, Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 299 (E.D. Pa. 1972). Compare the criticism of *Alabama Pub. Serv. Comm'n* in 1A J. MOORE, FEDERAL PRACTICE ¶ 0.203[1], at 2114 n.40 (2d ed. 1974).

[127] 358 U.S. 334 (1959). For a criticism that the Court should never have reached the issue of the pervasiveness of the regulatory scheme, see 3 K. DAVIS, *supra* note 18, § 19.06, at 636-37 (Supp. 1970). *See generally* 33 OHIO ST. L.J. 209, 215-16 (1972).

[128] 358 U.S. at 348. With respect to antitrust regulation the Court observed:

> [T]his Court consistently [has] held that when rates and practices relating [to a regulatory scheme involving fixed rates] were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance.

Id.

[129] "[T]here being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for

At one point in an abstention case,[130] the Court seemed to recognize that the complexity and pervasiveness of regulation should have a bearing on the need for abstention as well as the need for respecting primary jurisdiction. In deciding whether certain liquor sales to airline passengers leaving the United States could be taxed by the state of New York, the Court rejected abstention. One of the reasons it gave was that "[u]nlike many cases in which abstention has been held appropriate, there was here no danger that a federal decision would work a disruption of an entire legislative scheme of regulation."[131]

The soundness of *Thibodaux,* like that of *Alabama Public Service Commission,* can be assessed in light of the primary jurisdiction test which insists that the doctrine be invoked only when the advantages of the doctrine will result. Based on this comparison, the reasons behind *Thibodaux* are comparatively stronger than those behind *Alabama Public Service Commission*; yet they are still weak.

In *Thibodaux,* unlike in primary jurisdiction cases, there was no attempt to inquire into the actual effect of a federal court decision on the ability of the state to successfully run its program.[132] Whether a question is important to the state—even politically important—does not necessarily mean the state will be adversely affected by a federal court decision. In this respect, *Thibodaux,* like *Alabama Public Service Commission,* is based purely on reasons of deference to state courts growing out of theoretical values of federalism.

However, *Thibodaux* at least requires that the issue of state law be unclear.[133] Thus, deference to the state court could have some of the same advantages that are gained in primary jurisdiction, in that deferral is to a decision-maker more closely acquainted with the issues involved. This could be especially significant since the state law questions at issue are matters of political interest to the state, and thus a "wrong" federal court decision could have deleterious consequences.

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primary jurisdiction accordingly disappears." *Id.* at 350; *see* Denver Union Stockyard Co. v. Denver Live Stock Comm'n Co., 404 F.2d 1055 (10th Cir. 1968); *cf.* California v. FPC, 369 U.S. 482 (1962).

[130] Hobsetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

[131] *Id.* at 329.

[132] *See* notes 68-76 and accompanying text *supra.* Some courts bave made this inquiry. Another court has recognized the implications of failing to make this inquiry: "[I]f tbe 'avoidance of needless friction' standard were applied without due consideration, very few federal question cases challenging any aspect of state law or state authority would be appropriate for the federal courts." Garvin v. Rosenau, 455 F.2d 233, 237 (6th Cir. 1972).

[133] *See* note 122 and accompanying text *supra.*

The Supreme Court did not explicitly rely upon this rationale, but it did remark that a decision by the district court would only be a "dubious and tentative forecast."[134] This invocation of language from *Pullman* seems to indicate that the decision turns, at least to some extent, on the superior ability of the state court to decide the state law question at issue.[135]

The decision in another case tends to support this conclusion. In *Martin v. Creasy*,[136] the Supreme Court specifically discussed an actual advantage the state court would have over the federal court in deciding the case: "In the state court proceedings the case of each landowner will be considered separately, with whatever particular problems each case may present."[137]

In response to the ultimate question of whether there are any advantages to abstention sufficient to outweigh the plaintiff's congressionally-given right to be in federal court, *Thibodaux* offers the assertion that the state court is in a better position to make the decision. *Alabama Public Service Commission,* which does not depend on an unclear state law question, offers no such advantage. But beyond this, neither case inquires into any particular advantage a state court decision might have over a federal court decision. Respect for state courts seems to be considered sufficient to deny a plaintiff access to federal court.

