COMITY AND OUR FEDERALISM IN THE TWENTY-FIRST CENTURY: THE ABSTENTION DOCTRINES WILL ALWAYS BE WITH US—GET OVER IT!!

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I. INTRODUCTION .................................................. 375
II. THE CLASSIC ABSTENTION CASES ....................... 377
   A. Pullman Abstention ........................................... 377
   B. Burford Abstention ........................................... 379
   C. Colorado River Abstention ............................... 380
   D. Younger Abstention ........................................... 381
III. SOME CRITICISMS OF THE ABSTENTION DOCTRINES ........................................... 383
IV. THE ABSTENTION DOCTRINE IN THE TWENTY-FIRST CENTURY ....................... 387
   A. Overview .................................................... 387
   B. Pullman in the Twenty-First Century ................. 388
   C. Burford in the Twenty-First Century ................. 399
   D. Colorado River in the Twenty-First Century ........ 405
   E. Younger in the Twenty-First Century ................. 411
V. THE TALLY ON ABSTENTION IN THE TWENTY-FIRST CENTURY ................................. 418
VI. CONCLUSION .................................................. 424

I. INTRODUCTION

In the United States we are blessed—or cursed—with a legal system that contemplates parallel judicial processes. We have a federal court system and each state has a separate state court system. "Since

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1941 there has been considerable recognition of circumstances under
which a federal court may decline to proceed though it has jurisdiction
under the Constitution and federal statutes.\textsuperscript{1} "The cases in which
this has been recognized are usually referred to as the 'abstention doc-
trine.'\textsuperscript{2} "The abstention doctrine prohibits a federal court from decid-
ing a case within its jurisdiction so that a state court can resolve some
or all of the dispute."\textsuperscript{3} The purpose of such doctrine is to "preserve the
balance between state and federal sovereignty."\textsuperscript{4} "This constitutional
balance is 'often' referred to as federalism or comity."\textsuperscript{5} Scholars have
come to refer to not one, but a number of various types of cases which
reflect various notions of comity for purposes of abstention. In prac-
tice it is more precise to refer to the "abstention doctrines." These ab-
stention doctrines cases reflect complex considerations designed to
avoid friction between federal and state courts.\textsuperscript{6}

Although integral to the workings of state and federal courts, the
abstention doctrines have come under a legion of criticism from schol-
ars over the years. Such criticisms are unwarranted. We need ab-
stention in our parallel system of courts for the times that the
interests of various states must outweigh federal adjudications. There
is not an overabundance of such cases. The purpose of this article is to
review the theories of the various classic abstention doctrines cases
and their criticisms. The article will then review and analyze the ab-
stention cases decided by the United States Courts of Appeals since
the beginning of our new century in order to determine whether they
follow the dictates of the classic abstention cases. Such analysis will
reveal that in our parallel court system, comity and federalism de-
mand that the abstention doctrines should always be with us. Absten-
tion is not just a way for federal courts to shirk responsibility when it
actually has jurisdiction. The critics of abstention must accept this—
they must get over notions that the abstention doctrines must be, in
some way, neutralized or abolished through legislation. In the
twenty-first century, the federal courts are doing a fine job on a case-
by-case basis of recognizing and implementing the need or lack of need
for abstention.

\textsuperscript{1} Charles Alan Wright et al., Law of Federal Courts § 52, at 325 (6th ed.
2002).
\textsuperscript{2} Id.
\textsuperscript{3} James C. Rehnquist, Taking Comity Seriously: How To Neutralize The Absten-
\textsuperscript{4} Mathew D. Staver, The Abstention Doctrine; Balancing Comity With Federal
Court Intervention, 28 Seton Hall L. Rev. 1102, 1102 (1998).
\textsuperscript{5} Staver, 28 Seton Hall L. Rev. at 1102.
\textsuperscript{6} Wright et al., supra note 1, § 52.
II. THE CLASSIC ABSTENTION DOCTRINE CASES

Scholars and courts often refer to at least four distinguishable lines of abstention doctrines cases.7 These cases involve “different factual situations, different procedural consequences, different support in the decisions of the Supreme Court, and different arguments for and against their validity.”8 For the purpose of this article we will examine cases involving four different types of abstention doctrines that have appeared most often in recent cases. These four are the Pullman-type abstention; the Burford-type abstention; abstention to avoid duplicative litigation, frequently referred to as Colorado River-type abstention,9 and finally, Younger abstention, “which teaches that federal courts must refrain from hearing constitutional challenges to state actions under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts.”10 Let us review the classic cases from which the various abstention doctrines derive in order to understand criticism of the various doctrines, as well as obtaining an analytical framework to appraise the abstention cases decided in the twenty-first century.

A. PULLMAN ABSTENTION

With Pullman abstention, federal courts avoid decisions of federal constitutional questions when the case may be disposed of on questions of state law.11 The doctrine grows out of Railroad Commission v. Pullman Co.,12 the now famous 1941 Supreme Court case. The opinion was written by Justice Frankfurter and involved an order by the Texas Railroad Commission that no sleeping car could be operated on any railroad line in Texas unless the cars were in charge of an employee having the rank of Pullman conductor.13 This new order had strong racial overtones. The Court found that in those sections of Texas where the local passenger traffic was slight, trains carried only one sleeping car. Such trains, unlike trains having two or more sleepers, were without a Pullman conductor. Such sleeper was in charge of

7. WRIGHT ET AL., supra note 1 cautions: “[t]he Supreme court, the lower courts, and the commentators differ on how many abstention doctrines there are. Respectable support can be found for classifying the cases into two, three, four, or five categories. The number is of little significance, since the division is a mere organizational convenience.” WRIGHT ET AL., supra note 1, § 52, at 325 n.3.
8. WRIGHT ET AL., supra note 1, § 52.
9. Id.
10. Id. at § 52A, at 341-42.
11. Id.
12. 312 U.S. 496 (1941).
a Pullman porter.\textsuperscript{14} In 1941, all the Pullman conductors were white and all Pullman porters were black.\textsuperscript{15} Upon learning of the new Texas order, the Pullman Company brought an action “in federal district court to enjoin the Railroad Commission’s order.”\textsuperscript{16} The Pullman company “assailed the order as unauthorized by Texas law, as well as violative of the Equal Protection, the Due Process [Clause], and the Commerce Clause[s] of the Constitution.”\textsuperscript{17} The Pullman Porters, through their union, were allowed to intervene in the suit and objected to the order on the ground that it discriminated against African Americans in violation of the Fourteenth Amendment to the United States Constitution.\textsuperscript{18}

The federal court convened a three judge panel which enjoined the enforcement of the order. The case went directly to the Supreme Court from the decree of the three judge panel.\textsuperscript{19} The Court found that the complaint of the Pullman porters tendered a substantial constitutional issue. Yet, the Court held that the issue was a sensitive one that touched on “social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open.”\textsuperscript{20} The Court held that constitutional adjudication could “be avoided if a definitive ruling on the state issue would terminate the controversy.”\textsuperscript{21} The Court then turned to a consideration of questions under Texas state law. Pursuant to Texas law, the Court found a statute that maintained, in relevant part, “[i]t is common ground that if the order is within the Commission’s authority its subject matter must be included in the Commission’s power to prevent unjust discrimination ... and to prevent any and all abuses in the conduct of railroads.”\textsuperscript{22} The Supreme Court found that even though three federal judges had looked at the statute, the federal courts could not be the final word on Texas law.\textsuperscript{23} The last word on the meaning of the Texas statute, and therefore the last word on the authority of the Railroad Commission, belonged to the Texas Supreme Court. The Court reasoned that the “reign of law” was not “promoted if an unnecessary ruling of a federal court” could be “supplanted by a controlling decision of a state court.”\textsuperscript{24} The Court further reasoned that “the resources of equity

\begin{itemize}
\item \textsuperscript{14} \textit{Pullman}, 312 U.S. at 497.
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id. at} 497-98.
\item \textsuperscript{17} \textit{Id. at} 498.
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{Id. at} 498-99.
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id. at} 499.
\item \textsuperscript{23} \textit{Id. at} 499-500.
\item \textsuperscript{24} \textit{Id. at} 500.
\end{itemize}
ABSTENTION DOCTRINES

were equal to an adjustment that would avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."25

The Supreme Court remanded the case to the district court with directions to retain the case pending a determination of the state proceedings.26 The Court there reasoned that if there was "no warrant in state law for the Commission's assumption of authority there [was] an end to the litigation [and] the constitutional issue [did] not arise."27 On the other hand, if there were difficulties in the way, "the issue of state law could be settled by appropriate action on the part of the State to enforce obedience to the order."28 The Court held that "in the absence of any showing that these methods for securing a definitive ruling in the state courts cannot be pursued with the full protection of the constitutional claim, the district court should exercise its wise discretion by staying it hands."29 The classic Pullman abstention case dictates that the federal court stay but not dismiss the action while the state court resolves the issue of state law.

B. Burford Abstention

Burford abstention is also recognized by the federal courts. The doctrine is utilized "to avoid needless conflict with the administration by a state of its own affairs."30 The doctrine grew out of the case of Burford v. Sun Oil Co.,31 which, like Pullman, was a Texas case involving the Texas Railroad Commission. In the case, "Sun Oil attacked the validity of an order of the Texas Railroad Commission granting petitioner Burford a permit to drill four [oil] wells on a small plot of land" in East Texas.32 The proceeding, brought in federal district court, was based on diversity of citizenship of the parties because of Sun Oil's "contention that the order denied them due process of law."33 The district court refused to enjoin the order of the Railroad Commission. The Court of Appeals reversed the finding. The case went to the Supreme Court, where the district court's original decision was affirmed.34

The Supreme Court, in an opinion delivered by Justice Black, reasoned that abstention would be appropriate in this type of case. The

25. Id.
26. Id. at 501-02.
27. Id. at 501.
28. Id.
29. Id.
30. Wright et al., supra note 1, § 52, at 325.
34. Id. at 334.
Court held "that the questions of regulation of the industry by the State administrative agency, whether involving gas or oil prorating programs or Rule 37 cases, so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." The Court held further that the "state provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts . . . if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved . . . ." The Court concluded that "under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand." Unlike Pullman, which allows the district court to stay the proceedings while state court action is pursued, the federal action is dismissed entirely under Burford.

C. **COLORADO RIVER ABSTENTION**

The Colorado River abstention doctrine is sometimes invoked to avoid duplicative litigation, either in two different federal courts or in parallel proceedings in state and federal courts. This abstention doctrine is derived from the case of *Colorado River Water Conservation District v. United States*. In *Colorado River*, the United States brought suit in district court on its own behalf and on behalf of two Indian tribes seeking a declaratory judgment as to its rights to waters and their tributaries in the Colorado water division No. 7. "Shortly after the federal suit was commenced, one of the defendants in the suit filed an application in the state court for Division 7, seeking an order directing service of process on the United States in order to make it a party" to the proceedings in the state court "for the purpose of adjudicating all of the government's claims[—]both state and federal." "Several defendants and intervenors in the federal proceeding then filed a motion in the [federal] district court to dismiss on the ground that" the federal "court was without jurisdiction to determine water rights." The district court dismissed the case on the theory that the doctrine of abstention required deference to the state court proceedings. On appeal, the Tenth Circuit reversed.

35. *Id.* at 332
36. *Id.* at 333-34.
37. *Id.* at 334.
41. *Id.*
42. *Id.*
43. *Id.*
The Supreme Court, in an opinion written by Justice Brennan, recognized the general rule that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction." The Court also considered whether the district court's dismissal was appropriate under the doctrine of abstention. It found that the situation presented in Colorado River did not fit into any of the recognized abstention doctrines. Nevertheless, the Court held that "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist."

The exceptional circumstances found warranting dismissal of the federal suit in Colorado River were "(a) the apparent absence of any proceedings in the federal district court, other than the filing of the complaint, prior to the motion to dismiss, (b) the extensive involvement of state water rights occasioned by this suit naming 1,000 defendants, (c) the 300 mile distance between the district court in Denver and the [state] court in division 7, and (d) the existing participation by the Government" in state court proceedings in water Divisions 4, 5, and 6. Colorado River reveals that the factual situation in that case was so unusual and the rule "that only 'exceptional circumstances' [would] permit dismissal[s] 'in parallel proceedings' was so strong, that the case argues against, rather than for, the use of this type of abstention in routine cases."

D. Younger Abstention

The doctrine of abstention that grew out of the case of Younger v. Harris is known as "Our Federalism." This doctrine teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts.

