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I. INTRODUCTION

The federal courts have by now firmly established a variety of doctrines by which they decline to exercise jurisdiction vested in them by Congress. The constitutional validity of these "abstention" doctrines has been challenged in recent years by Professor Martin Redish, who contends that "[j]udge-made abstention constitutes judicial lawmaking of the most sweeping nature."[1] He characterizes the abstention doctrines "as a judicial usurpation of legislative authority, in violation of the principle of separation of powers."[2] To Professor Redish, judicial construction of "a jurisdictional statute that somehow vests a power in the federal courts to adjudicate the relevant claims without a corresponding duty to do so is unacceptable."[3] Redish's intellectual cohort, Professor Donald Doernberg, establishes the same point by invoking more directly the familiar admonition of Chief Justice Marshall in *Cohens v. Virginia*[4]: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."[5] Closely aligned with these commentators is former Justice Brennan, who has declared that the

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1. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 114 (1984).

2. *Id.* at 76; *see also* Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing"*, 40 CASE W. RES. L. REV. 1023 (1989-90); Doernberg, *"You Can Lead a Horse to Water . . .": The Supreme Court's Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress*, 40 CASE W. RES. L. REV. 999, 1016-21 (1989-90).

3. Redish, *supra* note 1, at 112.

4. 19 U.S. (6 Wheat.) 264, 404 (1821).

5. *Id.*; *see* Doernberg, *supra* note 2, at 1002.

federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."[6]

It is, in my judgment, correct to observe "that these suggestions of an overriding obligation, subject only and at most to a few narrowly drawn exceptions, are far too grudging in their recognition of judicial discretion in matters of jurisdiction."[7] It is also correct to conclude that, as a matter of sound policy, "state courts . . . should continue to play a substantial role in the elaboration of federal constitutional principles. . . . [and that] federal intervention [with state proceedings] is most dubious."[8] But it is not my intent to join these choruses in defense of the abstention doctrines. Nor do I wish to argue that the abstention doctrines result from a congressional delegation of authority to the courts, implicit in the jurisdictional grant, "to modify or limit the exercise of that jurisdiction in order to avoid friction within the federal system."[9] Similarly, I eschew the argument that abstention is rooted in an implicit legislative recognition of the equitable power of the courts to defer the exercise of their jurisdiction.[10]

Rather, I wish to chart a different course. My thesis is that the Supreme Court has crafted the abstention doctrines, or at least some of them, as a continuing exercise in constitutional law, and not merely as prudential limits upon the federal judicial power. To be sure, the accepted wisdom is that the abstention doctrines are not constitutionally required.[11] But it may be

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6. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). Of course, Justice Brennan's observation was qualified both by the use of the term "virtually" as well as by the fact that it was issued in the course of an opinion upholding a district court's refusal to exercise its jurisdiction in a case with ongoing parallel state proceedings; *see also* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983). In *Moses* Justice Brennan repeats this sentiment, albeit in a case in which the Court refused to acquiesce in a district court's refusal to exercise its jurisdiction because of an ongoing contract claim in the state courts. *Id.* at 13-28.

7. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985).

8. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 637 (1981).

9. Redish, *supra* note 1, at 80.

10. *Id.* at 84-85. *Cf.* Shapiro, *supra* note 7, at 549-50, 570-74.

11. *See* Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1337-39 (1986) (abstention is "founded solely on judicial policymaking"); Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985) (abstention is a federal common law doctrine); Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 269-70 (1976) (*Younger* abstention is a "judicially developed policy of self-restraint combining . . .

that such wisdom is so readily accepted because it comports so closely with the wishes of its adherents.[12] I seek to demonstrate in this article that a better explanation of the abstention doctrines lies in the thesis that the doctrines, in some form, are compelled by the Constitution.

I do not propose to chart the constitutional boundary of the abstention doctrines along the entire frontier of state and federal judicial power. My goal is far more limited; I simply wish to make the case that the Court, whatever its rhetoric, acts as if the abstention doctrines, or at least some of them, are mandated by the plan of the Constitution. More specifically, I hope to make a plausible argument that the abstention doctrines are part of a larger constitutional task in which the Court is continually engaged: the monitoring of the limits of the federal judicial power and the corollary congressional power to vest the federal courts with jurisdiction. Whether the Court is doing this by finding some independent normative and limiting force in the tenth amendment or whether it is doing this by finding some implied limitation upon federal judicial power in article III is ultimately of less importance than recognizing that this is, in fact, what the Court is doing.

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principles of comity, equity, and federalism"). Of course, Professor Redish takes this position since he thinks the abstention doctrines violate the Constitution. *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 233-321 (1980); Redish, *supra* note 1, at 71, 74, 112, 114 (abstention violates the separation of powers doctrine). *But see* E. CHEMERINSKY, FEDERAL JURISDICTION 627-28 (1989) (discussing the possibility that *Younger* abstention is a constitutional rather than prudential rule).

12. In addition to the views of Professors Redish and Doernberg, *supra* notes 1 and 2, see also Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 101 (1986) (*Colorado River* abstention "is an invidious encroachment on the constitutional and statutory rights of federal litigants" which "is merely a doctrine of judicial convenience that has no place in American jurisprudence"); Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 988 (by employment of *Younger* abstention "the federal courts' refusal to use their equitable powers to reform state justice systems directly contravenes the intent of the Reconstruction Congresses that adopted the fourteenth amendment and enacted section 1983"). It is likely that the views of these commentators are influenced by their subscription to the "nationalist" model of judicial federalism, which is premised upon the ubiquitous supremacy of the national government, and assumes that only the federal courts will effectively and vigorously enforce federal rights. By contrast, it is evident that I subscribe to a different model, one which stresses the importance within the federal constitutional design of state initiatives and obligations, contends that national intrusion upon state law should be minimal and effected cautiously, and regards the state judiciary as constitutionally and functionally competent to vindicate federal rights. *See generally* Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (presenting and discussing these two typologies of the law of federal jurisdiction).

Part II of this article analyzes the constitutional and judicial bases for my theory that the abstention doctrines are constitutionally mandated. Part III analyzes each abstention doctrine in light of my theory, leading to the conclusion that abstention is better understood as a constitutional mandate than as a prudential doctrine of judicial creation.

II. The Constitutional Argument In Outline

Professor Philip Bobbitt has identified six modes of constitutional argument: historical, textual, doctrinal, prudential, structural, and ethical.[13] Rare is the constitutional argument that can incorporate successfully all six modes. Indeed, some types of argument, such as textual and prudential, are inherently antagonistic.[14] My argument is principally structural, relying on the claim that "a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments."[15] However, my argument is also buttressed in places by resort to textual, doctrinal, and prudential arguments.

Given that "it is a Constitution we are expounding"[16] and, more particularly, a *written* one, it is incumbent to begin with text. There are at least three textual sources of the constitutional root of the abstention doctrines, but they are not determinative either in isolation or in combination. Other modes of constitutional argument must be joined to the textual in order to manufacture a plausible contention that abstention has a constitutional foundation.

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13. P. Bobbitt, Constitutional Fate 3-8 (1982). Historical argument "marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution." *Id.* at 7. Textual argument is "drawn from a consideration of the present sense of the words of the provision." *Id.* Doctrinal argument "asserts principles derived from precedent or from judicial or academic commentary on precedent." *Id.* Prudential argument "advanc[es] particular doctrines according to the practical wisdom of using the courts in a particular way." *Id.* Structural arguments claim that "a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments." *Id.* Ethical argument is not moral argument but, rather, "constitutional argument whose force relies on a characterization of American institutions and the role within them of the American people." *Id.* at 94.

14. *Id.* at 59-61.

15. *Id.* at 7. Perhaps the foremost exponent of this form of argument is Charles Black, Jr. *See* C. Black, Jr., Structure and Relationship in Constitutional Law (1969).

16. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis omitted).

A. *The Supremacy Clause*

The supremacy clause provides that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[17]

The emphasized passage seems to contemplate that the state courts would possess some measure of concurrent jurisdiction with the federal courts. Otherwise, there would be no reason to include an explicit command to the state judiciary that they act in obeisance to paramount federal statutory and constitutional law.

Support for that reading of the supremacy clause can be derived from that most germinal of cases, *Marbury v. Madison*.[18] As Professor Bator has put it, "[t]he deepest significance of the judicial power recognized in *Marbury v. Madison* is, ultimately, not that it permits the lower federal courts to disregard unconstitutional acts of Congress, but that it makes it the duty of the state courts to do so."[19] In justifying judicial review, Chief Justice Marshall never alluded to the powers of the *federal* courts; neither did he speak of judicial review as being limited to *federal* judicial review.[20] Rather, his defense of judicial review was in terms of the obligation of *all* courts to maintain fidelity to law.[21] To Marshall, it was almost self-evident that, in a society with a written Constitution, the highest form of law was that Constitution.[22] The obligation of obedience to federal law, imposed upon the state courts by the supremacy clause, demands that the state judiciary, no less than their federal siblings, undertake the burdens of constitutional judicial review.

In Federalist 82, Alexander Hamilton delivered his famous exposition of the relationship of the state courts to the federal courts. He concluded that state courts would possess concurrent jurisdiction with the federal courts unless Congress plainly

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17. U.S. CONST. art. VI, cl. 2 (emphasis added).
18. 5 U.S. (1 Cranch) 137 (1803).
19. Bator, *supra* note 8, at 628-29 (footnote omitted).
20. *Id.* at 629 n.60 (interpreting *Marbury*, 5 U.S. (1 Cranch) at 176-80).
21. *Id.*
22. *Id.*

invested the federal courts with exclusive jurisdiction over "objects intrusted to . . . [congressional] direction."[23] Hamilton did not ground his conclusion upon the supremacy clause; rather, he proceeded from the proposition that "the States will retain all *preexisting* authorities which may not be exclusively delegated to the federal head."[24] He then interpreted article III's directive that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . ordain and establish"[25] to refer simply to a division of federal judicial power among the various federal courts, rather that a statement that the federal courts "should alone have the power of deciding those causes to which their authority is to extend."[26] Hamilton was quick to limit this principle of concurrent jurisdiction "to those . . . causes of which the State courts have previous cognizance."[27] This allowed for the possibility that "the United States, in the course of legislation upon the objects intrusted to their direction, may . . . commit the decision of causes arising upon a particular regulation to the federal courts solely."[28]

Hamilton thus recognized both that the Constitution contemplated that the state courts could not be deprived altogether of their concurrent jurisdiction, and that Congress possessed the power to create a class of cases with respect to which the federal courts might exercise exclusive jurisdiction. For both of these positions to be viable, it is essential that some line be established demarcating the limits of congressional power to strip the state courts of their concurrent jurisdiction. Hamilton's proposed test for this constitutional dividing line was to read article III as containing an implicit prohibition upon congressional vesting of the federal courts with jurisdiction which would operate to prevent the state courts from considering federal claims in the type of cases of which the state courts had cognizance prior to the Constitution.[29]

Regardless of whether Hamilton's limiting principle is the appropriate one, the principle of concurrent jurisdiction oper-

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23. THE FEDERALIST No. 82, at 421 (A. Hamilton) (M. Beloff ed. 1987).
24. *Id.* at 420 (emphasis in original).
25. U.S. CONST. art. III, § 1.
26. THE FEDERALIST No. 82, at 421 (A. Hamilton) (M. Beloff, ed. 1987).
27. *Id.*
28. *Id.*
29. *Id.*

ates in tandem with the dictates of the supremacy clause to compel at least three results. First, the "state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States.' "[30] Second, "[t]he Supremacy Clause both imposes this responsibility and limits the discretion of the sovereign state courts: violations of federally protected rights are susceptible to correction in the federal courts."[31] Third, if the state and federal courts share jurisdiction over cases of which the states had pre-constitutional cognizance,[32] the states will retain their pre-constitutional jurisdiction in those cases, unless the Constitution has given exclusive jurisdiction to the federal courts.[33] While article III is "[t]he only thing in the . . . Constitution which wears the appearance of confining the causes of federal cognizance to the federal courts,"[34] article III also "admits the concurrent jurisdiction of the State tribunals."[35] It is thus incontestable that the concurrent jurisdiction of the state courts may not be entirely eliminated. Should Congress vest the federal courts with jurisdictional authority to entertain federal claims that is so expansive that it would effectively foreclose the possibility that the state courts might hear and decide any federal claims, the supremacy clause's explicit contemplation of concurrent jurisdiction would be offended. Given the existence of general federal question jurisdiction in the federal trial courts and the removal statutes, it is entirely possible that state courts might be wholly foreclosed from entertaining concurrent jurisdiction over federal claims. To prevent this, and to preserve the ability of the state courts to define state law, it is necessary to have some limiting principles, like the abstention doctrines, by which federal jurisdiction may be restrained. This principle, a mixture of the textual and struc-

30. Steffel v. Thompson, 415 U.S. 452, 460-61 (1974) (quoting Robb v. Connolly, 111 U.S. 624, 637 (1884)).

31. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 80 (1989).

