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Clearing the Judicial Fog: Codifying Abstention

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— Note —

CLEARING THE JUDICIAL FOG:
CODIFYING ABSTENTION

“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. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”

-Chief Justice John Marshall¹

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1. Cohens v. Virginia, 19 (6 Wheat.) U.S. 264, 404 (1821).

INTRODUCTION

On November 24, 2014, a state official allegedly lied to the public, and the law barred those with knowledge from revealing the truth. Within six weeks, a whistleblower filed a federal complaint to challenge the state statute that silenced her and to vindicate her First Amendment rights. She claimed that the November 24 statement of St. Louis County Prosecuting Attorney Robert P. McCulloch—describing a grand jury’s purportedly “collective” decision, based on all possible evidence, not to indict Darren Wilson, the police officer who had shot and killed Michael Brown three months earlier in Ferguson, Missouri—was profoundly misleading and should be corrected with facts from the grand jurors themselves.² Under the name “Grand Juror Doe,” she filed a complaint on January 5, 2015, in the United States District Court for the Eastern District of Missouri under 42 U.S.C. § 1983, alleging that Missouri’s statute criminalizing a grand juror’s disclosure of the evidence or proceedings violated the First Amendment.³

To this day, the merits of this challenge to Missouri law have not been addressed except by an elected state judge. The federal district court, on May 5, 2015, decided to abstain from hearing the case, citing the so-called *Pullman*⁴ abstention doctrine as its justification.⁵ Grand Juror Doe appealed the decision, and the United States Court of Appeals for the Eighth Circuit upheld the abstention on June 20, 2016.⁶ Grand Juror Doe was forced to bring her action under the federal Constitution to Missouri state court, and the case was dismissed with prejudice on December 13, 2016.⁷ Almost exactly one year later, on December 12, 2017, the Missouri Court of Appeals affirmed the trial

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2. Jeremy Kohler, *Statement of St. Louis Prosecuting Attorney Robert P. McCulloch*, ST. LOUIS POST-DISPATCH (Nov. 24, 2014), http://www.stltoday.com/news/local/crime-and-courts/statement-of-st-louis-prosecuting-attorney-robert-p-mcculloch/article_2becfef3-9b4b-5e1e-9043-f586f389ef91.html [<https://perma.cc/GNY7-QU37>]; Complaint for Prospective Relief at 6, *Doe v. McCulloch*, 106 F. Supp. 3d 1007 (E.D. Mo. 2015) (No. 4:15-cv-00006), 2015 WL 47623.
 3. Complaint for Prospective Relief, *supra* note 2, at 1, 9–10.
 4. *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).
 5. *Doe v. McCulloch*, 106 F. Supp. 3d 1007, 1012–15 (E.D. Mo. 2015).
 6. *Doe v. McCulloch*, 835 F.3d 785, 788–89 (8th Cir. 2016). Grand Juror Doe successfully moved to proceed under a pseudonym in the district court. The Eighth Circuit followed suit by using feminine pronouns for Grand Juror Doe, and this Note does the same. *Id.* at 786 n.1.
 7. *Doe v. McCulloch*, No. 15SL-CC01891, 2016 WL 9000971, (Mo. Cir. Ct. Dec. 13, 2016), *aff’d*, No. ED 105181, 2017 WL 6327682, (Mo. Ct. App. Dec. 12, 2017), *motion for transfer to Supreme Court filed*, No. SC96950 (Mo. Feb. 13, 2018).

court's dismissal.⁸ As of this writing, her motion for a transfer to the Supreme Court of Missouri is pending.⁹

After exhausting her state-court appeals, pursuant to *Pullman* abstention and an *England*¹⁰ reservation, Grand Juror Doe may ultimately return to the Eastern District of Missouri at the conclusion of all state court proceedings. This will occur no sooner than 2018, for a case that could have been decided three years prior. Potentially, *Pullman* abstention will have resulted in the chilling or silencing of constitutionally protected speech for an extended period of time while Grand Juror Doe bore the expense of years of litigation before her day in federal court to decide a federal question about the scope of the First Amendment.

Abstention is a collection of doctrines that largely create enormous waste and that overwhelm the perceived benefits of their implementation. Inefficiency in the judicial system leaves litigants with high transaction costs from added proceedings, extended delay in reaching a resolution, and a potentially elongated chilling effect on constitutional rights. Not only does abstention create unnecessary obstacles for litigants, but this Note also argues that abstention is needlessly complicated, leading to situations in which litigants are further burdened by judicial error. This Note proposes legislation to codify the entirety of abstention in federal courts so as to streamline judicial efficiency and promote clarity within the doctrines.

Part I of this Note will examine the various abstention doctrines used in the United States. Part II will address the issues that arise from the use of these abstention doctrines. Part III will introduce potential solutions to the problems created by abstention, along with the possible consequences from adopting the solutions. Part IV will focus on the proposed abstention legislation, and how it can improve the judicial system.¹¹

I. ABSTENTION IN FEDERAL COURTS

Abstention is not one specific doctrine, but a collection of common law doctrines addressing situations in which a federal court has jurisdiction over a case but decides not to exercise that jurisdiction. Courts

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8. Doe v. McCulloch, No. ED 105181, 2017 WL 6327682, (Mo. Ct. App. Dec. 12, 2017).
 9. Application for Transfer to the Supreme Court, Doe v. McCulloch, No. SC96950 (Mo. Feb. 13, 2018).
 10. England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411 (1964).
 11. While this topic necessitates a discussion of both federal and state procedures, this Note aims to propose only federal legislation, and thus solutions are made from that perspective.

generally apply abstention to facilitate a stable relationship between state courts and their federal counterparts.¹² This can sometimes take the form of an unclear issue of state law, a parallel proceeding in state court, or a complex state administrative structure, to name a few examples.

Depending on which doctrine the court uses to justify its decision to abstain, the result is typically a stay of federal proceedings, although sometimes it can be outright dismissal. A stay is issued when there remains a federal interest aside from the state interest in the case, and the litigants are invited to continue in federal court at a later time if necessary.

A. Pullman Abstention for Unclear State Law

Pullman abstention was “[d]esigned to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues.”¹³ This particular doctrine, which was created in the case of *Railroad Commission of Texas v. Pullman Company*,¹⁴ generally allows a federal court to decline to exercise jurisdiction because of an unclear issue of state law as to which a particular resolution could render the federal issue moot.¹⁵

At the time of the case, the Pullman Company manufactured sleeper cars that could be coupled to trains for overnight travel. Railroad companies would operate and staff the train generally, while the Pullman Company staffed and operated the sleeper cars under the general control of the railroad companies where applicable.¹⁶ Employee positions at the Pullman Company were divided by race. African Americans held the position of porter, while whites held the position of Pullman conductor. Some trains carried one sleeper car, while others carried two or more.¹⁷ In situations where a train had only one sleeper car, no Pullman conductor was utilized, and the porter would operate the Pullman car under the control of the train’s conductor.¹⁸

12. See Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrines Will Always Be with Us—Get Over It!!*, 36 CREIGHTON L. REV. 375, 376 (2003) (“These abstention doctrines cases reflect complex considerations designed to avoid friction between federal and state courts.”).

13. *Arizonians for Official English v. Arizona*, 520 U.S. 43, 76 (1997).

14. 312 U.S. 496 (1941).

15. *Id.* at 501.

16. *Id.* at 497–98.

17. *Id.* at 497.

