
Volume 59

Issue 1 *Remembering the Dream, Renewing the Dream: Celebrating the 50th Anniversary of Dr. Martin Luther King, Jr.'s 'I Have a Dream' Speech and the March on Washington*

Article 9

January 2015

Between the Acts: Federal Court Abstention in the 1940s and '50s

ANN WOOLHANDLER

William Minor Lile Professor of Law at the University of Virginia School of Law

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review



Part of the [Civil Rights and Discrimination Commons](#)

Recommended Citation

ANN WOOLHANDLER, *Between the Acts: Federal Court Abstention in the 1940s and '50s*, 59 N.Y.L. SCH. L. REV. (2014-2015).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

ANN WOOLHANDLER

Between the Acts: Federal Court Abstention in the 1940s and '50s

59 N.Y.L. SCH. L. REV. 211 (2014–2015)

ABOUT THE AUTHOR: Ann Woolhandler is the William Minor Lile Professor of Law at the University of Virginia School of Law. The author extends her thanks to Michael Collins, Barry Cushman, Caleb Nelson, Ed Purcell, and George Rutherglen.

BETWEEN THE ACTS: FEDERAL COURT ABSTENTION IN THE 1940s AND '50s

During the 1940s and '50s, the federal courts were between the acts. Substantive due process was finishing its long run, but modern civil rights cases had not fully occupied the stage.¹ Plaintiffs raising race issues in the 1940s did not necessarily perceive the federal courts as superior to state courts,² but saw increased advantages to a federal trial forum as the 1950s progressed.³

To the extent plaintiffs challenging state and local law sought an original federal forum—whether in race discrimination or other cases—they might find that various abstention doctrines obstructed their path. Under such doctrines, federal courts directed cases to state courts that would otherwise have been within federal subject matter jurisdiction. In *Texas Railroad Commission v. Pullman*, for example, the U.S. Supreme Court abstained when African American Pullman porters raised an equal protection challenge to the state Commission's work rule favoring white conductors. Under *Pullman* abstention, the federal court awaits a state court determination of an unclear state law issue—in that case, whether the Commission lacked authority to enter the order—that might obviate the need to decide a federal constitutional question.⁴ Other abstention doctrines forbid federal courts from disrupting states' efforts to establish a coherent administrative scheme (*Burford* abstention),⁵ deciding issues of state law whose importance transcends the particular case (*Thibodaux* abstention),⁶ and interfering with ongoing state enforcement actions (*Younger* abstention).⁷

-
1. See Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 692, 694–95 (1999) (noting the enhanced role of the federal courts in vindicating federal rights at the turn of the century and later with the Warren Court's "centralizing liberal activism").
 2. See, e.g., MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 51 (2004) (suggesting that federal courts were not seen as particularly better than state courts on race issues and indicating that the NAACP filed many graduate student cases in state courts and many salary equalization cases in federal courts); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 205 (2007) (noting the NAACP's successes in getting California state courts to forbid maintenance of both a closed shop and a closed union).
 3. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 n.* (1954) (involving three cases from federal courts and one from a state court); TUSHNET, *supra* note 2, at 151 & n.28 (noting facilities segregation cases pending at the time of *Brown*, which were in federal courts); JACK GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 9–10 (1959) (discussing overall superiority of federal courts on race issues); see also Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 703 (1989) (reviewing PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (3d ed. 1988)) (stating that the vision of state and federal courts as fungible was undermined by *Brown* and its progeny).
 4. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941); see also *id.* at 498 (indicating that the Pullman Company and the railroads brought the suit, in which porters intervened).
 5. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 317, 334 (1943) (directing to state court an oil company's state and federal-law based challenge to a state agency's alleged over-allocation of drilling rights to a small producer); see also *infra* text accompanying notes 50–54 (discussing *Burford*).
 6. See *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30–31 (1959) (directing the lower federal courts to await a determination by the state supreme court as to whether the city was authorized under state law to expropriate utility company property within the city).
 7. See *Younger v. Harris*, 401 U.S. 37, 52–53 (1971) (refusing to entertain a defendant's challenge to a state criminal syndicalism law). This article is somewhat more focused on *Pullman* abstention than other

By deflecting and delaying decisions by the federal judiciary, these jurisdictional decisions advanced the Progressive and New Deal substantive agenda of reducing federal court invalidation of state law—an agenda formed in reaction to decisions such as *Lochner v. New York*.⁸ In particular, Ed Purcell has ably shown that Felix Frankfurter, as a scholar and judge, saw procedural and jurisdictional decisions as instruments to effectuate such substantive policy goals.⁹

This article aims to make a modest addition to prior scholarship by showing ways in which the reasoning supporting abstention corresponded to the Court’s reasoning in substantive decisions as to the validity of statutes. Part of this overlap was the emphasis on judicial restraint and institutional competence,¹⁰ as other scholars have noted.¹¹ These broad principles supported not only federal court

types, but because the doctrines of abstention and the reasoning supporting them were not altogether distinct during the period under study, this article is not limited solely to *Pullman* abstention. *Younger* abstention, however, is not a central focus. For the classic article focusing on the cases preceding *Younger*, see Douglas Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636 (1979). While Professor Laycock shows that federal courts’ declining equitable jurisdiction when plaintiffs challenged state criminal statutes was a less pervasive practice than many had supposed, *id.* at 636, 642–44, this article suggests that other types of abstention may have been somewhat more prevalent than is currently appreciated.

8. 198 U.S. 45 (1905) (invalidating, under the Fourteenth Amendment’s due process clause, state legislation limiting bakery employee hours to ten hours a day and sixty hours a week). The *Lochner* Era, running roughly from the late 1890s to the late 1930s, was characterized by the federal courts’ overturning social and economic legislation based on implied limitations on government power. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 567 (2d ed. 1988).
9. Purcell, *supra* note 1, at 683–84 (stating that the agenda of Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* (1928), “included constraining the reach of the conservative Supreme Court, limiting the ability of corporate litigants to exploit federal jurisdiction, abolishing the doctrine of *Swift v. Tyson* (1842), blocking passage of the proposed federal declaratory judgment act, expanding substantially the issues on which the lower federal courts would defer to state courts, and justifying a series of progressive legislative proposals to restrict the jurisdiction and alter the structure of the national judiciary” (footnote omitted)); *id.* at 684–86 (discussing how Frankfurter’s seemingly neutral scientific and professional approach helped to obscure this progressive agenda); see also Stephen Gardbaum, *New Deal Constitutionalism and the Unbackling of the States*, 64 U. CHI. L. REV. 483, 565 (1997) (stating that New Deal constitutionalism viewed “the activist federal courts as the chief culprits of the previous era and, as a result, reallocated power from them to state and federal legislatures—and to state courts—by substantially reducing the scope of judicial review”).
10. Institutional competencies refers not only to the notion that one body may make better decisions than another as to fact, law, or policy, but also that it may more appropriately or legitimately make those decisions. See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at lx (1994) (characterizing institutional competency arguments: “In a government seeking to advance the public interest, each organ has a special competence or expertise, and the key to good government is not just figuring out what is the best policy, but figuring out which institutions should be making which decisions and how all the institutions should interrelate.”).
11. See, e.g., Amar, *supra* note 3, at 694, 696 (discussing the link between notions of fungibility of state and federal courts and the legal process school’s emphasis on institutional competencies); cf. Purcell, *supra* note 1, at 705 n.76 (noting that while Louis Brandeis and Frankfurter helped to inspire legal process jurisprudence, both were less concerned with abstract legal philosophy and more concerned with practical and political issues inseparable from progressive values); Mary Brigid McManamon, *Felix*

deference to state legislatures when reviewing the validity of state regulation, but also undergirded federal court abstention in favor of state court review of state regulation in the first instance. This parallel reasoning manifested itself not only at the general level of emphasizing institutional competencies and judicial restraint, but also in some of the more specific techniques that implemented those concepts. For example, the Court increasingly relied on social facts—such as those that had appeared in Brandeis briefs—to provide the substantive justification for legislation; it also relied on the importance of social facts as a reason for abstention.¹² The technique of testing the validity of legislation by imagining a possible state of facts that might support it, or by balancing governmental interests against what were previously more absolute rights,¹³ also had cognates when the Court justified abstention.¹⁴

This article also shows that, reinforced by such reasoning, the abstention doctrine at mid-century appeared to be heading in the direction of requiring exceptional circumstances *not* to abstain when plaintiffs contested state and local regulation. Because abstention subsists and continues to evoke academic criticism,¹⁵ it may be easy to forget how pervasive a doctrine abstention threatened to become.

Some justices, however, resisted application of these accepted aspects of substantive legal reasoning to the federal jurisdictional sphere. Civil rights cases would contribute considerably to reining in abstention.¹⁶ Not coincidentally then, it was roughly contemporaneous with Martin Luther King, Jr.'s "I Have a Dream" speech that the abstention doctrine started to become the more marginal doctrine that it is today.

Part I of this article discusses the origins of the abstention doctrines in the Progressive and New Deal desire to rein in federal courts' invalidation of regulation. Part II discusses how the reasoning supporting abstention paralleled that used in

Frankfurter: The Architect of "Our Federalism", 27 GA. L. REV. 697, 743–44 (1993) (discussing Frankfurter's thought and its influence on judicial federalism); *id.* at 777, 780–81, 783 (discussing Frankfurter's influence on the *Erie* doctrine (derived from *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)), the *Pullman* abstention doctrine, and the interpretation of the Anti-Injunction Act); *see* 28 U.S.C. § 2283 (2006).

12. *See infra* text accompanying notes 34–55.

13. *See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (rejecting Fourteenth Amendment challenges to restrictions on the work of opticians, based on imagining possible health reasons the legislature may have had for the restriction); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444–45 (1934) (rejecting a contract clause challenge to a mortgage moratorium by, in effect, balancing the right against the needs of society). *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948–63 (1987) (discussing the rise of balancing); *id.* at 964 (discussing *Blaisdell* as a balancing case).

14. *See infra* text accompanying notes 56–68 (discussing any state of facts reasoning); *infra* text accompanying notes 69–98 (discussing balancing).

15. *See, e.g.*, PETER W. LOW ET AL., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 770 (7th ed. 2011) (collecting authority).

16. *See Amar, supra* note 3, at 702–03 (indicating that *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), "called into question every central tenet of the legal process theory" manifest in the first edition of HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953)) [hereinafter HART & WECHSLER I].

determining the constitutionality of statutes. Part III shows that the abstention doctrines were less distinct from one another than they are today, and that abstention appeared to have the potential to become a general default doctrine for cases challenging state and local regulation. Part IV traces resistance to abstention, and the reasoning supporting it, from Justice William O. Douglas and like-minded justices. Part V shows how these justices helped to limit abstention to special categories and traces the decline of the doctrine, in part spurred by civil rights cases.

I. BACKGROUND

It is generally appreciated that the abstention doctrines were a reaction to the *Lochner* Court's substantive constitutional doctrines,¹⁷ and the perceived increase in federal equity jurisdiction to entertain anticipatory challenges to state regulation ushered in by *Ex parte Young*.¹⁸ An additional contributing factor was *Erie*'s rejection of the federal courts' power to confect general common law in diversity,¹⁹ which undermined federal courts' confidence in deciding state law issues that might arise in the course of challenges to state regulation.²⁰

Congressional legislation limiting federal court jurisdiction over challenges to state and local regulation followed soon after *Ex parte Young*.²¹ In addition to provisions for three-judge courts beginning in 1910,²² a 1913 statute required federal courts to stay proceedings to enjoin state statutes and administrative orders provided the state commenced an enforcement suit in state court prior to the federal court's final hearing, and provided the state courts supplied relief from the statute or order pending the state court determination.²³ The act had little effect, however, because states were

17. See *supra* note 9 and accompanying text.

18. 209 U.S. 123 (1908) (allowing an equity action where the government threatened to bring actions in state court to enforce an allegedly unconstitutional law); see, e.g., McManamon, *supra* note 11, at 784 (indicating that Frankfurter attempted to destroy *Ex parte Young* by *Pullman* abstention and by “breath[ing] new life into the Anti-Injunction Act”); Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 375 (1930) (arguing that allowing an injunction under *Ex parte Young* violated the spirit of the Anti-Injunction Act).

19. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

20. See, e.g., McManamon, *supra* note 11, at 744–49 (discussing Frankfurter's influential arguments for limiting pendent jurisdiction); *id.* at 749–51 (discussing Frankfurter's arguments that *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) led to nonuniformity); Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 648 (1999) (discussing *Erie*'s influence on abstention doctrine).

21. HART & WECHSLER I, *supra* note 16, at 854 (noting a “series of efforts, both legislative and judicial, to effect a partial shift to state courts from federal trial courts of litigation of the type of *Ex parte Young*”).

22. *Id.* at 848–49 (discussing three-judge-court provisions of 1910, 1913, 1925, and 1948).

23. Act of March 4, 1913, ch. 160, 37 Stat. 1013. The provision apparently did not evoke significant debate. See Welch Pogue, *State Determination of State Law and the Judicial Code*, 41 HARV. L. REV. 623, 626–27 (1928).

unwilling to supply the required *pendente lite* relief.²⁴ Undaunted, Frankfurter,²⁵ Charles Warren,²⁶ Frankfurter's students, and others²⁷ persistently argued in the 1920s and '30s that virtually all challenges to state regulation should be heard in the first instance in state courts.²⁸ They bemoaned the "hasty assumption of [federal] jurisdiction in suits to test the constitutionality of state statutes before the corporation affected has [resorted] to remedies afforded by state laws,"²⁹ and recommended that "the road to the protection of constitutional rights lay to the Supreme Court from the state courts."³⁰

Congress went a long way toward implementing the proposed jurisdictional shift to state courts with the Rate and Tax Injunction Acts of 1934 and 1937, which respectively directed challenges to state and local rates, and taxes to the state courts.³¹ Frankfurter helped send state courts some of the remaining cases challenging state and local regulation beginning with his decision in *Texas Railroad Commission v. Pullman, Co.*³² In that case, the Court withheld a determination of whether the Commission's order channeling certain work from black Pullman porters to white conductors violated the equal protection clause, pending a determination by the state courts of whether the Commission had power under state law to issue the order. With *Pullman*, said the *Harvard Law Review*, "the court enunciated a doctrine potentially as significant as the overthrow of *Swift v. Tyson* and one which evidences

24. See HART & WECHSLER I, *supra* note 16, at 854 ("The provision has been largely ineffectual."); see also Note, *The Pullman Case: A Limitation on the Business of the Federal Courts*, 54 HARV. L. REV. 1379, 1382 n.18 (1941) ("Up to 1937, only four states had adopted the necessary enabling statutes.").

25. See, e.g., Purcell, *supra* note 1, at 698–706 (discussing Frankfurter's works); McManamon, *supra* note 11, at 740–41 (discussing the works of Frankfurter and James M. Landis that appeared in the *Harvard Law Review* from 1925 to 1927, which became *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System* (1928)).

26. See, e.g., Warren, *supra* note 18.

27. See, e.g., Pogue, *supra* note 23, at 623 n.* (indicating the paper was originally prepared for Frankfurter's class); John E. Lockwood et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 426 n.a1 (1930) (expressing indebtedness to Frankfurter); McManamon, *supra* note 11, at 754 n.338 (listing papers published by Frankfurter's students and acolytes).

28. Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499, 517 (1928); Lockwood et al., *supra* note 27, at 454 (proposing that federal equity be unavailable so long as there is an adequate remedy in state courts, legal or equitable); Warren, *supra* note 18, at 378 (arguing that federal courts should be more willing to refuse jurisdiction where litigation can more satisfactorily be dealt with by state courts).

29. Warren, *supra* note 18, at 346.

30. Frankfurter, *supra* note 28, at 519.

31. These acts deprived the federal district courts of jurisdiction to entertain most actions to enjoin state and local taxes and utility rates, so long as a "plain, speedy and efficient remedy" was available in state court. 28 U.S.C. §§ 1341–1342 (2006). The prohibitions on jurisdiction extended to most constitutional challenges. See *id.*

32. 312 U.S. 496 (1941). The principal predecessor to *Pullman* was *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159 (1929), discussed in McManamon, *supra* note 11, at 781.

an effort to minimize the area of conflict between the federal judiciary and the states.”³³

II. TIES OF SUBSTANTIVE AND JURISDICTIONAL REASONING

A. Sociological, Fact-Based Jurisprudence

Abstention minimized the role of federal courts in invalidating state and local regulation and relied on reasoning that paralleled substantive constitutional doctrine. As to substantive methodology, the Progressive and New Deal Eras characteristically employed a sociological jurisprudence that emphasized social facts that helped justify legislation that might have been invalidated under more formalist notions.³⁴ “Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary,” stated Justice Louis Brandeis, “can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary . . . in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed.”³⁵

Even as Progressive and New Deal Era judges relied on social facts to justify legislation, the extent of their exploration of real-world facts could span a continuum. At one end was judicial scrutiny of actual justificatory facts, such as the Court’s

33. Note, *supra* note 24, at 1380; *see also id.* at 1385 (noting that *Pullman* had virtually the same effect as refusing “to enjoin enforcement of state orders in cases of doubt”); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (applying a general common law in a commercial case in diversity). The Court abandoned the general common law in diversity in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), making state law more pervasively the law that the federal courts applied in diversity cases.

34. *See* Aleinikoff, *supra* note 13, at 948–63 (discussing the rise of balancing as a reaction to Lochnerism); *id.* at 954 (indicating that Progressives were self-consciously attentive to facts and social conditions); Purcell, *supra* note 1, at 702 (discussing Frankfurter’s belief that “‘knowledge of [] facts’ was ‘the foundation of constitutional judgment’”). This is not to say that formalist approaches ignored facts and consequences. *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1099–1126 (2000) (indicating that formalism, “rooted in consequentialist concerns,” and in commerce clause jurisprudence, was a conscious strategy for maintaining principled boundaries between the state and federal spheres and promoting the free interchange of goods).

35. *Truax v. Corrigan*, 257 U.S. 312, 356–57 (1921) (Brandeis, J., dissenting); *see also* Aleinikoff, *supra* note 13, at 954 (discussing the call for attention to facts and pragmatism); FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 179–80 (1930) (praising Brandeis’s dissent in *Truax*); FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 192 n.29 (1928) (applauding the “application of a new technique in constitutional argument wherein an appreciation of facts is the decisive element”); Purcell, *supra* note 1, at 702–03 (citing to Frankfurter and Landis’s emphasis on knowledge of the facts, including the “facts of industrial life” as the basis for constitutional decisions, and also noting Frankfurter’s urging that the Supreme Court should not be a fact finder); Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175, 187 (1991) (suggesting that a description that would fit Frankfurter’s teaching of constitutional law would include “emphasis on process, . . . on peculiarities, on cases, . . . on resolving competing considerations, on watching for practicalities not likely to be expressed in opinions,” citing to what Thomas Reed Powell said of his own teaching, *in* LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 51 (1986)).

reliance on the poor bargaining power of women to uphold a state minimum wage.³⁶ At the other end was judicial indifference to real-world facts manifested in the formula that the Court would uphold economic legislation if a reasonably imaginable state of facts would support it.³⁷ Approaching the latter end of the spectrum was an emphasis on facts mysteriously accessible to legislatures and agencies, but not to reviewing federal judges.³⁸ In *Osborn v. Ozlin*, for example, in rejecting a Fourteenth Amendment attack on a law requiring that Virginia insurance agents receive at least half of the commissions on any insurance policy covering Virginia risks, Frankfurter recited facts about the insurance industry and various other aspects of Virginia's insurance regulation,³⁹ none of which suggested any particular problem the legislation addressed. But the legislation was "not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it."⁴⁰ Similarly, in rejecting a contracts clause challenge to New York's 1943 continuation of an earlier foreclosure moratorium despite improved financial conditions, Frankfurter reasoned that "when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements," the state's authority "is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment."⁴¹

36. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398–99 (1937) (discussing the poor bargaining power of women, and that the legislature was entitled to adopt measures to reduce the evils). See generally GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 477 (13th ed. 1997) (indicating that the *West Coast Hotel* opinion contained "explanations of the rationales for the challenged laws").

37. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153–54 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (citing *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924)), although also stating that "where the legislative judgment is drawn in question [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it"). Commentators generally see *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) as manifesting the extreme deference characteristic of modern review.

Indifference to supportive facts does not have to suggest that the Court sees state legislatures (or state courts) as superior fact finders, but rather may indicate that the Court sees these bodies as more legitimately deciding whether state legislation is justified by social conditions. Cf. Cushman, *supra* note 34, at 1144–45 (stating that the import of *Wickard v. Filburn*, 317 U.S. 111 (1942), was that a "record that had been utterly inadequate for an empirical, *judicial* assessment of the effect was perfectly adequate for a *legislative* determination"). Reference to superior fact finding abilities, however, could complement legitimacy concerns; both may be aspects of institutional competency arguments. See Eskridge & Frickey, *supra* note 10, at lxi.

38. Cf. *Nat'l Labor Relations Bd. v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 126 (1944) ("Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy.").

39. 310 U.S. 53, 61–62 (1940).

40. *Id.* at 63; cf. Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 395 (1949) (noting Frankfurter's resistance to code-like formulations).

41. *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230, 232 (1945).

Such fact-mysticism in substantive review translated to jurisdictional allocation decisions as well. At first blush, state courts would not evidently have institutional competency superior to federal courts in determining facts, as opposed to determining state law. But perhaps partly as a result of seeing state courts as sharing in state lawmaking,⁴² some Progressives saw the state courts as having access to inarticulable knowledge of local facts that the federal courts lacked.⁴³ In urging a decreased role for the federal courts, Frankfurter argued that federal courts would have trouble giving “meaning to isolated and frequently obscure expressions of state policy, behind which may lie unexpressed assumptions familiar to the state judges.”⁴⁴ Cases involving the validity of state statutes and regulation thus should proceed through state courts, said a like-minded commentator, because:

[T]he state courts would seem potentially better able to find [] facts by reason of their greater proximity to them. Most constitutional issues involve a close examination of the situation with which the statute deals. What this situation is, the reasons for the legislation, and the effect it will have, may lie deep in the roots of local peculiarities.⁴⁵

If constitutional challenges to state law made their way through the state courts, said another:

The state courts could have woven into the statute or order assailed an interpretation based on local laws, conditions, and history, essential in many cases to an understanding of the real meaning and operation of the statute or order, and known perhaps best and perhaps only to the state courts.⁴⁶

This *volksgeist* approach to both substantive review and jurisdictional allocation was evident in the cases restricting federal review of the Texas Railroad Commission’s allocation of drilling rights in the Texas oil fields. In *Railroad Commission v. Rowan*

42. See Woolhandler & Collins, *supra* note 20, at 652 (noting influence of line-blurring between state legislatures, agencies, and courts).