32. *See* THE FEDERALIST No. 82, at 421 (A. Hamilton) (M. Beloff ed., 1987) (concurrent jurisdiction is "clearly applicable to those descriptions of causes of which the State courts have previous cognizance").

33. *Id.* ("[T]he State courts will *retain* the jurisdiction they [had prior to the Constitution] . . . unless it appears to be taken away . . . [by] exclusive delegation [in the Constitution] . . . to the federal head.) (emphasis in original).

34. *Id.*

35. *Id.*

tural arguments, might well be the seed of at least a few of the trees in the abstention forest.

B. Article III.

Article III vests the federal judicial power in the Supreme Court and the lower federal courts and describes the outer limits of that judicial power. But as we have seen, article III does not compel the conclusion that the federal courts are, by virtue of the Constitution itself, given exclusive jurisdiction over all federal claims. Accordingly, although article III might be construed to mean that Congress has the power to vest the federal courts with exclusive jurisdiction of every federal question, such a reading "would amount to an alienation of State power by implication, . . . [and thus is not] the most natural and the most defensible construction."[36]

This should not be surprising, for it is well-settled that Congress may not expand federal judicial jurisdiction beyond the boundaries contained in article III.[37] It is also well-settled that parties may not consent to the exercise of federal court jurisdiction beyond those boundaries.[38] Thus, Congress possesses no more authority to deprive the state courts of all jurisdiction over federal claims than it does to compel the federal courts to render advisory opinions.[39] Neither limitation is explicit in the text of article III; both are derived from the linguistic and structural implications of the text.

What may be more surprising is the actual conduct of the

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36. *Id.*

37. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

38. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (federal question jurisdiction); Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379 (1884) (diversity jurisdiction).

39. Since the earliest years of constitutional union it has been the established view that article III does not contemplate the exercise of such authority by the federal judiciary. *See, e.g.*, D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888 6-14 (1985) (discussing the origins of the advisory opinion limitation). This constitutional limitation has not prevented individual justices from delivering to the other branches of national government both extra-judicial advice and confidential information concerning pending cases. *See, e.g.*, W. LASSER, THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS 28-32 (1988) (discussing the private communications between President Buchanan and Justices Catron and Grier concerning the outcome of the then pending *Dred Scott* case); B. MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 186-211 (1988); Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633 (1962).

Court with respect to its original jurisdiction, a jurisdictional grant that is self-executing and irreducible.[40] Despite the apparently mandatory nature of this jurisdiction, the Court regularly denies leave to file complaints that are within its original jurisdiction.[41] One justification for doing this has been that "the grant of original jurisdiction cannot be regarded as compelling this Court to assume [a burden] which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it."[42] Another justification is that, so long as another competent forum was available, the Court need not assume the burdens of original jurisdiction inasmuch as those obligations might seriously interfere with its more important function as a final constitutional court of review.[43] In reaching these decisions, the Court has delivered itself from the rigid rule set forth in John Marshall's emphatically blunt statement in *Cohens v. Virginia*.[44] Marshall's statement became viewed as not being "universally true but . . . qualified in certain cases."[45] The obligation of "a court possessed of jurisdiction . . . [to] exercise it"[46] became only *generally* true. Even more surprising is the fact that the Court refused, in *California v. West Virginia*,[47] to accept a case within its exclusive original jurisdiction. Since no other forum is available for the adjudication of such claims, the Court's decision is obviously inconsistent with its prior rationale for declining to exercise its original jurisdiction.

The Court's treatment of its original jurisdiction is certainly evidence that it believes it possesses a wide measure of discre-

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40. *See* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861). *But see* Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 254 n.160 (1985) (contending that article III's grant of original jurisdiction over "[c]ases . . . in which a State shall be a Party," U.S. CONST. art. III, § 2, cl. 2, is a permissive grant of jurisdiction, requiring congressional action to effectuate and subject to congressional restrictions). But even if Professor Amar's view is accepted, Congress has acted to mandate the original jurisdiction of the Court. *See* 28 U.S.C. § 1251 (1988).

41. *See, e.g.*, Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) (refusing to permit an action by a state complaining of pollution against an out-of-state manufacturer); Massachusetts v. Missouri, 308 U.S. 1 (1939) (refusing to permit Massachusetts to file a complaint for taxes allegedly owed by a citizen of Missouri).

42. Massachusetts v. Missouri, 308 U.S. at 19.

43. *Wyandotte Chemicals*, 401 U.S. at 498.

44. 19 U.S. (6 Wheat.) 264, 440 (1821).

45. Massachusetts v. Missouri, 308 U.S. at 19.

46. *Wyandotte Chemicals*, 401 U.S. at 496-97.

47. 454 U.S. 1027 (1981).

tion in deciding whether to exercise the jurisdiction it possesses. Nor is this the only evidence available to prove the point, for Professor David Shapiro has demonstrated that federal courts employ a wide variety of discretionary devices both to refuse to exercise jurisdiction and to determine whether they even possess jurisdiction.[48]

My point, however, is a bit different. The Court could not act as it does if it believed that a mandatory grant of jurisdiction carried with it a constitutional obligation to exercise the granted jurisdictional authority. Indeed, even in the case of the Court's original and exclusive jurisdiction, the Court sees no constitutional impediment to its refusal to exercise jurisdiction it plainly possesses. This is not to suggest that the Constitution somehow compels the Court to refrain from exercising its original jurisdiction. But when taken together with such doctrines as that pertaining to advisory opinions, it suggests that the Court views the jurisdictional authority and limits of article III as roughly analogous to an imaginary mollusk containing a flexible and permeable membrane attached to and encased within a hard shell. The shell represents the outer constitutional limits of federal jurisdiction; the membrane contains the actual jurisdictional authority exercised by the courts. Congress may pour jurisdiction into the jurisdictional membrane until it reaches the constitutional limits defined by the hard outer shell. None of that jurisdiction can seep through the shell, for it is impermeable to jurisdiction which is beyond the constitutional limits of article III. But the Court can squeeze the membrane within the shell. When it does so, some of that potential jurisdiction seeps through the permeable membrane to be contained by the shell, and the courts exercise only the jurisdiction remaining within the membrane. It is this discretionary squeeze of the membrane in order to shrink the allotted jurisdiction that is usually thought to be the core of the abstention doctrines. But, as will be seen shortly, it is my contention that it makes more sense to conceive of the abstention doctrines as part of the outer shell. For immediate purposes, it is enough to note that the Court acts as if article III consists of both a jurisdictional membrane malleable at the discretion of both Congress and the federal courts and a hard constitutional shell containing and limiting federal jurisdiction.[49]

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48. *See* Shapiro, *supra* note 7, at 547-70.

49. A similar phenomenon, outside the scope of this paper, has occurred with re-

C. *The Tenth Amendment*

When the Court in *United States v. Darby*,[50] pronounced the tenth amendment[51] to be a "truism that all is retained which has not been surrendered,"[52] the idea that the tenth amendment had any normative and independent significance seemed to have been interred forever. Nevertheless, thirty-five years later, in *National League of Cities v. Usery*,[53] the Court held that a combination of the limits of the commerce clause[54] and the tenth amendment prohibited Congress from enforcing the minimum wage and overtime provisions of the Fair Labor Standards Act[55] against the states "in areas of traditional governmental functions."[56] After a decade of inconclusive litigation concerning the precise identity of those "traditional governmental functions,"[57] the Court reversed direction and overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.[58] It is thus tempting, but unwise, to treat the tenth amendment "as having been consigned to the nether world [sic] of nonjusticiability."[59]

By a five-to-four vote the Court in *Garcia* concluded, in effect, that if states desire to preserve any aspect of their sovereignty within the federal system they must look to Congress, and not to the courts.[60] The Court recognized that the tenth amend-

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spect to standing. Once thought of as a prudential doctrine, standing has been transformed by the Court into a doctrine with both prudential and constitutional aspects. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982).

50. 312 U.S. 100 (1941).

51. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

52. *Darby*, 312 U.S. at 124.

53. 426 U.S. 833 (1976).

54. U.S. CONST. art. I, § 8.

55. The specific statute in question was the Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 6(a), 88 Stat. 58, *amending* 29 U.S.C. § 203(e) (1970).

56. *National League of Cities*, 426 U.S. at 852.

57. *See, e.g.*, United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982) (railroad operation not a traditional government function).

58. 469 U.S. 528 (1985).

59. Massey, *supra* note 31, at 72.

60. "[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." *Garcia*, 469 U.S. at 550.

> [T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of

ment was intended to and does affirm state sovereign authority but

> the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies. In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.[61]

The frontier is to be found by locating the outer edges of congressional power under the Constitution:

> [T]he sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers . . . are withdrawn from the States by Article I, § 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation.[62]

By this restatement of familiar principles the Court implicitly recognized that state sovereignty predated constitutional union. Indeed, the Court treated the tenth amendment as securing to the states certain residual sovereign powers but regarded the extent of those sovereign powers as measured by the area left for state action after Congress has validly exercised its delegated powers.[63]

> federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Id. at 552. The Court has expanded upon this view in *South Carolina v. Baker*, 485 U.S. 505 (1988), characterizing *Garcia* as holding that tenth amendment "limits are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." *Id.* at 512 (citation omitted).

61. *Garcia*, 469 U.S. at 550.

62. *Id.* at 548.

63. Professor Walter Berns contends that the tenth amendment, by itself, "is not and cannot provide a rule of law of the Constitution," and that its legal meaning can only be supplied by reference to other constitutional limitations on the exercise of congressional power. Berns, *The Meaning of the Tenth Amendment*, in A NATION OF STATES 139, 146, 158-61 (R. Goldwin ed. 1974). *But see* R. BERGER, FEDERALISM: THE FOUNDERS' DESIGN 84 (1987) ("Why does not the express reservation of undelegated powers equally furnish the 'terms' of constitutional adjudication?").