18. *Id.*

The Texas Railroad Commission ruled that a Pullman conductor was necessary for the operation of a sleeper car, regardless of the number of sleeper cars on the train.¹⁹ The Pullman Company sued the Railroad Commission in the U.S. District Court for the Western District of Texas, claiming the order violated both Texas law and the U.S. Constitution. The porters intervened in the suit, and challenged the commission's order as a violation of the Fourteenth Amendment.²⁰

The three-judge district court noted that the commission had the power to pass regulations that would correct abuses.²¹ The district court then determined that the commission only had the power to correct an "abuse which has been defined by the law."²² The court ruled in favor of the plaintiffs on the grounds that the commission lacked the authority for its order; the court did not address any other issues.²³

Citing a desire to avoid ruling on the sensitive constitutional issue of racial discrimination, the Supreme Court stated that the case must be viewed solely through the lens of Texas law.²⁴ Instead of actually grappling with state law, however, the Court announced that the Texas Supreme Court should hold the final word on the meaning of the Texas statute.²⁵ Although the Court noted the district court judges' experience with Texas law, it also characterized the Court as "outsiders without special competence in Texas law," and stated its lack of confidence in any decision it could render on the issue.²⁶

In carving out *Pullman* abstention, the Court stated:

In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced

19. *Id.* at 497–98.

20. *Id.* at 498. The contrast of testimony from the porters and witnesses called by the Commission showed the stark racism embedded into the Commission's order, highlighting the Fourteenth Amendment claim. While witnesses for the Commission stated they would more readily obey the authority of a white conductor over a black porter, the porters who took the stand—who were all experienced, educated, and respected in their communities—stated that asserting authority was not the way to effectively carry out their duties. Lauren Robel, *Riding the Color Line: The Story of Railroad Commission of Texas v. Pullman Co.*, in *FEDERAL COURTS STORIES* 163, 171–75 (Vicki C. Jackson & Judith Resnik eds. 2010).

21. *Pullman Co. v. R.R. Comm'n of Tex.*, 33 F. Supp. 675, 676 (W.D. Tex. 1940) (three judge court).

22. *Id.*

23. *Id.* at 677–78.

24. *Pullman*, 312 U.S. at 498.

25. *Id.* at 499–500.

26. *Id.* at 499.

tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication. . . .

[Prior Supreme Court decisions] reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, “exercising a wise discretion,” restrain their authority because of “scrupulous regard for the rightful independence of the state governments” and for the smooth working of the federal judiciary. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.²⁷

The *Pullman* doctrine was created as a response to a lack of guidance from the Texas Supreme Court in an effort to harmonize the state and federal court systems.²⁸ But under what circumstances should a federal court utilize the *Pullman* doctrine to abstain from deciding a case?

First, it is worth pointing out that whether the state courts have heard the issue is irrelevant “when the unconstitutionality of the particular state action under challenge is clear.”²⁹ In those circumstances, abstention is unnecessary, even if the state courts have not been afforded the opportunity to address that particular issue.

Furthermore, “abstention is not proper if the federal and state constitutional provisions are identical.”³⁰ Abstention under *Pullman* was not intended “merely to await an attempt to vindicate the claim in a state court.”³¹ Courts have affirmed decisions to abstain, however, when the unclear law in question is unique to the state.³²

A companion to *Pullman* abstention is the *England* reservation, named for the case *England v. Louisiana State Board of Medical*

27. *Id.* at 500–01 (citations omitted).

28. *Id.*

29. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 756 (1986).

30. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 840 (7th ed. 2016).

31. *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971); *see also* *Zwickler v. Koota*, 389 U.S. 241, 251 (1967) (“[A]bstention cannot be ordered simply to give state courts the first opportunity . . .”).

32. *See* *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970) (noting that the Constitution of Alaska contained provisions regarding fish resources, and a challenge to a statute allegedly violating that provision was unique to the state of Alaska).

Examiners.³³ While the majority opinion does not specifically mention *Pullman*, the case involved a group of chiropractors seeking an injunction against the Louisiana State Board of Medical Examiners, arguing that it violated the Fourteenth Amendment by barring them from practice for failing to meet its educational requirements.³⁴ The district court abstained because a determination that the statute in question did not apply to chiropractors could decide the entire case.³⁵ The chiropractors returned to state court and ultimately lost on both the state and the federal issues in the Louisiana state-court system.³⁶ When the chiropractors returned to federal court, the district court dismissed the case, indicating that the state court addressed all the issues—including the federal issue—and that they should have petitioned the U.S. Supreme Court instead of returning to the district court.³⁷

Following the district court's dismissal, the chiropractors appealed their way up to the U.S. Supreme Court. Justice Brennan, writing for the Court, noted that "[t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."³⁸ The Court determined that following abstention, a party moving to state court has the choice of deciding where the federal claims will be litigated.³⁹ The party may choose to litigate the federal claim in the state court, which would extinguish the party's right to return to the district court.⁴⁰ Alternatively, the party may present the federal claim to the state court solely for context, while also explicitly reserving the right to return to the district court.⁴¹ In this event, the party's right to return to the district court following the litigation of the state claim is

33. 375 U.S. 411 (1964).

34. *Id.* at 412–13.

35. *England v. La. State Bd. of Med. Exam'rs*, 180 F. Supp. 121, 124 (E.D. La. 1960).

36. The chiropractors lost in the Louisiana Court of Appeals, and the Louisiana Supreme Court denied their petition for review. *England v. La. State Bd. of Med. Exam'rs*, 126 So. 2d 51, 56–57 (La. Ct. App. 1960); *England v. La. State Bd. of Med. Exam'rs*, 194 F. Supp. 521, 522 (E.D. La. 1961).

37. *England*, 194 F. Supp. at 522.

38. *England*, 375 U.S. at 415.

39. *Id.* at 418.

40. *Id.* at 419.

41. *Id.* at 421–22.

preserved, even if the state court decides on its own to rule on the merits of the federal claim.⁴²

B. Thibodaux Abstention for Unclear State Law with Diversity Jurisdiction

As a general rule, courts do not abstain from hearing cases of unclear state law brought to federal court on diversity grounds.⁴³ The Supreme Court carved out a notable exception, however, in the case of *Louisiana Power and Light Co. v. City of Thibodaux*.⁴⁴

In that case, the city of Thibodaux had recently expanded its boundaries and sought to condemn facilities of an electric company within the newly annexed territory.⁴⁵ The city claimed authority under a state statute allowing Louisiana municipalities to expropriate utility service property in the public interest.⁴⁶ While the city originally brought the case in Louisiana state court, Louisiana Power & Light Company, a Florida corporation, removed the case to the U.S. District Court for the Eastern District of Louisiana.⁴⁷

The district court grappled with the concept that the statute granted eminent domain power to a subdivision of the state, noting that in those circumstances, “the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.”⁴⁸ The court also noted the seriousness of eminent domain, asserting that “the power of eminent domain is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice.”⁴⁹ Such gravity to the issue prompted the court to mention that before recognizing the power of eminent domain, “[a] federal court . . . must make certain that that power has been granted by the state”⁵⁰

42. *Id.* at 421 (“[T]he litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily . . . fully litigated his federal claims in the state courts.”).

43. CHEMERINSKY, *supra* note 30, at 844–45.

44. 360 U.S. 25 (1959).

45. *City of Thibodaux v. La. Power & Light Co.*, 153 F. Supp. 515, 516 (E.D. La. 1957).

46. *Id.* at 516 n.2.

47. *Id.* at 516 n.1.

48. *Id.* at 517.

49. *Id.*

50. *Id.*

Before the case came to the district court, no court—state or federal—had ever interpreted the statute at hand.⁵¹ The only authority the court was able to find on the issue was an opinion from the Louisiana Attorney General. The opinion was on an identical set of circumstances, but the lack of judicial interpretation “[gave the] court pause.”⁵²

The U.S. Supreme Court deemed the district court’s abstention from the case to be a proper use of its discretion.⁵³ The Court affirmed abstention from ruling due to the state’s interest in its own eminent domain laws.⁵⁴ As a result, federal courts could now abstain from judgment in a diversity case when a decision on an unclear issue of state law would have an impact on a state interest affecting “sovereign prerogative.”⁵⁵

C. Burford Abstention for Unclear State Law with Complex State Administrative Procedures

Just two years after the Supreme Court created *Pullman* abstention, the Court added a second, somewhat similar, doctrine called *Burford* abstention. *Burford v. Sun Oil Company*⁵⁶ involved oil drilling in Texas, for which the state had created complex a state administration to handle decision-making on the subject.⁵⁷ *Burford* began when the Texas Railroad Commission granted Burford a permit to drill four oil wells, and Sun brought suit in the U.S. District Court for the Western District of Texas seeking to enjoin the enforcement of the order.⁵⁸ The district court dismissed the case, and appeals eventually brought the case before the U.S. Supreme Court.⁵⁹ The Court detailed the complexities of oil drilling in Texas, specifically noting that the field in question had “approximately nine hundred operators.”⁶⁰ The Court also mentioned, as an example of the intricacy of the administrative system, the commission’s Rule 37, noting that “[i]t is estimated that over two-thirds of the wells in the East Texas field exist as exceptions to the rule, and since each exception may provoke a conflict among the interested parties, the volume of litigation arising from the admin-

51. *Id.*

52. *Id.*

53. *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959).