Primary jurisdiction tilts its balance the other way. The doctrine requires something in addition to comity in order to deny a plaintiff access to federal court. The question becomes, therefore, whether greater respect, for respect's sake, needs to be paid to state courts, than to federal agencies. The answer should be no. When Congress mandated concurrent jurisdiction, it decided the policy of division between jurisdictions. This is just as true between state and federal courts as between federal agencies and federal courts.

For this reason, primary jurisdiction requires that there should be an actual and substantial advantage to ignoring one's own jurisdiction in favor of another.[138] If there is no such advantage, it appears to be an abdication of the congressional edict for a court to refuse to hear a plaintiff's case because of the court's personal

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[134] 360 U.S. at 29. *See* note 114 and accompanying text *supra.*

[135] In *Pullman* the Court expressed the state court's special competence in these terms: "Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation." 312 U.S. at 499.

[136] 360 U.S. 219 (1959).

[137] *Id.* at 224-25.

[138] *See* note 68 and accompanying text *supra.*

predilections concerning the theoretical advantages of comity. Since *Alabama Public Service Commission,* and, to a large extent, *Thibodaux,* are based on the theoretical advantages of comity, they differ from the sounder policy of the primary jurisdiction doctrine.

D. *Abstention in the Fifth Circuit*

There is another rationale for abstention which has not been developed by the Supreme Court. In *Green v. American Tobacco Co.,*[139] the Court of Appeals for the Fifth Circuit heard a diversity of citizenship case involving the potential liability of a cigarette manufacturer to the widow and estate of a smoker who died from lung cancer. The court decided an issue of Florida law which was unclear under existing Florida precedent; but upon rehearing it revoked its original decision and held instead that the Florida courts should decide the question.[140] This was easily accomplished because Florida had a certification procedure whereby issues of Florida law could be sent directly to the Florida Supreme Court from a federal court.[141]

In *Green* no authority was cited for abstaining. Instead, the court justified its decision by pointing to two factors: the importance of the question involved and the split among members of the circuit on what was the correct decision.[142]

More formal authorization for the type of abstention invoked in *Green* had to await the court's decision in *United Services Life Insurance Co. v. Delaney,*[143] a case involving the question whether under Texas law life insurance policies which covered "passengers" of certain aircraft should be held to cover pilots. Analyzing relevant Texas law, five members of the circuit noted that "[t]he

[139] 304 F.2d 70 (5th Cir. 1962), *rev'd on rehearing,* 325 F.2d 673 (5th Cir. 1963).

[140] 304 F.2d at 85-86. The court originally decided that under Florida law a cigarette manufacturer was not an absolute insurer of its product on a theory of implied warranty because it had no superior knowledge of the product's effects. This holding resulted from a jury finding that no human skill or foresight could lead to the manufacturer's knowledge that lung cancer could result from cigarette smoking. On rehearing the court reversed itself and abstained in order to certify the question to the Florida Supreme Court.

[141] The Supreme Court recognized the Florida certification procedure in Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960). Certification has been alternately praised (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 (1962)), offered as a solution to some of the problems of abstention (ALI STUDY, *supra* note 16, § 1371(3), at 213; Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions,* 18 U.C.L.A.L. REV. 888 (1971)), and criticized (Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of Federal Courts,* 23 U. MIAMI L. REV. 717 (1969)).

[142] 304 F.2d at 86.

[143] 328 F.2d 483 (5th Cir.), *cert. denied,* 377 U.S. 935 (1964). *See generally* Comment, *supra* note 122.

guidance of the dim light of the Texas decisions [left] the meaning of the questioned clauses obscure."[144] Citing *Thibodaux,* the five thought referral to the Texas courts was the best course of action.[145]

Four members of the circuit dissented. They believed that a case involving only an unclear question of state law must be decided by a federal court because of the congressional mandate inherent in diversity jurisdiction and because of the Supreme Court's holding in *Meredith v. Winter Haven*[146] that the difficulty of a state law question is not a sufficient ground for abstention in a diversity suit. Moreover, the dissenters felt this was not the type of exceptional case which came under the *Thibodaux* rule.[147]

Judge Brown, in concurring, was prompted by the strong dissent to rationalize the holding on a basis other than *Thibodaux.* He emphasized that abstention was demanded by unclear questions of state law.[148]

Indeed, it is hard to put the question involved in *Delaney* in the

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[144] 328 F.2d at 484.