In Younger, the "[a]ppellee, John Harris, Jr. was indicted in a California state court [and was] charged with violation of [a] law known as the California Criminal Syndicalism Act." Harris "then filed a

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44. Id. at 817 (quoting McClellan v. Garland, 217 U.S. 268, 282 (1910)).
45. Id. at 813-17.
46. Id. at 818.
47. Id. at 820.
48. WRIGHT ET AL., supra note 1, at 339.
50. WRIGHT ET AL., supra note 1, § 52A, at 341-42.
complaint in federal district court, asking the court to enjoin Younger, the District Attorney of Los Angeles County, from prosecuting him on the grounds that such prosecution would be a violation of his rights to free speech and press as guaranteed under the First and Fourteenth Amendments.\footnote{52} The district court convened a three judge panel that held the California Criminal Syndicalism Act was "void for vagueness and overbreadth in violation of the First and Fourteenth Amendments."\footnote{53} The court issued an injunction restraining the district attorney from further prosecution of the pending state action against Harris.\footnote{54}

The United States Supreme Court, in an opinion delivered by Justice Black, reversed the decision of the district court.\footnote{55} The Court held that relief was barred because of "the fundamental policy against federal intervention with state criminal proceedings"\footnote{56} and the "absence of factors necessary under equitable principles to justify federal intervention."\footnote{57} The \textit{Younger} doctrine holds that "a federal court should not enjoin a state criminal prosecution begun prior to the institution of suit except in very unusual situations where necessary to prevent immediate irreparable injury."\footnote{58} Of course, there is ordinarily no irreparable injury if the threat to the plaintiff's federally protected rights can be eliminated by the defense of a single criminal prosecution, and "even irreparable injury is insufficient unless it is both great and immediate."\footnote{59} The Supreme Court did, however, make clear that a federal injunction could run against a pending state criminal prosecution on a "showing of bad faith, harassment, or other unusual circumstance that might call for equitable relief."\footnote{60}

The Supreme Court gave the name "Our Federalism" to the concept of comity at the heart of the decision in \textit{Younger}. "Our Federalism" was to be a doctrine of abstention that grew out of a "notion of comity, that is, a proper respect for the state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the national

\footnotesize{\textsuperscript{52}} \textit{Younger}, 401 U.S. at 38-39.

\footnotesize{\textsuperscript{53}} Id. at 40.

\footnotesize{\textsuperscript{54}} Id.

\footnotesize{\textsuperscript{55}} Id. at 54.

\footnotesize{\textsuperscript{56}} Id. at 46.

\footnotesize{\textsuperscript{57}} Id. at 54.

\footnotesize{\textsuperscript{58}} \textit{Wright et al.}, supra note 1, § 52A, at 345 (quoting Samuels v. Mackell, 401 U.S. 66, 69 (1971)). \textit{Samuels} was decided the same day as \textit{Younger}. \textit{Samuels}, 401 U.S. at 66.

\footnotesize{\textsuperscript{59}} \textit{Younger}, 401 U.S. at 46.

\footnotesize{\textsuperscript{60}} Id. at 49.
Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.\textsuperscript{61}

Younger abstention has been expanded by the Supreme Court to apply to more than state criminal proceedings. In \textit{Samuels v. Mackell},\textsuperscript{62} the Court held that in cases where the state criminal prosecution began prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in deciding whether to issue a declaratory judgment.\textsuperscript{63} If an “injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well.”\textsuperscript{64} In 1975, the Supreme Court expanded Younger with its decision in \textit{Huffman v. Pursue, Ltd.} to encompass quasi-criminal cases.\textsuperscript{65} In the 1980s, Younger abstention was extended to quasi-judicial proceedings.\textsuperscript{66} In 1987, the Supreme Court extended the Younger abstention to civil proceedings.\textsuperscript{67} In the classic sense, the main factors a federal court must analyze in determining whether Younger abstention is warranted are whether the federal proceedings “interfere with an ongoing state judicial proceeding that implicates important state interests and affords an adequate opportunity to raise federal claims.”\textsuperscript{68}

III. SOME CRITICISMS OF THE ABSTENTION DOCTRINES

Commentators and scholars criticize the abstention doctrines on a variety of grounds. Charles Alan Wright reminds us that “[t]he price of Pullman-type abstention is not cheap.”\textsuperscript{69} “In a number of [well-known] cases it has led to delays of many years before the case was finally decided on its merits or limped to an inconclusive end.”\textsuperscript{70} Wright also bemoans the fact that with Pullman-type abstention many federal litigants would not get their day in court. “In \textit{Pullman}, the Supreme Court ordered the trial court to retain jurisdiction [of the case] while parties sought a state ruling on the state issues.”\textsuperscript{71} “The

\textsuperscript{61} Id. at 44.
\textsuperscript{62} 401 U.S. 66 (1971).
\textsuperscript{63} Staver, 28 SETON HALL L. REV. at 1122.
\textsuperscript{64} Id.
\textsuperscript{65} 420 U.S. 592 (1975).
\textsuperscript{68} Joseph A. v. Ingram, 275 F.3d 1253, 1267 (10th Cir. 2002) (quoting J.B. v. Valdez, 186 F.3d 1280, 1291 (10th Cir. 1999)).
\textsuperscript{69} Wright \textit{et al.}, supra note 1, § 52, at 327.
\textsuperscript{70} Id. (citing Spector Motor Serv. v. O’Connor, 340 U.S. 602 (1951)) (taking seven years to decide); England v. Louisiana State Bd. Of Medical Examiners, 384 U.S. 885 (1966) (taking nine years to decide); United States v. Leiter Minerals, Inc. 381 U.S. 413 (1965) (dismissing the case as moot eight years after abstention ordered).
\textsuperscript{71} Wright \textit{et al.}, supra note 1, § 52, at 328.
Court held that the federal constitutional objections must be presented to the state court; so that it may consider [the issues of] state law in the light of the constitutional claims.\textsuperscript{72} Wright notes, however, with such procedure “if the state court should decide the federal issue, on ordinary principles of res judicata this would be a binding determination, subject to review only in the Supreme Court, and there would be nothing left for the federal court to decide in the exercise of jurisdiction it had retained.”\textsuperscript{73} “Since the Supreme Court cannot hear every case tendered to it, this would mean that many litigants never would have a hearing in a federal court [even] though they were asserting claims based on federal law.”\textsuperscript{74}

Scholars Rex Lee and Richard Wilkins argue that “[t]he wisdom of abstention doctrines is as questionable as its constitutional footing because under Article III of the Constitution Congress created the lower federal courts and specified their jurisdiction.”\textsuperscript{75} In this regard they note that because “[t]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends, [t]hey cannot abdicate their authority or duty in any case in favor of another jurisdiction.”\textsuperscript{76} Despite this well established principle, Lee and Wilkins argue that the abstention doctrines permit federal courts “to decline the exercise of congressionally conferred jurisdiction.”\textsuperscript{77} They raise the question “whether the judiciary has the authority to ignore the dictates of valid jurisdictional . . . statutes.”\textsuperscript{78} They agree with those who argue that abstention doctrines could be characterized as “judicial usurpation of legislative authority in violation of the principle of separation of powers.”\textsuperscript{79}

Lee and Wilkins further argue that legislation is needed since the federal courts have usurped traditional legislative prerogatives legislation with the creation of the abstention doctrines. They propose federal legislation that would direct when abstention could properly be invoked and which would minimalize cost to litigants.\textsuperscript{80} The legislation they propose to accomplish these ends appears rather simple.\textsuperscript{81}

\renewcommand{\thefootnote}{\arabic{footnote}}

\begin{footnotes}
\footnotetext{72}{Id.}
\footnotetext{73}{Id. at 328-29.}
\footnotetext{74}{Id. at 329.}
\footnotetext{76}{Lee & Wilkins, 1990 B.Y.U. L. Rev. at 336.}
\footnotetext{77}{Id.}
\footnotetext{78}{Id.}
\footnotetext{79}{Id. at 337}
\footnotetext{80}{Id at 362-63.}
\footnotetext{81}{Id. at 372 (describing various legislative proposals).}
\end{footnotes}
However, since publication of their 1990 article, Congress has proposed no legislation to codify the use of the abstention doctrines and probably never will.

Lee and Wilkins should be reminded that Congress has already passed some legislation to that effect. Congress' original statute, passed in 1793 and known as the Anti-Injunction Act, prohibits a federal court from issuing a writ of injunction "to stay proceedings in any court of a state." 82 That statute has been updated and now is codified as 28 U.S.C. § 2283. 83 The statute as originally written and in its present form was "calculated 'to prevent needless friction between state and federal courts' and 'represents Congress' considered judgment as to how to balance the tensions inherent in' a dual system of courts." 84 The United States Supreme Court, however, has held that "actions brought under 42 U.S.C. § 1983 are specifically excepted from the Anti-Injunction Act," and the statute has been interpreted as to not ban "federal courts from enjoining enforcement of a state court order." 85

A review of the cases undertaken later in this article demonstrate the competence and thoroughness of the federal circuit courts in recognizing whether they must accept jurisdiction and when comity would counsel a wise staying of the courts' hand. Despite Lee and Wilkins' proposals, legislation is not needed with respect to abstention. The federal courts are doing what needs to be done with respect to abstention and there certainly appears to be no abuse by litigants.

Another scholar, James C. Rehnquist, "contends that the abstention doctrine should be reoriented to reflect the Constitution's fundamental forum neutrality." 86 It is Rehnquist's thesis that "a federal court's abstention is justified only when a duplicative suit is first filed in state court and provides the litigant with an adequate opportunity to raise her federal claim." 87 He posits a "first filed rule." 88 Rehnquist's rule of abstention provides: "[a] federal court should abstain if, and only if, the federal plaintiff has an adequate opportunity to liti-

82. Wright et al., supra note 1, § 47, at 299.
83. 28 U.S.C. § 2283 (2000). The statute provides: "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Id.
85. Staver, 28 Seton Hall L. Rev. at 1103.
86. Rehnquist, 46 Stan. L. Rev. at 1049.
87. Id.
88. Id. at 1068-69.
gate his federal claim in a duplicative suit already pending in state court.  

Rehnquist himself acknowledges the main problem with such a rule. He writes: "as with all general rules, the edges of this one beg many questions. What does ‘duplicative’ mean? When is a case ‘pending’? How can state courts be made to abide by the principle of functional equivalence? What is an ‘adequate opportunity to litigate?’" If these questions can be answered, Rehnquist argues that his “first filed rule” would provide a simpler, cleaner and theocratically superior abstention doctrine. However, it is doubtful that various federal or state courts will be able to reach a consensus as to what “duplicative” means, when a case is “pending;” or what an adequate “opportunity to litigate” might be. What court would buy that “first filed rule?”

A more practical argument is made by Theodore B. Eichelberger, who recognizes that there are strong policy reasons underlying Pullman-type abstentions. He recognizes further that the doctrine invariably causes delay which can effectively deny a plaintiff his constitutional rights. Eichelberger argues that federal courts could avoid such difficult decisions “and at the same time reduce delay by using a certification procedure, rather than abstention, for resolution of the uncertain state law questions.” He also argues that “delay could be further reduced if the certification statutes required that state courts give priority on their dockets to certified questions in fundamental rights cases.”

He reminds us that “certification to state high courts of doubtful state law questions is a relatively recent development because until 1965, only Florida had an established certification procedure . . . .” By 1984, Eichelberger had found that twenty-four states and Puerto Rico had certification procedures. Today, forty-four states, the District of Columbia, and Puerto Rico have certification statutes. Although certification statutes vary among the states, Eichelberger found that the majority of those states “permit certification by the federal trial and appellate courts . . . .” “He also found that most such state statutes ‘require that the certified question be such that it could

89. Id. at 1068.
90. Id. at 1068 n.109.
92. Eichelberger, 59 Notre Dame L. Rev. at 1349.
93. Id.
94. Id.
95. Id. at 1348, 1349.
97. Eichelberger, 59 Notre Dame L. Rev. at 1349.
be determinative of the case." Nonetheless, not all of the states have adopted a certification statute.

In sum, commentators and scholars decry the abstention doctrines for a number of reasons, including Wright's complaints about cost, delay and uncertainty; Lee and Wilkins' questions concerning judicial usurpation of legislative authority; Rehnquist's arguments for a "first filed rule" to obviate the need for formal abstention doctrines; and Elchelberger's argument for the increased use of certification statutes to obviate the need for abstention. Yet, despite the protestations and suggestions by the scholars, it appears that the abstention doctrines are still with us. Despite the cost and the delay that the doctrines may sometimes bring, there has been no federal legislation to codify abstention and take it away from the federal courts. We already have an anti-injunction statute in force. The courts will never be able to agree on a "first filed rule." And even with forty-four states now having certification statutes abstention related to abstention sometimes fall between the cracks of how such statutes may be written. It is now the twenty-first century and federal courts are still churning out decisions which demonstrate the need for abstention. To the critics of abstention this commentator says, "Get over it!" The abstention doctrines will always be with us as long as we continue to recognize the necessity of comity and "Our Federalism" in our parallel judicial system.

Perhaps it would be better if the commentators and scholars would take a look at the abstention cases that have been decided since the beginning of the twenty-first century. A review of those cases would show them the "sky is not falling" with respect to the use of the abstention doctrine. The next sections of this article survey twenty-first century abstention doctrine cases and analyzes them against the backdrop of their classical underpinnings. Such a review will show the critics that as a result of the need for comity and "Our Federalism," the sky is truly not falling with respect to abstention.

IV. THE ABSTENTION DOCTRINES IN THE TWENTY-FIRST CENTURY

A. Overview

A search of the federal case law on abstention since the year 2000 revealed that 163 federal cases made some mention of abstention. Ninety-three of the cases involved abstention as a major issue in the
Approximately seventy-five of these cases were reported decisions. This article surveys only those abstention doctrine cases that are reported in the West Federal Reporter Series. Abstention doctrine cases were reported in all circuits, except for the United States Courts of Appeals for the District of Columbia and the Federal Circuit. This in itself shows, anecdotally, that abstention is still well with us into the twenty-first century.