54. *See id.* at 28.

55. *Id.*

56. 319 U.S. 315 (1943).

57. *Id.* at 318–19.

58. *Sun Oil Co. v. Burford*, 124 F.2d 467, 468 (5th Cir. 1941).

59. *Id.* at 468, 470.

60. *Burford*, 319 U.S. at 319.

istration of the rule is considerable.”⁶¹ The Supreme Court further spoke to the importance of having a unified body making these impactful decisions, and it ultimately affirmed the district court’s decision to dismiss the case.⁶²

A notable difference between *Burford* abstention and *Pullman* abstention is that the former requires the court to dismiss the case, rather than to simply grant a stay of proceedings while the state issues are resolved.⁶³ The Court subsequently expanded *Burford* abstention to dismiss cases containing both a strong local interest and the existence of a state-based regulatory system. This broad reading came from *Alabama Public Service Commission v. Southern Railway Co.*,⁶⁴ which differed from *Burford* in that the Court—hearing a case involving the denial of a request to decommission two train lines for a lack of profitability—focused more on the existence of a state regulatory procedure as opposed to the complexity of one.⁶⁵

This modification, however, has not been widely used by the Supreme Court in subsequent decisions. A few decades later, the Court walked this decision back a few steps and reaffirmed that any abstention based upon a state regulatory system must be done only if a decision would “disrupt the State’s attempt to ensure uniformity in the treatment of an essentially local problem.”⁶⁶ The Court also made it clear that *Burford* abstention was only appropriate for cases demanding declaratory or equitable relief.⁶⁷

61. *Id.* at 324.

62. *Id.* at 333–34.

63. *See id.* at 334.

64. 341 U.S. 341 (1951).

65. *See id.* at 349–50. Despite agreeing with the overall result, Justice Frankfurter penned a highly critical concurrence, characterizing the case as a “flagrant contradiction” with stare decisis. Justice Frankfurter listed a number of cases, including *Pullman* and *Burford*, and believed the case at hand was distinguishable, writing that “the claim that is made here is within the easy grasp of federal judges, and certainly within the competence of three judges bred in Alabama law, with wide experience in its administration.” *Id.* at 360–62 (Frankfurter, J., concurring).

66. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 362 (1989) (internal quotation marks omitted) (quoting *Southern Railway Co.*, 341 U.S. at 347).

67. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996) (“Because this was a damages action, we conclude the District Court’s remand order was an unwarranted application of the *Burford* doctrine.”).

D. Younger Abstention to Avoid Interference with Pending State Court Proceedings

The Court added a new doctrine in the 1970 case *Younger v. Harris*.⁶⁸ John Harris brought suit in the U.S. District Court for the Central District of California seeking an injunction against a state prosecution because the California statute at issue violated the First and Fourteenth Amendments.⁶⁹ A three-judge panel struck down the statute as unconstitutional on its face.⁷⁰

The Supreme Court reversed and remanded the lower court's decision granting the injunction.⁷¹ The Court noted that as a general rule, injunctions against pending state criminal prosecutions were not available.⁷² Justice Black, writing for the Court, mentioned that there could be exceptions to this general rule, but stated that "there is no point in our attempting now to specify what they might be."⁷³ Harris did not allege bad faith or indicate a pattern of harassment, so the Court did not find his arguments in favor of an injunction compelling.⁷⁴ More applicable to Harris, even a statute abridging First Amendment rights on its face is not enough to authorize an injunction.⁷⁵ The Court did go on to say, however, that "[t]here may . . . be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."⁷⁶

The *Younger* doctrine serves a similar purpose to that of the Anti-Injunction Act,⁷⁷ but *Younger* was decided instead on the principles of equity and comity, and the Court explicitly stated that the Anti-Injunction Act was not controlling in this situation.⁷⁸ The Act itself is brief, stating "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."⁷⁹

68. 401 U.S. 37 (1970).

69. *Harris v. Younger*, 281 F. Supp. 507, 508–09 (C.D. Cal. 1968).

70. *Id.* at 517.

71. *Younger*, 401 U.S. at 54.

72. *Id.* at 53.

73. *Id.* at 54.

74. *Id.*

75. *Id.* at 53.

76. *Id.*

77. Anti-Injunction Act, 28 U.S.C. § 2283 (2012).

78. 401 U.S. at 44, 54.

79. 28 U.S.C. § 2283.

It is not clear why the Court did not decide *Younger* on Anti-Injunction Act grounds. In a dissenting opinion, Justice Douglas stated the statute was “not a bar to a federal injunction under these circumstances.”⁸⁰ Douglas took the viewpoint that a § 1983 claim seeking an injunction as an equitable remedy was an express authorization from Congress as required by the Anti-Injunction Act.⁸¹ The Court later agreed with this proposition in *Mitchum v. Foster*,⁸² acknowledging that a § 1983 claim is an exception to the Anti-Injunction Act, but also stating that *Mitchum* was the first case in which the Court could explicitly decide the question.⁸³ It is possible that when *Younger* was decided a year earlier, the Court was not ready to decide the issue of whether § 1983 fit within the Anti-Injunction Act’s exception, so it opted to rule on abstention grounds rather than statutory grounds.⁸⁴

The *Younger* doctrine began as a means to stop federal court interference in pending state criminal proceedings, but as it evolved, courts began abstaining from cases involving state-initiated civil proceedings as well. Addressing a nuisance claim in *Huffman v. Pursue, Ltd.*⁸⁵—involving efforts to close an adult movie theater—the Court determined that the claim was more like a criminal case than other civil claims.⁸⁶ The *Huffman* case involved the State of Ohio as a party to the proceeding, and criminal statutes were involved in the case.⁸⁷ Two years later, the Court went on to clarify that *Younger* could be applied in any civil proceeding to which a state is a party.⁸⁸

The Court first dropped the necessity of the state as a party in *Juidice v. Vail*.⁸⁹ In that case, the Court classified the core principle behind *Younger* as deference to the state courts generally as opposed

80. 401 U.S. at 60 (Douglas, J., dissenting).

81. *Id.* at 62.

82. 407 U.S. 225 (1972).

83. *Id.* at 226.

84. See Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1147 n.36 (1977) (“The Anti-Injunction Act . . . was not available to Justice Black at the time of *Younger* because the Court had not resolved the relation between the Act and the Civil Rights Act.”).

85. 420 U.S. 592 (1975).

86. *Id.* at 604 (“[T]he proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials.”).

87. *Id.*

88. *Trainor v. Hernandez*, 431 U.S. 434, 443–44 (1977).