43. See Frankfurter, *supra* note 28, at 517 (noting that business regulation and tax cases turn “largely on voluminous facts, deriving significance from judgment on social and economic policy” and arguing for such cases to be heard in state courts). Indeed, according to Frankfurter, even utility regulation cases almost always involved the interpretation of “local laws and local contracts, not within the special competence of federal judges.” *Id.* at 519; see also Purcell, *supra* note 1, at 686 (stating that Frankfurter urged that “essentially local” matters should be heard in the state courts).

44. Frankfurter, *supra* note 28, at 518; *id.* at 519 (arguing that if cases challenging state and local regulation came to the Court through the state courts, “all state matters would be concluded, and the special local facts upon which constitutional questions now so frequently turn would, in the first instance, be canvassed by judges presumably most familiar with them” (footnote omitted)); see also McManamon, *supra* note 11, at 736 (noting Frankfurter and Landis’s statement that litigation involving state legislation unfairly required the Court to be aware of local facts); *id.* at 781 (stating that Frankfurter “was concerned that the federal courts were ill-equipped to interpret complex state statutory schemes”). *But cf.* David E. Lilienthal, *The Federal Courts and State Regulation of Public Utilities*, 43 HARV. L. REV. 379, 422–24 (1930) (arguing that local law and contracts were rarely at issue in utility cases).

45. Lockwood et al., *supra* note 27, at 451; *cf. id.* at 428, 451 (arguing that the Court needed the assistance of state courts that have “special knowledge” of state law).

46. Pogue, *supra* note 23, at 630.

ℰ Nichols Oil Co., the company challenged as confiscatory the Commission's system giving low-capacity wells near-equal allocations as productive wells.⁴⁷ Frankfurter, however, reduced due process review to a minimum, first giving a fact-laden discussion of Texas drilling regulation and relying on the "inherent empiricism"⁴⁸ of attempted solutions to common-pool allocation issues. Any particular order was "but one more item in a continuous series of adjustments"⁴⁹ by the Commission. Justice Hugo Black's opinion in *Burford v. Sun Oil Co.*, inaugurating *Burford* abstention, used similar reasoning. The Commission had issued a permit to Burford to drill four wells on a 2.33 acre plot, which the owners of larger neighboring tracts claimed allowed the confiscation of their oil.⁵⁰ According to Black's decision directing abstention, the Commission's "series of adjustments"⁵¹ would only be confounded by federal court participation. He piled on factual detail about the Texas oil fields, not in an attempt to find a discernible pattern in such state court adjustments, but seemingly because such detail self-evidently showed that oil allocation issues were better left to state courts.⁵² While Frankfurter dissented in *Burford*,⁵³ he later wrote the abstention decision in *Louisiana Power & Light v. City of Thibodaux*, reasoning that eminent domain issues "normally turn on legislation with much local variation interpreted in local settings."⁵⁴

Justices' assuming state court superiority in determining the social conditions justifying regulation was not limited to economic due process challenges. Knowledge of the problems that legislation was meant to address could be a reason for allowing

-
47. 310 U.S. 573, 577 (1940) (indicating that after first allocating twenty barrels per day to the low-capacity wells, the Commission determined that—given what remained of the total to be extracted—only twenty-two barrels per day could be allocated to productive wells).
48. *Id.* at 579–80. The *Rowan* decision effectively overruled *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55 (1937). See Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 984–88 (2005) (discussing *Thompson*). The Court there evaluated for itself the purpose of a particular proration order and found it was not designed to prevent waste or confiscation, but rather was meant to compel some producers to buy gas from others. *Thompson*, 300 U.S. at 77–79.
49. *Rowan*, 310 U.S. at 584. In denying rehearing, the Court declined to hear pendent state law issues. 311 U.S. 614, 615 (1940).
50. *Sun Oil Co. v. Burford*, 124 F.2d 467, 468 (5th Cir. 1941), *rev'd on rehearing*, 130 F.2d 10 (5th Cir. 1942), *rev'd*, 319 U.S. 315 (1943).
51. *Burford*, 319 U.S. at 332 (citing *Rowan*, 310 U.S. at 584).
52. *Id.* at 318–24; see also *Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 349 (1951) (abstaining with respect to an order requiring continuation of unremunerative local service challenged on federal and state grounds, and stating: "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights." (footnote omitted)).
53. 319 U.S. at 336, 340 (Frankfurter, J., dissenting) (arguing that because Congress had resisted efforts to restrict diversity outside of the rate context and state law standards were clear, abstention was inappropriate); see also Jaffe, *supra* note 40, at 381 ("*Pullman* is a better guide to . . . Justice[] [Frankfurter's] philosophy than his dissent in *Burford*."); HART & WECHSLER I, *supra* note 16, at 873 (attributing Frankfurter's *Burford* dissent in part to the constitutional issues' being minor).
54. 360 U.S. 25, 28 (1959).

states the initial decision on claims that we would now characterize as calling for more scrutiny. For example, in *Stainback v. Mo Hock Ke Lok Po*, in which a private school challenged on Fifth Amendment grounds a territorial law restricting foreign language instruction of younger children, the Court ordered dismissal as a matter of equitable discretion. The Court stated:

We think that where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course. We find no such circumstances in this case.⁵⁵

B. Any State of Facts to Which the Law Might Constitutionally Be Applied

The institutional competency arguments that supported greater reliance on state courts had their more obvious application where state law, as opposed to the underlying facts justifying state law, was at issue. After all, *Erie* made state courts the more definitive expositors of state law.⁵⁶ In *Pullman*, sending the case to state court was justified by the existence of a plausible narrowing construction that the state courts might give to the Commission's state law authority.⁵⁷ And *Pullman* continues to have currency for cases in which an obviously available interpretation of state law might obviate a federal court's having to decide a federal constitutional issue.

The 1940s Court, however, did not necessarily require that the narrowing interpretation be obvious when abstaining. Rather, the Court took the "any state of facts" notion for upholding the constitutionality of economic legislation⁵⁸ and transferred that notion to jurisdictional allocation decisions. Translated to abstention, the reasoning was that state courts should be given the opportunity to review the legislation ahead of the federal court, so long as there were any state of facts to which the legislation could apply without offense to federal law. "When a statute is assailed as unconstitutional," said the Court in declining to decide a case on direct review, "we are bound to assume the existence of any state of facts which would sustain the statute in

55. 336 U.S. 368, 383–84 (1949); *id.* at 373 (indicating the plaintiffs claimed a violation of the Fifth Amendment by the interference with the use of their property); *cf.* *Pub. Utils. Comm'n of Cal. v. United States*, 355 U.S. 534, 546, 552 (1958) (Harlan, J., dissenting, joined by Warren, C.J. & Burton, J.) (arguing for abstention in a preemption case, and adverting to special problems faced by California).

56. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

57. See Lauren Robel, *Riding the Color Line: The Story of Railroad Commission of Texas v. Pullman Co.*, in *FEDERAL COURTS STORIES* 163, 171 (Vicki C. Jackson & Judith Resnick eds., 2010) (stating that according to the company's complaint, the Commission lacked authority to regulate services as distinguished from rates); *id.* at 180 (noting the company's argument from a Texas case that "abuses" had to be statutorily defined).

58. See *supra* note 37 and accompanying text. The any state of facts notion was also used for legal sufficiency of the complaint. See *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."). *But cf.* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (retiring the *Conley* formula).

BETWEEN THE ACTS: FEDERAL COURT ABSTENTION IN THE 1940s AND '50s

whole or in part.”⁵⁹ And because state courts were the only forums that could definitively make such narrowing interpretations, resort to state court was frequently called for.⁶⁰

Such any state of facts reasoning for jurisdictional decisions survives, particularly as to *Younger* abstention, where it reinforces the requirement of extraordinary circumstances for federal court interference with an ongoing state criminal proceeding.⁶¹ The Court, however, used any state of facts notions in directing *Pullman* abstention as well, leading to abstention in cases when the possible saving interpretations by state courts often seemed much more far-fetched than in *Pullman*. In several cases, the Court reasoned that a state court might hold a statute to apply only to intrastate commerce, thus mooting commerce clause and preemption challenges. In *Spector Motor Service, Inc. v. McLaughlin*, for example, the Court abstained on that ground with respect to a commerce clause challenge to a state tax that applied to the “privilege of carrying on or doing business within the state.”⁶² And in *American Federation of Labor v. Watson*, the Court held that the lower court should have abstained rather than upholding Florida’s right to work law, again, because it was possible that Florida might construe the provisions to cover only employees not covered by the National Labor Relations Act⁶³—i.e., only employees whose labor disputes would not affect interstate commerce.⁶⁴

59. Ala. State Fed’n of Labor v. McAdory, 325 U.S. 450, 465 (1945). Justice Black had used similar language in directing that the federal courts not hear most of ASCAP’s challenge to a Florida law restricting copyright holders from entering price-fixing agreements. See *Watson v. Buck*, 313 U.S. 387, 402 (1941) (stating that this was not a case in which a “statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it”).

60. Cf. Frankfurter, *supra* note 28, at 518 (indicating that constitutional controversies often required a construction of state law).

61. See *Younger v. Harris*, 401 U.S. 37, 53–54 (1971) (citing the language in *Buck*, 313 U.S. at 402, as to a completely unconstitutional statute, as a possible exception to the usual prohibition on obtaining a federal injunction against a pending prosecution). The Court has used similar language in rejecting certain types of “facial” challenges. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (rejecting the challenge to the federal bail statute on the merits); cf. *United States v. Raines*, 362 U.S. 17, 21 (1960) (stating that persons to whom the act could constitutionally be applied “will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional”). The Court’s use of any state of facts reasoning in abstention cases, however, included cases in which plaintiffs claimed that the statute could not constitutionally be applied to their own conduct. See, e.g., *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 102–03 (1944) (indicating the tax commissioner had determined that the tax applied to Spector and assessed the tax for the years 1937 to 1940); *id.* (indicating Spector claimed that the statute could not constitutionally be deemed to apply).

62. 323 U.S. at 102; see also *Spector Motor Serv., Inc. v. O’Connor*, 340 U.S. 602, 605, 610 (1951) (holding the statute unconstitutional after state courts had held that the plaintiff was subject to the tax).

63. 327 U.S. 582, 598 (1946); see also *id.* at 598–99 (directing federal court to retain jurisdiction pending state determination).

64. See Ala. State Fed’n of Labor v. McAdory, 325 U.S. 450, 464 (1945) (dismissing certiorari in part based on discretion not to take jurisdiction in declaratory judgment suits and also based on the possibility that the state might hold that state union registration requirements would only apply with respect to workers whose labor disputes would not affect interstate commerce).

Other abstention cases, while not using the possibility of an intrastate commerce-only interpretation, alluded to similarly unlikely narrowing interpretations. In *City of Chicago v. Fieldcrest Dairies, Inc.*, the “important question of [state] law” as to which the federal courts would be making a mere “prediction” was whether a city’s requirement that milk be sold in “standard milk bottles” might be interpreted to allow sale in paper cartons.⁶⁵ And in *Stainback*,⁶⁶ when a private school challenged a territorial law providing that foreign languages could be taught to students under certain ages only if specific conditions obtained,⁶⁷ the Court dismissed the case, *inter alia*, on the ground that the Hawaii courts had not yet construed the act, without mentioning how the statute might be narrowed.⁶⁸

C. Balancing

The sociological jurisprudence that purported to look to real-world facts to justify legislation was tied to balancing as a technique for resolving substantive constitutional issues—a development ably analyzed by Alexander Aleinikoff.⁶⁹ For adherents to this style of legal analysis, the “absolutes of the past had to yield to experience and the social facts of the day.”⁷⁰ Similarly, jurisdictional allocations should give way to social facts. The allocation of jurisdiction was an “empiric process,”⁷¹ that should change with the particular needs of the day.⁷² The distribution of powers between

65. 316 U.S. 168, 169–72 (1942). In subsequent proceedings, the Illinois Supreme Court held, “It is inescapable that the words ‘standard milk bottles’ as used in this ordinance means the familiar glass milk bottles in common usage when it was adopted and cannot be construed to include ‘paper single service containers.’” *Dean Milk Co. v. City of Chicago*, 53 N.E.2d 612, 616 (Ill. 1944). The Illinois Supreme Court also held that the ordinance was reasonable as a matter of Illinois law. *Id.* at 618–19; *see also id.* at 614–15 (discussing the prior federal litigation). Although Justice Douglas authored the Court’s opinion in *Fieldcrest*, he would become increasingly hostile to abstention. *See infra* note 126.