The search of the case law revealed no Supreme Court cases deciding an abstention question in the twenty-first century. The only Supreme Court decision found to even mention abstention was Stenberg v. Carhart, which involved a constitutional challenge to the State of Nebraska's statute banning partial birth abortion. In an opinion written by Justice Breyer, the Supreme Court held the statute unconstitutional because it lacked any exception for the preservation of the health of the mother and was overbroad. In answer to the Nebraska Attorney General's argument that the Supreme Court should accept a narrowing interpretation of the partial birth abortion statute or certify the question to the Nebraska Supreme Court, Justice Breyer wrote:

Finally, the law does not require us to certify the state-law question to the Nebraska Supreme Court . . . . Even if we were inclined to certify the question now, we cannot do so. Certification of a question (or abstention) is appropriate only where the statute is "fairly susceptible" to a narrowing construction . . . . We believe it is not.

Not much wisdom from the Supreme Court on abstention in the twenty-first century. Any action with respect to abstention was in the circuits. Let us review how the circuits handled the various types of Pullman, Burford, Colorado River, and Younger abstention cases.

B. PULLMAN IN THE TWENTY-FIRST CENTURY

In reviewing Pullman abstention in the twenty-first century we must be mindful of the general rule of Pullman. That is, Pullman counsels abstention by federal courts in order to avoid decisions of federal constitutional questions when the case may be disposed of on questions of state law. Courts often explain that in order for Pullman abstention to be appropriate, the case must involve "(1) a federal constitutional challenge to a state action and (2) an unclear issue of
state law that, if resolved, would make it unnecessary for [a federal court] to rule on the federal constitutional question.\textsuperscript{104}

Since the turn of the twenty-first century, \textit{Pullman} abstention was found to be a major issue in twelve reported cases. \textit{Pullman} abstention was found appropriate in four of such cases. Those four cases originated in the First, Fifth and Eleventh Circuits. In these cases we will see the classic \textit{Pullman} situations concerning constitutional questions and unclear state law. What will appear "unclassic" about these four cases is the number of times that the circuit court is the first to raise, \textit{sua sponte}, abstention as the deciding issue in the case.

In the first of these cases, \textit{Ford Motor Co. v. Meredith Motor Co.},\textsuperscript{105} the First Circuit held that \textit{Pullman} abstention was warranted. The facts reveal that Meredith Motor Company filed a protest with the New Hampshire Motor Vehicle Industry Board pursuant to that State's Motor Vehicle Franchise Act\textsuperscript{106} following Ford Motor Company's decision to relocate a competing dealer into Meredith's market area.\textsuperscript{107} "While that proceeding was pending, Ford filed this action in federal district court seeking a declaration that the [Franchise] Act was not retroactive and in the alternative, that retroactive application of the [Franchise] Act would violate the Contract and Due Process Clauses of the Constitution" of the United States.\textsuperscript{108}

\textsuperscript{104}. Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm., 283 F.3d 650, 653 (5th Cir. 2002).
\textsuperscript{105}. 257 F.3d 67 (1st Cir. 2001).
\textsuperscript{106}. The relevant portions of the Franchise Act for purposes of this case provides:
I. All written or oral agreements of any type between a manufacturer, or distributor and a motor vehicle dealer shall be subject to the provisions of this chapter, and provisions of such agreements which are inconsistent with this chapter shall be void as against public policy and unenforceable in the courts or the motor vehicle industry board of this state.
II. Before any new selling agreement or amendment to an agreement involving a motor vehicle dealer and such party becomes effective, the manufacture, distributor, distributor branch or division, factory branch or division, or agent thereof shall, 90 days prior to the effective date thereof, forward a copy of such agreement or amendment to the New Hampshire Motor Industry Vehicle Board and to the dealer.
III. Every new selling agreement or amendment made to such agreement between a motor vehicle dealer and a manufacture or distributor shall include, and if omitted, shall be presumed to include, the following language: "If any provision herein contravenes the valid laws or regulations of the state of New Hampshire, such provision shall be deemed to be modified to conform to such laws or regulations; or if any provision herein, including arbitration provisions, denies or purports to deny access to the procedures, forums, or remedies provided for by such laws or regulations, such provisions shall be void and unenforceable; and all other terms and provisions of this agreement shall remain in full force and effect.
\textsuperscript{107}. Ford Motor Co., 257 F.3d at 68.
\textsuperscript{108}. \textit{Id.}
“The Board found Ford in violation of the Act.” The federal district court issued an order declaring that the [Franchise] Act was intended to be applied retroactively and that such application was constitutional. The First Circuit declared that "because the constitutional questions raised in the appeal rested on questions of state law that may be resolved by the New Hampshire state courts, we hold that Pullman abstention is proper in this proceeding."

The First Circuit observed in its opinion that "although the district court did not address the issue of abstention, we note that it was raised in the pleadings below and at oral argument . . . [that] a court may raise the issue of abstention sua sponte." The court, in assessing the appropriateness of abstention, had to determine "(1) whether there was substantial uncertainty over the meaning of the state law at issue; and (2) whether a state court's clarification of the law would obviate the need for a federal constitutional ruling." The court found both factors. First, with respect to state law, the court found that the "applicability of the state statute to contracts formed before its passage was unclear: this issue forms the crux of the dispute between Ford and Meredith and neither party has pointed to an authoritative New Hampshire decision that resolves the ambiguity." Second, the court found that Ford's federal claims relied entirely on its statutory claim; the Contracts and Due Process Clauses were implicated only if the state law was found to be retroactive. Consequently, the court reasoned that "a dispositive state court interpretation of this issue could eliminate entirely the need to address the constitutional issues." Finally, the court took into consideration the federalism concerns supporting abstention. In particular, the court alluded to that fact that "the implications of granting Ford its requested relief would be to declare that the Board lacked jurisdiction to hear the protest in the first instance, . . . an outcome that would 'disrupt substantially the review proceedings' then pending before the state court." The First Circuit here reasoned that "the avoidance of needless friction between the federal and state proceedings" carried weight in its

109. Id.
110. Id.
111. Id.at 67, 68 (citations omitted).
112. Id. at 71 n.3 (citing Pustell v. Lynn Pub. Schs., 18 F.3d 50, 51 n.1 (1st Cir. 1994) (citations omitted).
113. Id. at 71 (citations omitted).
115. Id. at 72 (quoting Pustell, 18 F.3d at 54).
116. Id. at 73 (quoting Bettencourt v. Bd. of Registration in Med., 904 F.2d 772, 777 (1st Cir. 1990)).
decision to abstain.117 The First Circuit vacated the judgment of the district court and remanded the case with an order for the district court to retain jurisdiction pending final review of the Board's decision in the New Hampshire state courts.118 These actions make for the classic Pullman scenario.

In Cruz v. Melecio,119 the First Circuit, also sua sponte, invoked abstention in a case involving members of a new political party seeking declaratory and injunctive relief against members of Puerto Rico's Election Commission.120 Cruz and another member of the party "challenged the constitutionality of certain provisions of Puerto Rico law regulating ballot access on the part of political parties."121 Cruz and the Partido Accion Civil ("Party") sought to register their party on a commonwealth-wide basis in order to have its candidates appear on the ballot in the November 2000 general election.122 In order to do so, they learned that they would have had to file notarized petitions with the Election Commission showing signatures for 100,000 registered voters within a seven day period.123

Viewing such hurdles as nearly insurmountable, the Party filed "for declaratory and injunctive relief in Puerto Rico's federal district court."124 The Party argued that the notarization requirement and the seven day deadline, separately and in combination, were violations of the First and Fourteenth Amendments' rights to free speech and association, and was also in violation of the rights "to participate meaningfully in the political process, to vote, and to enjoy equal protection of the laws."125 Melecio, the defendant and the Election Commission chairman, moved for dismissal of the federal action.126 "The Puerto Rico Attorney General intervened and joined Melecio's motion to dismiss" on the ground that the Party's actions were barred by res judicata.127 The reference to res judicata related to an earlier action filed by the party in a commonwealth court challenging the same ballot access requirements.128 The Party had lost in the trial court and had also lost in the appellate court.129 The commonwealth action was

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117. Ford Motor Co., 257 F.3d at 73.
118. Id.
119. 204 F.3d 14 (1st Cir. 2000).
120. Cruz v. Melecio, 204 F.3d 14, 17, 22 n.7 (1st Cir. 2000).
121. Cruz, 204 F.3d at 17.
122. Id.
123. Id.
124. Id.
125. Id. (discussing the Party's arguments).
126. Id. at 18.
127. Id. (citations omitted).
128. Cruz, 204 F.3d at 18.
129. Id.
on appeal to the Puerto Rico Supreme Court awaiting a decision at the time of the federal suit.\textsuperscript{130} The district court "elected neither to delve into the intricacies of the res judicata defense nor to address the appellants' prayer for preliminary injunctive relief, dismissing the action on the merits."\textsuperscript{131} The First Circuit held that because "courts must view severe restrictions on party ballot access skeptically," dismissal for failure to state a claim was unwarranted.\textsuperscript{132} The court further held that "the fact-specific nature of the relevant inquiry obviated a resolution of the case on the basis of the complaint alone."\textsuperscript{133} The court could have ordered remand of the dismissal. Instead, the court recognized that "considerations of federalism, comity, and sound judicial administration" prompted the path of abstention.\textsuperscript{134} The court found that the distinguishing circumstance was the fact that the appellants filed suit in federal court while still pursuing an appeal from a disposition of the same claims through the commonwealth courts.\textsuperscript{135}

The First Circuit realized that the appellants, already in the jurisdiction of the state court, had then filed an action in federal court. Such actions sought to bring about an "unseemly conflict between two sovereignties which the doctrines of comity and abstention are designed to avoid."\textsuperscript{136} The factors which convinced the court that abstention was appropriate in this case included: (1) the notion that "federal courts should exercise their equitable powers with discretion"—that is, just because an equitable remedy was available, it did not have to be used;\textsuperscript{137} (2) the fact that the commonwealth suit had not been filed first, but that it progressed much further than the federal case;\textsuperscript{138} (3) the fact that the case before the Puerto Rico Supreme Court was more comprehensive than the newer federal case because it covered both commonwealth and federal constitutional claims and as a result there was "a real possibility that the Puerto Rico Supreme Court [would] decide the case on state-law grounds in a way that altogether avoided the necessity for federal constitutional adjudication;"\textsuperscript{139} and finally, (4) the realization that the Puerto Rico Supreme Court [stood] poised to enter a judgment on the merits that

\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 22.
\textsuperscript{133} Id. (citations omitted).
\textsuperscript{134} Cruz, 204 F.3d at 22.
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 23 (quoting Glen Oaks Utils., Inc. v. City of Houston, 280 F.2d 330, 334 (5th Cir. 1960)).
\textsuperscript{137} Id. at 23-24 (citations omitted).
\textsuperscript{138} Cruz, 204 F.3d at 24.
\textsuperscript{139} Id.
in all probability would carry full preclusive effect under Puerto Rico law.\textsuperscript{140} The dismissal was reversed and the case remanded to the district court with orders to stay the proceedings pending outcome of the Puerto Rico Supreme Court decision.\textsuperscript{141} Again, a classic \textit{Pullman} outcome.

In \textit{Nationwide Mutual Insurance Co. v. Unauthorized Practice of Law Commission},\textsuperscript{142} the Fifth Circuit found that \textit{Pullman} abstention was warranted. "Nationwide Mutual Insurance Company sued Texas's Unauthorized Practice of Law Committee ("UPLC") in federal district court."\textsuperscript{143} "Nationwide sought a declaration that Texas law [did not] prohibit it from employing salaried staff attorneys to represent insureds in policy-related cases and a declaration that the Texas State Bar Act, as interpreted by the UPLC, violated the federal Constitution's Due Process Clause and First Amendment."\textsuperscript{144} The district court found the State Bar Act's unauthorized practice of law provisions to be unclear and "abstained from exercising its jurisdiction under the \textit{Pullman} doctrine."\textsuperscript{145}

The Fifth Circuit upheld the district court's decision. The court found that Nationwide employed staff attorneys duly licensed under state law "to conduct discovery, draft and file court documents," and to appear in court to represent its insureds.\textsuperscript{146} The only difference between these staff attorneys and outside counsel was that the staff attorneys were salaried employees of Nationwide; they were not "independent attorneys paid on a per case basis."\textsuperscript{147}

The court also found that prior to filing suit, Nationwide had learned that "the UPLC had sued Allstate Insurance Company in a Texas state court, alleging that Allstate's employment of staff attorneys constitute[d] the unauthorized practice of law . . . ."\textsuperscript{148} Even though a number of other insurance companies had intervened in the Allstate litigation, Nationwide chose not to intervene and went directly to federal court seeking a declaratory judgment.\textsuperscript{149} Nationwide averred in its complaint that "there was no disciplinary rule, ethical

\textsuperscript{140} \textit{Id.} On this point the court said, "from the standpoint of federalism and comity, there is something particularly offensive about hijacking a case that is pending on the docket of a state's highest tribunal." \textit{Id.}
\textsuperscript{141} \textit{Cruz}, 204 F.3d at 25.
\textsuperscript{142} \textit{Nationwide Mut.}, 283 F.3d 650 (5th Cir. 2002).
\textsuperscript{143} \textit{Id.} at 651.
\textsuperscript{144} \textit{Id.} Nationwide filed its suit after discovering the UPLC's investigation of its use of staff attorneys. \textit{Id.}
\textsuperscript{145} \textit{Nationwide Mut.}, 283 F.3d at 651.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.} The appeal alleged that Nationwide had committed the unauthorized practice of law. \textit{Id.}
\textsuperscript{149} \textit{Nationwide Mut.}, 293 F.3d at 651.
The Fifth Circuit reasoned that abstention was warranted under *Pullman* because there was (1) "a federal constitutional challenge to state action"—the UPLC was a state agency attempting "to prohibit Nationwide from employing staff attorneys;" and (2) the court found no Texas cases that prohibited an insurance company's staff employees from representing insureds. In light of these facts, the court held that the law would be "fairly susceptible to a reading that would permit Nationwide to employ staff counsel." The court further held that "while the Texas courts certainly may decide that Nationwide's staff attorneys are engaged in the unauthorized practice of law... the [state] law is uncertain enough on this issue that we should abstain from ruling on its federal constitutionality." The court held further that "given that the strictures of the *Pullman* doctrine were satisfied and in light of Texas's interest in policing its state bar, the district court did not abuse its discretion in applying *Pullman* abstention to this case." Another classic *Pullman* decision.