89. 430 U.S. 327 (1977).

to some necessity tied to criminal proceedings.⁹⁰ The Court indicated that an important state interest, be it criminal or civil, can be grounds for *Younger* abstention.⁹¹ The Court offered a qualification on its ruling, stating that *Juidice* did not answer the question of whether *Younger* can apply to all civil proceedings.⁹²

The Supreme Court clarified the applicability of *Younger* in the 2013 case *Sprint Communications, Inc. v. Jacobs*.⁹³ Reiterating the holding from a previous case, *New Orleans Public Service, Inc. v. Council of the City of New Orleans*,⁹⁴ the Court affirmed three categories as being applicable to *Younger* abstention: “state criminal prosecutions,’ ‘civil enforcement proceedings,’ and ‘civil proceedings involving certain orders that are uniquely in furtherance of the state courts’ ability to perform their judicial functions.’”⁹⁵ Writing for the Court, Justice Ginsburg reversed the Eighth Circuit’s pro-abstention decision, emphasizing that the circumstances giving rise to *Younger* abstention are “exceptional.”⁹⁶

E. Colorado River Abstention to Avoid Duplicative Proceedings

Another abstention doctrine surfaced to address specific situations involving parallel litigation in the case of *Colorado River Water Conservation District v. United States*.⁹⁷ In *Colorado River*, the United States and Colorado residents became involved in a water dispute. The United States brought suit in the U.S. District Court for the District of Colorado seeking declaratory relief about the rights to the water.⁹⁸ Shortly thereafter, one of the defendants filed suit against the United States in state court over the same claims as the federal suit.⁹⁹

The Court first rejected the idea that the circumstances at play in *Colorado River* fit into any of the currently established abstention

90. *Id.* at 334.

91. *Id.* at 335.

92. *Id.* at 336 n.13. In a harsh dissent, Justice Brennan considered the case “nothing less than plain refusal to enforce the congressional direction,” and he considered the Court’s aforementioned qualification irrelevant from a practical perspective. *Id.* at 345 (Brennan, J., dissenting).

93. 134 S. Ct. 584 (2013).

94. 491 U.S. 350 (1989).

95. *Jacobs*, 134 S. Ct. at 588 (quoting *New Orleans Pub. Serv.*, 491 U.S. at 368).

96. *Id.* (quoting *New Orleans Pub. Serv.*, 491 U.S. at 368).

97. 424 U.S. 800 (1976).

98. *Id.* at 805.

99. *Id.* at 806.

doctrines.¹⁰⁰ Despite this, the Court proclaimed that principles of judicial efficiency sometimes create situations in which a court should abstain.¹⁰¹ But while the Supreme Court showed some support for abstaining when proceedings in state court and federal court exist simultaneously for the same issue, it also declared that abstention should only be done in “exceptional circumstances.”¹⁰² In upholding the district court’s dismissal of the complaint, the Court looked to many different aspects of the litigation, and found that the infancy of the federal proceeding,¹⁰³ extensiveness of the state involvement,¹⁰⁴ distance between the two courts,¹⁰⁵ and the U.S. participation in the related state-court proceedings weighed in favor of abstaining from the case.¹⁰⁶

The *Colorado River* Court outlined some factors to consider in abstaining due to parallel litigation: “the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained”¹⁰⁷ The Court determined that no single factor is determinative, and that “[o]nly the clearest of justifications will warrant dismissal.”¹⁰⁸

A few years later, the Court had the opportunity to clarify when *Colorado River* abstention should be invoked. The Court reaffirmed the holding in *Colorado River* and also stated that a federal court cannot abstain simply because parallel litigation exists. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*,¹⁰⁹ a contractor petitioned the federal court to compel arbitration after a hospital brought suit in state court.¹¹⁰ In affirming the Court of Appeals’ reversal of a stay pending the outcome of the state proceeding, the Supreme Court also added factors to the *Colorado River* analysis: the source, either federal or state, of the law in question and the adequacy of the state-court proceedings to protect an individual’s rights.¹¹¹ In that case,

100. *Id.* at 813.

101. *Id.* at 817.

102. *Id.* at 813.

103. Outside of the motion to dismiss giving rise to the appeal, the only other filing in the federal proceeding was the complaint. *Id.* at 820.

104. The United States’ lawsuit was brought against 1,000 defendants. *Id.*

105. The state court was located 300 miles away from the district court. *Id.*

106. *Id.*

107. *Id.* at 818 (citations omitted).

108. *Id.* at 818–19.

109. 460 U.S. 1 (1983).

110. *Id.* at 7.

111. *Id.* at 23–27.

the Court also established that these factors are not a “mechanical checklist, but . . . a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.”¹¹² The presence of a federal question was important to the Court in ruling against abstention.¹¹³

II. ABSTENTION FACILITATES INEFFICIENCY

Legal scholars have covered abstention from a variety of different angles.¹¹⁴ This Note will address abstention not from a theoretical perspective, but rather from a policy perspective. Here, the validity of the Court’s creation of the pertinent common law doctrines will be put aside in favor of addressing the tangible impact the use of these doctrines has.

In practice, the different abstention doctrines create different problems with judicial inefficiency. These problems include an increased burden on the litigants through cost and delay, a chilling effect on asserted rights, and a lack of clarity as to when the lower courts should abstain from a case.

A. Abstention Places an Undue Burden on Litigants

Litigation can be an arduous process. A case can take years after filing to be resolved, and it can generate substantial expenses in the process. In many instances, abstention increases these costs.

Consider a situation in which a party brings a state claim and a federal claim in federal court. If the court decides to abstain through either a dismissal or a stay of proceedings, that order is immediately appealable.¹¹⁵ If the litigant is adamant on having his claim heard in

112. *Id.* at 16.

113. *Id.* at 26.

114. *See, e.g.*, Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate: An Essay on the Distinction Between “Legitimate” and “Illegitimate” Statutory Interpretation and Judicial Lawmaking*, 107 NW. U. L. REV. 847 (2013); Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) (arguing that federal courts, following a set of principles of preference articulated by the author, should employ reasoned discretion when it comes to exercising jurisdiction in order to avoid overburdening themselves and unduly interfering with the states).

115. *See* *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9–10 (1983) (holding that an appeal to an abstention stay was proper because the stay order put the litigants “effectively out of court” (quoting *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962))).

federal court, he must then bear the expense of appealing the decision in the federal courts. Should that not produce a favorable outcome, the litigant must then move to the state courts and pursue the case there. This could further include more appeals at the state level before potentially allowing the litigant back into the federal court he chose in the first place.

Much of the reasoning behind the “state law trio”¹¹⁶ of abstention doctrines stems from deference to the state court system by the federal court system.¹¹⁷ The idea is that the federal court should defer to the state court so that the issue can be decided correctly. It is debatable, however, whether abstention actually results in these issues being decided correctly more often. The assumption here is that the state court—by nature of being the state court ruling on unclear issues of state law—is inherently more likely to be correct on the issue than a federal court could be.¹¹⁸ The error in this assumption is that “[t]he standard . . . refers to the highest court of the state.”¹¹⁹ In many ways, a lower state court decision has little more precedential weight than a ruling from the federal court. So is the resulting cost to the litigant justifiable in this instance?

If one wants to argue that the state court has the right to take ownership of the issue, then maybe abstention is justified. The *Pullman* decision cites avoiding “friction” as a motivating factor to abstain from ruling, but does not explain further.¹²⁰ Federal courts often decide issues of state law, regardless of whether the state’s highest court has spoken on the issue.¹²¹ How much weight should we give to any inherent ownership right of the state courts? When the benefit is only slight, and the cost to the litigants is so great, the importance of preserving this

116. The “state law trio” refers to *Pullman*, *Burford*, and *Thibodaux*, which all deal with some aspect of an unclear state law.

117. *See* R.R. Comm’n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941) (“Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . .”).

118. *See* Field, *supra* note 114, at 1091 (finding that abstention discussions frequently assume the state court will come to the correct decision on remand).

119. *Id.*

120. 312 U.S. at 500.