[145] *Id.* Ironically, the Texas Supreme Court refused to decide the case upon referral. Since the federal court retained jurisdiction, the Texas court felt this rendered their decision an impermissible advisory opinion. United Services Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965). Compare the Florida procedure of certification discussed at note 141 and accompanying text *supra.*

For a discussion of the merits of the *Delaney* decision see note 157 and accompanying text *infra.*

[146] 360 U.S. 228 (1943). The Supreme Court in Louisiana Power & Light Co. v. City of Thibodaux, 260 U.S. 25 (1959), left unclear the status of *Meredith. See* note 122 *supra.* Some circuits still recognize *Meredith* as controlling. *See* note 151 and accompanying text *infra.*

[147] 328 F.2d at 485.

> The mandate from Congress that we decide diversity cases, Title 28 U.S.C.A. § 1332; Meredith v. City of Winter Haven, . . . makes plain our duty to decide these matters.
>
> They are not the exceptional cases referred to in Meredith v. City of Winter Haven . . . where a federal court may decline to act, nor do they fall in one of the classes of cases where the doctrine of abstention bas been given application.

Id.

[148] *Id.* at 485-89. Judge Brown saw abstention in the circumstances of an unclear state law question as an opportunity to effectuate the purposes of Erie R.R. v. Tompkins, 304 U.S. 64 (1938). If, in *Erie*-type cases, it was unfair for a result to turn on irrelevant accidents such as citizenship, Judge Brown thought it was likewise unfair for a result to turn on diverse holdings between federal and state courts on what was the substantive law of a state. 328 F.2d at 485. For an extension of Judge Brown's views see W.S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 262-67 (10th Cir. 1967) (Brown, J., dissenting in part).

For criticism of Judge Brown's analysis see Agata, *Delaney, Diversity, and Delay: Abstention or Abdication?,* 4 HOUSTON L. REV. 422, 431-39 (1966); Gowen & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation,* 43 TEXAS L. REV. 194, 211-13 (1964); Comment, *supra* note 122, at 256. For mild support of Judge Brown's analysis see Note, *Federal Abstention and Its Relation to the Erie Doctrine,* 38 TEMP. L.Q. 72, 83-84 (1964). For an appreciation of Judge Brown's position, but ultimate rejection of it, see Liebenthal, *supra* note 18, at 183-201.

Thibodaux category of a question politically important to the state.[149] Later Fifth Circuit cases have made it clear that the basis of their abstention doctrine is solely the unclear nature of the state law.[150]

Other circuits disagree with abstention in such cases because they consider *Meredith* still determinative of the issue.[151] Regardless of whether or not *Meredith* controls, a comparison with primary jurisdiction can offer some insights into the quality of the Fifth Circuit doctrine.

As stated previously, the fundamental test for primary jurisdiction has been whether the purposes of the doctrine would be served by its use in a given situation.[152] Those purposes relate to the superior ability of the agency to handle the particular issues before the court.[153] In this sense, both primary jurisdiction and Fifth Circuit abstention recognize the advantages of referring cases to a decision-maker who is more acquainted with the issues involved in the problem.

Primary jurisdiction, however, unlike Fifth Circuit abstention, has a justifiable basis for denying the plaintiff his right to be in a federal court. The court defers to the superior ability of the agency because a "wrong" decision by the court can affect the agency's ability to accomplish its statutory purposes.[154] The court therefore overrules the congressionally-given right to be in federal court in favor of effectuating the congressional purposes behind setting up the regulatory agency. Such considerations are legitimate because they are the result of problems which directly result from the nature of concurrent jurisdiction.

On the other hand, the judges of the Fifth Circuit, except for Judge Brown, offer no reason for denying the plaintiff his congressionally-given right to be in federal court, other than the rather weak justification that the court is faced with a difficult

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[149] For a discussion of politically important questions see notes 100-38 and accompanying text *supra.*

[150] *See, e.g.,* Boyd v. Bowman, 455 F.2d 927 (5th Cir. 1972); Martinez v. Rodriquez, 394 F.2d 156 (5th Cir. 1968); Life Ins. Co. v. Shifflet, 370 F.2d 555 (5th Cir. 1967); Hopkins v. Lockheed Aircraft Corp., 358 F.2d 347 (5th Cir. 1966).