In *DeJulio v. Georgia*, the Eleventh Circuit found that *Pullman* abstention was warranted in a voting rights action. This case involved the enactment of local legislation by the Georgia General Assembly. Due to the volume of such local legislation, the House and Senate of the General Assembly adopted a scheme whereby local delegations were formed to consider passage of such local legislation. "Each county, municipality, or other jurisdiction [had] a local delegation and any legislator whose district encompassed territory within, any specific city or county [was] a member of the local delegation for that entity." The local delegations [made] recommendations to the House and Senate standing committees, which then recommended local legislation to the entire body." If local legislation received the number of required signatures, it ordinarily passed on an uncontested basis as a matter of courtesy. "For local legislation to become law, the
Plaintiffs DeJulio and Galambos ("Voters") filed a voting rights action in federal district court pursuant to 42 U.S.C. § 1983, the Fourteenth Amendment of the Constitution and the Voting Rights Act of 1965, as amended, alleging that the procedures for "enactment of local legislation of the General Assembly" violated the "one person, one vote" standard. The district court granted summary judgment to the State of Georgia after determining that (1) the "one person, one vote" standard did not apply to the local legislative delegations, and (2) "the changes in internal rules and procedures by which the General Assembly enacted local legislation" were not violative of the Voting Rights Act. The Voters appealed.

The Eleventh Circuit reversed in part and affirmed in part and remanded the case to the district court. The court reversed the dismissal on the grant of summary judgment, reasoning that "because this issue is better determined by the state the district court should have invoked Pullman abstention ... [and that] by abstaining in such cases federal courts 'avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.'" The court noted that it was raising abstention sua sponte. The court reasoned that two criteria had been established for the application of the Pullman doctrine: (1) the case presented an unsettled question of state law in that "whether the local delegations perform governmental functions" which subjected them to the "one person, one vote" requirement was appropriate only for the state court to decide, and (2) on the question of whether "state law must be dispositive of the case or would materially alter the constitutional question presented," the court found that "the relief sought by Voters regarding the validity of the House and Senate rules may [have been] available under Georgia law, [thus] ... the district court should not have de-

161. Id. at 1247.
162. Id. The court noted: "[v]oters' argument is based on the undisputed population data for Georgia's 159 counties broken down according to the House and Senate Districts located in those counties. Voters allege that a House or Senate member with constituents in the county have one vote on local legislation while another House or Senate member with fewer constituents in the county also has one vote on local legislation affecting the county." Id. at 1247 n.9.
163. DeJulio, 276 F.3d at 1247 (citations omitted).
164. Id. at 1248 (quoting Harman v. Forssenius, 380 U.S. 528, 534 (1965)).
165. DeJulio, 276 F.3d at 1248 n.10. The court stated, "[w]e are raising abstention sua sponte and have determined de novo the propriety of abstention in this case. We join other circuits in this approach." Id. (citations omitted).
166. DeJulio, 276 F.3d at 1248-49. (citing Duke v. James, 713 F.2d 1506, 1510 (11th Cir. 1983)).
cided the merits of the federal constitutional claims . . . ."167 The court held that it would be "speculation to conclude that the Georgia courts [were] not capable of resolving [the instant] dispute."168 The court further held that "principles of federalism limit the power of federal courts to intervene in state elections . . . ."169 The court affirmed the district court's ruling that the procedural changes to the internal Rules of the General Assembly [were] not subject to the . . . Voting Rights Act.170

It is evident that the First, Fifth, and Eleventh Circuits followed the classic dictates of Pullman in finding abstention appropriate in Ford Motor Co., Cruz, Nationwide Mutual, and DeJulio because all involved constitutional challenges to state laws that were unclear. The courts in each case deferred to the state to first resolve state law while the federal court stayed its hand. It is surprising that the circuit courts granted Pullman abstention sua sponte in three of the four such cases where Pullman was found appropriate. This includes Ford Motor, Cruz, Nationwide Mutual and DeJulio—two cases from the First Circuit and one from the Eleventh Circuit. Does such fact indicate the poor quality of the lawyering in not recognizing the need for abstention, or could it have been a legal strategy to avoid abstention in an effort to cap cost? Or were the district courts just asleep at the switch in failing to recognize that abstention, as a doctrine, was surprisingly still alive in the twenty-first century?

Before we leave the workings of Pullman abstention in the twenty-first century, perhaps it would give us a better appreciation of the work of the courts with respect to Pullman abstention if we were to briefly compare some of the cases wherein Pullman abstention was found not to be warranted. Pullman abstention was found not to be warranted in eight cases decided by the circuit courts since the beginning of the new century. Among the more interesting of these cases are decisions from the First, Second, Third, Sixth, and Ninth Circuits.

The First Circuit found Pullman abstention was not warranted in the case of Bonas v. Smithfield.171 Therein four registered voters in North Smithfield, Rhode Island, sought declaratory and injunctive relief in federal district court to compel the holding of a town election in 2001.172 Defendants argued, among other defenses, that the townspeople had ratified a referendum designed to transition the town from

167. Id.
168. Id.
169. Id. (quoting Burton, 953 F.2d at 1268).
170. DeJulio, 276 F.3d at 1250.
171. 265 F.3d 69 (1st Cir. 2001).
an odd-year election cycle to an even-year cycle beginning in 2002.\textsuperscript{173} The defendants contended this referendum obviated the need for a 2001 election.\textsuperscript{174} The district court found the town charter still authorized a 2001 election and ordered that the election be held.\textsuperscript{175} The First Circuit confirmed this ruling, holding that the decision not to hold the election was deliberate and if allowed to stand would deprive all citizens of the town of their right to vote.\textsuperscript{176} The court further held \textit{Pullman} abstention was not appropriate because the relevant charter provisions of the town were clear in and thus there was no ambiguous state or local law.\textsuperscript{177}

In \textit{Vermont Right to Life Commission v. Sorrell},\textsuperscript{178} the Second Circuit upheld the district court’s ruling that \textit{Pullman} was not warranted. That case involved the Vermont Right To Life Committee’s § 1983 suit against state officials, seeking declaratory judgment that sections of Vermont’s campaign finance laws establishing disclosure requirements for mass media expenditures were facially unconstitutional under the First Amendment of the Constitution.\textsuperscript{179} The Second Circuit ruled that district courts must “exercise particular caution before abstaining where a plaintiff has raised a facial constitutional challenge and the attendant delay would work to inhibit exercise of the First Amendment freedoms injured by the statute’s existence.”\textsuperscript{180} The court further held that “[i]n the context of First Amendment claims, \textit{Pullman} abstention has generally been disfavored where state statutes have been subjected to facial challenges.”\textsuperscript{181}

In \textit{Planned Parenthood v. Farmer},\textsuperscript{182} the Third Circuit upheld a district court’s ruling that New Jersey’s partial birth abortion law was unconstitutionally vague and was an undue burden on a woman’s right to obtain an abortion.\textsuperscript{183} Planned Parenthood and several physicians had brought a § 1983 action against the Attorney General of New Jersey the day the state’s partial birth abortion ban law became effective.\textsuperscript{184} After a hearing, the district court permanently enjoined

\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 75.
\textsuperscript{177} Id. at 75 n.5.
\textsuperscript{178} 221 F.3d 376 (2d Cir. 2000).
\textsuperscript{179} Id. at 379.
\textsuperscript{180} Id. at 385 (citing Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth., 134 F.3d 87, 93-94 (2d Cir. 1998)).
\textsuperscript{181} Id. (citing Bad Frog Brewery, 134 F.3d at 93-94 and City of Houston v. Hill, 482 U.S. 451, 467 (1987)).
\textsuperscript{182} 220 F.3d 127 (3d Cir. 2000).
\textsuperscript{183} Planned Parenthood v. Parmer, 220 F.3d 127, 134, 142 (3d Cir. 2000); Cf. Carhart, 530 U.S. at 914.
\textsuperscript{184} Planned Parenthood, 220 F.3d at 131.
enforcement of the new law.\textsuperscript{185} The Third Circuit found the law unconstitutional and found no reason that the district court should have abstained.\textsuperscript{186} The court held that “the district court carefully considered whether it should abstain under \textit{Pullman} and concluded that abstention was not warranted because the Act was so vague that it was not susceptible to a state court interpretation which would render unnecessary, or substantially limit, the federal constitutional question.”\textsuperscript{187}

The Sixth Circuit in \textit{Associated General Contractors, Inc. v. Dranik}\textsuperscript{188} also upheld a district court’s decision and found \textit{Pullman} abstention unwarranted. The facts therein reveal that several general contractor associations in the State of Ohio brought an action against state officials seeking declaratory judgment that a section of Ohio’s Minority Business Enterprise Act (“MBEA”) providing for racial and ethnic preferences in state construction contracts was unconstitutional on equal protection grounds.\textsuperscript{189} The district court agreed and permanently enjoined the state from awarding any construction contracts thereunder.\textsuperscript{190} The Sixth Circuit agreed that the provision violated equal protection since it was not narrowly tailored to meet compelling government interests.\textsuperscript{191} The court also held that there was no need to abstain under \textit{Pullman} in the case because a “federal court owes no duty to abstain in deference to a state court when a federal constitutional question is at issue, as in the instant case.”\textsuperscript{192}

\textit{Fireman’s Fund Insurance v. City of Lodi}\textsuperscript{193} was a complicated case wherein various insurers brought actions for declaratory and injunctive relief against the City of Lodi, California.\textsuperscript{194} The complaint alleged that the local Comprehensive Municipal Environmental Response and Liability Ordinance (“MERLO”), which permitted the city to investigate and remediate the hazardous waste contamination of its soil and groundwater, was preempted by federal and state law.\textsuperscript{195} The district court dismissed the claims on the grounds that \textit{Pullman} abstention was appropriate.\textsuperscript{196} The Ninth Circuit reversed the abstention ruling but affirmed other parts of the decision.\textsuperscript{197}

\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 134-35, 148.
\textsuperscript{187} \textit{Id.} at 149. Cf. \textit{Carhart}, 530 U.S. at 914.
\textsuperscript{188} 214 F.3d 730 (6th Cir. 2000).
\textsuperscript{190} Drabik, 214 F.3d at 734.
\textsuperscript{191} \textit{Id.} at 739-40.
\textsuperscript{192} \textit{Id.} at 740.
\textsuperscript{193} 271 F.3d 911 (9th Cir. 2001).
\textsuperscript{194} Fireman’s Fund Ins. v. City of Lodi, 271 F.3d 911, 922 (9th Cir. 2001).
\textsuperscript{195} \textit{Fireman’s Fund Ins.}, 271 F.3d at 921-22.
\textsuperscript{196} \textit{Id.} at 928.
\textsuperscript{197} \textit{Id.} at 953.
The court found abstention not warranted because there was (1) "no 'sensitive area of social policy' that was best left to the states to address" in the case and (2) there was no uncertain state law issue in the case that should have been decided by the state court.\textsuperscript{198} In essence, the court ruled that the local MERLO ordinance was not an issue best left to the states because "federal government [had] definitively entered the field of hazardous waste remediation" and state court determination of the issue would not relieve the federal court of its duty to resolve constitutional issues.\textsuperscript{199}

It is not surprising that \textit{Pullman} was found to be inappropriate in these cases. None of them fit the classic mold for \textit{Pullman} abstention. In each of these cases either the state law in question was clear, or there was no question of state law at issue, or there was a federal question, or there was federal preemption. In such cases there is no need for comity and thus no need for abstention.