121. *See, e.g.*, Blankenship v. USA Truck, Inc., 601 F.3d 852, 856 (8th Cir. 2010) (“When there is no state supreme court case directly on point, our role is to predict how the state supreme court would rule if faced with the [same issue] before us.” (quoting *Northland Cas. Co. v. Meeks*, 540 F.3d 869, 874 (8th Cir. 2008))); *Chatlos Sys., Inc. v. Nat’l Cash Register Corp.*, 635 F.2d 1081, 1086 (3d Cir. 1980) (“New Jersey has not taken a position on this question, so . . . we must predict which view the New Jersey Supreme Court would adopt . . .”).

deference to the state courts lessens. Judith Kaye, former Chief Judge of the New York Court of Appeals, recognized the delay and expense caused by abstention, and concluded that “it soon became apparent that abstention was not an effective solution to the problem of federal courts seeking to ascertain state law.”¹²²

B. Abstention Can Have a Chilling Effect on Individual Rights

Grand Juror Doe filed suit in federal court because she wanted to exercise what she believed to be her rights under the First Amendment.¹²³ With litigation having carried on for over a year, and proceedings still ongoing, has the need to go through so much effectively chilled free speech?

The Supreme Court has considered the possibility that delayed resolution of cases involving constitutional challenges could produce this undesirable result.¹²⁴ Despite this, the Court has not provided a definitive answer on the appropriate action in those circumstances, although it did note that it has “been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment.”¹²⁵ Still, given both the financial and mental cost of prolonged litigation, it is not surprising that some litigants would view an entirely new set of proceedings brought about by abstention as a motivating factor in dropping their claims.

C. Lower Courts Are Not Clear on When to Apply Abstention

No matter what goals one thinks abstention should achieve, the lower courts’ ability to fulfill those objectives can work only as long as they understand when to abstain and when not to abstain from hearing a case. Some doctrines have been clearer than others, but abstention as a whole could benefit from codification in order to provide lower federal courts with a clear directive as to the circumstances that warrant abstaining.

In Grand Juror Doe’s case, the federal district court originally abstained under *Burford* and *Pullman*, and it dismissed her entire case.¹²⁶

122. Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 *FORDHAM L. REV.* 373, 380 (2000).

123. See *supra* notes 2–9 and accompanying text.

124. See *Zwickler v. Koota*, 389 U.S. 241, 252 (1967) (“[T]o force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect.”).

125. *City of Houston v. Hill*, 482 U.S. 451, 467 (1987).

126. *Doe v. McCulloch*, 835 F.3d 785, 788 (8th Cir. 2016). The district court’s usage of *Burford* as the driving force of its decision is peculiar. Not only was

On appeal, Grand Juror Doe argued that *Burford* abstention was inappropriate while also noting that the court should have retained jurisdiction if abstaining under *Pullman*.¹²⁷ Grand Juror Doe crafted her briefs and oral argument to the Eighth Circuit so as to carefully avoid asserting a claim under state law, instead choosing to focus on whether the district court erred in relying on *Burford* and dismissing the case.¹²⁸ Despite this, the Eighth Circuit—possibly treating the slight nudge towards the use of *Pullman* abstention over *Burford* as an implied argument for a state claim that would obviate a federal decision—extrapolated Grand Juror Doe’s argument into “whether and to what extent the [grand jury secrecy] statute applies to her.”¹²⁹ In a sense, the district court’s confusion over which abstention doctrine to apply led to Grand Juror Doe being forced to argue in favor of moving her case out of federal court temporarily pursuant to *Pullman*, because the alternative—the court abstaining under *Burford* and dismissing the case—would shut her out of federal court until a potential Supreme Court review of the Missouri Supreme Court.

It is not always clear whether abstention is discretionary or mandatory. The Supreme Court has seemingly ruled in both directions, although more recent decisions tend to support the doctrine as discretionary.¹³⁰ Furthermore, where a statute creates exclusive federal jurisdiction, it is unclear if abstention is proper. The Fifth Circuit has deemed that it is not.¹³¹ Although the Supreme Court declined to review

abstaining under *Burford* wholly inappropriate given the circumstances, but neither party cited the case in the numerous briefs on the issue.

127. Brief of Appellant at 27–33, *Doe v. McCulloch*, 835 F.3d 785 (8th Cir. 2016) (No. 15-2667).

128. *Id.* at 33–36; Appellant’s Reply Brief at 6, 19, *Doe v. McCulloch*, 835 F.3d 785 (8th Cir. 2016) (No. 15-2667); Oral Argument at 00:00–12:15, 28:38–31:28, *Doe v. McCulloch*, 835 F.3d 785 (8th Cir. 2016) (No. 15-2667), <http://media-oa.ca8.uscourts.gov/OAaudio/2016/3/152667.MP3>.

129. *McCulloch*, 835 F.3d at 788.

130. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727–28 (1996) (“[T]he power to dismiss under the *Burford* doctrine, as with other abstention doctrines, . . . derives from the discretion historically enjoyed by courts of equity.”); *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) (“The abstention doctrine is not an automatic rule . . . ; it rather involves a discretionary exercise”); *City of Meridian v. S. Bell Tel. & Tel. Co.*, 358 U.S. 639, 640 (1959) (“Proper exercise of federal jurisdiction *requires* that controversies involving unsettled questions of state law be decided in the state tribunals preliminary to a federal court’s consideration of the underlying federal constitutional questions.” (emphasis added)).

131. *Key v. Wise*, 629 F.2d 1049, 1059 (5th Cir. 1980) (“When Congress has directed . . . that [federal courts] have *exclusive* jurisdiction . . . , abstention . . . defeats the purpose of that legislation.”).

the Fifth Circuit case establishing that opinion, at least one member of the Court likely supports that viewpoint.¹³²

The uncertainty surrounding abstention has created circuit splits with regard to *Pullman* and its requirements. The Second, Third, Sixth, Ninth, and Tenth Circuits utilize a three-part test to determine if *Pullman* abstention is appropriate.¹³³ This test has generally considered the level of uncertainty in the state-law issue, how much an interpretation of the state law could affect the federal law outcome, and whether an interpretation of the state law could obviate or change the federal constitutional issue.¹³⁴ In the Fifth Circuit, however, the parts of the three-part test are considered factors, and only one is necessary to allow abstention.¹³⁵ This only becomes more uncertain when dealing with *Thibodaux* abstention in diversity cases.¹³⁶ Unsurprisingly, lower court disagreement has carried over into *Burford* abstention as well.¹³⁷ Clarity appears to resume—at least in comparison—when looking to lower court interpretations of *Younger* and *Colorado River* abstention, but

132. *See* *Key v. Wise*, 454 U.S. 1103, 1109 (1981) (Brennan, J., dissenting) (“When Congress speaks definitively, . . . state courts may not act to obstruct or unsettle the congressional design.”).

133. *Burdick v. Takushi*, 846 F.2d 587, 588 (9th Cir. 1988) (reformulating the second part of the test enunciated in *McRedmond v. Wilson*, 533 F.2d 757, 761 (2d Cir. 1976), to require consideration of sensitive social policy issues typically reserved for state courts); *Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981) (quoting the three-part test formulated in *D’Iorio v. City of Delaware*, 592 F.2d 681, 686 (3d Cir. 1978)); *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 925 (6th Cir. 1980) (combining the Second Circuit’s second and third factors, and adding a consideration of the federal decision’s potential for interference with “important state policies or regulatory programs”).

134. *McRedmond*, 533 F.2d at 761; *see also supra* note 133 (citing cases supporting a three-part test for *Pullman* abstention with only slight differences in wording).

135. *Mireles v. Crosby Cty.*, 724 F.2d 431, 433 (5th Cir. 1984).

136. *Compare* *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 484–85 (5th Cir. 1964) (en banc) (abstaining in a diversity case solely because the state law was unclear), *with* *Miller-Davis Co. v. Ill. State Toll Highway Auth.*, 567 F.2d 323, 326 (7th Cir. 1977) (finding abstention in a diversity case inappropriate, noting that an *England* reservation would be impossible in a diversity situation).