The approach to the tenth amendment shared by the Court and Professor Berns assumes that the task is simply to describe the limits of federal power; whatever remains is state sovereignty. An alternative approach is to start with state power: all powers are reserved to the states except those prohibited and those delegated. Thus, unless Con-

By contrast, *National League of Cities* was a short-lived effort to find in the tenth amendment a principle of state sovereignty insulating some state activities from congressional regulation that would otherwise be valid if applied to private citizens. *Garcia*'s abandonment of this enterprise signals the Court's unwillingness to stake out a boundary to congressional power as applied to the states which is more restrictive than that applicable to private citizens. The conventional reading of *Garcia* is that the "Court abdicate[d] tenth amendment questions."[64] To an extent this is correct, for the Court has indeed retreated from the labor of finding in the tenth amendment some independent normative limits on congressional power applied to the states. The Court prefers instead to transfer to article I the judicial interpretive task of surveying the federal-state frontier. On the article I front, generous readings of congressional power will continue to push the federal boundary well into state territory.[65]

It would be premature, however, to pronounce the tenth amendment dead. *Garcia* may have done so for the moment with respect to the contention that the tenth amendment created a zone of state immunity from the congressionally wielded club of the commerce power, but it does not necessarily stand for the proposition that the tenth amendment has no independent role to play with respect to the limits of the federal judicial power. *Garcia* accepts the prevailing wisdom that the limiting

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gress acts pursuant to a power that is comfortably within the zone of authority delegated to it, Congress has usurped authority belonging to the states. Though the end result is theoretically identical, the manner in which the inquiry is formulated suggests a great deal about the likely conclusions concerning distribution of state and federal power. A good example of the latter approach is *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Chief Justice Marshall observed that "[c]ommerce among the States" does not

> comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State. . . .
>
> [T]he enumeration of the particular classes of commerce to which the [commerce clause] power was to be extended . . . presupposes something not enumerated; and that something . . . must be the exclusively internal commerce of a State.

Id. at 194-95. Thus, when Marshall correctly observed that "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects," it is evident that his starting point was to focus on the reserved powers of the states to regulate their internal commerce. *Id.* at 197.

64. Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 793 (1985).

65. It is true, however, that there exist revisionist notions of congressional power which argue for a reversal of this trend. *See, e.g.*, R. BERGER, *supra* note 63; Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

force of the tenth amendment is precisely coterminous with the extent of federal power under the Constitution. Thus, since the Court treats article III as containing some implicit, but quite real, limits on the reach of federal judicial power, it is quite possible that the Court uses the tenth amendment, *sub silentio*, as the other blade of a pair of scissors with which it prunes the ever-growing twigs of the federal judicial power.

Indeed, it is evident that there are a number of "freestanding" conceptions surrounding federalism which have at their core notions of state sovereignty. Though the Court does not clearly refer to these principles as tenth amendment guarantees,[66] it does treat them in practice as rooted in tenth amendment principles of residual sovereignty.[67] The rhetorical label applied is usually that of "federalism and comity."[68] Once these "freestanding" sovereignty notions are treated as aspects of a state's residual sovereignty preserved by the tenth amendment, it becomes apparent that, despite protestations to the contrary in *Garcia*, the Court is constantly engaged in a judicial patrol of the frontier between federal and state sovereignty, at least with respect to the sector defining the relative judicial power of the states and the federal government.

D. Adequate and Independent State Grounds

The Supreme Court has "from the time of its foundation . . . adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."[69] Until *Michigan v. Long*,[70] this doctrine proved to be

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66. The Court has, however, begun to provide verbal, if not substantive, recognition of this point in the context of consideration of post-*Garcia* limits on congressional power to regulate the activities of the states. *See* South Carolina v. Baker, 485 U.S. 505, 511 n.5 (1988) ("We use 'the Tenth Amendment' to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution").

67. *See, e.g.*, Massey, *supra* note 31, at 75-87 (discussing the implicit tenth amendment foundations to such doctrines as adequate and independent state grounds, the *Erie* rule, exhaustion, abstention, the anti-injunction act, and the constitutional law pertaining to the compact clause).

68. *See infra* text accompanying notes 95-209.

69. Herb v. Pitcairn, 324 U.S. 117, 125 (1945). The proposition follows from the fact that, with one brief exception dealt with in *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874), the Supreme Court's statutorily created appellate jurisdiction of state court judgments has always been limited to review of federal questions decided by the state courts. *See* 28 U.S.C. § 1257 (1948) and *infra* note 72.

a "vexing issue"[71] as the Supreme Court struggled with the problem of deciding whether a state ground had been passed upon and, if so, whether that ground was sufficiently adequate and independent of federal claims present in the litigation to support the state court's decision.[72] *Michigan v. Long* clarified matters somewhat by its determination that, in cases presenting both federal and state issues, the state judgment would be presumed to rest on federal law unless the state court included in its opinion a plain statement of its reliance on state law as the ground for decision.

Where federal claims are present, the adequate and independent state grounds doctrine has been claimed to be constitutionally required,[73] compelled by statute,[74] or merely pruden-

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70. 463 U.S. 1032 (1983).

71. *Id.* at 1038.

72. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-24 (2d ed. 1988); Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip*, 19 GA. L. REV. 799 (1985) (discussing the methodology of *Michigan v. Long* against a backdrop of prior law); Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965) (discussing the pre-*Michigan v. Long* methodology by which the Court assessed the adequacy of state grounds).

73. The constitutional argument begins with the proposition that where a state court judgment rests on adequate and independent state grounds the federal courts are deprived of jurisdiction of all claims in the case, including the federal ones. If this is so, it must be because of the respect due one sovereign by another. Though "[t]he jurisdiction of the nation . . . is susceptible of no limitation not imposed by itself," Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812), that self-imposed limitation can be read into either the principle of residual state sovereignty embodied in the tenth amendment or the implicit limitations of article III on the federal judicial power. This idea derives some support from *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874), in which the Court expressed doubt about the power of Congress to enable the federal courts to review and decide issues of state law independently of the state courts. *Id.* at 626, 633. Professor Tribe contends that *Murdock* bars the Court from "reviewing *federal* issues in those cases which also contain state issues dispositive of the case." L. TRIBE, *supra* note 72, at § 3-24, 163 (emphasis in original). This is because *Murdock* has a "constitutional resonance" which prevents Congress from authorizing the Supreme Court to decide state law issues. *Id.* at 380; *see also* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 503 (1954).

74. Congress, of course, has authority under the "exceptions and regulations" clause, U.S. CONST. art. III, § 2, cl. 2, to alter the Supreme Court's appellate jurisdiction; *see also* Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) (recognizing some power of Congress to withdraw appellate jurisdiction from the Supreme Court in cases arising in the federal courts). From the Judiciary Act of 1789 onward, the Supreme Court's appellate jurisdiction from state courts has been limited to cases posing certain federal issues. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (codified as amended at 28 U.S.C. § 1257 (Supp. 1989)). In 1867 Congress removed a proviso in section 25 of the 1789 Act which limited the Court's appellate jurisdiction to the review of federal issues. Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386-87. In *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874), the Court concluded that Congress had not intended to confer jurisdiction

tial.[75] The disagreement stems from the ambiguous and politically charged origins of the doctrine in *Murdock v. Memphis*,[76] a Reconstruction era case which posed great potential for conflict between Congress and the Court.

Commencing with the Judiciary Act of 1789, the Supreme Court's appellate jurisdiction had been consistently limited to cases posing issues of federal law.[77] But in 1867, at the peak of the centralist fervor of Reconstruction, Congress acted to remove a portion of section 25 of the 1789 Act that limited the Court's appellate jurisdiction to review of federal issues.[78] When the question of whether Congress possessed the power to vest the Supreme Court with appellate jurisdiction over state law

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over state law matters since the repeal of the 1789 proviso was not a sufficiently clear statement of such intent. *Id.* at 619, 630. Congress has never responded by an explicit grant of such jurisdiction, apparently content that its statutory directives are satisfied by the Court's employment of the adequate and independent state grounds doctrine.

75. Ever since *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), federal courts have possessed power to review state judgments of federal statutory or constitutional law. As a theoretical proposition, a case containing a federal issue confers federal jurisdiction; the adequate and independent state grounds doctrine is not a jurisdictional bar but is a judicial refusal to exercise its jurisdiction. Matasar and Bruch contend that *Martin* "also broadly authorizes federal review of *state* law matters for their compatibility with federal law." Matasar & Bruch, *supra* note 11, at 1297 (emphasis in original). More precisely, their contention is that in deciding the first installment of the Fairfax grant litigation, Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813), the Court was compelled to pass upon the validity of Hunter's title under Virginia law to a portion of the Fairfax grant. Matasar & Bruch, *supra* note 11, at 1297-98. In fact, the ultimate title determination hinged on federal treaty law issues. *Martin*, 14 U.S. (1 Wheat.) at 358. Inquiry into the state of title under Virginia law was simply a "preliminary inquiry" undertaken in order to "construe the treaty in reference to that title." *Id.* *See also* Smith v. Maryland, 10 U.S. (6 Cranch) 286, 305-07 (1810) (similar inquiry made into Maryland law in order to determine treaty issues).

Matasar and Bruch also rely on *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), for support of the proposition that the federal courts may take jurisdiction of a case if it contains any federal issue and thereafter decide both state and federal issues presented. *See* Matasar & Bruch, *supra* note 11, at 1299-1300. The claim is overbroad, for *Osborn* does not purport to hold that the federal courts may decide state law independently and thereafter bind the states through the supremacy clause. This might have been true in diversity cases under the rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), but not after *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In any case, the federal courts have never had such power in federal question cases.

76. 87 U.S. (20 Wall.) 590 (1874). *Murdock* is commonly regarded as a germinal source of the adequate and independent state grounds doctrine, though that reading of *Murdock* has recently been criticized. *See* Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 920-22 & nn.180-81 (1986); Matasar & Bruch, *supra* note 11, at 1317-22.

77. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (codified as amended at 28 U.S.C. § 1257 (Supp. 1989)).

78. Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386-87.

came before the Court in *Murdock*, the Court side-stepped this politically volatile issue. The Court did this by concluding that Congress' partial repeal of section 25 of the 1789 Act lacked a sufficiently clear statement of intent to confer upon the federal courts jurisdiction over state-law matters.[79] Given the adamantly centralist focus of the Reconstruction Congress, this reading of congressional intent is a bit suspect. However, in the wake of *Murdock*, Congress took no action to make plain its intent to confer such jurisdiction. Nevertheless, while the narrow holding of *Murdock* supports the conclusion that the adequate and independent state grounds doctrine is compelled only by statute, the implications of a statutory extension of such jurisdiction argue strongly that the doctrine is compelled by the Constitution.

Because Congress has never conferred upon the Supreme Court the power to review state court determinations of state law in federal question cases,[80] the issue of the constitutional validity of federal judicial review of purely state claims has never squarely arisen.[81] If Congress did so act, one of two alternatives would inevitably result. First, the exercise by the federal courts of a power of appellate review over pure state law issues could result in the creation of a federal common law which would displace state law through the medium of the supremacy clause.[82] Any state law could ultimately be rendered impotent in the face of a contrary rule under the federal common law. For example, in a case arising under Washington law in which the plaintiff claims punitive damages, a federal court might conclude that Washington's rule prohibiting the award of punitive damages is displaced by a contrary rule under federal common law. The other alternative is the implausible phenomenon of a federal court altering settled interpretations of state law under the pretense of acting as the state's highest court of appeal. Thus, in the first example, a federal court would simply overrule the

79. *Murdock*, 87 U.S. (20 Wall.) at 619, 630.

80. *See supra* note 74.

81. *But see* discussion of Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) and Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813), *supra* note 75.

82. It can be argued that this result bears some similarities to the doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), which fashioned a post-*Erie* federal common law with respect to commercial paper issued by the United States and which necessarily displaced otherwise applicable state law pertaining to commercial paper. But because *Clearfield Trust* is rooted in the idea of the sovereign immunity of the United States it does not stand for such a sweeping proposition as the idea that all state law could be displaced by a federal common law.

Washington prohibition of punitive damages awards and make that revision binding upon Washington through the supremacy clause. In the second scenario, a state's law would be held hostage to its ultimate interpretation or revision by the federal courts.