[151] *See, e.g.,* King-Smith v. Aaron, 455 F.2d 378, 380 n.3 (3d Cir. 1972); Garvin v. Rosenau, 455 F.2d 233 (6th Cir. 1972); Martin v. State Farm Mut. Ins. Co., 375 F.2d 720 (4th Cir. 1967); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972).

[152] *See* notes 124-29 and accompanying text *supra.*

[153] *See* notes 68-74 and accompanying text *supra.*

[154] *See* notes 23-31 and accompanying text *supra.*

question of state law.[155] There are no claims of comity as in *Thibodaux* and *Alabama Public Service Commission.*[156]

Thus, the reasons for abstention by the Fifth Circuit do not flow from the concurrent nature of diversity jurisdiction or the problems associated with that concurrent jurisdiction. For this reason, the Fifth Circuit doctrine is an unsupportable extension of the abstention doctrine.[157]

III

CONCLUSIONS FROM A COMPARATIVE ANALYSIS

The Supreme Court has, in a number of cases spanning many years, established wide and somewhat uncertain criteria for the doctrine of abstention. Because abstention almost always inflicts a longer and more costly law suit on a plaintiff, fundamental fairness requires that the doctrine be invoked only where valid reasons support its use. The purpose of this Article has been to analyze the validity of the present criteria for abstention by comparing them to those which support the more lucid doctrine of primary jurisdiction.

A number of important considerations have emerged from

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[155] Judge Brown's reasons for abstention focus upon the problems posed by concurrent diversity jurisdiction, but his analysis has been the subject of substantial criticism. *See* note 148 *supra.*

[156] *See* text accompanying notes 102-06 & 132-33 *supra.* In one primary jurisdiction case another circuit has made the same mistake that was made in *Delaney.* In Wheelabrator Corp. v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971), the court sent a case to the General Accounting Office (GAO) because of the GAO's greater expertise. However, there was not concurrent jurisdiction between the GAO and the court over the issue. Thus, the court sacrificed the plaintiff's congressional right to be in federal court for no other reason than that the court faced a difficult question. The court, if it wanted the help of the agency, should have instead had the agency become a party to the proceedings before it. This was done, for example, in Catholic Medical Center, Inc. v. Rockefeller, 305 F. Supp. 1256 (E.D.N.Y. 1969).

[157] Professor Agata, using a different method of analysis, reaches a similar conclusion: "Problems of federalism, which justify abstention in federal question cases, deny the general application of abstention in diversity cases." Agata, *supra* note 148, at 430.

Support for *Delaney* in Note, *Fifth Circuit Abstention Procedure—A Proposed Solution,* 52 IOWA L. REV. 686 (1967), is based on erroneous conclusions. The Fifth Circuit does not, as the author contends, depend on an *Erie* rationale. *Id.* at 695. Only Judge Brown uses that basis and it has heen the subject of substantial attack. *See* note 148 *supra.* Nor can the decision be based on *Thibodaux* as the author suggests. *See* text accompanying notes 147-50 *supra.*

Most commentary on *Delaney,* however, has been extremely critical. *See, e.g.,* Gowen & Izlar, *supra* note 148, at 211-14; Comment, *Recent Developments in the Doctrine of Abstention,* 1965 DUKE L.J. 102, 107-12; Comment, *Abstention under Delaney: A Current Appraisal,* 49 TEXAS L. REV. 247 (1971); Comment, *supra* note 148; Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 YALE L.J. 850 (1964).

this analysis. They merit at least a brief summary. Abstention under *Railroad Commission v. Pullman Co.*[158] professed to use a simple boundary-type test of whether an unclear question of state law could be resolved by the state court to avoid the unnecessary decision by the federal court of a constitutional law question. But in fact, no consistent criteria for determining an unclear state law question can be observed in the opinion. Instead, the degree of clarity of the state law question, along with other factors such as comity and the nature of the rights involved, appear to have been the principal factors in determining whether abstention would occur.

In contrast, primary jurisdiction uses as a test a determination of whether the reasons for the doctrine are present and whether the purposes of the doctrine would be served by invoking it. Because it focuses on the factors which influence courts to use the doctrine, the results of primary jurisdiction cases are more understandable than the results in many abstention cases, especially those cases in which abstention is ordered in the face of what appears to be a clear question of state law.