137. *See* *Neufeld v. City of Baltimore*, 964 F.2d 347, 349–51 (4th Cir. 1992) (noting the Supreme Court’s lack of a “hard-and-fast rule” from *Burford* and that the federal ruling in the instant case would not disrupt a state policy); *see also* Charles S. Treat, Comment, *Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the Burford Doctrine*, 46 U. CHI. L. REV. 971, 980–88 (1979) (discussing examples of the “considerable confusion” among lower courts in applying *Burford*).

even then, the clarity achieved through courts developing tests and lists of factors is undercut by the lack of uniformity.¹³⁸

Even outside the merits and procedural elements, Grand Juror Doe's case indicates the uncertainty of abstention. Judge Roger Wollman wrote the opinion for the Eighth Circuit in both *Doe v. McCulloch* and *Sprint Communications Co. v. Jacobs*,¹³⁹ the latter of which was a *Younger* abstention case that was reversed by the Supreme Court.¹⁴⁰ At oral argument in *Doe*, Judge Wollman quipped that he was "still smarting in a way from the unanimous decision that overruled . . . one of [his] opinions in the *Sprint* case."¹⁴¹ Wollman continued to joke that the Supreme Court "had to rub it in" when explaining the ruling, characterizing the Court as saying, "dumb-dumb can't you read our cases?"¹⁴²

D. Current Mechanisms Are Inadequate

Two major procedures are typically discussed in conjunction with abstention. These procedures are *England* reservations and certified questions. An *England* reservation is meant to ensure that a plaintiff continues to hold access to her chosen forum, but this access can still be delayed until the plaintiff has traversed the entire state court process.¹⁴³ When returning to state court in Missouri, Grand Juror Doe explicitly made an *England* reservation, indicating her intention to return to the federal district court.¹⁴⁴ In order to comply with *England*, Grand Juror Doe asserted her federal claim with the caveat that she was only providing context for the case.¹⁴⁵

Despite Grand Juror Doe's *England* reservation, the Missouri state court proceeded to rule on the merits of her First Amendment claim,

138. See Tyler A. Mamone, Comment, *No Simple Compromise: Reconciling Duty and Discretion Under Colorado River Abstention in Claims for Mixed Relief*, 45 U. TOL. L. REV. 347, 359 (2014) ("Circuits reviewing these cases are forced to navigate the often confusing and less-than-uniform exceptional circumstances test.").

139. 690 F.3d 864 (8th Cir. 2012).

140. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 593–94 (2013).

141. Oral Argument, *supra* note 128, at 25:57.

142. *Id.* at 26:05–26:19.

143. See *supra* notes 33–42 and accompanying text (discussing the procedure outlined in *England*).

144. Petition for Declaratory & Injunctive Relief at 2, *Doe v. McCulloch*, No. 15SL-CC01891 (Mo. Cir. Ct. Dec. 13, 2016).

145. *Id.* at 10–11, 11 n.3 ("Plaintiff does not seek relief on Count I from this Court. Count I is set forth here for the sole purpose of allowing this Court to construe the relevant statutes against a backdrop of Plaintiff's federal constitutional challenge.").

making no mention of her request not to litigate the issue in that forum.¹⁴⁶ The Missouri Court of Appeals addressed Doe's *England* reservation head on, stating that because a freedom of speech claim would be resolved identically under the Missouri Constitution and the United States Constitution, the trial court was correct to ignore the *England* reservation and reach the merits of Doe's federal issue.¹⁴⁷ In these situations, the *England* reservation preserves the ability of a litigant to return to the federal district court, but "issue preclusion generally binds an abstaining federal court to those state court findings that are necessary to the state court's holding"¹⁴⁸ So while the *England* reservation serves an important function in preserving the litigant's rights, it can sometimes be seen as doing too little, too late—or preclude additional litigation entirely—should a state court ignore a litigant's plea for separation of the federal and state issues, or when such separation is impracticable.

A certified question can be used to clarify an unclear law; it is a process by which a federal court presents a question of law to a state supreme court.¹⁴⁹ Individual states have adopted certified question laws, and the Supreme Court has supported states' efforts to help "build a cooperative judicial federalism."¹⁵⁰ A judge on the United States Court of Appeals for the First Circuit made much less flattering remarks about them.¹⁵¹

Certified questions are, on their face, an innovative concept that theoretically solves many abstention-related problems. They suffer, however, from the lack of uniformity across the states. This is seen from the perspective of both timeliness and quality of the answer. Unfortunately, certified questions will only help expedite a case so long as the highest court in the state answering the question is willing to cooperate.

The National Conference of Commissioners on Uniform State Laws drafted the Uniform Certification of Questions of Law Act to serve as a recommendation for states interested in adopting the certified

146. Doe v. McCulloch, No. 15SL-CC01891, slip op. at 12–13 (Mo. Cir. Ct. Dec. 13, 2016), *aff'd*, No. ED105181 (Mo. Ct. App. Dec. 12, 2017).

147. Doe v. McCulloch, No. ED105181, slip op. at 8–10 (Mo. Ct. App. Dec. 12, 2017), *motion for transfer to Supreme Court filed*, No. SC96950 (Mo. Feb. 13, 2018).

148. Jonathan Remy Nash, *The Uneasy Case for Transjurisdictional Adjudication*, 94 VA. L. REV. 1869, 1892 (2008).

149. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 678 (1995).

150. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

151. Selya, *supra* note 149, at 681 (“[T]he beauty of certification, like the beauty that Hollywood cherishes, is only skin-deep”).

question procedure.¹⁵² Variation still exists, however, between the procedures eventually adopted by the states.¹⁵³ This variation takes the form of different standards for posing a question to the state court, and which courts are permitted to issue question to the state court.¹⁵⁴

Access tends to be the first bar to a successful certified question. The highest court in some states will outright refuse to hear a question posed by certain courts.¹⁵⁵ The certified question procedure has gained popularity in the country over the years, but still has not reached every state.¹⁵⁶ North Carolina's lack of a certified question process is especially notable when considering that every other state in the country, the District of Columbia, Guam, Puerto Rico, and the Northern Mariana Islands all have at least some variation on this procedure in place.¹⁵⁷ Even if every jurisdiction implements a certified question procedure, the variation in courts allowed to present such a question means a litigant's ability to have her case fully decided in the federal forum of her choice could be at the mercy of a state supreme court's policy on the procedure.

Even when access itself is not an issue to presenting a certified question, variation still exists on the quality of the response to the question. The highest court in New York has been open to certification, even reframing the question to "make [it] more readily answerable[.]

152. UNIF. CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1995).

153. See Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN ST. L. REV. 377, 392 n.107 (2010) (contrasting the level of clarity between the highest courts in New York and New Jersey in answers to certified questions).

154. See *id.* at 398–99 (comparing Pennsylvania's enumerated standards for posing certified questions with New Jersey's lack of standards, with Pennsylvania allowing any Court of Appeals to certify a question as opposed to New Jersey only allowing questions from the Third Circuit); see also *id.* at 403–04 (noting Delaware's broad acceptance of certified questions from any federal court at the appeals or district level, along with the highest appellate court in any state, and any Delaware court).

155. See *supra* note 154 and accompanying text (illustrating variation in acceptable certifying courts for Pennsylvania, New Jersey, and Delaware).

156. Acquaviva, *supra* note 153, at 383–85 (noting that only four states had a certified question procedure in 1967, but now only North Carolina lacks such a process).

157. Michael Klotz, Note, *Avoiding Inconsistent Interpretations: United States v. Kelly, the Fourth Circuit, and the Need for a Certification Procedure in North Carolina*, 49 WAKE FOREST L. REV. 1173, 1175 (2014). North Carolina has introduced a bill for the 2017 session that would implement a procedure for certified questions. H.B. 157, Gen. Assemb., 2017 Sess. (N.C. 2017).

and . . . remov[ing] . . . other obstacles that may not have been apparent at the time of certification.”¹⁵⁸ The court has similarly made an effort to answer the question as completely as possible, even when that pertains to issues not explicitly presented in the question.¹⁵⁹ New York has also done well to consider timeliness when answering questions, at one point holding an average initial response time—whether the court will accept or reject the question—of six weeks and answer production in six months.¹⁶⁰

While New York may exemplify some of the more beneficial aspects of certification, other courts illustrate how a lack of uniformity in the process creates disparate outcomes for litigants in different parts of the country.¹⁶¹ The Michigan Supreme Court has been characterized as, “to say the least, . . . not very receptive to the certified question.”¹⁶² The court has often declined to answer certified questions, refused to state the reasons for not answering, and has been “even more hostile” to questions presented by federal district courts.¹⁶³ In a recent answer to a certified question, Chief Justice Young began his concurring opinion by clarifying that he wrote “only to explain why, given my longstanding views on the questionable constitutionality of responding to certified questions from federal courts, I choose to participate in responding to the instant certified question.”¹⁶⁴ Young’s opinion is that the court should only answer certified questions “when the Michigan legal issue

158. Kaye & Weissman, *supra* note 122, at 420.

159. *Id.* at 420–21.