Either alternative would require the Court squarely to face the issue of whether the states can be deprived of their law-making autonomy by Congress. Professor Deborah Jones Merritt has argued that, unless the states "retain sufficient autonomy to establish and maintain their own forms of government,"[83] they are deprived of the federal government's pledge to "guarantee to every State in this Union a Republican Form of Government."[84] The wholesale destruction of a state's independent law-making power certainly would seem to be the loss of the power to maintain its own form of government. This potential for elimination of state sovereignty also suggests rather strongly that federal review of pure state law issues does not comport with the residual sovereignty guaranteed to the states by the tenth amendment. Put more conventionally, such review seems to be outside the implicit limits of the federal judicial power created by article III.

Whatever the specific constitutional source, the conclusion of highly regarded constitutional commentators that such congressional action would violate the tenth amendment or other "related principles of state autonomy"[85] surely indicates a belief that the doctrine is constitutionally required. Either the tenth amendment possesses some normative core of its own, even after *Garcia*, or the adequate and independent state grounds doctrine is further evidence of article III's implicit limits upon the federal judicial power.[86] It is within that core—which includes the "tacit

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83. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 2 (1988).

84. U.S. CONST. art. IV, § 4. Of course, ever since *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the guarantee clause has been consigned to the constitutional purgatory of nonjusticiability. *See also* Baker v. Carr, 369 U.S. 186 (1962); Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). *But see* Linde, *When Is Initiative Lawmaking Not "Republican Government"?*, 17 HASTINGS CONST. L.Q. 159, 160-63 (1989) (contending that state courts can and should interpret the meaning of this guarantee).

85. L. TRIBE, *supra* note 72, at §3-24, 163.

86. These limits find their substantive meaning in notions of state sovereignty. It may be equally likely that this normative core of state sovereignty derives from the delegated and limited nature of the powers given Congress under article I. The result is the same as if the tenth amendment or article III were read to impose the limits. Indeed, given the helix-like relationship between congressional power, federal judicial power and the tenth amendment, it is difficult, if not impossible, to separate these concepts.

postulates"[87] of the Constitution with respect to state sovereignty—that the adequate and independent state grounds doctrine resides.

E. The Role of the Fourteenth Amendment

The Constitution's structural relationship between the states and the central government was radically altered by the Reconstruction amendments, particularly the fourteenth amendment. Any argument that the constitutional structure implicitly limits the federal judicial power must, therefore, confront the structural alterations resulting from the fourteenth amendment. There has been considerable argument over the nature of the transformation accomplished by the fourteenth amendment. These arguments have ranged from Justice Hugo Black's position that the amendment was, "a *comprehensive restatement* of the commitments made during both the Federalist and Reconstruction periods,"[88] to the withered view of Raoul Berger that the amendment was intended simply to constitutionalize the Civil Rights Act of 1866.[89] It is implausible to treat the amendment as a restatement of federalism principles, for it is simply not consistent with much of the prior understanding of those principles. It is even less plausible to argue, as does Berger, that the amendment was a sort of "superstatute," designed simply to make the 1866 Civil Rights Act a part of the Constitution. It is far more likely that the amendment was a "culminating expression of a broad-based effort to revise the foundational principles of our higher law."[90] The resulting problem, as Professor Bruce Ackerman recognizes, lies in stitching together as a coherent whole the vision of 1787 and the vision of 1868.[91]

Professor Ackerman has suggested that this reconciliation has occurred in a piecemeal fashion, by "a dialogue over time, in which early efforts at judicial synthesis serve as precedents in a continuing legal conversation seeking a deeper understanding of the tension-filled relationship between [the Founding] and [the Reconstruction]."[92] This is surely correct, but the "continuing

87. Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

88. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 521 (1989) (paraphrasing Black) (emphasis in original).

89. *See generally* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

90. Ackerman, *supra* note 88, at 522.

91. *Id.* at 524-27.

92. *Id.* at 525.

legal conversation" is not a single conversation. Rather, like a social gathering, it consists of a number of conversations occurring simultaneously, each with separate content but united by the common interest that actuated the gathering. Thus, issues like incorporation of the Bill of Rights are central to the "tension-filled relationship" Ackerman identifies, but the question of whether the federal courts may ignore the concurrent jurisdiction of the state judiciaries is far more peripheral to that relationship. The reason that the latter issue is more peripheral is that there is no immutable *structural* reason why state courts are unable to vindicate federal rights. The fourteenth amendment altered forever the balance of substantive power possessed by the states and the central government, but it did not purport to alter the pre-existing allocation of judicial authority to adjudicate the new balance of substantive rights. Thus, the "tension" injected into federal-state relationships by the fourteenth amendment is less pronounced when the issue is locating the constitutional limits of the federal judicial power. The Court's development of the abstention doctrines has arguably been a part of the "continuing legal conversation" about the role of the states and the central government in light of the inconsistent premises of the 1787 Constitution and the Reconstruction amendments. But, as will be seen, the abstention doctrines are the subject of a small conversation off in the corner.

F. A Brief Recapitulation

In the abstract, the constitutional argument is simply that the plan of the Constitution recognized—implicitly in the supremacy clause and article III, and explicitly in the tenth amendment—that the states would continue to exercise judicial authority over their own law and concurrent authority over at least some cases raising issues of federal law. This structural argument is not disturbed by the Reconstruction amendments, for they do not speak to the scope of either federal or state judicial power, but rather operate to prohibit certain substantive practices of the states. The limitations upon state authority worked by the Reconstruction amendments can be accomplished without wholesale displacement of state judicial authority over cases in which issues of federal law are present. Moreover, as will be seen, the manner in which the Supreme Court has interpreted the intersection of federal and state judicial power lends substantial support to the proposition that the Court is engaged in

the *constitutional* task of policing the frontier between federal and state judicial authority.

One objection to this argument is that the abstention doctrines are merely a judicially created analogue to a host of relatively minor statutory limits on federal jurisdiction, such as the amount in controversy requirement in diversity cases[93] or the thirty-day removal deadline.[94] It could hardly be contended that a thirty-day removal deadline is constitutionally mandated; why are the abstention doctrines any more likely to have a constitutional pedigree than these statutory limits?

There are several answers. It is the special province of the judiciary to develop constitutional doctrines limiting governmental authority. The fact that the abstention doctrines are of judicial manufacture is at least some, albeit quite modest, indication of a constitutional root. But not every judicial doctrine controlling the exercise of federal jurisdiction is of constitutional origin. As will be seen in the next section, the abstention doctrines are characterized by their almost harmonic resonance with the structural federalism concerns identified in this section. They operate as a set of devices which are simultaneously triggered by specific state interests (such as preserving a state's power to determine its own law) and which respond to a more general concern. That concern is that without the abstention doctrines, the combination of general federal question jurisdiction in the federal trial courts and an equally general removal statute would create the possibility that state courts could be wholly deprived of their role as concurrent adjudicators of federal claims.

Returning to the metaphor of the imaginary mollusk, the shape of the internal membrane may be partly determined by the statutory judgments of Congress limiting or conditioning access to the federal courts. Congress can be more restrictive than the Constitution demands. It has surely exhibited its intent to be so when, for example, it has imposed a thirty-day deadline for removal of state actions to federal court. But it is the Court which maintains the hard outer shell of constitutional limits upon jurisdiction. To be sure, there may be instances in which Congress has fashioned limiting doctrines, like the Anti-Injunction Act, which replicate the outer constitutional shell. However,

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93. 28 U.S.C. § 1332 (1988).

94. 28 U.S.C. § 1446(b) (1988).

as will be seen in the subsequent discussion of *Younger* abstention, even then the Court maintains the Constitution as a separate and independent limit, via the operation of the *Younger* doctrine. In short, congressional limitations upon jurisdiction reflect the prudential judgment of Congress, but at least some of the judicially created limitations operate to enforce the limits of the Constitution.

III. The Constitutional Argument Applied: The Abstenstion Doctrines

Abstention refers to a congeries of doctrines which share a common theme: the outright rejection or postponement by a federal court of its jurisdiction "even though Congress has vested jurisdiction in the federal courts to hear the cases in question."[95] There are at least four (and possibly five) major species of abstention, each bearing the label of the germinal case creating the doctrinal variant. *Younger* abstention[96] operates to prevent the federal courts from enjoining judicial and, occasionally, administrative[97] proceedings occurring simultaneously in the state courts. *Pullman* abstention[98] is a postponement of federal jurisdiction designed to enable the state courts to clarify state law in the hopes of avoiding a federal constitutional issue. *Burford* abstention[99] occurs when the assertion of federal jurisdiction might interfere with important state regulatory or administrative schemes. *Thibodaux* abstention[100] is sometimes identified as a separate abstention doctrine,[101] but has as often been treated as merely a specific application of *Burford* abstention.[102] Like *Burford* abstention, the *Thibodaux* strain seeks to avoid the use of federal judicial power to decide unsettled and "difficult questions of state law bearing on policy problems of substantial pub-

95. M. Redish, *supra* note 11, at 233.

96. Younger v. Harris, 401 U.S. 37 (1971).

97. *See, e.g.*, Ohio Civil Rights Comm'n. v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

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

99. Burford v. Sun Oil Co., 319 U.S. 315 (1943).

100. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

101. *See, e.g.*, Lee & Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321, 335-36, 343-45. While Professors Lee and Wilkins recognize that *Thibodaux* abstention might "be more properly classified as a category of *Burford* abstention," they analyze the doctrines separately. *Id.* at 336 n.86, 343-48.

102. *See, e.g.*, C. Wright, Law of Federal Courts 308-10 (4th ed. 1983).

lic import."[103] *Colorado River* "abstention"[104] is treated by the commentators as an abstention doctrine[105] but it is not so regarded by the Supreme Court.[106] Nevertheless, whether or not a true form of abstention, the *Colorado River* doctrine permits federal courts to defer to duplicative state court proceedings, but only if the circumstances justifying such abstention are "exceptional."[107] The abstention doctrines thus display "a welter of concerns regarding the proper allocation of federal judicial power."[108]

Critics of the abstention doctrines proceed along two principal avenues of attack. A favorite route is to question "the efficacy and wisdom of the various abstention doctrines."[109] But it is increasingly popular to challenge the constitutional authority of the judiciary to abstain from exercising jurisdiction.[110] The latter attack is far more germane to my purposes since, if it is a valid criticism, there is no merit in my claim that the abstention doctrines, or some of them, are compelled by the Constitution.

The argument challenging the constitutional validity of abstention begins with the uncontroversial proposition that article III vests Congress with the power to both create the inferior fed-

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103. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (discussing *Thibodaux* abstention).

104. *Id.*

105. *See, e.g.*, E. CHEMERINSKY, *supra* note 11, at 659-76; C. WRIGHT, *supra* note 102, at 315; Mullenix, *supra* note 12, at 99.

106. *See, e.g.*, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 14-15 (1983).

107. Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983); *see also Moses*, 460 U.S. at 25-26.

108. Lee & Wilkins, *supra* note 101, at 336.

109. Redish, *supra* note 1, at 71. In earlier articles Professor Redish employed that method. *See* Redish, *The Doctrine of* Younger v. Harris*: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978). Other critics in this vein include Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977); Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974); Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683 (1981); Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977); Mullenix, *supra* note 12, at 99 (1986); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987).