66. *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1948); *id.* at 372–73 (noting lack of criminal sanctions); *see also* CHARLES ALAN WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 170 n.6 (1963) (treating *Stainback* as a *Pullman* case).

67. The student would have to have passed the fourth grade and a standard English test, or passed the eighth grade, or attained fifteen years of age. *Stainback*, 336 U.S. at 372 n.4.

68. *Id.* at 380–83.

69. *See generally* Aleinikoff, *supra* note 13 (discussing the rise of balancing as a method of constitutional reasoning).

70. Aleinikoff, *supra* note 13, at 954 (referring to Justice Oliver Wendell Holmes); *cf.* *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 95 (1947) (reasoning that “fundamental human rights are not absolutes” in upholding the constitutionality of the Hatch Act). Formalist jurisprudence did not ignore facts, *see generally* Cushman, *supra* note 34, but tended to use facts with a view more to proper categorization than to balancing. *See* Aleinikoff, *supra* note 13, at 950–51.

71. Frankfurter, *supra* note 28, at 514 (referring to diversity jurisdiction).

72. *See id.* at 506; *see also id.* at 503 (“That the wisdom of 1875 [the year Congress provided for general federal question jurisdiction] is the exact measure of wisdom for today is most unlikely.”); *id.* (“[The] specific functions [of the federal courts] ought to submit to the judgment of appropriateness to the needs and sentiments of the time.”); Purcell, *supra* note 1, at 698–99 (arguing that Frankfurter’s seemingly

BETWEEN THE ACTS: FEDERAL COURT ABSTENTION IN THE 1940s AND '50s

different courts “can be determined neither on a priori reasoning, nor by unchanging political considerations.”⁷³

In the case of jurisdictional determinations, the absolutism of the past consisted in positing a right to a federal forum. The earlier Court had sometimes articulated the ability to invoke federal jurisdiction as effectively being a constitutional right,⁷⁴ including in utility regulation challenges that proved such an irritant to Progressives.⁷⁵ Frankfurter and Charles Warren, however, argued that any right to invoke federal jurisdiction was statutory.⁷⁶ Such deconstitutionalization not only meant that Congress had no duty to give federal courts jurisdiction,⁷⁷ but also suggested that the federal courts had a less insistent duty to exercise the jurisdiction given. Rather, the federal courts could use their discretion⁷⁸ to balance the litigant’s claim to a federal forum against the interests of the court system, the states, or society more generally. Warren criticized *Ex parte Young*-style anticipatory actions for valuing “the right of an individual to resort to the federal court more highly than the right of a state to resort to its own courts.”⁷⁹ And as Justice Wiley B. Rutledge stated in lauding the

laudatory language for the enhanced role of the federal courts under the 1875 statute should rather be read as critical of the resultant docket pressures, and thus as pointing to jurisdictional restrictions).

73. Frankfurter, *supra* note 28, at 506.
74. *See, e.g.*, *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922) (invalidating a state law revoking a foreign corporation’s license to do in-state business if the corporation resorted to federal court, and referring to “the federal constitutional right of . . . foreign corporation[s] to resort to . . . federal courts”), *discussed in* EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 205–07 (1992); Woolhandler & Collins, *supra* note 20, at 638–40 (stating that the Court sometimes referred to diversity jurisdiction as a constitutional right); *see also* EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 83–84 (2000) (detailing arguments by businesses that diversity was a constitutional right, in response to Senator George Norris’s 1931 proposal to abolish diversity jurisdiction).
75. *See, e.g.*, *Reagan v. Farmers’ Loan & Trust Co.*, 154 U.S. 362, 391 (1894); *cf.* *R.R. & Warehouse Comm’n of Minn. v. Duluth St. Ry. Co.*, 273 U.S. 625, 628–29 (1927) (rejecting an argument that the railroad had to resort to state court for review of a rate order alleged to be confiscatory, stating, “the plaintiff if it prefers to entrust the final decision to the Courts of the United States rather than those of the State has a right to do so”).
76. *See, e.g.*, FRANKFURTER & GREENE, *supra* note 35, at 214 (arguing that there was clearly not a constitutional right to a federal forum); Warren, *supra* note 18, at 375 (indicating that a right to test the constitutionality of a state law in federal courts was possessed “only by virtue of the provisions of the federal statutes”); *see also* Amar, *supra* note 3, at 696 (indicating that legal process reasoning, manifest in the first edition of HART & WECHSLER, saw the federal courts “as fungible with state courts,” and “wholly dependent on Congress” for jurisdiction); Purcell, *supra* note 1, at 689 n.30, 699 (discussing Frankfurter’s emphasis on Congress as the source of federal jurisdiction).
77. Frankfurter, *supra* note 28, at 514 (“The constitutional grant of judicial power has never implied a duty by Congress to employ it.”).
78. Some discretion was already thought to inhere in equitable jurisdiction. *See, e.g.*, *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935) (relying on equitable discretion in holding that the district court should have declined jurisdiction in favor of state liquidation procedures for an insolvent state building and loan).
79. Warren, *supra* note 18, at 375 (crediting the thought to Justice John Marshall Harlan); *cf.* *Ex parte Young*, 209 U.S. 123, 182 (1908) (Harlan, J., dissenting) (“Surely, the right of a State to invoke the jurisdiction of its own courts is not less than the right of individuals to invoke the jurisdiction of a

various manifestations⁸⁰ of the “policy of strict necessity in disposing of constitutional issues,”⁸¹ “[e]xecution [of the policy] has involved a continuous choice between the obvious advantages it produces for the functioning of government in all its coordinate parts and the very real disadvantages, for the assurance of rights, which deferring decision very often entails.”⁸²

One of the principal advantages of the federal forum for the party invoking federal equity, according to then-contemporary commentators, was the “facility and speed with which temporary relief may be obtained in a meritorious case.”⁸³ Arguments for abstention sometimes treated the delay to the plaintiff caused by abstention as a cost that was overbalanced by federalism concerns. As the Court said in *Fieldcrest Dairies, Inc.*, “Considerations of delay, inconvenience, and cost to the parties, which have been urged upon us, do not call for a different result. For we are here concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole.”⁸⁴ Delay, moreover, could count not merely as a cost for the litigant, but also as a benefit to the public and the federal system.⁸⁵ Rutledge stated that constitutional avoidance helped to maintain the authority of the Court, and “the benefits of tolerance and harmony for the functioning of the various authorities in our scheme;” these interests would be undermined by “a contrary policy, of accelerated decision.”⁸⁶

Of course, delay is another name for constitutional avoidance, constitutional gradualism, and passive virtues—all concepts that the Court continues to rely on to a

Federal court.”); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 230 (1948) (arguing that actions under the civil rights laws should be excluded from his proposal of sending all challenges to state laws to state courts for litigation, “not because the interest of the state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern” (footnote omitted)).

80. *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 568–75 (1947); *id.* at 570 n.34 (citing, inter alia, *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101 (1944)).

81. *Id.* at 568.

82. *Id.* at 571–72; *cf. id.* at 572 (also noting that an accelerated abstract determination could leave rights “uncertain and insecure”).

83. *See, e.g.*, Lilienthal, *supra* note 44, at 416 (noting a number of ways in which the preliminary relief available in the federal courts was superior to that in state courts); *cf.* Lockwood et al., *supra* note 27, at 428–29 (discussing the speed with which plaintiffs could obtain federal court injunctions).

84. 316 U.S. 168, 172–73 (1942); *see also* Charles Alan Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815, 818 (1959) (discussing *Gov't & Civil Emps. Org. Comm. v. Windsor*, 353 U.S. 364 (1957), and stating, “One can imagine the frustration which such delay and expense must cause to the parties involved. But the controlling policy, that a federal court will not decide a constitutional question where [the] decision can go on other grounds, is of sufficient importance to the whole institution of judicial review that such expense and delay seem justifiable.”).

85. *See* Lockwood et al., *supra* note 27, at 429 (apparently treating the speed of the federal court determination as a defect, for making it “improbable that contemporaneous litigation” would be heard in the state courts).

86. *Rescue Army*, 331 U.S. at 572.

certain extent.⁸⁷ The “delay is good” notion, however, perhaps reached its apex in the 1940s and '50s. In *Government & Civil Employees Organizing Committee v. Windsor*,⁸⁸ for example, the litigants abandoned their constitutional challenges to a state statute after the Court directed the plaintiffs to resort to the state court for a second time. The decision shows just how little the interests of the litigants in having their case promptly decided weighed against the interests of federal-state harmony in the Court’s balance.⁸⁹ The Court’s declining jurisdiction in the cases mentioned above, with a view to giving state courts the chance to limit the challenged state statute to intrastate commerce, similarly accorded little heft to the regulated party’s interest in a prompt decision.⁹⁰

One might think that litigants’ interests in speedy vindication of their rights might count more in areas where *Carolene Products*’ Footnote Four suggested a less retiring role for the federal courts.⁹¹ But the Footnote Four taxonomy was not well-established in the 1940s, particularly with respect to race cases.⁹² And while the political process theory reflected in Footnote Four was making inroads in First Amendment cases,⁹³ Frankfurter’s dissent from the Court’s prohibition of compulsory

-
87. See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (listing doctrines under which the Court “has avoided passing upon a large part of all the constitutional questions pressed upon it for decision”).
88. 353 U.S. at 366–67 (after directing plaintiffs to obtain a ruling from the state courts, sending the case back to state court again because plaintiffs had not asked the state court to consider the act in light of their constitutional objections). The state act’s prohibition on state workers’ unionization seemed relatively clear. *Id.* at 364–65.
89. See Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1086 n.65 (1974) (discussing the delays in *Windsor*).
90. The impact might be mitigated by the federal court’s ability to enter a preliminary injunction in *Pullman* cases. See, e.g., *Am. Fed’n of Labor v. Watson*, 327 U.S. 582, 599 (1946). It is unclear how often the plaintiffs returned to federal courts. See *infra* text accompanying note 116.
91. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938) (suggesting more searching review for legislation that restricted political processes, such as the right to vote or disseminate information, that was directed against minorities who might have difficulty influencing the political process, or that impinged on Bill of Rights protections).
92. See, e.g., GOLUBOFF, *supra* note 2, at 45–47 (stating that any new constitutional paradigm suggested by *Carolene Products* remained a suggestion in the 1940s and did not govern the Court’s race decisions); Amar, *supra* note 3, at 706 (noting that the first edition of HART & WECHSLER did not cite *Carolene Products*); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 219–20 (1991) (indicating that the Court invoked the political process theory in a variety of contexts, including First Amendment cases, but was slow to use the theory in race cases); cf. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 215 (2000) (suggesting that the Warren Court was “not worrying about constitutional theory but rather reaching results that conformed to the values that enjoyed significant national support in the mid-1960s”); *id.* at 489 (noting that “only once in Warren’s sixteen years did an opinion of the Court cite Footnote Four”).
93. See Klarman, *supra* note 92, at 224–25 (“Underlying judicial solicitude for free expression was the notion that legislatures cannot be trusted to afford adequate scope to political speech owing to their vested interest in stifling criticism of the prevailing regime.”); *id.* at 225–26 (also noting use of the political process theory in dormant commerce clause decisions, based on reasoning that legislation would be subjected to lesser political restraints when its burdens fell on out-of-staters). Political process theory justifies judicial review

flag-salutes in *West Virginia Board of Education v. Barnette* voiced opposition to tiered scrutiny.⁹⁴ In addition, the more difficult or divisive the constitutional issue, the more appropriate avoidance and delay might seem to some justices. Frankfurter thus reasoned in *Pullman* that because the race discrimination claim involved “a sensitive area of social policy,” the federal courts ought not to address the issue “unless no alternative to its adjudication is open.”⁹⁵ Manifesting the same taste for delay, Frankfurter famously helped to engineer the gradualist approach to desegregation remedies in *Brown v. Board of Education*.⁹⁶ Commentators, moreover, generally have noted that there has not been a clear “civil liberties” or “civil rights” exception to abstention.⁹⁷ Nevertheless, school desegregation and other civil rights cases eventually would help to undermine the pervasiveness of abstention, not only for civil rights cases, but for other cases as well.⁹⁸