C. \textit{BURFORD ABSTENTION IN THE TWENTY-FIRST CENTURY}

\textit{Burford} abstention is utilized by the federal courts to "avoid needless conflict with the administration by a state of its own affairs."\textsuperscript{200} As stated earlier in this article, the doctrine grew out of the case of \textit{Burford v. Sun Oil Co.}\textsuperscript{201} In that case Sun Oil "attacked the validity of an order of the Texas Railroad Commission granting petitioner Burford a permit to drill four [oil] wells on a small plot of land in [East Texas]."\textsuperscript{202} The proceeding was brought in federal district court and was based on "diversity of citizenship of the parties, and because of [Sun Oil's] contention that the order denied them due process of law."\textsuperscript{203} The United States Supreme Court reasoned that abstention would be appropriate in this type of case, holding that the "questions of regulation of the industry by the state administrative agency . . . so clearly involve[d] basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them."\textsuperscript{204} The Court concluded that "under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand."\textsuperscript{205} Unlike \textit{Pullman}, which

\textsuperscript{198} \textit{Id.} at 928 (quoting Cedar Shake & Shingle Bureau. v. City of Los Angeles, 997 F.2d 620, 622 (9th Cir. 1993)) (citations omitted).
\textsuperscript{199} \textit{Id.} at 928-31.
\textsuperscript{200} WRIGHT ET. AL., \textit{supra} note 1, § 52, at 325.
\textsuperscript{201} 319 U.S. 315 (1943).
\textsuperscript{202} \textit{Burford v. Sun Oil Co.}, 319 U.S. 315, 316-17 (1943).
\textsuperscript{203} \textit{Burford}, 319 U.S. at 316-17.
\textsuperscript{204} \textit{Id.} at 332.
\textsuperscript{205} \textit{Id.} at 394.
allowed the district court to stay the proceedings while state court action was pursued, under Burford, the federal action was dismissed.

With this understanding of the classic Burford case, let us examine the Burford situations the federal courts have considered in the twenty-first century. The federal courts have considered Burford arguments in twelve cases. Such cases have arisen in most of the circuit courts of appeal, except for the Third, Fifth, Seventh, Eighth and the District of Columbia Circuits. Burford abstention was found appropriate in three cases arising in the First, Second and Third Circuits. Although all three were decided under Burford, the 1996 case of Quackenbush v. Allstate Insurance Co. would have an effect on whether these cases could be dismissed outright as in the classic Burford case.

In Dunn v. Cometa, a case from the state of Maine, the First Circuit upheld the district court's dismissal of portions of a case based on Burford abstention. In Dunn, a father acting on behalf of himself and his brain-damaged son brought suit for money damages, alleging tort claims arising from the former wife's care of the son. At the time of the suit, Cometa had obtained a divorce from Dunn. The dismissed counts of the suit "charged intentional infliction of emotional distress, negligent infliction of the same, and 'malice' . . . growing out of Cometa's alleged mismanagement of his care, his insurance and his property, . . . by [her] conduct relating to her romantic association with a third party during Dunn's incapacitation."209

The district court dismissed the aforementioned charges on abstention grounds on the rationale that they "implicate[d] murky, cutting-edge areas of Maine public policy" and other counts of the suit on the grounds that they fell within the domestic relations exception to federal court jurisdiction and that they failed to satisfy the jurisdictional amount requirement.210 The court did not agree with the district court's dismissal of part of the suit on grounds of the domestic relations exception but did uphold the use of abstention finding that in certain circumstances, the abstenion principles developed in Burford might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody. This would be so when a case presents "difficult questions of state law bearing on policy problems of substantial public import

207. 238 F.3d 38 (1st Cir. 2001).
208. Dunn v. Cometa, 238 F.3d 38, 39-40 (1st Cir. 2001).
209. Dunn, 238 F.3d at 40.
210. Id. at 41 (citations omitted).
whose importance transcends the result in the case at bar." The court held that the case fit squarely within Burford and that abstention made "good sense as a means to 'soften the tensions' of the dual federal-state court system." The court also held that the claims were 1) based upon purely state law claims; 2) "the claims [were] based upon conduct in a family context;" and 3) the legal framework for such claims had not been fully developed in state law. The court further held that "if state law were clear there would be no reason to abstain in the case."

In the end, the First Circuit departed from the classic Burford model of dismissal of the case as a remedy under the holding of Quackenbush, wherein the Supreme Court held that dismissal of a common law damage action is not allowed under Burford abstention where money damages were sought instead of injunctive or other discretionary relief. Neither side below had called to the district court's attention the Quackenbush holding. The First Circuit therefore remanded the case with an order to stay the proceedings.

In 767 Third Avenue Associates v. Consulate General, the Second Circuit considered a case brought by landlords who had leased space to the former Socialist Federal Republic of Yugoslavia ("SFRY"), which had ceased to exist beginning in 1991. The landlords brought suit against successor states, seeking determination that these successor states were liable for the debts incurred by SFRY. The district court determined that the action presented nonjusticiable political questions and "stayed 'all matters in the case' and placed it on the suspense calendar."

The Second Circuit agreed that the case was nonjusticiable and supported the district court's reliance on the doctrine of Burford abstention "where a federal court abstains 'on grounds of comity with the States where ... federal review of the question ... would be disruptive of state efforts to establish a coherent policy with respect to a matter.

211. Id. at 42 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).
212. Id. at 42-43 (quoting Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 11 n.9 (1987)).
213. Id. at 43.
214. Id.
217. Quackenbush, 517 U.S. at 714.
218. 218 F.3d 152 (2d. Cir. 2000).
219. 767 Third Ave. Assoc., 218 F.3d at 155.
220. Id. at 158. In the government's amicus brief it was argued that the executive branch of the government made an "initial policy determination that resolution of issues such as debt allocation among the successors to the SFRY must be resolved in an international forum." Id. at 160.
221. 767 Third Ave. Assoc., 218 F.3d at 159 (citations omitted).
of substantial public concern." The court further supported the district court's reasoning that "its deference to resolution of [the] dispute by international negotiations or by the Executive was akin to the 'principles of comity and federalism' that support a stay of a federal action until state proceedings have been concluded." Nevertheless, the court believed that the entry of the stay order in this case was inappropriate because the case would never be ripe for a judicial determination. The court thus vacated the stay and remanded the case with an order to dismiss the action. A classic Burford decision.

In Johnson v. Collins Entertainment Co., the Fourth Circuit denied a petition for rehearing with a suggestion for rehearing en banc in a case which had arrived in federal district court on removal by defendants. The defendants in the case were operators of video poker machines in South Carolina. Having successfully removed the case to federal court, a group of the video poker operators then argued that federal jurisdiction was inappropriate. A panel of Fourth Circuit judges had agreed and held that the district court should have abstained under Burford instead of issuing an injunction. At issue was "whether the video poker operators violated South Carolina's statutorily-imposed $125 limit on payouts from video poker machines, and, if so, whether this constituted a "special inducement" or an unfair trade practice under South Carolina law."

On the petition for rehearing with suggestion of rehearing en banc, the court again held the case appropriate for Burford abstention and not an injunction. It held that the case was "dominated by unsettled questions of state law . . . [and that] these state law issues bear on policy problems of substantial public importance . . . [that are] at the heart of the state police power." The court also found that "the state courts [had been] addressing the questions of the payout limit interpretation and the application of state unfair competition law to the payout statute at the very time the district court [had] rendered

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222. Id. at 163 (quoting 767 Third Ave. Assocs. v. Consulate General, 60 F.2d 267, 270 (S.D.N.Y. 1999)) (citations omitted).
223. The court indicates that the State Department would be the proper entity of the Executive Branch to oversee the matter.
225. Id. at 163.
226. Id. at 164.
227. 204 F.3d 573 (4th Cir. 2000).
228. Johnson v. Collins Entm't., 204 F.3d 573, 574-75 (4th Cir. 2000).
229. Johnson, 204 F.3d at 577.
230. Id.
231. Id.
232. Id. at 575 (citations omitted).
The court concluded that "Burford abstention is rooted in the law of remedies, being derived from the discretion historically enjoyed by the courts of equity. The premise underlying abstention is that federal courts should not exercise expansive remedial powers when to do so would damage principles of federalism and comity . . . . To condone the district court's action . . . would be to endorse broad federal equitable sway over the most basic state regulatory functions."234 Again, this was a classic Burford decision.

In nine other cases, the federal circuit courts found that Burford abstention was not appropriate.235 A few of the more interesting such cases include Gross v. Weingarten.236 In Gross, the Fourth Circuit reviewed a case brought by a deputy receiver of an insolvent insurer against directors of the insurer and stockholders in the insurer's parent company. The defendants in the case had received a judgement as a matter of law.237 On appeal the deputy receiver argued for dismissal of the matter on abstention grounds pursuant to Burford. The court rejected this argument and stated: "federal courts frequently have relied on the abstention doctrine to avoid disruption of state insurance insolvency proceedings . . . . We find, however, that dismissal on abstention grounds is inappropriate on the facts of this case."238 The court found that the defendant's legal claims for money damages could not be dismissed under the equitable doctrine of abstention.239 The court also found one of the defendant's claims was subject to exclusive federal jurisdiction under § 10(b) of the Securities Exchange Act of 1934 and thus could not be dismissed.240

In Johnson v. Rodrigues,241 the Tenth Circuit reversed in part the district court's dismissal of claims and held that Burford abstention and related theories did not apply to an alleged father's constitutional claim seeking invalidation of Utah adoption statutes.242 The court reasoned that the alleged father's constitutional claim did not depend on the status of the parties and it did not "present difficult questions

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233. Johnson, 204 F.3d at 575.
234. Id. at 577 (quoting Quackenbush, 517 U.S. at 727-28).
235. The author declines to discuss but acknowledges that the following cases also found Burford abstention to be inappropriate: City of Tucson v. U.S. West Communications, Inc., 284 F.3d 1128 (9th Cir. 2002); United States v. Kentucky, 252 F.3d 816 (6th Cir. 2001); United States v. Moros, 268 F.3d 695 (9th Cir. 2001); Fisher v. King, 232 F.3d 391 (4th Cir. 2000); GTE North, Inc. v. Strand, 209 F.3d 909 (6th Cir. 2000); Boyes v. Shell Oil, 199 F.3d 1260 (11th Cir. 2000).
236. 217 F.3d 208 (4th Cir. 2000).
238. Gross, 217 F.3d at 223.
239. Id.
240. Id. at 223-24.
of state law bearing on policy problems of substantial public import . . . .”243 The court held that the plaintiff's constitutional claim only required “the district court to determine whether a Utah statute violate[d] plaintiff's federal constitutional rights.”244 Thus, the claim “only ask[ed] the district court to act within its area of expertise, rather than to invade the province of the state.”245

The case of Siegel v. Lepore246 grew out of the disputed presidential election of 2000. In Siegel, the Eleventh Circuit found abstention under Burford was inappropriate where registered voters sued election canvassing boards in four Florida counties to enjoin manual recounts of ballots cast for President of the United States.247 The district court denied a preliminary injunction.248 The defendants, on behalf of the Democratic candidate Vice President Al Gore, argued that the federal courts should abstain from hearing the case under Burford.249 The circuit court disagreed and held that “a central purpose furthered by Burford abstention is to protect complex state administrative processes from undue federal interference and that case did not "threaten to undermine all or a substantial part of Florida's process of conducting elections and resolving election disputes."250 Instead, the court found 1) that plaintiff's claims in the case targeted only “certain discrete practices set forth in a particular state statute” concerning elections;251 and 2) that the case did not “threaten to undermine Florida's uniform approach to manual recounts.”252 Abstention under Burford was not necessary. The court upheld the district court's denial of the preliminary injunction.253

Review of the cases reveal that in the twenty-first century the Burford abstention doctrine decisions have strayed a bit from the classic case of Burford, wherein the Supreme Court mandated dismissal of the action. In Dunn, the First Circuit found Burford abstention appropriate because the case implicated a “murky, cutting-edge areas of Maine public policy.”254 Yet, the court decided that the case could not be dismissed pursuant to the 1996 holding by the Supreme Court in Quackenbush. So in Dunn we have an important state interest that

243. Johnson, 226 F.3d at 1112.
244. Id.
245. Id.
246. 234 F.3d 1163 (2000).
247. Siegel v. Lepore, 234 F.3d 1163, 1168, 1174 (11th Cir. 2000).
248. Siegel, 234 F.3d at 1170.
249. Id. at 1173.
250. Id. (citations omitted).
251. Id., 234 F.3d at 1173.
252. Id.
253. Id. at 1179.
254. Dunn, 238 F.3d at 41.
the state and not the federal court should regulate. However, since the plaintiffs sought money damages, the court must stay the proceedings until a state court decides a number of issues. In *767 Third Avenue Associates*, the Second Circuit reasoned that the district court was correct in finding *Burford* abstention appropriate in order that the executive branch of the government might decide the issue of whether successor states were liable for unpaid rents. However, the circuit court chided the district court for putting the case on the suspense calendar. That was classic *Burford*, and the facts of this case demanded dismissal. The case would never be ripe for judicial determination. Finally, in *Johnson v. Collins Entertainment Co.*, the Fourth Circuit on rehearing took the classic *Burford* route, finding abstention appropriate and dismissing a case where there were unsettled questions of state law concerning payout limits on video poker gaming machines.