110. *See* Doernberg, *supra* note 2; Redish, *supra* note 1; Comment, *Preclusion Concerns as an Additional Factor When Staying a Federal Suit in Deference to a Concurrent State Proceeding*, 53 FORDHAM L. REV. 1183, 1184, 1188-90 (1985). A related attack is one made upon *Younger* abstention by contending that the doctrine is not supported by the legislative history of the Civil Rights Act of 1971, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983). *See* Zeigler, *supra* note 12, at 987.

eral courts[111] and to define their jurisdiction.[112] From there, things get murky. Critics of the abstention doctrines usually proceed by quoting Chief Justice Marshall's famous pronouncement in *Cohens v. Virginia*:[113]

> [T]his Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.[114]

If more recent support for the proposition is thought advisable, one need look no further back than two terms ago, when the Court declared it to be the long established rule that the federal courts "are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."[115]

From this initial premise the constitutional critics leap swiftly to the conclusion that abstention is "a judicial usurpation of legislative authority, in violation of the principle of separation of powers."[116] There seems to be little consideration of the possibility that the abstention doctrines, rather than constituting a judicial thumb of the nose to the Constitution, actually represent part of the Court's considered judgment of the outer limits of the power of the Congress to vest the federal courts with jurisdiction.

A. Younger *Abstention*

Younger v. Harris[117] held that principles of "comity and federalism" prevented federal courts from enjoining state criminal prosecutions "except in very unusual situations, where necessary to prevent immediate irreparable injury."[118] Although the

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111. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

112. Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850).

113. 19 U.S. (6 Wheat.) 264 (1821).

114. *Id.* at 404.

115. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2513 (1989) (quoting Chicot County v. Sherwood, 148 U.S. 529, 534 (1893)).

116. Redish, *supra* note 1, at 76.

117. 401 U.S. 37 (1971).

118. Samuels v. Mackell, 401 U.S. 66, 69 (1971).

exception was couched in terms suggesting that the Court was basing *Younger* upon the historic discretion of equity courts to dispense relief,[119] it is reasonably clear that the real foundation for the decision was not principles of equity jurisprudence, but was "an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions."[120] Although the Court made no claim that abstention was constitutionally required, its discussion of the applicable principles of "comity" that compelled abstention proceeded from constitutional norms.[121] The Court emphasized that "the entire country is made up of a Union of separate state governments . . . [and] the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[122] While employing the language of discretion and prudence, the Court nevertheless recognized as fundamental and controlling the principle that the states continue to exercise residual sovereignty even over constitutional matters, so long as some article III court retains the power of ultimate review. Indeed, it is precisely this principle that has made *Younger* abstention perhaps the most controversial of federal jurisdictional issues,[123] for after a case presenting a federal constitutional issue has made a complete tour of a state judicial system, the United

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119. In part, the *Younger* Court's declared rationale for its decision was that "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger*, 401 U.S. at 43-44. The Court did identify three circumstances that might entitle a federal plaintiff to injunctive relief of state criminal proceedings: bad faith prosecution, prosecution pursuant to a "patently unconstitutional" law, and the lack of an adequate state forum. *Id.* at 45, 53-54. Two of these circumstances are chimerical. Professor Fiss has declared that "the universe of bad-faith-harassments claims that can be established is virtually empty." Fiss, *supra* note 109, at 1115. Professor Chemerinsky claims that the Court has never applied the "patently unconstitutional" exception. E. CHEMERINSKY, *supra* note 11, at 653. The apparent sole exception to the *Younger* rule thus appears to be the lack of a state forum adequate to consider the federal constitutional objections to the state prosecution.

120. *Younger*, 401 U.S. at 44.

121. *Id.* at 43-48.

122. *Id.* at 44. *See also* L. TRIBE, *supra* note 72, at §3-30, 203-04 n.9 ("it is certainly clear . . . that the most basic underpinning of the *Younger* doctrine is *not* any special equity concept but, rather a federalism-based notion of comity") (emphasis in original); Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1488-89, 1531-34 (1987) (at core of *Younger* doctrine is concern for protecting role of state courts as independent adjudicators of state and federal constitutional issues).

123. *See* E. CHEMERINSKY, *supra* note 11, at 622-23; 17A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4251, 180 (2d ed. 1988).

States Supreme Court is generally the sole article III court with the power of review.[124] Under those circumstances, the realistic prospect of federal review is, of course, remote.

The Court's implicit recognition of a constitutionally secured right of the states to decide issues of constitutional law without interference from a federal court deciding those same issues in a collateral proceeding may be seen from other aspects of the *Younger* doctrine as it has developed over the years. In a companion case decided the same day as *Younger*, the doctrine was extended to actions seeking declaratory relief concerning criminal liability.[125] In *Hicks v. Miranda*[126] the Court concluded that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, [*Younger* abstention] should apply in full force."[127] Abstention critics rail against the *Hicks* decision as a repudiation of "the century-old canon of federalism that the filing of an action in state court could not oust a federal court first obtaining jurisdiction."[128] But the principle supposedly repudiated was never based on the Constitution.[129] It may well be that

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124. Of course, in some circumstances review may be obtained in the federal district courts via habeas corpus. *See* 28 U.S.C. §§ 2241, 2254 (1988).

125. Samuels v. Mackell, 401 U.S. 66 (1971).

126. 422 U.S. 332 (1975).

127. *Id.* at 349. The *Hicks* rule has been interpreted by some of the leading commentators in the federal jurisdiction field to mean that "once a state criminal prosecution is filed, federal courts may not decide issues properly before the state court, unless it has already done so." 17A C. WRIGHT, A. MILLER & E. COOPER, *supra* note 123, at § 4253, 228 (quoting Note, *Federal Court Intervention in State Criminal Law Proceedings When Charges Are Brought After Filing of the Federal Complaint*, 37 OHIO ST. L.J. 205, 214-15 (1976)).

128. Soifer & Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1192 (1977).

129. Soifer and Macgill rely on *Ex parte Young*, 209 U.S. 123 (1908), and *In re Sawyer*, 124 U.S. 200 (1888). *See* Soifer & Macgill, *supra* note 128, at 1193 n.210. *Ex parte Young* asserted that a federal court "having first obtained jurisdiction . . . has the right . . . to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed." 209 U.S. at 161-62. But the reason for this rule was not linked to any constitutional mandate by either *Ex parte Young* or any of the supporting authority cited by the Court in that case. Rather, as *In re Sawyer* makes clear, the rule (at least as it relates to attempts to obtain a federal court injunction of a state criminal prosecution) is rooted in the historic limits upon equity courts. 124 U.S. at 209-11.

Moreover, the "century old canon of federalism" embraced by Soifer and Macgill has existed for at least that long in uneasy tension with another axiom: "the pendency of a prior suit in another jurisdiction is not a bar to a subsequent suit [in a different jurisdiction] even though the two suits are for the same cause of action." Stanton v. Embrey, 93 U.S. 548, 554 (1877); *see also* McClellan v. Carland, 217 U.S. 268, 282 (1910). The two

the *Hicks* "repudiation" serves instead to delineate a constitutional line between the outer limits of federal judicial power and the correlative power inherent in the states' residual sovereignty.

Younger abstention as refined by *Hicks* can usefully be thought of as the Court's way of defining the frontier between federal and state judicial authority in the context of state criminal proceedings. Direct interference in such proceedings, or the prevention of their commencement by the insignificant fact of victory in the race to file first, is thought by the Court to be an unconstitutional interference with the retained sovereign prerogatives of the states. To the extent that there are federal statutory or constitutional objections to the manner in which the states are exercising their sovereign authority, and those objections have been resolved erroneously by the state courts themselves, the supremacy clause preserves to the federal courts the power to review and revise such determinations.

Younger abstention is not limited to state criminal proceedings. Ever since *Huffman v. Pursue, Ltd.*,[130] in which the Court first guardedly extended the scope of *Younger* abstention to state civil proceedings, the Court has proceeded to broaden the application of the doctrine. It has been extended to cover state civil proceedings where an "important state interest" involving either "civil enforcement proceedings" or "orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions" are implicated.[131] In *Huffman* the Court's logic was that the state civil proceeding—an action to close a cinema on the ground that its exhibition of obscene films constituted a nuisance—was "more akin to a criminal prosecution than are most civil cases."[132] The Court has stated that *Younger* policies "are fully applicable to noncriminal judicial proceedings when important state interests are involved."[133]

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rules conflict to the extent that *Ex parte Young* declares the jurisdiction first acquired to be exclusive; toleration of concurrent jurisdiction eliminates the problem of conflict but not the constitutional problem presented by the necessity of maintaining some inviolate zone of judicial authority for state courts to proceed with the disposition of their own law. It is this last problem which preoccupied the Court in *Hicks v. Miranda*.

130. 420 U.S. 592 (1975).

131. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2517-18 (1989); *cf.* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982).

132. *Huffman*, 420 U.S. at 604.

133. *Middlesex County*, 457 U.S. at 432.

However, in *Juidice v. Vail*,[134] the Court stated that it was saving "for another day" the broader question of whether *Younger* applies to all civil proceedings.[135] Justice Brennan, dissenting in *Juidice*, referred to the Court's reservation as a "tongue in cheek . . . signal that merely the formal announcement [of *Younger*'s application to all civil proceedings] is being postponed."[136] To Justice Blackmun, that announcement was made by the Court's extension, in *Pennzoil Co. v. Texaco, Inc.*,[137] of *Younger* abstention to foreclose a federal forum for Texaco's claim that Texas' judgment lien and appeal bond requirements in civil actions violated its federal constitutional rights. Justice Blackmun thought *Pennzoil* broadened the scope of *Younger* sufficiently to apply "whenever any State proceeding is ongoing, no matter how attenuated the State's interests."[138]

If the *Pennzoil* Court thought it had answered the question reserved by *Juidice* the clarity of the answer has been muddied by *New Orleans Public Service, Inc. v. Council of New Orleans*.[139] The New Orleans City Council had refused complete reimbursement to the utility for costs incurred in the construction of a nuclear power plant, despite a contrary determination by the Federal Energy Regulatory Commission. The validity of the Council's action became the subject of both state and federal litigation, although the federal courts abstained, invoking both *Younger* and *Burford*. In reversing this decision, the Court conceded that utility rate regulation is "one of the most important [state] functions"[140] but nevertheless found *Younger* abstention inapplicable because the state interest implicated was neither a "civil enforcement proceeding[]" nor an "order[] . . . uniquely in furtherance of the state courts' ability to perform their judicial functions."[141]

New Orleans Public Service has been criticized as utilizing an "ultimately unsatisfying" analysis that "gives little, if any, discernible guidance."[142] The problem with *New Orleans Public*

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134. 430 U.S. 327 (1977).
135. Id. at 336 n.13.
136. *Id.* at 345 n.* (Brennan, J., dissenting).
137. 481 U.S. 1 (1987).
138. *Id.* at 1534 (Blackmun. J., concurring).
139. 109 S. Ct. 2506 (1989).
140. *Id.* at 2516 (quoting Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 377 (1983)).
141. *Id.* at 2517-18.
142. Lee & Wilkins, *supra* note 101, at 356.

Service is said to be that it rejects the presence of an important state interest, by itself, as a sufficient reason for abstention, but simultaneously identifies two categories of cases in which *Younger* abstention should apply without providing any clue why "those categories of state proceedings merit special deference by the federal courts."[143] Yet, if one assumes that *Younger* abstention is truly an exercise in defining the constitutional limits of the federal judicial power, the decision makes considerably more sense.

If the Court in *New Orleans Public Service* had relied on the presence of an important state interest to support abstention, it would have fashioned a rule that would radically alter the allocation of judicial power between the federal and state courts. The new rule would have operated to prevent the federal courts from deciding questions of federal constitutional and statutory law whenever there exists a contemporaneous state proceeding in which the federal issues could be litigated. The *New Orleans Public Service* Court was well aware of this disturbing possibility. It rejected this outcome precisely because it would eliminate the well-established "right of a party plaintiff to choose a Federal court where there is a choice."[144] At the same time, however, the Court strove to retain as the core principle of *Younger* abstention in civil matters the idea that state courts possess unimpeachable authority both to enforce state law that is quasi-criminal in nature and to be free of federal interference in the processes by which they perform their judicial functions. The identified categories reflect a recognition that the states possess a core of sovereign judicial authority with which the federal courts may not interfere.