This comparison suggests that *Pullman* abstention should utilize a balancing-of-factors test rather than trying to fashion a test based on the presence or absence of an unclear state law question. Although the balancing test would not have the consistency found in primary jurisdiction, since various factors are to be weighed against each other, it could lead to a clearer understanding of the factors that courts should consider in deciding whether to abstain.

Abstention under *Burford v. Sun Oil Co.*[159] has been shown to be an almost identical counterpart to primary jurisdiction. But even in cases where *Burford*'s characteristic feature, *i.e.*, a state court of special expertise, is not present and the strict analogy fails, abstention is still similar to primary jurisdiction since referral to a state court, like referral to an agency, can be justified on the basis of its greater familiarity with the complex and pervasive system of regulation.

Alabama Public Service Commission v. Southern Ry.[160] and *Louisiana Power & Light Co. v. City of Thibodaux*[161] have replaced the *Burford* criteria for abstention with the requirement that a state program must be politically important rather than complex and

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[158] 312 U.S. 496 (1941); *see* notes 38-87 and accompanying text *supra.*
[159] 319 U.S. 315 (1943); *see* notes 88-99 and accompanying text *supra.*
[160] 341 U.S. 341 (1951); *see* notes 100-08 and accompanying text *supra.*
[161] 360 U.S. 25 (1959); *see* notes 109-16 and accompanying text *supra.*

pervasive. With this change, the rationale of abstention has shifted from that of using the greater expertise or experience of the state court to that of respecting federal-state comity in both diversity cases and equitable suits.

Unlike the test in primary jurisdiction, however, no attention is paid to whether the federal court decision would cause any real interference with the state programs. In fact, by dropping the requirement that the state program be complex and pervasive, the likelihood of a "wrong" decision by the federal court is less and the chances of interference are decreased. Thus, deference to the state courts without such an inquiry has to be viewed as being based on theoretical values of federalism.

However, the approach in *Thibodaux* does differ from that of *Alabama Public Service Commission* in one important respect since it requires that the state law question involved be unclear. Thus the rationale behind primary jurisdiction that the decision-maker to whom the problem is referred is likely to be more familiar with it could also be cited in favor of abstention in a *Thibodaux* situation.

But the analogy to primary jurisdiction also suggests that abstention for the purpose of respecting theoretical values of comity is improper. In primary jurisdiction, a plaintiff's congressionally-given right to be in federal court is denied in order to enhance the ability of an agency to regulate. One congressional policy is balanced against another. In abstention cases, however, the congressional edict that a plaintiff can sue in federal court is balanced only against the court's own views of the policy advantages of comity.

Finally, the furthest extension of the abstention doctrine appears in the Fifth Circuit's opinion in *United Services Life Insurance Co. v. Delaney.*[162] Unlike the balancing in primary jurisdiction, the Fifth Circuit approach is not tied to the concurrent nature of jurisdiction between federal and state courts. And unlike any of the previous abstention cases, the *Delaney* rationale is not shaped by problems supposedly resulting from this concurrent jurisdiction. It arises only from the desire of the court to avoid deciding difficult questions. As such, the Fifth Circuit doctrine is an unsound and impermissible extension of the abstention doctrine.

In sum, since abstention and primary jurisdiction rest upon substantially similar theoretical grounds, it follows that, ideally, the two doctrines should also be similar in their application. As the

[162] 328 F.2d 483 (5th Cir.), *cert. denied,* 377 U.S. 935 (1964); *see* notes 143-57 and accompanying text *supra.*

preceding analysis has shown, however, this is not the case. While primary jurisdiction focuses upon the actual benefits to be achieved by referring the litigation to another decision-maker, abstention involves no such concrete test. As a result, the primary jurisdiction doctrine places well-defined limits on the discretion of the federal court while abstention permits a court to deny access to a federal forum based upon the court's own views of the policy advantages of such a denial. Thus, the primary jurisdiction test pays greater heed to the congressional grant of jurisdiction and only denies it when there is a significant advantage in so doing. It would seem, therefore, that the abstention doctrine could be made more palatable to litigants and courts by the incorporation of the primary jurisdiction "actual benefits" test.