III. LESS DISTINCT CATEGORIES AND THE POSSIBILITY OF A MORE PERVASIVE DOCTRINE

The Court’s treating state courts as having greater access to social facts, its giving state courts the opportunity to make unlikely narrowing interpretations, and its balancing the public interest in delay against the private interest in speedy federal decisions, all suggested that abstention was at least potentially available in any case

“as an enterprise designed to repair defective processes of participation and representation.” TRIBE, *supra* note 8, at 1 (characterizing John Hart Ely’s views in *DEMOCRACY AND DISTRUST* (1980)).

94. 319 U.S. 624, 649 (1943) (Frankfurter, J., dissenting); *see also* Urofsky, *supra* note 35, at 183 (discussing Frankfurter’s *Barnette* dissent); *id.* at 189–90 (discussing Frankfurter’s upholding a compulsory flag salute in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), based on his reasoning that the legislative end was legitimate, and the means chosen reasonable); *id.* at 191 (discussing Frankfurter’s ordered liberty approach to applying Bill of Rights protections against the states). *But cf.* Jaffe, *supra* note 40, at 401 (indicating that Frankfurter’s *Barnette* approach was untenable and that Frankfurter seemed not to follow it in *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948)); *id.* (indicating that Frankfurter found a sounder course with his “immutable principles of justice” approach to the Bill of Rights’ applicability to the states).
95. 312 U.S. 496, 498 (1941); *see also* *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949) (abstaining in a case involving the constitutionality of an Hawaii law restricting foreign language teaching).
96. 347 U.S. 483 (1954); *see* MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936–1961*, at 192 (1994) (stating that Frankfurter campaigned with other justices for reargument on remedy in *Brown* “because deferring [the] decision might lead Congress or the newly elected President to act”); *id.* at 195 (noting that Frankfurter’s five questions for reargument included two as to “whether an equity court might authorize ‘gradual adjustment’”).
97. *See, e.g.*, Field, *supra* note 89, at 1131–32 (writing in 1974, indicating that the cases did not generally support a civil rights exception); WRIGHT, *supra* note 66, at 170 (noting that *Pullman* abstention had even been ordered in actions under the civil rights statutes, although noting that some cases had accepted Herbert Wechsler’s argument, *see infra* note 117, that abstention was inappropriate for such cases). *But cf.* Frank L. Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535, 540–41, 566 (1970) (seeing several cases in the early 1960s as confirming a civil rights exception to abstention, which included First Amendment and race cases).
98. *See, e.g.*, Amar, *supra* note 3, at 703 (emphasizing *Brown* as central to undermining the retiring role for the federal courts reflected in the first HART & WECHSLER).

challenging state and local regulation. While federal courts were still deciding many cases challenging state regulation in the 1940s and '50s,⁹⁹ a default rule of abstention might have evolved.¹⁰⁰ Abstention, then, might have mimicked substantive review of economic regulation, where seemingly more fact-bound justifications gave way to across-the-board deference.

A. Less Distinct Categories

This risk was enhanced by the fact that the specific abstention categories and criteria were less distinct than they are now,¹⁰¹ and reasoning from what we might now consider one type of abstention was freely used in others.¹⁰² As noted above, while the “any state of facts” language is sometimes cited as support for *Younger* abstention,¹⁰³

99. See Laycock, *supra* note 7, at 642, 643–44, 649 (detailing cases).

100. See W.F. Young, Jr., *Discretion to Deny Federal Relief Against State Action*, 28 TEX. L. REV. 410, 417 (1949) (referring to the “dark hint” from the Court’s “exceptional circumstances” language in *Stainback*); see also *supra* text accompanying note 55.

101. See Philip B. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 488 (1959) (noting problems with the lack of definition of the abstention doctrine); WRIGHT, *supra* note 66, § 52, at 169 (stating in 1963 that there were as many as four doctrines—*Pullman*, *Burford*, possibly one for difficult issues of state law in diversity involving private parties, and possibly one for the convenience of the federal courts); Field, *supra* note 89, at 1152, 1154 (writing in 1974, and seeking to delineate the categories, but noting the lack of clarity as to *Thibodaux* and *Burford* administrative abstention); Young, *supra* note 100, at 412 (noting that the cases “are not susceptible of any nice alignment” but fit into “two broad frames” based on the aims “to preserve to state agencies the enforcement of state policies demanding local evaluation” and “to save waste motion on the part of a federal court faced with an unsettled point of state law”).

Cases discussing the want of equity, which we would now tend to locate under *Younger* abstention, were in a considerable state of disarray. See, e.g., *Watson v. Buck*, 313 U.S. 387, 399 (1941) (adverting to the prohibition on injunctions against enforcement of criminal statutes, but also relying on the lack of any pending threat of prosecution as a reason to withhold decision in a challenge to Florida’s regulation of copyrights). See generally Laycock, *supra* note 7, at 644 (pointing out that the criminal prosecution was no longer likely in *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), because the Court had held the statute unconstitutional in a companion case); *id.* at 642 (indicating that between *Ex parte Young* and *Douglas*, the Court granted injunctions with little mention of distinctions “between injunctions and declaratory judgments, between criminal and civil proceedings, and between cases with and cases without pending enforcement proceedings,” nor did the line of cases freely granting injunctions die out thereafter); HART & WECHSLER I, *supra* note 16, at 863 (trying to sort cases when injunctions against criminal prosecutions were denied or allowed). To be sure, the Court did to an extent employ distinctions we now use. See, e.g., *Am. Fed’n of Labor v. Watson*, 327 U.S. 582, 588–89 (1946) (distinguishing between want of “equity in the bill” and *Pullman*); *Ala. Pub. Serv. Comm’n v. S. Ry. Co.*, 341 U.S. 341, 344 (1951) (indicating the case did not involve construction of an “ill-defined” state statute as in *Pullman*).

102. See, e.g., *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 & n.29 (1943) (citing *Pullman*, and other cases where the Court declined equity jurisdiction).

103. See *Younger v. Harris*, 401 U.S. 37, 51 (1971) (indicating that this was not a case in which a statute was “flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it” (quoting *Watson*, 313 U.S. 387)). The Court has been reluctant to find cases within this exception such that the language continues to be used to support a notion that *Younger* abstention is the norm with respect to pending prosecutions. Cf. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1097–98* (6th ed. 2009).

such reasoning was also used to support *Pullman* abstention.¹⁰⁴ What is more, in *Stainback*, the case challenging Hawaii's prohibition of foreign-language teaching (sometimes characterized as a *Pullman* case),¹⁰⁵ the Court dismissed the action rather than retaining jurisdiction as *Pullman* calls for.¹⁰⁶

Justices who maintained a more pro-abstention stance tended to favor an open-ended and pervasive doctrine of jurisdictional discretion, rather than a set of limited categories. In extending abstention to a diversity action at law involving an unsettled issue of state eminent domain law, for example, Frankfurter stated, "These prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism."¹⁰⁷

Perhaps a high point for a global policy of withholding a federal court decision was the Court's 1947 decision in *Rescue Army v. Municipal Court of Los Angeles*. Los Angeles had twice before prosecuted Charles T. Murdock, an officer of the religious group Rescue Army, for failing to obtain a permit to use a box for solicitation and for failing to display a required information card.¹⁰⁸ When the city brought a third action against Murdock on the same grounds, he and the group sought a writ of prohibition in the California courts.¹⁰⁹ The California Supreme Court upheld the statute's constitutionality on the merits. The case seemingly was within the mandatory appellate jurisdiction of the U.S. Supreme Court.¹¹⁰

The Court, however, declined to hear the appeal; Rutledge treated the state court action as a declaratory suit and relied, inter alia, on the federal courts' discretion to decline to exercise jurisdiction in declaratory actions.¹¹¹ He characterized the constitutional issues as abstract,¹¹² although the issues affecting Murdock—the requirements of a permit for a solicitation box and of an information card—seemed clear. Rutledge went on for several pages listing doctrines that together manifested the

104. See *supra* text accompanying notes 61–68.

105. See WRIGHT, *supra* note 66, at 170 & n.6.

106. *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383–84 (1949) (remanding with directions to dismiss the complaint).

107. *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959).

108. *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 553–54 (1947); *id.* at 566–68 (concluding there was jurisdiction but also finding compelling reasons for not exercising it); cf. Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961) (treating the Court's dismissals of appeals for want of a substantial federal question as involving a discretionary denial of seemingly mandatory jurisdiction).

109. *Rescue Army*, 331 U.S. at 552.

110. *Id.* at 549 (appeal from the California Supreme Court). The California Supreme Court had declined to determine if the act was unconstitutional as applied. See *Rescue Army v. Mun. Court of L.A.*, 171 P.2d 8, 16–17 (Cal. 1946).

111. *Rescue Army*, 331 U.S. at 574; see also *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 471 (1945) (dismissing certiorari based partly on such reasoning); cf. *Parker v. Cnty. of L.A.*, 338 U.S. 327 (1949) (dismissing certiorari to a state court because it only became clear in another case that the failure to take the city loyalty oath could lead to discharge, and that case was then pending in the state courts).

112. *Rescue Army*, 331 U.S. at 581–83.

Court's "policy of strict necessity in disposing of constitutional issues,"¹¹³ one that transcended the particular limitations of particular procedural doctrines¹¹⁴ and that "cannot be reduced to any precise formula or complete catalogue."¹¹⁵

B. The Possibility of a More Pervasive Practice

The premise of some of the legislative initiatives following *Ex parte Young*, and of writings by Frankfurter and his students in the 1920s and '30s, was that virtually all issues of the legality of state and local regulation should go to the state courts in the first instance—at least where adequate remedies were available in the state courts. While the Court continued to entertain many challenges to state regulation on review of federal courts, the trend at mid-century seemed to be going the way of broader abstention. Writing in 1948, Herbert Wechsler argued that, in abstention cases, the federal courts' retention of jurisdiction "is hardly a matter of significance."¹¹⁶ He stated:

The development described should be extended by the statute to deny original jurisdiction in all cases that present a claim of federal invalidity in state legislative or administrative action where, in the language of the present statute, a "plain, speedy and efficient remedy" is available in the state courts. There is no reason to exempt from application of this principle the small residuum of cases to which present limitations may be held inapplicable, as where state law is not conceived to be uncertain or the constitutional issue is present in an action that would formerly have been at law. The crucial point is one of general validity: it is that application of the federal authority to invalidate the action of a state is best accomplished when the issue finds its way to the Supreme Court after it has had examining in the state courts.¹¹⁷

A 1950 article noted statements by the Court suggesting it would require "exceptional circumstances" not to abstain in suits seeking injunctions against state laws.¹¹⁸ And the 1953 Hart and Wechsler casebook noted various judicially developed doctrines, and stated that the "delicacy of the jurisdiction sanctioned" in cases such as *Ex parte Young*, had become apparent to the Court. "The process appears to be one of a series

113. *Id.* at 568.