Indeed, the nature of the categories identified suggests that the Court was fashioning a constitutional line for preservation of state judicial authority not unlike that proposed by Alexander Hamilton in Federalist 82.[145] Hamilton's notion described the preservation of state authority over federal issues arising in the context of cases over which the states would have had pre-constitutional jurisdiction. The *New Orleans Public Service* categories are surely within that concept, for they preserve the states' authority to enforce their public policies and to control the

143. *Id.*

144. *New Orleans Pub. Serv.*, 109 S. Ct. at 2513 (quoting Willcox v. Consol. Gas Co., 212 U.S. 19, 40 (1909)).

145. *See supra* notes 23-35, and accompanying text.

processes of their own judicial systems. Claims that the states might do so in a manner inimical to the Constitution are preserved by the supremacy clause. The supremecy clause operates both to preserve for the federal judicial power the opportunity to review and revise state determinations of federal law while, at the same time and in conjunction with the tenth amendment, prohibiting the federal judicial power from extending so far into the state judicial process that the sovereignty of the states is compromised. *New Orleans Public Service* thus represents the Court's attempt to map the boundary between federal and state judicial power in the context of the civil proceeding.

The constitutional foundations of the *Younger* doctrine are further buttressed by an examination of the intersection between the Anti-Injunction Act[146] and *Younger* abstention. The Anti-Injunction Act prohibits federal courts from enjoining state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[147] It has been a continuous limitation upon the power of the federal courts to invade state sovereignty since its enactment as part of the Judiciary Act of 1793.[148] In *Mitchum v. Foster*,[149] the Court concluded that a federal court in a 42 U.S.C. section 1983 action may enjoin a state court. The Court construed section 1983 impliedly to contain sufficient "express authorization" of Congress to escape the statutory bar of the Anti-Injunction Act.[150] While the Court may have reasoned illogically as a matter of statutory construction,[151] the Court was most explicit in its view that the statutorily memorialized desires of Congress do not "qualify in any way the principles of equity, comity, and federalism that *must* restrain a federal court when asked to enjoin a state court proceeding."[152]

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146. 28 U.S.C. § 2283 (1988).

147. *Id.*

148. Act of March 2, 1793, § 5, 1 Stat. at 334, 335 (1793) ("a writ of injunction [shall not] be granted to stay proceedings in any court of a state"). This provision has been codified as Rev. Stat. § 720 (1878); Judicial Code § 265 (1911); 28 U.S.C. § 379 (1940); and finally, in 1948, at 28 U.S.C. § 2283 (1988).

149. 407 U.S. 225 (1972).

150. *Id.* at 240-41. This exercise of finding in section 1983 an " 'implied' express exception" to the bar of the Anti-Injunction Act has been labelled a "bizarre contortion[]" and "an oxymoron if ever there was one." Redish, *supra* note 1, at 87.

151. *See, e.g.*, Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 733-39 (1977); Redish, *supra* note 1, at 86-87.

152. *Mitchum*, 407 U.S. at 243 (emphasis added). This principle was emphatically reaffirmed in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

As a result, even if a federal plaintiff states a claim under section 1983, the Court's view is that *Younger* abstention must apply, even though the section 1983 claim is one which would entitle a federal court to enjoin a state court under the Anti-Injunction Act.[153]

This is a state of affairs that has been criticized by one abstention foe as "an effective reversal of the congressional decision to make section 1983 an exception to the Anti-Injunction Act."[154] In this view, "the combined effect . . . of . . . *Younger* and *Mitchum* is that the federal judiciary has arrogated to itself the authority to decide when to enjoin state court proceedings. It is difficult to imagine a starker illustration of judicial usurpation of legislative authority."[155] But if *Younger* abstention is treated as compelled by the Constitution, the interplay between *Younger*, *Mitchum*, and the Anti-Injunction Act becomes more understandable.

In the constitutional view of *Younger* abstention, *Mitchum* is simply a case of statutory construction. It may be that the Court in *Mitchum* erred in its construction of both section 1983 and the Anti-Injunction Act, but that is of no significance to the constitutional issues. If *Younger* is a constitutional decision, it makes perfectly good sense that the Court would hold that, even though a federal plaintiff has stated a claim under section 1983 (thus escaping the *statutory* bar of the Anti-Injunction Act), the *constitutionally* mandated principle of *Younger* requires the federal court to abstain from exercising jurisdiction. That is precisely what the Court has done in such cases as *Pennzoil Co. v. Texaco, Inc.*[156] If a federal court in a section 1983 action has the *power* to enjoin a state court (because Congress has authorized it to do so) but may not *exercise* that power due to principles of "equity, comity and federalism," it appears that something necessarily exists which vetoes congressional attempts to exercise its powers. That "something" may be simply an exercise of judicial prudence, but it seems far more likely that it is really a judicial recognition that Congress is acting beyond its delegated powers or, what is virtually the same thing, a recognition that retained state sovereignty occupies a sphere that, in some instances, trumps congressional power.

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153. *See, e.g.*, *Pennzoil*, 481 U.S. at 10-11.
154. Redish, *supra* note 1, at 88.
155. *Id.*
156. 481 U.S. 1, 10-11 (1987).

The constitutional view of *Younger* also explains the often criticized rigidity of *Younger* abstention. The Court has declared that "where a case is properly within [the scope of *Younger* abstention], there is *no discretion* to grant injunctive relief."[157] Critics of *Younger* abstention typically begin with the premise that the doctrine is rooted solely in "considerations of equity and comity developed through decades by the Court to accommodate the tensions among state power, federal power, and individual rights."[158] But these flexible concepts, charge the critics, "have been turned into a single, rigid commandment of federal judicial inaction that violates even such rules as equity and comity could be said to have contained. . . . This rigidity has eliminated the discretionary balancing at the heart of equity."[159] The flaw in this criticism lies in the assumption that *Younger* abstention is simply another equitable doctrine. If it is regarded as a constitutional command, its rigidity is far easier to understand. To invoke my earlier metaphor, *Younger* composes a portion of the hard outer shell of article III;[160] federal jurisdiction cannot expand beyond its confines. Equity does not operate to expand constitutional authority; thus, it makes more sense to regard *Younger* as rooted in the Constitution, not in principles of equity.

The *Younger* doctrine derives its compulsive force from mandatory principles of "equity, comity and federalism." The instrument which mandates these considerations is the Constitution. As I have attempted to sketch out earlier, the constitutional command is primarily a structural one, derived from the implicit limits on federal judicial power contained in the supremacy clause, article III, the tenth amendment, and a legacy of doctrines which have accreted around that structural principle. The net effect, as articulated in the *Younger* doctrine, is that the federal courts are unable to restrain the jurisdiction of state courts if Congress directs them to do so pursuant to an illegitimate claim of authority, or if the federal courts themselves act outside their constitutionally limited jurisdictional grant. From this perspective, *Younger* abstention is more than a monument to customary norms of comity and federalism; it is

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157. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 n.22 (1976) (emphasis added).

158. Soifer & Macgill, *supra* note 128, at 1143.

159. *Id.*

160. *See supra* text following note 48.

another embodiment of the Constitution's tacit postulates of twin sovereignties.

B. Pullman *Abstention*

Under the *Pullman* abstention doctrine federal courts defer to the state courts by permitting them to resolve their own unsettled issues of state law, rather than exercising federal jurisdiction to determine the case on federal constitutional grounds. The doctrine was created in 1941 in *Railroad Commission v. Pullman Co.*,[161] a case in which the Texas Railroad Commission had issued a regulation requiring all sleeping cars to have a conductor as well as porters. Since "[i]n Texas, at this time, conductors were white and porters were black,"[162] the regulation was challenged in federal court on the ground that the racial discrimination inherent in the regulation violated the fourteenth amendment's guarantee of equal protection. The Court concluded that the federal courts should have refrained from determining the federal constitutional issue until the Texas courts had been given an opportunity to decide the pertinent state-law issue.

The Court's rationale for its decision was that abstention "avoid[ed] . . . needless friction with state policies,"[163] and was calculated to limit the possibility that the federal court's ruling on issues of state law would be "supplanted by a controlling decision of a state court."[164] The Court further reasoned that abstention under these circumstances enabled the entire judicial system, state and federal, to avoid ruling unnecessarily on federal constitutional claims.[165] All of the proffered rationales have been heavily criticized,[166] but the doctrine remains vigorous as it nears its semi-centennial.

None of the original rationales for *Pullman* abstention are overtly connected to the idea that the doctrine might be compelled by the Constitution. Indeed, Justice Frankfurter, writing for the Court in *Pullman*, seemed to ground the newborn doc-

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161. 312 U.S. 496 (1941).

162. E. CHEMERINSKY, *supra* note 11, at 595.

163. *Pullman*, 312 U.S. at 500.

164. *Id.*

165. *Id.* at 501.

166. For a brief synopsis of the academic criticism, see Lee & Wilkins, *supra* note 101, at 339-43.

trine in the historic discretion of courts of equity.[167] The argument that *Pullman* abstention is part of the constitutional outer shell of federal jurisdiction is more diffuse than that pertaining to *Younger* abstention.

Unlike *Younger* abstention, which when properly invoked operates to foreclose federal jurisdiction with finality, *Pullman* abstention is commonly described as a mere *postponement* of federal jurisdiction, not its complete *abdication.*[168] This is because, under the rule enunciated in *England v. Louisiana State Board of Medical Examiners,*[169] the state courts may not finally adjudicate the federal issues in a case unless the litigants acquiesce. Traditional preclusion rules do not operate; a federal plaintiff whose case has been presented to a state court after the federal court has abstained under *Pullman* may return to federal court for relitigation of the federal issues if she has had the foresight expressly to reserve that right.[170]

From a different perspective, however, *Pullman* is perhaps a doctrine even more deferential to the state courts than is *Younger*, for it counsels abstention even when there is no assurance that the state courts will act to decide the case on state grounds.[171] It requires that "when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an *opportunity* to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question."[172] The central purpose of the doctrine thus seems to

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167. "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. . . ." *Pullman*, 312 U.S. at 500.

168. Allen v. McCurry, 449 U.S. 90, 101 n.17 (1980).

169. 375 U.S. 411 (1964).

170. *Id.* at 421-22. Of course, the federal plaintiff may voluntarily present her entire case, including the federal claims, to the state court. If she does this, either expressly or through the inadvertence of failing to expressly reserve her right to return to federal court for more litigation of the federal issues, the state court's determination of the federal issues will be final. *Id.* at 419. Of course, certiorari to the United States Supreme Court remains available to correct any errors of federal law made by the state court system. *See* 28 U.S.C. § 1257 (1988).

171. Of course, if the case is decided on federal grounds, or on an ambiguous mixture of federal and state grounds, the federal courts will exercise jurisdiction on appeal. Michigan v. Long, 463 U.S. 1032 (1983); *see also supra* notes 69-87 and accompanying text.

172. Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975) (emphasis added). *Pullman* abstention only applies when a constitutional issue is posed; the presence of a federal statutory issue is not enough. Propper v. Clark, 337 U.S. 472, 490

be to avoid interference with state courts in their role as "the principal expositors of state law"[173] by channelling the resolution of state issues to the state courts and reserving to the federal courts the unavoidable federal claims. While it is true that federal courts exercising *Pullman* abstention generally retain jurisdiction but stay the federal action pending state law clarification[174] and the Court has "repeatedly warned" the federal courts that *Pullman* abstention should only be invoked in "special circumstances,"[175] the rationale of the doctrine partakes heavily of the "tacit postulates" of residual state sovereignty.