160. *Id.* at 397.

161. It is worth noting that while New York’s response quality and timeliness are laudable, the state does not allow for questions to be posed from federal district courts. N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a) (2016).

162. M. Bryan Schneider, Note, “*But Answer Came There None*”: *The Michigan Supreme Court and the Certified Question of State Law*, 41 WAYNE L. REV. 273, 315 (1994).

163. *Id.* at 315–17.

164. *Deacon v. Pandora Media, Inc. (In re Certified Question from the U.S. Court of Appeals for the Ninth Circuit)*, 885 N.W.2d 628, 634 (Mich. 2016) (Young, C.J., concurring). Chief Justice Young does bring up a valid concern about the constitutionality of certified questions. Given that many states have constitutions modeled after the U.S. Constitution, certified questions could run afoul of the prohibition against advisory opinions. For a discussion of the constitutionality of certified questions, using Michigan’s constitution as an example, see Schneider, *supra* note 162, at 308–12.

is a debatable one and pivotal to the federal case that prompted the request for the certified question.¹⁶⁵

Timeliness lies at the crux of easing the burden on litigants, and state courts vary in their ability to satisfy that element through certified questions. Judge Bruce Selya of the United States Court of Appeals for the First Circuit noted that after certifying a question to the Supreme Court of Puerto Rico, the court did not respond until years later and stated that it would not be answering the question.¹⁶⁶ While this incident lies on the extreme side, it is not an uncommon occurrence.¹⁶⁷

The mechanisms currently in place—*England* reservations and certified questions—both do well in an ideal world. An *England* reservation can ensure that the right to return to a federal district court is protected, but protecting against the additional burdens of abstention is beyond the scope of the mechanism. Certified questions have the potential to help ease the burden on litigants significantly, but its usefulness is largely controlled by the state courts, and it suffers from a lack of uniformity to be a conclusive answer to the difficulties abstention creates.

III. SOLUTIONS AND CONSEQUENCES TO CHANGES IN ABSTENTION

The purpose of these solutions is to create a system that works as efficiently as possible while deferring as much as possible to the plaintiff's choice of the federal forum. To the extent that any proposed changes to the current system are ambiguous in their application to a case, the preference should be to allow the litigant to remain in federal court.

This Note aims to codify only certain aspects of the current abstention doctrines. Generally, the proposal is to alter the requirements for when *Pullman* and *Burford* abstention can be invoked, to abolish the practice of *Thibodaux* and *Younger* abstention entirely, and to make *Colorado River* abstention more easily invoked.

165. *Deacon*, 855 N.W.2d at 634 (quoting *M.M. v. Soc. Sec. Comm'r (In re Certified Question from the U.S. Dist. Court for the W. Dist. of Mich.)*, 825 N.W.2d 566, 573 (Mich. 2012) (Young, C.J., dissenting)).

166. Selya, *supra* note 149, at 681.

167. *See id.* at 681 n.18 (noting that delay is the biggest problem in the procedure and collecting cases in which the state court delayed answering certified questions by a range of thirteen months to six years).

A. Expand the Use of Certified Questions

Certified questions are a source of untapped potential. While in some jurisdictions the process works quite well, it suffers from a lack of uniformity across the country.¹⁶⁸ Since this is still largely a state-controlled mechanism, there is only so much that can be done, but adding federal guidelines built around the notion of certified questions can allow for federal courts to maneuver with greater ease regardless of a given state's disposition on the subject.¹⁶⁹

To account for differences in various state statutes and rules governing certified questions, a federal statute covering certified questions can give a federal court options when a state does not provide specific protections. The first step would be to introduce a provision that leads the federal courts away from abstention in favor of certified questions where available. This provision would bar the courts from abstaining from a case when a certified question would otherwise resolve the issue.

The next consideration would be the timing of the answer to the question. New York prided itself on being able to answer questions in an average time of six months.¹⁷⁰ Pennsylvania requires all questions be resolved within sixty days.¹⁷¹ California does not specify a time for answering certified questions, but the California Constitution suspends the salary of any judge before whom a question remains pending for ninety days after being submitted for decision, although this does not account for the amount of time it takes from certification to submission.¹⁷² To ensure uniformity over timing, the proposed legislation will include a provision requiring the federal court to withdraw the question if an answer has not been produced within six months. This would give the state court adequate time to respond, but also protect litigants from having to postpone their cases for longer than necessary to reasonably allow the state to be heard on the issue.

Should the state court decline to answer the question, the federal court would continue to move forward with the case. If the state court decides it does not want to answer the question, the federal court can treat that non-response as implied approval for a federal decision on

168. *See id.* at 681.

169. As a theoretical exercise, Judge Selya opined on Congressional action requiring state courts to accept and answer certified questions. Aside from constitutional concerns, Judge Selya noted that such a one-way provision would never work, as “cooperative judicial federalism cannot be force-fed to the states without destroying both the spirit and the utility of the practice.” *Id.* at 684.

170. Kaye & Weissman, *supra* note 122, at 397.

171. PA. SUP. CT. INTERNAL OPERATING P. § 8(B).

172. CAL. R. CT. 8.548; CAL. CONST. art. VI, § 19.

the state law issue. In many cases regarding *Pullman* and *Burford* abstention, this process could essentially obviate their use.

This provision could, first and foremost, pose a great risk of the “friction” that the *Pullman* Court warned about.¹⁷³ While this could potentially be a step forward for efficient litigation in federal courts, it would undoubtedly impose burdens on the highest courts in each state. Increasing the number of questions posed to the state courts could lead to the state courts simply declining to answer the questions, especially if this process begins to erode cooperative federalism in the courts.

A more optimistic look on the provision is that the state courts can utilize truncated proceedings to exercise more control over how the federal courts interpret unsettled areas of law. Should state courts look to the provision as an opportunity, the consequences would rise above adding more work without increased results. Should the state court look to the provision as an insult,¹⁷⁴ at least the uniform timing would prevent the litigant from being too negatively impacted by a long delay.¹⁷⁵ A compromise, if necessary, could be to allow the state courts, in their response, to decline to answer while simultaneously requesting abstention from the federal courts.¹⁷⁶

Ultimately, a federal provision on certified questions would ideally solve the problem of the lack of uniformity and ease the burden of prolonged litigation, while it would also allow the state courts a mechanism by which they can influence the interpretation of their own laws. It would take good faith from all involved in order to work, but it gives all parties something to gain. Certified questions as currently used are,

173. While this Note takes the position that communication and collaboration—principles with which this proposed legislation was designed—promote harmony between the state and federal courts, this may not be a widely accepted position. See Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 162 (2009) (“[S]tate courts have the power and duty to address federal questions When a state court answers a certified question, however, it has been deprived of this power.”).

174. See *id.* at 166 (“Federal judges confronted with an open and challenging question of state law should see the case as a reason for harder work and deeper thought, not quitting the field. The alternative is not comity, but disrespect for states”). This Note agrees with Professor Long that federal judges should be inclined to tackle unanswered questions, even if they pertain to state issues, but further argues that certified questions are much better suited than abstention in the rare circumstances outlined above.

175. Judge Selya’s two-to-three-year wait time to hear that the Supreme Court of Puerto Rico will be declining to answer the certified question is completely unacceptable. See Selya, *supra* note 149, at 681.