114. *Id.* at 571.

115. *Id.* at 573. The doctrines of avoidance that underlay abstention were present when the constitutionality of federal legislation was at issue as well, although in that context separation of powers concerns replaced federalism concerns. *See id.* at 569 n.31 (citing Brandeis's concurrence in *Asbrow v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936)).

116. Wechsler, *supra* note 79, at 229; *see also* Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 COLUM. L. REV. 749, 776 (1959) ("[I]t seems clear that in practice few such cases return to a district court.").

117. Wechsler, *supra* note 79, at 229. He would have excepted cases under the civil rights laws. *Id.* at 230.

118. Young, *supra* note 100, at 417. The language was from *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 381 (1949) and is quoted *supra* text accompanying note 55. "This language, if it is to be credited," said Young, "virtually closes the federal courts as an avenue of attack on state statutes. . . . What may be meant by the dark hint of 'exceptional circumstances' is left a guess"

of landmark decisions by the Court molding traditional doctrines to meet the peculiar problems of this jurisdiction and, especially in later years, almost always in the direction of placing greater restraints on the [federal] district courts.”¹¹⁹

IV. RESISTANCE

With the benefit of hindsight, we know that neither the Court nor Congress took the path Wechsler prescribed, and we can trace the developing lines of resistance. On the one hand, most justices during this period adhered to aspects of sociological jurisprudence,¹²⁰ particularly with respect to substantive review of mine-run economic legislation. On the other hand, several justices, as to both substantive and jurisdictional methodologies, shared neither the degree of deference to other institutions nor the taste for incrementalism that characterized such abstention stalwarts as Frankfurter and John Marshall Harlan.¹²¹ For example, Douglas’s versions of substantive review, compared to Frankfurter’s, used incorporation rather than an ordered liberty approach to the Bill of Rights,¹²² more fully embraced high levels of scrutiny for speech,¹²³ and favored a wider scope for equal protection¹²⁴ and federal preemption.¹²⁵ And as to

119. HART & WECHSLER I, *supra* note 16, at 858.

120. *See* Eskridge & Frickey, *supra* note 10, at lxi (indicating that substantive deference was widely shared on the Court).

121. *See, e.g.*, PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION, *supra* note 74, at 222 (contrasting Frankfurter’s emphasis on judicial restraint, deference to other branches, and adherence to judicial limitations to Black’s more activist stance); McManamon, *supra* note 11, at 730–32 & n.223 (discussing the influence on Frankfurter of James Bradley Thayer, who believed legislation should be struck down only when its unconstitutionality was clear); Urofsky, *supra* note 35, at 186 (“One can characterize the division between the Frankfurter and Black/Douglas views in several ways—restraint versus activism, process versus results . . .”).

122. *See* Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 693–94 (1963) (noting Douglas, Murphy, and Rutledge’s agreement with Black’s incorporation views).

123. *See, e.g.*, Urofsky, *supra* note 35, at 199 (indicating that Black and Douglas argued for treating the speech clause as having a “preferred” constitutional position, and for a more “absolutist” interpretation of the First Amendment, while Frankfurter preferred the evaluation and balancing of the “clear and present danger” test); ROGER K. NEWMAN, HUGO BLACK 295–97 (2d ed. 1997) (discussing Douglas, Black, and Murphy’s agreement as to preferred freedoms, and Frankfurter’s disagreement).

124. *Oyama v. California*, 332 U.S. 633, 640 (1947) (Vinson, C.J.) (ruling narrowly, in an opinion joined, inter alia, by Frankfurter, that California’s prohibiting land ownership by immigrants who were ineligible for citizenship (Japanese immigrants) violated the equal protection rights of the immigrant’s son, who was a citizen, and in whose name the father had put title); *id.* at 647 (Black, J., concurring, joined by Douglas, J.) (arguing that the Court should decide the broader constitutional question); *id.* at 650 (Murphy, J., concurring, joined by Rutledge, J.) (similar); *cf.* *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948) (holding that California’s making immigrants who were ineligible for citizenship ineligible for commercial fishing licenses violated equal protection).

125. *See, e.g.*, *Hill v. Florida*, 325 U.S. 538 (1945) (Black, J.) (holding, in an opinion joined, inter alia, by Douglas and Murphy, that the Wagner Act preempted a state law requiring unions and their business agents to register and pay a one-dollar fee); *id.* at 548 (Frankfurter, J., dissenting) (arguing that “repugnance” of state law to federal law should be “direct and positive” (citing *Sinnot v. Davenport*, 63 U.S. 227, 243 (1859))); *see also* *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480–81 (1955) (Frankfurter, J.) (stating that the area of labor preemption is “not susceptible of delimitation by fixed

jurisdictional issues, Douglas unsurprisingly led the opposition to abstention,¹²⁶ sometimes joined by Frank Murphy,¹²⁷ and later by Earl Warren and William J. Brennan.¹²⁸ Black, however, combined a peremptory substantive style with a fairly pro-abstention stance.¹²⁹

A. Discounting the Significance of Local Facts

Preemption cases demonstrated how narrower versus broader substantive approaches translated into greater and lesser willingness to abstain, through the

metes and bounds” and that the “penumbral area can be rendered progressively clear only by the course of litigation”); *Int’l Union v. Wis. Emp’t Relations Bd. (Briggs-Stratton)*, 336 U.S. 245 (1949) (Jackson, J.) (holding, in an opinion joined, inter alia, by Frankfurter, that there was no preemption of the state’s injunction against a union’s calling constant union meetings to pressure the employer to enter a contract); *id.* at 265 (Douglas, J., dissenting, joined by Black & Rutledge, JJ.) (arguing for preemption); *id.* at 270 (Murphy, J., dissenting, joined by Rutledge, J.) (same).

126. This is not to say that Douglas never supported abstention. He wrote a few opinions directing abstention in the 1940s. *See, e.g.*, *City of Chicago v. Fieldcrest Dairies, Inc.*, 316 U.S. 168 (1942) (requiring abstention to allow state courts to determine if the ordinance requiring milk to be sold in “standard milk bottles” would allow sales in the plaintiff’s paper containers); *Am. Fed’n of Labor v. Watson*, 327 U.S. 582 (1946) (directing the lower federal court, which had upheld a state right to work law, to abstain under *Pullman*). And he did not dissent in a number of abstention cases. *See, e.g.*, *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). He did, however, join Chief Justice Harlan Fiske Stone’s opinion declining to abstain in *Meredith v. City of Winter Haven*, 320 U.S. 228 (1943), and by the late 1940s Douglas seemed fairly resistant to abstention. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (Douglas, J.), *discussed infra* text accompanying notes 133–35; *cf. Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 585 (1947) (Murphy, J., dissenting, joined by Douglas, J.), *discussed infra* text accompanying notes 136–37. This resistance continued in the 1950s. *See, e.g.*, *Shipman v. DuPre*, 339 U.S. 321, 322 (1950) (Douglas, J., dissenting) (dissenting alone from the Court’s ordering abstention to allow the state court to construe the state statute regulating fishing that plaintiffs claimed allowed administrative forfeiture without a judicial hearing); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957) (Douglas, J., dissenting) (dissenting alone from holding a federal action filed by the United States in abeyance while a parallel state court action determined a state mineral rights question); *Pub. Serv. Comm’n of Utah v. Wycoff Co.*, 344 U.S. 237, 251–52 (1952) (Douglas, J., dissenting) (dissenting alone from the majority’s declining to hear a declaratory judgment action); *id.* (arguing that there was a sufficient threat to the plaintiff’s business by the state’s regulation of transportation of films and newsreels). *But cf. Reetz v. Bozanich*, 397 U.S. 82 (1970) (Douglas, J.) (holding that the federal courts should abstain pending state court determination of the constitutionality of the statute under the state constitutional provision relating to fishing).
127. *See, e.g., Rescue Army*, 331 U.S. at 585 (Murphy, J., dissenting, joined by Douglas, J.) (dissenting from the majority’s declining to decide the case on direct review); *see also Am. Fed’n of Labor v. Watson*, 327 U.S. 582, 606 (1946) (Murphy, J., dissenting) (arguing that the Court should decide the merits of the state right to work law rather than abstain); *cf. Int’l Bhd. of Teamsters v. Denver Milk Prods.*, 334 U.S. 809 (1948) (Black, J., dissenting, joined by Murphy, J.) (dissenting from the Court’s declining to hear an appeal from a state judgment reinstating a suit for an injunction against picketers).
128. *See Kurland, supra* note 101, at 488 (noting that Douglas was “most vehement” against the use of abstention, with Warren and Brennan “not far behind”).
129. *See, e.g., Younger v. Harris*, 401 U.S. 37 (1971) (Black, J.); *see also* text accompanying notes 50–52. Of course Black sometimes opposed abstention. *See, e.g., Albertson v. Millard*, 345 U.S. 242, 245 (1953) (Black, J., dissenting, joined by Murphy, J.) (dissenting from abstention with respect to a state communist control bill); *cf. Reich, supra* note 122, at 723–25 (indicating that Black was not a proponent of constitutional avoidance).

medium of whether a justice believed that local problems might justify a statute or that narrowing rulings would save the law.¹³⁰ In *California Public Utilities Commission v. United States*, for example, Douglas garnered a majority for immediately invalidating state legislation that would have allowed the state Commission to regulate the rates the federal government paid for intrastate railroad service, reasoning that “[t]he conflict seems to us to be as clear as any that the Supremacy Clause . . . was designed to resolve.”¹³¹ Harlan’s dissent, by contrast, argued that the California law responded to the local problem of military rates depressing carrier profits, and that the Court should withhold any preemption decision until construction and implementation of the statute showed the effect on federal interests.¹³² Similarly in *Rice v. Santa Fe Elevator*, Douglas’s majority opinion rejected abstention¹³³ and held that the United States Warehouse Act should be read to preempt state warehouse regulation based on a test of “whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act.”¹³⁴ By contrast, Frankfurter, in dissent, would have looked for actual conflict or perhaps direct overlays, such that the Court should await authoritative interpretation by the state court that might avoid such conflict.¹³⁵

B. Declining to Imagine State Narrowing Interpretations

Those disinclined to abstain, moreover, resisted hypothesizing potential state court narrowing interpretations pursuant to any state of facts reasoning. In *Rescue Army*, for example, Murphy, joined by Douglas in dissent, argued sensibly that the Court’s refusal to decide the religious solicitation case on direct review to await state court clarification

130. Cf. Bickel, *supra* note 108, at 53, 56 (discussing *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961), and suggesting that if one held the view that any prior restraint is unconstitutional, then one would be less likely to see a challenge to a licensing scheme that the plaintiff declined to utilize as too abstract for immediate decision).

131. 355 U.S. 534, 544 (1958).

132. *Id.* at 546, 552 (Harlan, J., dissenting, joined by Warren, C.J. & Burton, J.).

133. 331 U.S. 218, 231–34 (1947) (rejecting the argument that the decision should await action by the Illinois Commission to see if the Commission determinations ran counter to federal policy); *see also id.* at 230 (laying out a general assumption that “the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress”); *id.* at 234 (finding such a clear purpose).