It has been charged that "[a]voiding erroneous constructions of state law is a dubious foundation for abstention . . . [because] [f]ederal courts hearing diversity cases must routinely determine uncertain issues of state law."[176] It is certainly true that federal courts necessarily deliver informed predictions about state law in the course of resolving diversity cases, but the reasons for doing so in the context of diversity cases are quite different than in a case eligible for *Pullman* abstention.

Under the familiar rule of *Erie Railroad Co. v. Tompkins*,[177] federal courts sitting in diversity must adhere to the decisional law of the state, except where inconsistent with paramount federal constitutional or statutory provisions, and may not infer from the grant of diversity jurisdiction itself any power to contravene state precedents by fashioning a binding federal common law. Even in federal question cases involving state law issues, *Erie* commands that state decisional law be observed.[178]

(1949). The definitive treatment of Pullman abstention is Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, *supra* note 109.

173. Moore v. Sims, 442 U.S. 415, 429 (1979).

174. *Harris County*, 420 U.S. at 83. This goal is accomplished by the *England* rule that a litigant cannot be compelled to submit to the state court her federal claims for binding adjudication. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964); *supra* text accompanying notes 163-65. Of course, since the federal case remains alive, if dormant, in the federal court some state courts have taken the position that the state courts may not entertain the claim because to do so would be to deliver an advisory opinion in contravention of applicable state law. *See, e.g.*, United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965). In these circumstances, the Supreme Court has held that federal courts exercising *Pullman* abstention may dismiss the federal case "without prejudice so that any remaining federal claim may be raised in a federal forum after the [state] courts have been given the opportunity to address the state-law questions." *Harris County*, 420 U.S. at 88-89.

175. *Harris County*, 420 U.S. at 83.

176. Lee & Wilkins, *supra* note 101, at 340.

177. 304 U.S. 64 (1938).

178. *See* United States v. Standard Oil, 332 U.S. 301, 307 (1947); Field, *supra* note

When considered in league with *Murdock v. City of Memphis*,[179] which is generally regarded as articulating the principle that the Supreme Court may not review issues of state law,[180] the *Erie* doctrine preserves the integrity of state law from federal judicial erosion. While the nation's long history of a general common law as the rule of decision in federal courts prevents any confident assertion that the *Erie* doctrine is constitutionally compelled, its rooted nature today is additional evidence that the "tacit postulates" of state sovereignty continue to inform and shape the contours of federal jurisdiction. Thus, federal courts in diversity cases "decide" issues of state law primarily because the alternative—manufacture of a general federal common law which would displace state law in diversity cases—is even more invasive of the states' sovereign authority to make and enforce their own law.

These considerations are not present in a case ripe for *Pullman* abstention. Here, the federal courts can avoid decision of the state law claims altogether by allowing the state courts the opportunity to do so before the federal constitutional issues are reached. In a manner consistent with the *Erie* doctrine, *Pullman* abstention counsels against deciding the state issues in a federal forum because the alternative in this instance — permitting the state courts to decide the state law issues — is far less invasive of the states' sovereign authority to make and enforce their own law. *Pullman* abstention thus operates in tandem with *Erie* to accomplish a common end: preservation of this aspect of the residual sovereignty of the states.

It is here that the argument that *Pullman* abstention is a creature of the Constitution, rather than equity, assumes its shape. There is a structural principle embedded in the Constitution that operates to hem in federal jurisdiction. But that principle has been articulated and implemented by the Court in the *Pullman* doctrine in such a way that it seems part of a shadow Constitution, functioning somewhat like a shadow cabinet in a parliamentary system to define by its opposing tension the outer limits of the power that can be exercised by the nominal Constitution or cabinet. The Court has spoken of *Pullman* abstention by using a curious lexicon composed of snippets of equity, slivers

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76, at 912 n.141.

179. 87 U.S. (20 Wall.) 590 (1874).

180. *See supra* text accompanying notes 69-87 (discussing the adequate and independent state grounds doctrine).

of federalism, and bits of judicial prudence. If one accepts the idea that *Pullman* abstention is part of a constitutional structural principle, the Court's rhetoric is simply misleading, for it suggests that the doctrine lacks the mandatory force of the Constitution.

But from another perspective, the Court's rhetoric is quite constitutional. Professor Bobbitt has written about the "prudential" mode of constitutional argument. The prudential mode is characterized by a self-conscious attempt to respond to the context of the issue and to develop standards articulating the values underlying the constitutional issue in question. Given the unknown context in which the matter will next arise, an attempt is made to direct judges to apply those values in some necessarily vague way.[181] It is quite plausible to read the Court's approach to the question of *Pullman* abstention as in the eddies, if not the mainstream, of the prudential mode. Discretion is at the heart of the prudential approach. Justice Frankfurter's reference in *Pullman* to the "federal chancellor"[182] can thus be viewed as an appeal to the prudential Constitution. It is no accident, I submit, that *Pullman* itself was authored by Justice Frankfurter, one of this century's foremost adherents to the prudential mode of constitutional adjudication.[183]

There is another aspect of the *Pullman* doctrine that suggests it has its roots in the prudential Constitution. *Pullman* operates to defer determination of federal constitutional issues in the hope that final resolution of the state law issues will make the federal constitutional decision unnecessary. There will be at least some cases in which that hope will be realized. With respect to those cases, if the federal constitutional issue was nevertheless decided, such decision would be purely advisory. An identical problem is posed by the United States Supreme Court deciding a federal constitutional issue in a case squarely disposed of by a state's highest court on a point of state constitutional law.[184] It is partly for that reason that the Court has fash-

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181. *See generally* P. BOBBITT, *supra* note 13, at 59-73.

182. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941).

183. *Id.* at 497.

184. *See, e.g.*, Colorado v. Nunez, 465 U.S. 324 (1984), in which the Court concluded that the judgment of the Colorado Supreme Court affirming a trial court's decision to suppress evidence rested on adequate and independent state grounds. Nevertheless, three justices concurred simply in order to opine that "neither the Federal Constitution nor any decision of this Court requires the result reached by the Colorado Supreme Court." *Id.* at 324 (White, J., concurring). That opinion produced a rebuke from Justice

ioned the adequate and independent state grounds doctrine. Of course, in the absence of *Pullman* abstention, the federal constitutional issue would not be advisory, but only because the federal constitutional issue would be rushed to a premature, and often unnecessary, judgment.

The *Pullman* doctrine, while not compelled solely in order to avoid advisory opinions of federal constitutional law, performs a constitutional prudential function in much the same way as the adequate and independent state grounds doctrine. Both doctrines operate to insure that the federal courts do not decide issues of federal law unnecessarily; both preserve to the states the power to decide their own law. Both doctrines serve to limit federal judicial power at the margin in order to preserve the Constitution's intended design that the states retain plenary authority over their own law.

This is not to suggest, however, that the Court is fully conscious that in crafting the *Pullman* doctrine it is defining constitutional boundaries. Were it acutely aware of this enterprise, it would have built upon its conclusion in *Reetz v. Bozanich*[185] that *Pullman* abstention should apply when the state constitution contains a provision which might invalidate the state law without a federal constitutional decision. If state law violates the state constitution that is the end of the matter. It is only when the state constitution has been considered and the conclusion reached that the state law does not violate the state constitution that the federal constitutional issue need be raised and decided. The structural principle which seems to actuate *Pullman* abstention thus argues strongly for abstention in cases like *Reetz*, where there is a possibility that the state constitution might be dispositive.

Instead, in *Wisconsin v. Constantineau*,[186] the Court seemed to restrict this application of *Pullman* to situations in which the state constitution provides some unique guarantee. In *Examining Board of Engineers v. Flores de Otero*,[187] the Court fleshed out this restriction by holding that if the state constitu-

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Stevens, who noted that Justice White's opinion was purely "an advisory opinion . . . concerning the merits of the case. . . . [O]nce we agree that we lack jurisdiction, this case no more provides a vehicle for deciding the question upon which three Justices now volunteer an opinion than if the petition for a writ of certiorari had never been filed." *Id.* at 328 (Stevens, J., concurring).

185. 397 U.S. 82 (1970).

186. 400 U.S. 433 (1971).

187. 426 U.S. 572 (1976).

tional provision is a mirror image of a federal constitutional provision abstention is improper. The Court assumed that the state provision would be interpreted in conformity with the federal provision. In so deciding the Court seems to be burdened with a sort of constitutional xenophobia, for it ignores the reality that state constitutions are independent of the federal Constitution. There is no principle which compels a state court to interpret its equal protection guarantee, for example, as narrowly as the federal analogue. To illustrate, imagine a state law which is clearly valid under the federal equal protection clause. If a state court determines that the state law violates the state equal protection guarantee, there is no need to consider any federal constitutional issue. But the *Constantineau* and *Flores de Otero* decisions prevent this from happening and push the federal courts into an inappropriate and premature decision of the federal constitutional issue. If the Court were more cognizant of the constitutional terrain of *Pullman* abstention, it would likely reconsider these aberrant decisions.

Of course, it is possible that inconsistencies of this sort demonstrate the lack of constitutional compulsion in the *Pullman* doctrine. However, if that were true, one would expect the Court to abandon even *Constantineau*'s recognition of the idea that if the state constitution affords some unique guarantee the state courts should have the opportunity to dispose of the case on that basis. The fact that the Court has left this opportunity alive suggests that it has some glimmering of the constitutional mandate. The fact that it fails to be more deferential to state constitutions suggests that it lacks both a full appreciation of the independent significance of state constitutions and of the constitutional nature of the *Pullman* doctrine.

C. Burford *Abstention*

The abstention doctrine originating in *Burford v. Sun Oil Co.*[188] represents the judgment of the Court that state regulatory schemes involving issues of overriding state concern should be left to the state courts.[189] In the *Burford* case, Texas had created

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188. 319 U.S. 315 (1943) (federal courts should refrain from exercising jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs).

189. As most recently restated by the Court, Burford abstention applies

> (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; *or* (2) where the "exercise of federal review of the question

an administrative system to review decisions of the Texas Railroad Commission, which regulates Texas' important oil and gas industry. The administrative scheme was designed to achieve uniformity and effectuate the substantive policies of Texas with respect to the production of oil and gas. The Court concluded that abstention from consideration of Sun Oil's challenge to a licensing order of the Railroad Commission was necessary in order to avoid undermining the state's important substantive and procedural policies embedded in the oil and gas administrative scheme.[190] *Burford* did not, however, provide a general analytical framework for deciding the difficult question of precisely which state regulatory schemes involve issues of sufficiently overriding state concern that their resolution should be left to the state courts.

Eight years later, in *Alabama Public Service Commission v. Southern Railway*,[191] the Court seemed to provide an answer. The Court concluded that a federal suit brought by Southern Railway challenging the constitutionality of the Commission's refusal to permit discontinuance of certain Alabama train service should have been dismissed under the *Burford* doctrine because local train service was "primarily the concern of [Alabama]."[192] The Court found that "intervention of a federal court is not necessary for the protection of federal rights" whenever "adequate state court review of an administrative order based upon predominantly local factors is available."[193]

Thus, *Burford* abstention as expanded by *Alabama Public Service Commission* seems related to the requirement that litigants contending that a state has violated their constitutional rights must first exhaust their state administrative remedies before filing a claim in the federal courts.[194] The Court's justifi-

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in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2514 (1989) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)) (emphasis added).

190. *Burford*, 319 U.S. at 325-32.

191. 341 U.S. 341 (1951).

192. *Id.* at 346 (quoting North Carolina v. United States, 325 U.S. 507, 511 (1945)).