176. Whether the federal court grants the request is the first in a potentially long series of questions about this approach, but this Note takes the stance that cooperative federalism can be made stronger through communication.

at least on a national level, underutilized, and an improvement can do well to reconcile the various policy goals at play.

B. Additional Requirements for Pullman and Burford Abstention

Notwithstanding the previous Section, the *Pullman* Court's "friction" rationale is, at best, too abstract. While there can be some benefit to state supreme courts being the first to interpret the laws of their jurisdictions, the fact that a predictive federal court ruling could one day be displaced by a state supreme court ruling is a concern outweighed by the cost to litigants. And while the Court has anchored *Burford* abstention to a more predictable set of circumstances, it should be interpreted more narrowly to reduce the transaction costs that further litigation would entail.

Even if the use of certified questions is expanded, changing state laws individually is not an effective option.¹⁷⁷ Thus, the proposals in Part III.A must deal with the reality that not all state courts accept certified questions from federal district courts. Thus, the proposed legislation requires contingencies for instances in which certified questions are not possible.

Rather than putting the focus of *Pullman* and *Burford* on how unclear a state law may be or how complex a state regulatory system may be, the focus should fall onto the possible outcome. The federal district judge should abstain from ruling on the case only if the state's interest in hearing the case first is both overwhelmingly strong and a decision on the state-law issue will have a unique impact on the state.¹⁷⁸ While somewhat subjective in nature, this is meant as an extremely high bar to act as a general deterrent against the use of abstention in these circumstances. This should be discretionary for the judge, and an appellate court can review the decision for abuse of discretion. While determining whether to abstain or hear the case, a federal district judge should always analyze the situation with a weight already placed on the side of not abstaining.¹⁷⁹

The general aim of this proposal is to promote leaving the case within federal jurisdiction. Possible consequences could be abuse of discretion by district judges, as they could abstain for subjective reasons.

177. See *supra* note 169 and accompanying text.

178. While this language is purposely vague, the circumstances in *Reetz v. Bozanich*, 397 U.S. 82 (1970), come to mind as a proper use of abstention for this reason. Because of the unique and powerful impact commercial salmon fishing has on Alaska and its residents, abstaining to allow Alaska a chance to shape the issue moving forward was the correct decision. *Id.* at 86–87.

179. In the event that a state's highest court requests abstention in a certified question response, the weight should instead be placed on the side of abstaining.

An appeal on a decision to abstain or to not abstain would increase litigation costs, but at least with this method the costs are being expended in the litigant's original choice of forum.

Another danger to raising the bar for *Pullman* and *Burford* abstention is forum shopping. If federal courts in a given state are coming to different conclusions on important questions of state law, litigants may try to use this to their advantage when bringing suit.¹⁸⁰ This could be counteracted on appeal, which would generally open the door to posing a certified question to the state court. So even if forum shopping begins to take place, the state would have the motive and opportunity to address the issue through the certified question procedure.

C. Abolish Thibodaux and Younger Completely

To the extent that the proposed solutions do not cover everything, it is preferable that the lower courts not abstain when they should rather than abstain when they should not. Therefore, to the extent that abolishing *Thibodaux* and *Younger* brings more litigants to federal courts than there otherwise should be, that is considered a feature, not a bug.

While this Note is focused more on the practical effects of abstention than on its source of power, it is worth noting that in his separation of powers argument, Martin Redish wrote that *Thibodaux* abstention is “[b]y far [one of] the least justifiable forms of abstention.”¹⁸¹ Because *Thibodaux* directly contradicts a congressional statute giving jurisdiction in diversity cases, and because diversity jurisdiction was designed to avoid out-of-state bias, it should no longer be used.¹⁸²

Younger is peculiar because of its relationship with the Anti-Injunction Act, both being mechanisms for prohibiting the injunction of a state court proceeding in certain circumstances.¹⁸³ Since the Anti-Injunction Act covers many of the same dangers against which *Younger* tries to protect, the Anti-Injunction Act can pick up a significant

180. The extent to which modifying abstention may influence the viability of forum shopping may necessarily be undesired, at least within the larger context of current norms. See Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 291 (1996) (“There are no uniform opinions on the acceptability of filing lawsuits in given venues in order to obtain more favorable laws or more favorable juries. But the overwhelming majority of decisions accepts these two types of forum-shopping as legitimate tactical maneuvers.”).

181. Redish, *supra* note 114, at 98.

182. *Guar. Tr. Co. v. York*, 326 U.S. 99, 111 (1945) (“Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias.”).

183. See *supra* Part I.D (discussing *Younger* and its relationship with the Anti-Injunction Act).

amount of slack should *Younger* abstention no longer exist. And again, to the extent that this leads more litigants to remain in federal court, that is not considered troublesome.

D. Expand Colorado River Abstention

Courts should feel more empowered to abstain based on *Colorado River* abstention. While this may appear odd, given the largely anti-abstention sentiment conveyed thus far, *Colorado River* provides the courts, both state and federal, with an opportunity to avoid the redundant practice of working through the same issues more than once, or to avoid working through multiple issues in separate forums all at once.¹⁸⁴

A strict first-in-time rule may be on the extreme side, but it should be one of the most important factors in considering whether the court should abstain. The Supreme Court has since expanded on its initial factors for *Colorado River* abstention, and that provides a good starting point for codification. Essentially, if there are two cases on the same issue occurring simultaneously, a federal court should give serious consideration to abstention. So long as the litigants can be afforded an adequate forum—which should not be a problem within the United States¹⁸⁵—a reduction of judicial waste should take precedence. While the current system urges *Colorado River* abstention in only the clearest cases, this ought to be changed in order to allow federal courts more freedom to take measures to ease the burden on litigants.

IV. PROPOSED ABSTENTION LAW

1. A federal court may abstain from hearing a case arising under federal law when:

(A) The case contains an issue of state law on which no definitive guidance can be found from the state's highest court, and:

(1) The state does not allow the federal court to pose a certified question of law;

(2) A reasonable construction of the issue of state law would render deciding a constitutional issue unnecessary;

184. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983) (“There is no force here to the consideration that was paramount in *Colorado River* itself—the danger of piecemeal litigation.”).

185. Forum adequacy is typically an analysis by U.S. courts of foreign judiciaries, not domestic. *See, e.g.*, Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1460 (2011).

- (3) The state's interest in deciding the issue in its own judicial system is strong; and
 - (4) The issue has a unique impact on the state.
- (B) The case exists alongside a parallel state court proceeding, and after balancing the following factors, with an extra weight added to abstention, abstaining would promote judicial economy in an adequate forum:
- (1) Which forum first claimed jurisdiction;
 - (2) Relative progress made in each proceeding;
 - (3) Inconvenience of the forum;
 - (4) Desirability of avoiding piecemeal litigation;
 - (5) Source of the law in question.
2. A federal court may certify a question of law to a state's highest court when:
- (A) The state has a certified question procedure; and
 - (B) The case contains an issue of state law on which no definitive guidance can be found from the state's highest court; but
 - (C) The federal court must withdraw the question and resume proceedings if the state does not respond within six months.

CONCLUSION

While abstention involves several competing interests, paramount among them should be a reduction in judicial waste with the cost to the litigants kept in mind. The courts have thus far used abstention in a manner that solves only a few problems, if any, while significantly increasing the cost to the individuals involved in the case. In some circumstances, this may only be a monetary burden, but in other cases, like that of Grand Juror Doe, current abstention policy can have the effect of chilling free speech and nullifying an individual's desire to exercise his or her constitutional rights.

Ultimately, creating a better use of abstention is difficult given the elements of federalism at play between the federal and state court systems. While this proposed legislation can only make an impact on the federal side of this issue, it is drafted with the goal of ensuring efficient litigation in an adequate forum, doing its best to ensure the plaintiff's choice of venue. Reforming abstention doctrines into a federal law not only promotes a more streamlined judicial system, but it also gives more

clarity to judges confronted with these situations. Both outcomes hopefully work to create a more efficient judicial system for those who choose to utilize it.

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