134. *Id.* at 236; *see also* *City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 84–85 (1958) (Black, J.) (holding that federal commerce acts preempted a city’s requiring a certificate of convenience for an inter-terminal transportation company formed at the request of the railroads, and rejecting abstention); *id.* at 91 (Harlan, J., dissenting, joined by Frankfurter & Burton, JJ.) (arguing that the case for preemption was unclear and that the decision should await the city’s action under its ordinance). *But cf. Santa Fe Elevator*, 331 U.S. at 236–37 (noting three matters that the federal act did not cover, and that as to those matters any conflict could be addressed if it arose); *Rice v. Bd. of Trade of Chi.*, 331 U.S. 247, 256 (1947) (Douglas, J.) (holding unanimously, on certiorari from the lower federal court, that the federal commodities act did not supersede all state regulation, and that any specific claims of supersedure could be preserved in state proceedings).

135. *See Santa Fe Elevator*, 331 U.S. at 239 (Frankfurter, J., dissenting, joined by Rutledge, J.).

of state law was unwarranted; the constitutionality of the city's requirements to obtain a permit to use a solicitation box, and to display an information card, had been decided by the court below.¹³⁶ Similarly, in *Albertson v. Millard*, Douglas dissented from the Court's holding in abeyance a federal action challenging the Michigan communist control bill, pointing out the lack of uncertainty as to whether the plaintiff would be required to register under the act.¹³⁷

C. A Duty to Exercise Federal Jurisdiction

The broad view that Douglas and other abstention resisters had as to preferred federal rights generally extended to rights of litigants to invoke federal jurisdictional statutes in both diversity and federal question cases. As noted above, Frankfurter and Charles Warren sought to banish notions that federal jurisdiction was a right—particularly a constitutional one—and encouraged a liberal use of discretion to decline jurisdiction that was statutorily conferred. Abstention resisters, by contrast, argued that litigants had at least statutory rights to a federal forum and that the federal district courts had a corresponding “duty” to entertain congressionally conferred jurisdiction. The right-duty argument got early traction in diversity, where the problems of determining state law seemed inherent to the constitutional and statutory grants.¹³⁸ Douglas, Brennan, and Earl Warren would help reinforce a duty as to federal questions¹³⁹—particularly for cases under the civil rights acts.¹⁴⁰ Douglas,

136. *See, e.g.*, *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 585 (1947) (Murphy, J., dissenting, joined by Douglas, J.); *cf.* *Doremus v. Bd. of Educ.*, 342 U.S. 429, 435–36 (1952) (Douglas, J., dissenting, joined by Reed & Burton, JJ.) (dissenting as to the majority's finding standing lacking).

137. 345 U.S. 242, 245–46 (1953) (Douglas, J., dissenting) (reasoning that it was clear that the act covered the Communist Party, that the plaintiff was a member, and that the act required registration and forbade appearance on ballots); *cf.* *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957) (ordering the federal court to hold a U.S.-a-party action in abeyance, to await state court determination of whether the state's 1940 statute purporting—as against the United States—to disallow prescription of a prior owner's mineral rights, applied to a 1938 deed preserving the vendor's mineral rights only until 1945); *id.* at 230 (Douglas, J., dissenting in part) (arguing it was improper to hold the U.S.-a-party action in abeyance); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 214–15 (1960) (Black, J., dissenting, joined by Warren, C.J. & Douglas, J.) (arguing that state law issues were clear and opposing the majority's referral to state court—possibly by certification).

138. *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943) (Stone, C.J.) (stating that deciding state law issues was necessary to diversity jurisdiction); *id.* at 236 (stating that the difficulty or uncertainty of the state law issue did not preclude the federal court's deciding it); *cf.* *La. Power & Light v. City of Thibodaux*, 360 U.S. 25, 32 (1959) (Brennan, J., dissenting, joined by Warren, C.J. & Douglas, J.) (arguing that the decision was inconsistent with the “imperative duty” imposed under the district court by diversity and removal statutes).

139. *See* *Martin v. Creasy*, 360 U.S. 219, 229 (1959) (Douglas, J., dissenting) (dissenting from abstention in a case where the plaintiffs claimed a taking through loss of highway access, and arguing that federal courts should be responsible for the exposition of federal law); *see also* *Propper v. Clark*, 337 U.S. 472, 491–92 (1949) (Reed, J.) (declining abstention where a state law issue bore on a federal statutory issue).

140. *See, e.g.*, *Harrison v. NAACP*, 360 U.S. 167, 181 (1959) (Douglas, J., dissenting, joined by Warren, C.J. & Brennan, J.) (“It seems plain to me that it was the District Court's duty to provide this remedy, if the appellees, who invoked that court's jurisdiction under the Civil Rights Act” showed they were deprived of civil rights provided by the Constitution); *Zwickler v. Koota*, 389 U.S. 241, 247–48 (1967) (Brennan,

for example, invoked against abstention the language of 42 U.S.C. § 1981 that “[a]ll persons . . . shall have the same right in every State . . . to sue . . . as is enjoyed by white citizens.”¹⁴¹

V. EMPHASIZING SPECIFIC CATEGORIES AND THE DECLINE OF ABSTENTION

A. *Special Circumstances Required to Abstain*

If there were a general duty of lower federal courts to exercise jurisdiction, then abstention should be reserved for “special circumstances,”¹⁴² countering suggestions noted above that special circumstances might be required *not* to abstain in cases challenging state and local regulation. A requirement of special circumstances for abstention was reinforced by enumeration of specific doctrines rather than alluding to a general policy of avoidance and federalism. In *Meredith v. City of Winter Haven*, for example, Stone refused to abstain in a diversity case merely because the state law issue was difficult, and attempted to show that exceptional circumstances were required for the federal courts to decline jurisdiction.¹⁴³ His nearly two-page catalogue of such circumstances, however, seemed to undermine his claim that the circumstances were exceptional.¹⁴⁴ Brennan would later provide shorter enumerations,¹⁴⁵ thereby reinforcing the notion of abstention as extraordinary and not subject to case-by-case balancing.

Even when a case fell within an established category, abstention-induced delay began to weigh more heavily against abstention. Commentators noted that the *Spector* case¹⁴⁶—in which the Court abstained because the state might possibly interpret its tax to apply only to intrastate commerce—took nearly a decade to resolve.¹⁴⁷ And in the school desegregation cases, abstention-caused delay proved to

J.) (stating that in expanding federal judicial power with the civil rights acts and the 1875 act, “Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor’s choice of a federal forum for the hearing and decision of his federal constitutional claims”).

141. *Harrison*, 360 U.S. at 180.

142. *See, e.g.*, *Propper v. Clark*, 337 U.S. 472, 492 (1949) (Reed, J.) (rejecting abstention in a federal statutory case and stating that the “special circumstances” of cases such as *Pullman* were absent); *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) (Brennan, J.) (indicating that the doctrine of abstention is an “extraordinary and narrow exception” to the duty to adjudicate); *Zwickler*, 389 U.S. at 248 (Brennan, J.) (indicating that for federal constitutional claims, exceptions are only for “narrowly limited ‘special circumstances’” (citing *Propper*, 337 U.S. at 492)).

143. 320 U.S. 228, 235–36 (1943).

144. *Id.*

145. *La. Power & Light v. City of Thibodaux*, 360 U.S. 25, 32–33 (1959) (Brennan, J., dissenting, joined by Warren, C.J. & Douglas, J.) (describing categories as mooted or changing the posture of a federal constitutional issue, disrupting a state administrative process, or otherwise creating needless friction); *Frank Mashuda Co.*, 360 U.S. at 188–89 (1959) (Brennan, J.) (listing categories); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814–17 (1976) (Brennan, J.) (enumerating categories, although abstaining in a case that he concluded did not fit those categories).

146. *Spector Motor Servs. v. McLaughlin*, 323 U.S. 101 (1944), *discussed supra* text accompanying note 62.

147. *See, e.g.*, *Kurland*, *supra* note 101, at 489 (noting the delay problem in cases such as *Spector*, and suggesting a more appropriate solution would be to have the state court pronounce on both the state and federal

be a tool for resistance. Jack Greenberg, writing in 1959, noted that “resistance by all lawful means” included “legislating and re-legislating to establish a body of laws, which, it is asserted, must first be construed or invalidated before federal rights can be enjoyed.”¹⁴⁸ “It is a common defense tactic in segregation cases,” he stated, “to urge that the cause should first be heard in the state courts.”¹⁴⁹ In the Arkansas desegregation case *Cooper v. Aaron*, the entire Court joined an opinion renouncing delay by abstention.¹⁵⁰ The district court had put off implementing a desegregation plan in light of resistance, but also to allow completion of state court review of state legislation.¹⁵¹ The Court stated:

We are urged to uphold a suspension of the Little Rock School Board’s plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the courts. We reject these contentions.¹⁵²

B. Mixed Results; Then Decline of Abstention

While the beginning of the 1950s suggested to commentators a trend toward having nearly all federal challenges to state and local laws go to state trial courts,¹⁵³ the results were more mixed by the end of the decade. Some saw cases such as *Cooper* as portending a lesser role for abstention.¹⁵⁴ Other commentators assumed that abstention would remain robust¹⁵⁵—an assumption reinforced by four decisions handed down on the same day in 1959 that at once highlighted divisions on the Court, but also suggested that the abstention doctrine would retain substantial vigor.¹⁵⁶ On

question); HART & WECHSLER I, *supra* note 16, at 870 (noting that the plaintiffs secured a decision nine years after the action commenced).

148. GREENBERG, *supra* note 3, at 61.

149. *Id.*

150. 358 U.S. 1 (1958).

151. *Aaron v. Cooper*, 163 F. Supp. 13 (E.D. Ark.), *rev’d*, 257 F.2d 33 (8th Cir.), *aff’d*, 358 U.S. 1 (1958).

152. *Cooper*, 358 U.S. at 4; *see also* GREENBERG, *supra* note 3, at 9–10 (writing in 1959 and seeing federal judges as less tolerant of evasion in school cases).

153. *See supra* text accompanying notes 116–19.

154. 358 U.S. 1 (1958); *see also* GREENBERG, *supra* note 3, at 63 & n.119 (referring also to *Pub. Utils. Comm’n of Cal. v. United States*, 355 U.S. 534 (1958), *City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77 (1958), and several lower court desegregation cases as moving away from finding state law ambiguous); *cf.* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959) (discussing a duty to take jurisdiction conferred).

155. Charles E. Clark, *Federal Procedural Reform and States’ Rights; to a More Perfect Union*, 40 TEX. L. REV. 211, 221 (1961) (criticizing expansions of abstention and its near-mandatory nature); Kurland, *supra* note 101, at 491 (suggesting a solution that the first filed action should proceed with the entire case); *see also* Note, *supra* note 116, at 776–78 (suggesting greater weight to the statutory obligation to take jurisdiction and also arguing for making the doctrine more predictable).