In the cases where *Burford* abstention was found not to be appropriate, the reasons for such decision are clear. In *Gross*, only money damages were at issue and the case could not be dismissed because of *Quackenbush*. Moreover, the court found that one of the defendant's claims was subject to exclusive federal jurisdiction mandated by the Securities and Exchange Act of 1934. In *Johnson v. Rodrigues*, the court found that the father's constitutional question did not present a difficult question of state law but instead was one well within the province of a federal court to answer. That court also found that there was no difficult question bearing on a policy problem that was of substantial public import. Thus, no need for *Burford*. Finally, in *Siegel*, the election case, the court found abstention inappropriate; the federal suit did not threaten to undermine all or part of Florida's process of conducting elections and resolving election disputes. There was no need for *Burford* because the federal case was not one in which federal influence would harm a complex state administrative process.

### D. Colorado River Abstention in the Twenty-First Century

"The *Colorado River* abstention doctrine is based on principles of federalism, comity, and conservation of judicial resources."255 “It represents an ‘extraordinary and narrow exception’ to the ‘virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.’"256 *Colorado River* abstention may be appropriate in situations involving the contemporaneous exercise of concurrent jurisdic-

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255. Black Sea Inv., Ltd. v. United Heritage Corp., 204 F.3d 647, 650 (5th Cir. 2000).
256. Black Sea, 204 F.3d at 650 (quoting *Colorado River*, 424 U.S. at 813, 817) (citations omitted).
tion by state and federal courts. However, the United States Supreme Court warns that “the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than circumstances appropriate for abstention” and should be ‘exceptional’ to justify deferral to the state court.”

As a result of the exceptional circumstances required for Colorado River abstention, one might suppose that there may have been very little such use of the doctrine in the early part of the twenty-first century. The cases prove this supposition correct. There have been a total of sixteen cases reported in the circuits wherein Colorado River abstention was considered or discussed. Only in two of those cases did the courts find the exceptional circumstances warranting Colorado River abstention. However, these exceptional circumstances do not quite fit with the classic case of Colorado River; nevertheless, the circuit courts reasoned it was best to abstain. Let us look at those cases and contrast them with a few of the cases wherein Colorado River abstention was found to be inappropriate.

The First Circuit found that Colorado River abstention was appropriate in Currie v. Group Insurance Commission. In that case, Currie, a Massachusetts state employee with schizophrenia, sued, in federal district court, the Group Insurance Commission which provided long-term disability benefits to state employees. The suit alleged that the one year limitation on benefits for noninstitutionalized individuals with mental disabilities violated the Equal Protection Clause, the Due Process Clause, and the Americans with Disabilities Act (“ADA”). The employee also initiated a similar suit in state court in Massachusetts several months later. Both the federal court and the state court granted summary judgment to the insurance company. Currie appealed both the federal action and the state action.

The First Circuit ultimately decided to invoke abstention pursuant to Colorado River but not for the exceptional circumstances factors the Supreme Court outlined in Colorado River and its subsequent decision in Moses H. Cone Memorial Hospital v. Mercury Construction Corp. The court analyzed the facts of Currie’s case against the fac-

258. 290 F.3d 1 (1st Cir. 2002).
259. Currie v. Group Ins. Comm’n, 290 F.3d 1, 3 (1st Cir. 2002).
260. Currie, 290 F.3d at 3.
261. Id. at 10.
262. Id.
263. 460 U.S. 1 (1983). The six factors the Supreme Court set out to be analyzed in Moses Cone included: 1) whether either party has assumed jurisdiction over the res; 2)
tors set out for *Colorado River* abstention and did not find that the case absolutely mandated abstention.\textsuperscript{264} What the court did find, however, was a federal statutory question intertwined with a complex issue of state law pending in Currie’s state law case.\textsuperscript{265} The court found the situation more like a *Pullman* abstention matter where a federal court is faced with the prospect of being required to resolve complicated state law problems.\textsuperscript{266} Significant to the court’s decision to grant abstention was the fact that Currie herself, who had originally filed in federal court, had asked the First Circuit to abstain in favor of the state court.\textsuperscript{267} The court reasoned “because the plaintiff is the same in both this case and the parallel state case, there is no danger that the plaintiff will be prejudiced by ineffective prosecution . . . nor would the defendant be prejudiced by our staying the action: whatever uncertainty exists as to outcome. . . also exists as to the state court litigation.”\textsuperscript{268} Not exactly the *Colorado River* reasoning one might expect, but probably the right decision in light of comity.

In *Missouri v. Prudential Health Care Plan, Inc.*,\textsuperscript{269} the Eighth Circuit found that *Colorado River* abstention was appropriate. The case involved two federal suits by the State of Missouri alleging the same violation against the same insurer. That is, the state filed two actions against Prudential pertaining to a single contract dispute.\textsuperscript{270} The federal district court dismissed the first suit because of a defective complaint pursuant to Fed. R. Civ. P. 12(b)(6).\textsuperscript{271} The action brought against Prudential alleged that Prudential had failed to comply with a federal requirement that children receiving medical services be tested for lead poisoning.\textsuperscript{272} Missouri appealed the dismissal of the first suit.\textsuperscript{273} The circuit court, pursuant to *Colorado River*, found the appealed case duplicative of the second case and dismissed it.\textsuperscript{274}

In arriving at its decision to abstain, the court noted that *Colorado River* abstention applied to concurrent state–federal proceed-

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\textsuperscript{264} Currie, 290 F.3d at 10, 11.
\textsuperscript{265} Id. at 13.
\textsuperscript{266} Id. at 11.
\textsuperscript{267} Id. at 12.
\textsuperscript{268} Id.
\textsuperscript{269} 259 F.3d 949 (8th Cir. 2001).
\textsuperscript{270} Missouri v. Prudential Health Care Plan, Inc., 259 F.3d 949, 950 (8th Cir. 2001).
\textsuperscript{271} Prudential Health Care Plan, 259 F.3d at 950.
\textsuperscript{272} Id. at 950-51.
\textsuperscript{273} Id. at 951.
\textsuperscript{274} Id. at 954, 956.
The court noted further, however, that the Supreme Court opinion in *Colorado River* had discussed concurrent federal litigation as well, and that “the Supreme Court [had] identified a general policy that duplicative litigation in federal courts should be avoided.” In dismissing the case on abstention grounds the court also noted that both economic and jurisprudential grounds guided their decision in upholding the principle that a plaintiff may not litigate two federal actions against the same defendant involving the same controversy. Again, this was not classic *Colorado River* reasoning.

As one might expect, in many cases where *Colorado River* abstention was argued, the federal courts found no exceptional circumstances warranting the federal court to abstain because of parallel proceedings in a state or other federal suit. A total of fourteen such cases have been reported since the year 2000, including cases in the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits.

Representative of such cases was *Bass v. Butler*, wherein the Third Circuit found the abstention question moot. Dianne Bass, who had been denied worker’s compensation benefits in the State of Pennsylvania, brought a § 1983 action in federal district court against the state and state officials where she alleged that denial of her claim was unconstitutional. The district court, without analysis, dismissed her case, reasoning that under *Colorado River* it should abstain because Bass had not exhausted her remedies in the state court. On appeal, the Third Circuit opined that the lower court had not done sufficient analysis to determine whether abstention had actually been warranted. Nonetheless, the Third Circuit found that abstention of jurisdiction was no longer applicable and that Bass’ appeal was moot.

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275. Id. at 953.
276. Id.
277. Id. (citations omitted) (emphasis omitted).
278. *Prudential Health Care Plan*, 259 F.3d at 956.
279. The author chooses to discuss in this article only four of the cases in which *Colorado River* abstention was found inappropriate since the beginning of the twenty-first century as representative of the types of cases in which there were no special circumstances warranting application of *Colorado River* abstention. The author acknowledges that the remaining such cases are: *Bank One v. Boyd*, 288 F.3d 181 (5th Cir. 2002); *Bank One v. Shumake*, 281 F.3d 507 (5th Cir. 2002); *Woodford v. Cmty. Action Agency*, 239 F.3d 517 (2d Cir. 2001); *Garcia v. Akwesasne House Auth.*, 268 F.3d 76 (2d Cir. 2001); *Safety Nat. Cas. Corp. v. Bristol-Myers Squibb Co.*, 214 F.3d 562 (5th Cir. 2000); *United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001); and *United States v. Moros*, 268 F.3d 695 (9th Cir. 2001); *Al-Abood v. El-Shamari*, 217 F.3d 225 (4th Cir. 2000).
280. 258 F.3d 176 (3d Cir. 2001).
282. *Bass*, 258 F.3d at 178-79.
283. Id. at 179.
because by the time of the appeal all of the state court proceedings had been completed. There were no longer parallel proceedings.

The Fifth Circuit reversed a district court grant of abstention in *Black Sea Investment, Ltd. v. United Heritage Corp.* Black Sea had bought shares of stock from United Heritage. Black Sea then brought suit against United Heritage, seeking injunctive and declaratory relief with respect to a contract dispute over the ability of Black Sea to sell the stock within a certain time period. United Heritage filed suit in Texas state court. Black Sea then filed a diversity action in federal district court. The district court abstained under the *Colorado River* doctrine. The Fifth Circuit found the district court should not have granted abstention because all of the exceptional circumstance factors of *Colorado River* were either neutral or counseled against abstentions. Among the factors the court enumerated were 1) that the case did not involve any res or property over which either the state or federal court had control; 2) there was no inconvenience of forums - both the state court and the federal court were in the same part of the state; 3) there was no federal law at issue in the case; and 4) there was no indication that "Black Sea’s interests would not be adequately protected in [the] state court."

Similarly, the Third Circuit in *PaineWebber, Inc. v. Cohen* undertook an analysis of the factors and found that an investment firm’s action to compel arbitration following a state court fraud action against the firm’s manager did not warrant *Colorado River* abstention. Among the factors the court pointed out were 1) “the state court did not assume jurisdiction over any res or property” (where no property is at issue it supports federal court jurisdiction); 2) there was no convenient forum argument because the state and federal court houses in this case were in the same city; 3) the law at issue was federal law—interpretation of the Federal Arbitration Act; and finally, 4) the state court action had not progressed very far, even though the state action had been filed two days before the federal action.

lessees and sublessees for breach of the lease. Nimelias sought abstention on grounds that there were pending related actions on the lease in question in the courts of the country of Greece. The court, after a thorough analysis of the Greek cases and the lease, found that the Greek cases were not a parallel suit for purposes of Colorado River because on the “facts presented it did not appear substantially likely that the Greek actions would dispose of all the claims presented in the federal suit.” There were no actual parallel proceedings; thus, there was no need for Colorado River abstention.

Neither of the two cases wherein Colorado River abstention was found appropriate quite fit the classic factors and analysis of the seminal case of Colorado River Water Conservation District v. United States. In Currie, there were parallel proceedings in state and federal suits involving duplicative litigation. This seems classic. Yet, the First Circuit, after its analysis, did not believe that the case absolutely mandated abstention. Although Currie herself had asked for abstention based on the Colorado River doctrine, the court viewed the case more of a Pullman situation because there were complicated state law problems at issue. As a result of the parallel proceedings, the court did abstain pursuant to Colorado River. The court noted that Currie herself had asked for such abstention and the court believed there would be no prejudice to her. This was not a classic Colorado River analysis, but it probably led to the best result in light of the notion of comity with respect to parallel suits in state and federal court.

Prudential Health differs from the classic Colorado River case in that it involved two federal suits on the same claim. Instead of traditional Colorado River doctrine analysis, the Eighth Circuit relied on dicta from Colorado River to decide on both economic and jurisprudential grounds that such duplicative cases should not proceed and one should be dismissed. Since this matter does not involve comity between the state and federal system, should we really call it a Colorado River abstention case? The answer is yes. Though not a classic Colorado River doctrine decision, it is apparent the Supreme Court believed that there should not be parallel federal suits on the same claim. The Eighth Circuit rightly followed the Supreme Court’s thinking on the matter.

In the cases discussed which found Colorado River not appropriate, one could argue that they fit the classic pattern of inappropriateness. In Bass, there could be no issue of abstention because at the

294. AAR Int‘l, Inc., 250 F.3d at 517.
295. Id. at 518, 519.
296. Currie, 290 F.3d at 1.
time of the federal suit all state court proceedings had been completed. In *Black Sea*, all of the exceptional circumstances were either neutral or counseled against abstention. Also, there was no federal law at issue in the case. In *PaineWebber*, there was no need for abstention because the law at issue was all federal interpretation of the Federal Arbitration Act. And, finally, we saw the correct decision in *AAR International*, wherein the court found that there existed no true parallel proceedings with respect to the actions in the Greek courts. Thus, no need for *Colorado River* abstention.