156. *See* Kurland, *supra* note 101, at 481–87 (discussing these cases, all handed down on June 8, 1959); Note, *Abstention: An Exercise in Federalism*, 108 U. PA. L. REV. 226 (1959) (same).

the one hand, the Court in *Allegheny County v. Frank Mashuda Co.*¹⁵⁷ adhered to the Court's earlier decision in *Meredith*¹⁵⁸ that resisted, in a diversity case, a blanket eminent domain exclusion. But the Court extended abstention to a diversity action at law involving the scope of a city's eminent domain power in *Thibodaux*,¹⁵⁹ and also ordered abstention in a takings case to determine if the state considered highway access to be property.¹⁶⁰ And in *Harrison v. NAACP*, in which the NAACP challenged Virginia barratry statutes aimed at the organization's desegregation activities, a majority opinion by Harlan required the plaintiffs first to seek an authoritative interpretation of the law in the Virginia courts, stating "we are unable to agree that the terms of these three statutes leave no reasonable room for a construction by the Virginia courts" that might obviate or change a federal decision.¹⁶¹

The apparent advantage for abstention, however, would quickly reverse. Judicial restraint famously declined in the 1960s,¹⁶² signaled in part by the Court's expansive interpretation of the scope of § 1983 in *Monroe v. Pape*.¹⁶³ As a substantive matter, the Court accelerated the selective incorporation of the Bill of Rights criminal procedure guarantees,¹⁶⁴ and extended First Amendment protections.¹⁶⁵ Both scholars and the Court would employ *Carolene Products'* Footnote Four to support the Court's desegregation cases, thereby helping to consolidate two-tiered equal protection

157. 360 U.S. 185 (1959).

158. 320 U.S. 228 (1943).

159. 360 U.S. 25 (1959); *see also* *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 212 (1960) (indicating that the lower federal court should obtain a state court determination of state law, possibly by certification).

160. *Martin v. Creasy*, 360 U.S. 219, 220 (1959); *see also* *City of Meridian v. S. Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959) (ordering abstention when the utility claimed a violation of the contracts clause by the city's requirement that it pay two percent of its monthly service charges as compensation for use of streets).

161. 360 U.S. 167, 177 (1959); *see also* *NAACP v. Bennett*, 360 U.S. 471 (1959) (per curiam) (noting, while remanding for consideration in light of *Harrison*, that reference to state courts for construction should not "automatically be made"); *id.* (Douglas, J., dissenting, joined by Warren, C.J. & Brennan, J.) (arguing that the district "court should be directed to pass on the constitutional issues"); Note, *supra* note 156, at 236–37 (seeing as significant the Court's indication that abstention as to unconstrued state law would not be automatic); TUSHNET, *supra* note 96, at 275–76 (discussing *Harrison*, and Frankfurter's attempt to keep Douglas from dissenting). *But cf.* *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (upholding a commerce clause challenge to a mud flap regulation).

162. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962) (Brennan, J.) (rejecting a political question bar to a challenge to apportionment); *id.* at 266–67 (Frankfurter, J., dissenting, joined by Harlan, J.); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (holding that "both houses of a bicameral state legislature must be apportioned on a population basis"); *id.* at 589 (Harlan, J., dissenting).

163. 365 U.S. 167, 172 (1961) (Douglas, J.) (holding that a government official's acts that violated state law nevertheless could be under color of state law for purposes of § 1983); *id.* at 237 (Frankfurter, J., dissenting) (arguing that § 1983 only addressed constitutional violations authorized by state law or custom).

164. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule for Fourth Amendment violations to the states); *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963) (recognizing a right to counsel under the Fourteenth Amendment for indigent defendants); *Duncan v. Louisiana*, 391 U.S. 145, 147–50 (1968) (enumerating Bill of Rights guarantees that now applied to the states, and noting that the "Court has looked increasingly to the Bill of Rights for guidance" in giving content to due process).

165. *See, e.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

BETWEEN THE ACTS: FEDERAL COURT ABSTENTION IN THE 1940s AND '50s

scrutiny,¹⁶⁶ and the Court extended heightened scrutiny to new classifications.¹⁶⁷ The Court's already evident impatience with Southern resistance to desegregation, moreover, only increased.¹⁶⁸

Frankfurter's 1962 retirement¹⁶⁹ would mark dramatic setbacks for abstention, as noted by contemporary and later commentators.¹⁷⁰ David Currie's 1968 Federal Courts casebook listed a series of early 1960s cases where the Court explicitly rejected arguments for abstention,¹⁷¹ including two school desegregation cases,¹⁷² a reapportionment case,¹⁷³ a foreign commerce case,¹⁷⁴ and a First Amendment case.¹⁷⁵ In these cases, the Douglas-style abstention resisters' arguments prevailed. The Court reasoned that state law was sufficiently clear such that there was no need to

166. GOLUBOFF, *supra* note 2, at 264 (stating that Louis Pollack invoked Footnote Four in *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959) to respond to Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 27 (1959)); *id.* (stating that Pollock's theory would eventually be embraced by the Court, the Bar, and the legal academy); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (“The Warren Court embraced a rigid two-tier attitude.”).

167. Gunther, *supra* note 166, at 8 (noting that the 1960s saw judicial intervention under equal protection extend well beyond race, and that “[t]he familiar signals of ‘suspect classification’ and ‘fundamental interest’ came to trigger the occasions for the new interventionist stance”).

168. *See The Supreme Court, 1963 Term*, 78 HARV. L. REV. 179, 187 (1964) (noting impatience); *id.* at 187–88 (discussing that *NAACP v. Ala. ex rel. Flowers*, 377 U.S. 288 (1964), was the Court's “fourth decision concerning Alabama's attempt to exclude the [NAACP] from the state”); *id.* at 189 (discussing *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964), which indicated that the federal court below might order the defendant to raise taxes sufficient to reopen closed schools).

169. *See* Powe, *supra* note 92, at 209–13 (indicating that what the public calls the Warren Court coincided more or less with Frankfurter's 1962 retirement, which gave Douglas, Warren, Black, and Brennan a reliable liberal fifth vote with Arthur Goldberg, shortly after replaced by Abe Fortas); *id.* at 498 (noting that some placed the transformation as starting between 1960 and 1961); Michael E. Parrish, *Felix Frankfurter, the Progressive Tradition, and the Warren Court*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 54 (Mark Tushnet ed. 1993) (“Frankfurter's retirement and replacement by Arthur Goldberg in the summer of 1962 gave Warren a dependable fifth vote and opened the most militant chapter in the Court's defense of civil liberties and civil rights.”).

170. *See, e.g.,* Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604, 604 (1967) (stating that Frankfurter's retirement left the abstention doctrine a “judicial orphan,” and discussing the quick turn in the case law); Burton D. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 831 (1974) (“The Court's interest in *Pullman* abstention . . . drastically declined in the early sixties . . .”).

171. DAVID P. CURRIE, *FEDERAL COURTS* 510–14 (1968); *see also* DAVID P. CURRIE, *FEDERAL COURTS* 658 (2d ed. 1975) [hereinafter CURRIE II] (noting that the “abstention doctrine was thought to have gone into something of a decline in the mid-1960's” and that in “each of the seven cases passing on abstention between 1962 and 1967, the Supreme Court managed to distinguish *Pullman* and avoid abstention”).

172. *McNeese v. Bd. of Educ.*, 373 U.S. 668 (1963); *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964).

173. *Davis v. Mann*, 377 U.S. 678 (1964).

174. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

175. *Baggett v. Bullitt*, 377 U.S. 360 (1964).

resort to state courts.¹⁷⁶ Indeed, to the extent that the overbreadth-vagueness doctrine gained traction in First Amendment cases, the uncertainty of state law would become an affirmative reason for the federal courts to take jurisdiction.¹⁷⁷ And as opposed to earlier, more expansive notions of jurisdictional discretion, the federal courts were said to have a duty to take jurisdiction, particularly in civil rights cases.¹⁷⁸ The Court in these cases found no “special circumstances” that would mitigate such a duty.¹⁷⁹ Delay, once seen as serving the public interest, was now seen as a disadvantage to both the litigant and the public interest.¹⁸⁰

VI. CONCLUSION

The 1960s did not extinguish abstention completely.¹⁸¹ Nevertheless, that decade saw the fading importance of abstention and some of the strands of reasoning that had supported its broad reach. One occasionally sees reference to local facts as a reason for *Burford* abstention,¹⁸² but there is little remaining conviction that state

-
176. See *Griffin*, 377 U.S. at 229 (“[T]he Supreme Court of Appeals of Virginia has already passed upon the state law with respect to all the issues here.”); *Davis*, 377 U.S. at 690 (indicating that state law was unambiguous). The Court also indicated that unclear issues of state law did not necessarily require abstention. See *Hostetter*, 377 U.S. at 327–29 (agreeing with the court below that further delay of the case was unwarranted, despite questions as to whether the state courts would treat the state law as applicable in a free-trade zone); *Baggett*, 377 U.S. at 375 (“The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law . . .”).
177. See *Baggett*, 377 U.S. at 375–76 (“We doubt . . . that a construction of the oath provisions, in light of the vagueness challenge, would avoid or fundamentally alter the constitutional issue raised in this litigation.”); see also *Dombrowski v. Pfister*, 380 U.S. 479, 489–90 (1965) (Brennan, J.) (“We hold the abstention doctrine is inappropriate for cases such as the present one where . . . statutes are justifiably attacked on their face as abridging free expression, or as applied for purposes of discouraging protected activities.”).
178. See *McNeese v. Bd. of Educ.*, 373 U.S. 668, 674 (1963) (“Such [Fourteenth Amendment] claims are entitled to be adjudicated in the federal courts.” (footnote omitted)); see also *Harman v. Forssenius*, 380 U.S. 528, 534–35 (1965) (Warren, C.J.) (indicating in a voting case that if the state statute was not fairly subject to an interpretation that would modify or obviate the need to decide the federal question, then the court had a duty to exercise its jurisdiction (citing *Baggett v. Bullitt*, 377 U.S. 360, 375–79 (1964))).
179. *Baggett*, 377 U.S. at 375 (“Those special circumstances are not present here.”); *McNeese*, 373 U.S. at 674 (emphasizing the lack of issues of local law); *id.* at 673 & n.5 (acknowledging, however, that the “variations on the theme [of abstention] have been numerous”); cf. *Hostetter*, 377 U.S. at 329 (noting that “there was here no danger that a federal decision would work a disruption of an entire legislative scheme of regulation”).
180. *Griffin*, 377 U.S. at 229 (“The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits.”); *Hostetter*, 377 U.S. at 329 (agreeing with the district court that abstention would cause further delays in a case where three-judge-court issues, see *id.* at 327 & n.4, had already caused delay); *Baggett*, 377 U.S. at 374, 379 (reasoning that abstention would cause delays in the free dissemination of ideas); see also *Harman*, 389 U.S. at 537 (given the election context, and the delay abstention would cause, the district court did not abuse its discretion in denying abstention).
181. See, e.g., FALLON ET AL., *supra* note 103, at 1065 (noting a decline of *Pullman* abstention in the 1960s, a resurgence with the Burger Court, followed by a decline in the Court but continued use in the lower federal courts); see also CURRIE II, *supra* note 171, at 659–60 (noting 1970s cases where the Court abstained, but also noting limits).
182. See, e.g., *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311, 314 (5th Cir. 1993) (abstaining under *Burford*, inter alia, because the issue “would require delving into highly local issues of fact”).

BETWEEN THE ACTS: FEDERAL COURT ABSTENTION IN THE 1940s AND '50s

courts have superior access to social facts than federal courts.¹⁸³ The federal courts may refuse jurisdiction in *Younger* cases if the contested legislation might constitutionally be applied to some state of facts, but obscure possibilities that state courts will narrow a plain statute are not grounds for *Pullman* abstention. And while balancing litigants' rights and governmental interests produced the abstention doctrines, most jurisdictional questions are determined categorically based on federal courts' duty to exercise the jurisdiction given.

Because abstention doctrines remain a potential barrier to litigants challenging state and local regulation, it is easy to forget how much greater an obstruction they once posed. Modern civil rights cases could fully take the stage—the federal forum—by pushing these doctrines into the wings.

183. Purcell, *supra* note 1, at 714 (“Frankfurter’s corollary idea that state courts should hear federal claims that were ‘essentially local’ provided little if any useful guidance.”).