E. **Younger in the Twenty-First Century**

The *Younger* abstention doctrine “teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts.”297 As explained earlier, *Younger* abstention has been expanded by the Supreme Court to apply to more than state criminal proceedings.298 In 1975, the Supreme Court expanded *Younger* to encompass quasi–criminal cases with its decision in *Huffinan v. Pursue, Ltd.*299 In the 1980s, *Younger* abstention was extended to quasi-judicial proceedings.300 In 1987, the Supreme Court extended the *Younger* abstention to civil proceedings.301

The classic situation for *Younger* abstention “requires that a federal court refrain from hearing an action over which it has jurisdiction ‘[when the] federal proceedings would (1) interfere with an ongoing state judicial proceeding (2) that implicates important state interests, and (3) affords an adequate opportunity to raise federal claims.’”302

In this section we will explore a number of the *Younger* abstention cases decided in the twenty-first century to determine how they compare to the classic case of *Younger v. Harris* and its progeny. Since the turn of the new century the federal courts of appeal have visited *Younger* abstention in twenty-nine cases. The circuit courts have upheld the *Younger* abstention doctrine in thirteen cases. Interestingly, in an almost equal number of cases (sixteen) the circuit courts found that *Younger* abstention was not appropriate. A brief review of the cases in which all three of the classic factors of *Younger* abstention

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297. Wright et al., supra note 1, § 52A at 341-42.
299. Huffinan, 420 U.S. at 592.
302. Joseph A. v. Ingram, 275 F.3d 1253, 1267 (10th Cir. 1999) (quoting J.B. v. Valdez, 186 F.3d 1280, 1291 (10th Cir. 1999)).
obtained exhibit a wide variety of situations. There are no real surprises with these cases. They all fit the classic Younger pattern.

The First Circuit in In re Justices,303 invoked Younger when defendants filed a pretrial federal habeas corpus petition in federal court.304 The defendants had already been charged in Massachusetts state court with insurance fraud and were set to go to trial. The court held that "with notable exceptions of cases involving double jeopardy and certain speedy trial claims, federal habeas relief, as a general rule, is not available to defendants seeking pretrial review of constitutional challenges to state criminal proceedings, and this case does not present the kind of special circumstances which might require a different result."305 The court found that their constitutional claims could be adequately adjudicated in the state case.

Kirschner v. Klemons306 is a Second Circuit decision upholding Younger abstention. Kirschner was a dentist upon whom state disciplinary sanctions had been imposed.307 He sought declaratory relief and money damages against members of the state sanctioning board.308 The court found that the state agency hearing for the disciplinary charges involved important state interests and that there were no special circumstances or bias that would prevent the federal case being dismissed pursuant to Younger.309 The important state issue, of course, was the obligation of a state to license, regulate, and discipline, when necessary, dentists or other health care professionals. The Second Circuit also upheld the use of Younger abstention in Grieve v. Tamerin.310 In that case a father, Grieve, brought action against his former wife, Tamerin, who had filed for custody of their child in New York state court.311 The couple had once been permanent residents of Israel.312 The father brought his action against the mother under the Hague Convention on Civil Aspects of International Child Abduction relating to then pending state custody proceedings.313 The court upheld abstention under Younger in this case on the grounds "that abstention was proper because of New York State's strong interest in domestic matters generally and child custody ques-

303. 218 F.3d 11 (1st Cir. 2000).
304. In re Justices, 218 F.3d 11, 14, 17 (1st Cir. 2000).
305. In re Justices, 218 F.3d at 19 (citing Braden v. 30th Judicial Court, 410 U.S. 484, 489 (1973)).
306. 225 F. 3d 227 (2d Cir. 2000).
308. Kirschner, 225 F.3d at 230.
309. Id. at 235-36.
310. 269 F.3d 149 (2d Cir. 2001).
311. Id. at 151.
312. Id.
313. Id.
tions in particular... and because Grieve would have a full and fair opportunity to litigate his federal claims under the Hague convention."\(^{314}\)

More recently, the Second Circuit reversed a district court's finding that there existed circumstances sufficient to trigger exception to the Younger doctrine. In *Diamond "D" Construction Corp. v. McGowan*,\(^ {315}\) a road construction contractor brought a § 1983 action against the New York State Department of Labor ("DOL") alleging Due Process violations in connection with an investigation into contractors' compliance with prevailing wage law.\(^ {316}\) Although the federal district court granted Diamond D the requested injunction, the DOL appealed.\(^ {317}\) The Second Circuit reversed because it found no bad faith on the part of the DOL. The court held "to invoke this exception, the federal plaintiff must show that the state proceeding was initiated with and is animated by a retaliatory, harassing, or other illegitimate motive."\(^ {318}\) The court found no such motive in the case; instead, it found "a prosecution motivated principally by 'a straight-forward application of the laws of New York.'"\(^ {319}\)

In *Zahl v. Harper*,\(^ {320}\) a medical doctor sought a federal injunction when the New Jersey State Board of Medical Examiners instituted disciplinary proceedings against him for Medicare fraud.\(^ {321}\) The federal district court abstained under Younger and dismissed his case. The Third Circuit affirmed the district court's grant of abstention. On appeal, the doctor, Zahl, argued that the New Jersey administrative action for Medicare fraud allegations was preempted by federal law and that he had a constitutional challenge which the federal court should address.\(^ {322}\) The Third Circuit found that an ongoing state proceeding existed, that the state had a compelling interest to oversee the discipline of medical doctors, and agreed that Zahl's claim raised a constitutional question.\(^ {323}\) Yet such claim could not defeat the need for abstention. The court reasoned that Zahl could readily "assert his preemption claim in the administrative proceeding itself, and, if necessary, he [could] have [that decision] reviewed by the New Jersey Ap-

\(^{314}\) *Id.* at 154.
\(^{315}\) 282 F.3d 191 (2d Cir. 2002).
\(^{316}\) *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 193, 196 (2d Cir. 2002).
\(^{317}\) *Diamond "D" Const. Corp.*, 282 F.3d at 197.
\(^{318}\) *Id.* at 199 (citing Schlagler v. Phillips, 166 F.3d 439, 442-44 (2d Cir. 1999)).
\(^{319}\) *Id.* (quoting Schlagler, 166 F.3d at 443).
\(^{320}\) 282 F.3d 204 (3d Cir. 2002).
\(^{322}\) *Zahl*, 282 F.3d at 210.
\(^{323}\) *Id.* at 210-11.
pellate [Court]." This satisfied the third prong of the classic Younger test.

In Cooper v. Parrish, the Sixth Circuit reviewed a case brought by owners and employees of nightclubs offering nude dancing in Memphis, Tennessee. The clubs had been seized and temporarily closed pursuant to a state nuisance statute. The owners and operators sued the state court judge and state prosecutors in federal court, asserting § 1983 and state claims. The district court dismissed the action pursuant to Younger abstention. The Sixth Circuit believed that there were important state issues in the case concerning "exposing and prohibiting promotions of prostitution [and] illegal obscene live performances" which would warrant the upholding of Younger. Yet, the court remanded the case to the district court to determine whether there was actually a state court proceeding pending when Cooper filed his federal complaint. Cooper argued that no such proceedings had been pending. The district attorney argued that state proceedings involving obscenity and prostitution charges were still pending when Cooper filed his federal complaint. The court reasoned that if no such charges were pending, the first element of Younger would not be satisfied and abstention would not be warranted.

The Seventh Circuit held that the federal district court should have abstained pursuant to Younger in the case of Green v. Benden. Green was an African American psychologist in Chicago whose license was suspended by the Illinois Department of Professional Regulation (DPR) for practicing clinical psychology without a license. Green filed federal suit under § 1983 seeking declaratory judgment and damages for the violation of his civil rights. The district court dismissed several of his claims and granted summary judgment to the DPR. On appeal the Seventh Circuit ruled that the district court should have abstained. The court found that the state court administrative

324. Id. at 210.
325. 203 F.3d 937 (6th Cir. 2000).
326. Cooper v. Parrish, 203 F.3d 937, 942, 943 (3d Cir. 2002).
327. Cooper, 203 F.3d at 492, 493.
328. Id. at 954.
329. Cooper, 203 F.3d at 954 (quoting Cooper v. Parrish, 20 F. Supp. 2d 1204, 1211 (W.D. Tenn. 1998)).
330. Cooper, 203 F.3d at 954.
331. The Sixth Circuit case of Armco, Inc. v. United Steelworkers, 280 F.3d 669 (6th Cir. 2002), which I have chosen not to discuss, also upheld the use of Younger abstention.
332. 281 F.3d 661 (7th Cir. 2002).
333. Green v. Benden, 281 F.3d 661, 663-64 (7th Cir. 2002).
334. Benden, 281 F.3d at 664.
335. Id. at 667.
review action was judicial in nature and still pending when he filed in federal court. The court further held that the state action implicated important state interests in regulating and licensing of health care professionals. The court held further that the state court administrative review of the DPR proceedings allowed Green adequate opportunity to raise his review of constitutional claims.

The Eighth Circuit found that abstention was warranted in the case of Cedar Rapids Cellular Telephone, L.P. v. Miller. In this case various cellular telephone providers brought a federal action against the State of Iowa relating to notice from Iowa’s Attorney General that charging liquidated damages on canceled term service agreements of customers was violative of Iowa consumer law. On the same day the cellular company filed its federal suit seeking a declaratory judgment, the Iowa Attorney General filed a civil enforcement action against the company in state court. The federal district court dismissed the case on several abstention theory grounds. The Eighth Circuit upheld the dismissal and ruled that Younger abstention required dismissal of the case on grounds of comity. The court reasoned, among other factors, that the State of Iowa had an important state “interest in enforcing its consumer protection statutes” in an effort to protect the public against deceptive business practices.

The Ninth Circuit in Green v. City of Tucson also upheld a federal district court’s grant of abstention under the Younger doctrine. In 1961, the Arizona legislature enacted a statute which provided that “a territory within six miles of an incorporated city or town having a population of five thousand or more [could] not be incorporated without the consent of [that] city or town.” In 1997, the state legislature passed a two year suspension of the statute in Pima County, Arizona. The City of Tucson, which was in Pima County, filed an action in state court alleging that the suspension of the statute was unconstitutional. The state appellate court declared that the statute was unconstitutional. The case was remanded to the trial court for further proceedings. While the case was still pending on remand,
Green and other plaintiffs filed a § 1983 action in federal district court alleging that the suspension statute unconstitutionally infringed upon their rights under the Fourteenth Amendment. The district court dismissed the case on abstention grounds. The circuit court ruled that abstention was warranted under Younger v. Harris. The court reasoned that there was an ongoing state action that implicated an important state interest—municipal interests in land use regulation. The court also held that the state proceedings allowed the plaintiffs adequate opportunity to intervene and raise their federal claims. In two other cases the Ninth Circuit also found that Younger abstention was warranted.

The Tenth Circuit also found abstention was warranted in the case of Joseph A. v. Ingram. The court, in a rehearing of the case, reasoned that Younger abstention may have been warranted in a class action suit in which minor wards of the State of New Mexico alleged that they were denied meaningful access to adoption services. The court found that there were ongoing state court proceedings in the New Mexico courts that implicated an important state interest. In this case, the important state interest was the welfare of abused and neglected wards of the state.

As indicated, there have been no surprises with respect to situations in which the courts found Younger abstention appropriate. They all fit the classic Younger formula. The First Circuit found no special circumstance warranting upholding a federal habeas corpus action to defendants seeking pretrial review in In re Justices of the Massachusetts Superior Court. Similarly, in Diamond "D" the court found no bad faith with respect to the prosecution of the company and ordered abstention of the federal claim for injunctive relief. The Younger factor of important state interest was well spelled out in the cases of Kirschner, Zahl, Cooper, Benden, Cedar Rapids Cellular, and Green. In Grieve v. Tamerin, the court found that the father would have a full and fair opportunity to litigate his federal claims in state court under the dictates of the Hague Convention.

349. Id.
350. The district court dismissed the plaintiff's case without prejudice.
351. Green, 217 F.3d at 1083.
352. Id. (citing San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095, 1104 (9th Cir. 1998)).
353. Green, 217 F.3d at 1084.
354. See Columbia Basin Apartment Ass'n v. City of Pasco, 268 F.3d 791 (9th Cir. 2001); H.C. v. Koppel, 203 F.3d 610 (9th Cir. 2000).
356. Ingram, 257 F.3d at 1257, 1268.
357. Id. at 1257, 1268.
In an effort to determine what factor or factors make *Younger* inappropriate we will briefly compare a few of the cases wherein the circuit courts found *Younger* abstention inappropriate. The answer is fairly simple in most cases. The Second Circuit in *Rivers v. McLeod* found that *Younger* abstention was inappropriate therein because the litigant sought money damages for an alleged violation of § 1983. The court reiterated the rule that *Younger* abstention is appropriate for injunctive and declaratory relief but not money damages. In *Rivers*, a grandfather brought the § 1983 action against a state judge and a social services organization providing foster boarding care for his grandson. In his federal suit he alleged that the organization failed to provide the grandson "adequate medical care in violation of the Fourteenth Amendment." In this case the court reversed the *Younger* abstention dismissal of the lower district court.

In *Midwestern Gas Transmission Co. v. McCarty*, the Second Circuit determined that there was no reason to abstain where there was dual federal state jurisdiction over an activity. The activity at issue in *Midwestern Gas* was the sale and distribution of natural gas. The court found that when the federal proceeding before the Federal Energy Commission, which overlapped the state proceeding, reached completion while the state proceeding was still pending, there was no need to abstain. The court held that "principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court."

The Tenth Circuit found *Younger* abstention was not appropriate in *Southwest Air Ambulance v. City of Las Cruces* because the mu-
nicipal court stayed its criminal proceedings in deference to the federal suit that was subsequently filed. In this case an air ambulance service had brought a federal suit challenging the legality and enforcement of a municipal ordinance setting fees at the Las Cruces Airport in New Mexico.\(^{365}\) Thus, the court reasoned that there was no need for Younger abstention when there was no interference with an ongoing state judicial proceeding, especially when the state court had deferred to the federal court.

Finally, there is the case of *For Your Eyes Alone, Inc. v. City of Columbus*.\(^{366}\) Therein, the Eleventh Circuit found that Younger abstention was not required because the federal district court held a full evidentiary hearing on a TRO on May 4, 1998, yet the litigant in this case, Pennza, was not arrested on criminal charges until May 5, 1998.\(^{367}\) The case involved a constitutional challenge by a manager of a lingerie modeling studio of the constitutionality of a city ordinance prohibiting private modeling sessions at adult entertainment clubs.\(^{368}\) In this case there had been no ongoing criminal prosecution until after the federal district court had moved quite far into its case. The court ruled that the federal suit had progressed beyond a point at which Younger could be invoked.\(^{369}\)

Again, no surprises with respect to the representative cases discussed here, where Younger abstention was found to be inappropriate. In *Rivers*, the grandfather had sought only money damages; thus, no abstention. In *Midwestern Gas*, there was dual federal and state jurisdiction. No problems with respect to comity there. The court reasoned in *Southwest Air Ambulance* that there was no reason to abstain when the state court defers in favor of the federal action. And, finally, in *For Your Eyes*, the federal case had proceeded too far to invoke Younger.

V. THE TALLY ON ABSTENTION IN THE TWENTY-FIRST CENTURY

Having now completed review of the abstention doctrine cases decided in the twenty-first century, what is the tally? The raw numbers show abstention mentioned or considered in 163 federal appellate cases. Ninety-three of the cases involved abstention as a major issue in the case. Approximately seventy-five of these cases were reported

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365. Southwest Air Ambulance, Inc. v. City of Las Cruces, 268 F.3d 1162, 1164-66 (10th Cir. 2001).
366. 281 F.3d 1209 (11th Cir. 2002).
367. For Your Eyes Alone, Inc. v. City of Columbus, 281 F.3d 1209, 1213 (11th Cir. 2002).
368. *For Your Eyes*, 281 F.3d at 1211.
369. *Id.* at 1218.
This article only discussed or cited those cases that are reported in the West Reporter system. With respect to Pullman abstention there were a total of twelve cases. Pullman abstention was found appropriate in only four of those cases. Burford abstention was also an issue in twelve cases. Burford abstention was found appropriate in only three such cases. The issue of Colorado River abstention arose in sixteen cases, and, as might be expected, such abstention was found appropriate in only two such cases. Younger abstention was at issue in twenty-nine cases. There was an almost even split in these cases. Younger was found to be appropriate in thirteen such cases and inappropriate in sixteen of the cases.

The raw numbers reveal that there were far fewer situations in the twenty-first century in which abstention was found to be appropriate than the situations where abstention was not appropriate. Out of seventy-one cases discussed or cited in this article, abstention was granted in only twenty-two cases—approximately one-third of the cases reported. In light of the hundreds of federal cases reported since the beginning of the twenty-first century, abstention has been found appropriate in a minuscule number. One wonders whether the critics of abstention might be mollified when they learn the small number of times abstention may really be necessary—that is, where there is a genuine tension between the federal and state court systems and the federal system must for reasons of comity abstain.

Yet, the raw numbers in themselves mean nothing. The question to be addressed to the critics of abstention is whether the rationale for comity and "Our Federalism" found in the classic abstention doctrines cases have been followed rigorously and analytically by the courts. The answer? Of course it has, as have the analyses of the cases reviewed herein reveal.

Still, critics may argue the raw numbers do not reveal the delay and costs that litigants may suffer when their federal case is stayed or dismissed because of abstention. All litigation is costly and expensive. Learning the costs of litigating the cases reviewed herein are far beyond the kin of this author. However, we might look at the issue of delay in two of the cases. A strong criticism of Pullman abstention is that it causes delay to the litigants. Is the delay inordinate? Federal court dockets are always full and few obtain their day in court as soon as they might wish.

Let us again examine two of the twenty-first century Pullman decisions to determine the time the cases consumed. In Ford Motor,
Meredith filed its protest with the New Hampshire Motor Vehicle Industry Board sometime after January 15, 1998. Ford filed its federal action seeking declaratory relief on September 28, 1999. On August 16, 2000, the New Hampshire court reached its decision. Eight days later the federal court entered judgment for Meredith. Ford appealed shortly thereafter. The First Circuit heard oral argument on May 9, 2001, and rendered its sua sponte decision invoking Pullman abstention on August 6, 2001. The matter was resolved in just under three years of litigation. For Ford the federal portion of the matter lasted two years. Was there delay for Ford? Yes, but it does not appear inordinate given today’s federal court dockets.

In Cruz v. Melecio, the timing was as follows: the “Party” filed its state suit seeking to register their party for the November 2000 election on October 16, 1998. Summary judgment was granted for defendants on January 21, 1999. The Party appealed the state court dismissal and the appellate court upheld the dismissal on March 25, 1999. The state case was pending before the Puerto Rico Supreme Court at the time of the federal appeal. The Party had filed their federal complaint on March 23, 1999. The federal suit was dismissed July 7, 1999. The Party appealed shortly thereafter. The First Circuit heard argument on the case on December 6, 1999. On February 17, 2000, the court, sua sponte, ruled that it must abstain in light of the pending state action. This case appears to have flown through the system very speedily, but after all it was a voter registration matter with a well-defined deadline that had to be met. There appears to be little delay in this Pullman abstention case, at least with respect to the federal action. We can make no determination as to whether there may have been inordinate delay in the other two cases upholding Pullman because the written decisions do not provide enough specificity with respect to procedural dates. Yet, the point is made. The critics may decry the delay and cost of Pullman abstention, but given federal court dockets, the delay does not appear to be inordinate. This author’s personal experience with cases in federal court indicate that even the most routine federal court case, even without abstention, will have a pendency of at least eighteen months or better, if not dismissed earlier on summary judgment grounds.

371. Ford Motor Co., 257 F.3d at 68, 70.
372. Id. at 70.
373. Id. at 67.
374. Id. at 67, 71, 71 n.3.
375. Cruz, 204 F.3d at 18.
376. Id.
377. Id.
378. Id. at 14, 22 n.7, 25.
ABSTENTION DOCTRINES

As noted earlier, Charles Wright has criticized abstention and particularly Pullman abstention, on grounds of delay and also on grounds that it denies litigants a hearing in federal court on claims based on federal law. This author finds such criticism unpersuasive. Wright's argument, in full, on this point provides:

[That with Pullman-type abstention many federal litigants would not get their day in court.] In the Pullman case the Supreme Court ordered the trial court to retain jurisdiction while the parties sought a state ruling on the state issues . . . . The Court first held that the federal constitutional objections must be presented to the state court, so that it may consider the issues of state law in the light of the constitutional claims. But if the state court should decide the federal issues, on ordinary principles of res judicata . . . this would be a binding determination, subject to review only in the Supreme Court, and there would be nothing left for the federal court to decide in the exercise of jurisdiction it had retained. Since the Supreme Court cannot hear every case tendered to it, this would mean that many litigants never would have a hearing in a federal court even though they were asserting claims based on federal law.379

This author finds such argument unconvincing in light of experience and in light of the raw numbers of appeals filed to the Supreme Court. It is almost axiomatic that whether in a Pullman case or any other type of federal litigation one's chance of getting to the United States Supreme Court is remote. The numbers alone show that in 2001–2002, the United States Supreme Court received 7,924 appeals. Only eighty-eight of these cases were argued and the court disposed of eighty-five.380 Most were not even accepted for review. Very few cases are heard by the United States Supreme Court. This does not mean that a litigant will be denied rights by not having his federal claims heard by a federal court. This author decryes the notion that a state court, faced with a federal claim, cannot properly apply federal law. As every student and teacher of federal jurisdiction understands, federal law is enforceable in state court. There may then be an appeal from the state trial court to the state supreme court which is also constitutionally bound to enforce federal law. An appeal from the state supreme court to the U.S. Supreme Court is also possible, even though the numbers of cases accepted are small.

The larger point here from this author's point of view as a former federal court practitioner and one who teaches federal jurisdiction is

379. WRIGHT ET. AL., supra note 1, § 52, at 328-29.
that a litigant can well have his federal claims fairly adjudicated in a
state court. In my class on federal jurisdiction I am fond of reminding
my students of the Supreme Court’s axioms on this point:

Federal law is enforceable in state courts not because Con-
gress has determined that federal courts would otherwise be
burdened or that state courts might provide a more conve-
nient forum—although both might well be true—but because
the Constitution and laws passed pursuant to it are as much
laws in the States as laws passed by the state legislature.
The Supremacy Clause makes those laws “the supreme Law of
the Land,” and charges state courts with a coordinate re-
sponsibility to enforce that law according to their regular
modes of procedure. “The laws of the United States are laws
in the several States, and just as much binding on the citi-
zens and courts thereof as the State laws are . . . . The two
together form one system of jurisprudence, which constitutes
the law of the land for the State; and the courts of the two
jurisdictions are not foreign to each other, nor to be treated by
each other as such, but as courts of the same country, having
jurisdiction partly different and partly concurrent.381

Again, and for the reasons outlined above, Wright’s notion that a liti-
gant may not get his federal claims heard before a federal court be-
cause of Pullman abstention is unpersuasive in light of the operation
of our dual court system of jurisprudence. Such litigant can get his
federal claims heard before a court, even a state court, that can decide
federal claims. Justice can be so served.

As stated earlier in this article, the scholars Lee and Wilkins ar-
agree that the abstention doctrines permit “federal courts to decline the
exercise of congressionally conferred jurisdiction”382 and they ques-
tion “whether the judiciary has the ‘authority to ignore the dictates of
valid jurisdictional . . . statutes.’”383 The authors note that abstention
doctrines “could be characterized as a judicial usurpation of legisla-
tive authority, in violation of the principle of separation of powers.”384
They propose federal legislation that would direct when abstention
could properly be invoked.385 As this author points out, Congress has

U.S. 130, 136-37 (1876)).
383. Id. at 336-37 (quoting Martin H. Redish, Abstention, Separation of Powers,
and the Limits of the Judicial Function, 94 Yale L. J. 71, 72 (1984)).
384. Id. at 337.
385. An example of their statute for Pullman abstention would provide:
(1) A federal district court may, in its discretion, abstain from deciding a fed-
eral constitutional issue if
(a) Decision of the federal constitutional issue depends upon the construction
of state law; and
proposed no legislation and probably never will propose legislation to codify the use of the abstention doctrines. Congress is too busy wrestling with issues concerning homeland security, prescription medicine payments for seniors, the war with Iraq, and its next biennial election to consider codifying the abstention doctrines. One can argue after this review that there are far too few cases each year invoking abstention for Congress to make this a major legislative initiative.

Moreover, Congress could probably not be convinced to pass a federal abstention doctrine law which would authorize federal courts to certify state law questions to the appropriate state court since the concept of certification has been a creature of state law. There would be no need for Congress to preempt this area of state law. Forty-four out of fifty states already have such certification statutes. This fact taken together with the relatively modest number of abstention cases decided each year militate against such legislation. At present under the Uniform Certification of Questions of Law Act, passed in 1967 and amended in 1996, the highest court of a state may answer questions of law certified to it by various federal courts, including a federal district court, court of appeals, and the United States Supreme Court.386

If Congress would examine the abstention doctrine cases considered and decided in the twenty-first century and reviewed in this article, it would come to the conclusion that federal circuit courts are doing a wonderful job to balance the need for comity within our dual system of courts. There has been no abuse of the doctrines and the courts have been going thorough in their analyses. The system with respect to abstention isn't broke—there is no need for legislation to fix it.

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


386. This may be done when requested by the certifying court if there are involved in any proceeding before the federal court questions of law of the state which (1) may be determinative of the cause then pending in the federal court, and (2) as to which it appears to the certifying court there is no controlling precedent in the decisions of the state highest court or intermediate courts. 1 Fed Proc, L Ed § 1:690, Lawyers Cooperative Publishing (1995) (citing Uniform Certification of Question of Law Act § 1.
The overall paucity of abstention cases in the twenty-first century in regard to the total number of federal cases decided in the same time frame should also convince the critics that there is little likelihood that Congress is ever going to take up legislation beyond the anti-injunction statute to codify rules concerning abstention. As the twenty-first century progresses we may witness a refining of the certification statutes and the adoption of such statutes in all of the fifty states. Yet, it must be remembered that certification is not abstention. A federal court may not properly ask a state court if it would care to rewrite a statute. It would also be inappropriate for a federal court to certify an entire constitutional challenge to the state court, for certified questions should be confined to uncertain questions of state law. 387

VI. CONCLUSION

This review of the abstention doctrine cases decided in the twenty-first century and their comparison with the classic abstention doctrine cases should show the critics that abstention is not something to be reviled or legislated out of existence. There will be times when although a federal court might have jurisdiction, such federal court may be wise to stay its hand on grounds of comity. In only one-third of the overall cases where abstention was an issue did the circuit courts find abstention appropriate. Such small numbers reveal the prudence and wisdom of the federal courts with respect to abstention. Because the United States has two parallel systems of courts (state and federal) there will sometimes be tensions. As a result, the need for notions of comity and “Our Federalism” are still with us in the twenty-first century. It is likely that abstention will always be with us—the critics should get over it.