193. *Id.* at 349.

194. *See, e.g.*, Illinois Commerce Comm'n v. Thomson, 318 U.S. 675, 686 (1943); First Nat'l Bank v. Board of County Comm'rs, 264 U.S. 450, 453-56 (1924). Suits brought under 42 U.S.C. § 1983 are exempt from the requirement. *See* Patsy v. Board of Regents, 457 U.S. 496, 516 (1982). But, of course, *Younger* abstention applies to such claims. *See supra* text accompanying notes 145-56. In general, there is no requirement that a litigant

cations for the exhaustion requirement are threefold: to ensure that the states have an opportunity to protect federal constitutional rights, to be certain that the litigant's assertions of state misconduct are well-founded, and to avoid unnecessary decisions where the states may obviate the claim by their own actions.[195] Like *Younger* abstention, the exhaustion requirement and its close relative, *Burford* abstention, thus seem to be rooted in the structural principle implicit in the supremacy clause, article III, and the tenth amendment that both demands of and preserves a role for the states to protect federal constitutional rights and to control the implementation of state law.

The *Burford* doctrine's linkage with the constitutional root of *Younger* abstention also helps to explain why the Court in its application of *Burford* has required dismissal of the federal claim, rather than a mere postponement of federal jurisdiction as in *Pullman*. If the central justification for *Burford* is the necessity of preserving state courts' power to create and implement their own law free from federal interference,[196] and the state courts are constitutionally obligated to preserve and protect federal constitutional rights, there is no need to retain federal trial jurisdiction to relitigate federal issues present in the case. As with the *Younger* doctrine, the Court requires state courts to assume their obligations to protect federal rights. Their errors, like those of their federal judicial cousins, may be corrected by certiorari to the United States Supreme Court.

To be sure, the Supreme Court has never provided definitive guidance as to the precise triggers of *Burford* abstention, preferring instead to describe the doctrine in broad generalities. The Court continues to proclaim the *Burford* doctrine applicable whenever federal review of a state question "would be dis-

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exhaust state judicial remedies. *See* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 284-86 (1913) (interpreting the fourteenth amendment); Monroe v. Pape, 365 U.S. 167, 183 (1961) (construing 42 U.S.C. § 1983) *overruled*, 436 U.S. 658 (1978). *But see* Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 229-30 (1908) (litigant must exhaust both state administrative and judicial remedies if the state courts participate in the administrative process); 28 U.S.C. § 1341 (state tax collection issues); 28 U.S.C. § 1342 (state utility rate orders); 28 U.S.C. § 2254 (1988) (exhaustion of state judicial remedies required for habeas corpus).

195. *See, e.g.*, *Prentis*, 211 U.S. at 230.

196. To be sure, many commentators believe that the *Burford* rationale is simply not clear. *See* Lee & Wilkins, *supra* note 101, at 345, 347-48; Wells, *supra* note 11, at 1115-18; Comment, *Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the* Burford *Doctrine*, 46 U. CHI. L. REV. 971, 1006 (1979) (*Burford* abstention is "confused and cryptic").

ruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern,"[197] but has failed to provide anything more specific. The most that can be said about *Burford* is that the Court seems to have created and preserved the doctrine in recognition of structural limits the Constitution imposes on the federal judicial power, but has found it difficult to articulate with any confidence the exact location of this constitutional boundary. It is as if the Court believes that the Constitution compels some limit, and the Court is able to describe the general nature of the limit, but the Court is much less able to enforce this limit in any predictable or meaningful fashion.

D. Thibodaux *Abstention*

The *Thibodaux*[198] abstention doctrine, which is sometimes said to be a variant upon *Burford* abstention,[199] applies to cases presenting for decision an uncertain or unsettled issue of state law which is "intimately involved with [a state's] sovereign prerogative."[200] In the *Thibodaux* case itself, a municipality sought to condemn certain property of the defendant corporation. Since diversity of citizenship was present, the corporation removed the action to federal court, where the court stayed the federal proceedings to permit the state courts to resolve unclear issues of state law regarding the municipality's authority to condemn the defendant corporation's property. The Supreme Court affirmed the trial judge's decision since it regarded the state law issue as both unsettled and involving the state's "sovereign prerogative."[201]

But unlike *Burford* abstention, which appears to be appropriate whenever there are *either* "unsettled state law issues . . . of transcendent importance"[202] *or* if federal review of a state question "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public con-

197. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976), *quoted in* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2514 (1989).

198. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

199. *See, e.g.*, C. WRIGHT, *supra* note 102, at 308-10.

200. *Thibodaux*, 360 U.S. at 28.

201. *Id.*

202. Lee & Wilkins, *supra* note 101, at 348.

cern,"[203] the *Thibodaux* doctrine requires that there exist *both* unsettled state law issues *and* that the unsettled issues relate intimately to the sovereign prerogative of a state. The proof of this is not only in the fact that *Thibodaux* declared that to be the test, but also that in a companion case to *Thibodaux*, *County of Alleghany v. Frank Mashuda Co.*,[204] the Court rejected the application of *Thibodaux* abstention although *Frank Mashuda* involved substantially the same issue. The only apparent reason for the different result was that in *Frank Mashuda* the state law pertinent to condemnation was absolutely clear.[205]

The explanation for the more restrictive approach to abstention taken by *Thibodaux* may lie in the fact that the *Thibodaux* doctrine applies to diversity cases where, of course, federal courts routinely apply state law. In *Meredith v. Winter Haven*,[206] a case decided sixteen years before *Thibodaux*, the Supreme Court declared that it could find no basis upon which to "exclude cases from [diversity] jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine."[207] As discussed in the context of *Pullman* abstention, the requirement under the *Erie* doctrine that federal courts exercising diversity jurisdiction apply state law is designed in considerable part to prevent the federal courts from eroding state law by displacing it with an ever-expanding federal common law.[208]

There is thus a presumption that federal courts in diversity cases are not impeding the development of state law by deciding issues of state law. But this presumption partially breaks down when the state law issue is an unsettled one. This breakdown occurs because even though the federal court is theoretically do-

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203. Colorado River Water Conservation Dist. v. United States, 424 U.S. at 814, *quoted in* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 109 S. Ct. 2506, 2514 (1989).

204. 360 U.S. 185 (1959).

205. *See, e.g.*, *Thibodaux*, 360 U.S. at 31 (Stewart, J., concurring) (declaring that the difference between *Thibodaux* and *Frank Mashuda* was the presence in *Thibodaux* of unclear state law regarding the condemnation power and the clarity of the state law on the same point in *Frank Mashuda*); *see also* Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593, 594 (1968) (applying *Thibodaux* abstention to a case which presented an unsettled point of New Mexican water law that was a matter "of vital concern in . . . arid . . . New Mexico, where water is one of the most valuable natural resources"). The commentary generally agrees. *See, e.g.*, E. CHEMERINSKY, *supra* note 11, at 607.

206. 320 U.S. 228 (1943).

207. *Id.* at 236.

208. *See supra* text accompanying notes 177-81.

ing nothing more than forecasting the state rule once settled by the state courts, its decision necessarily has some effect on the final resolution of the state-law issue.[209] By itself, the danger of forecasting state decisions might not be enough to call for abstention in a diversity case, but when the unsettled issue of state law is one that is at the heart of the state's sovereign prerogative, the constitutional implications of the doctrine come into clearer focus.

In a fashion somewhat evocative of *Pullman* abstention, the *Thibodaux* doctrine is designed to permit the state courts to decide unsettled state law issues intimately bearing upon the state's sovereignty without any "first-guessing" by the federal courts. The fundamental constitutional rationale for *Pullman* abstention is that it preserves a core aspect of state sovereignty: the right to fashion its own law without federal interference. *Thibodaux* takes a more restricted approach because in the context of diversity cases that rationale is weaker, due in no small measure to the presence of the *Erie* doctrine. But because the rationale is ultimately based on structural constitutional principle, it has not entirely evaporated. Rather, its presence is felt when the issue requiring decision is one that is at the core of a state's sovereignty.

Indeed, the two-part nature of the *Thibodaux* doctrine reveals its constitutional foundation. The state law issue must be unsettled because, if it were plain, the federal courts could be trusted to decide it correctly. The unsettled issue must be one at the center of state sovereignty for it is that residual value that the Constitution protects from federal judicial invasion. In a somewhat simplistic sense, *Thibodaux* abstention might be

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209. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 17-23 (1989) (arguing that the Heisenberg uncertainty principle has as much application in law as in physics). Professor Tribe describes the Heisenberg uncertainty principle as the unavoidable phenomenon of altering the world by the very process of observing it. He offers this revealing example.

> You have a very ill friend in the next room. . . . You want to find out how she is faring. . . . You call to her,'How are you doing?' . . . She replies, 'Fine.' But the effort kills her. . . . Clearly, the outcome is sadly misleading—the very process of observation changed the system under study.

Id. at 18-19. The principle is no different with law, for as law "develops, [it] constantly alters the warp and woof of the relevant epistemological space." *Id.* at 22. For other explorations of the related but larger point that the prevailing paradigm of legal thought is breaking down and is evolving into a new paradigm, see G. WALKER, THE RULE OF LAW 44-47 (1988); Massey, *Rule of Law and the Age of Aquarius*, 41 HASTINGS L.J. 757, 762 (1990).

roughly characterized as holding that the federal courts simply have no authority to make important state policies by deciding issues of state law. In this sense, the doctrine is rather clearly rooted in recognition of the constitutional principle of residual state sovereignty or, if you prefer its mirror-image twin, implicit and structural limitations upon the federal judicial power.

E. Colorado River *Abstention*

An additional indication that the abstention doctrines are rooted in a structural constitutional principle of state sovereignty, whether expressed as a right reserved to the states through the tenth amendment or as an implicit limitation upon federal judicial power, can be seen in those cases which the Supreme Court considers outside the abstention pigeonhole. In *Colorado River Water Conservation District v. United States*[210] the Supreme Court concluded that a federal court was entitled to stay or dismiss a federal action when there exist "parallel actions filed in both state and federal courts" and the refusal to exercise jurisdiction will "foster [the] sound management of cases."[211] On its face, this would appear to be simply another form of abstention, albeit a doctrine founded explicitly upon the desire to avoid inconvenience to the courts by avoiding duplicative litigation.[212] Hence, it is initially puzzling that the Court does not regard *Colorado River* as a true abstention doctrine because it is not founded upon "considerations of state-federal comity or on avoidance of constitutional decisions."[213]

The statement is illuminating since it suggests that the Court regards "true" abstention as based upon the structural constitutional principles which permeate the *Younger*, *Pullman*, *Burford*, and *Thibodaux* abstention doctrines. *Colorado River* thus represents a bastard form of abstention. A better way to draw the distinction is to identify the "true" abstention doctrines as those compelled by the Constitution and to classify the *Colorado River* doctrine as a discretionary abstention doctrine not mandated by the Constitution.

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210. 424 U.S. 800 (1976).

211. Matasar & Bruch, *supra* note 11, at 1342 (citing *Colorado River*, 109 S. Ct. at 817).

212. *See, e.g.*, C. WRIGHT, *supra* note 102, at 315 (*Colorado River* abstention furthers "the convenience of the federal courts . . . [by] avoid[ing] duplicative litigation").

213. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 14-15 (1983).

The interests at stake in *Colorado River* abstention provide further support for this characterization. In *Colorado River*, the Court suggested that the decision to abstain was proper when the "interests of sound judicial administration clearly outweigh[] the 'virtually unflagging obligation' to exercise jurisdiction."[214] The Court then identified several specific factors to be considered in making this judgment, including the presence of a res and attendant difficulties of joint jurisdiction, inconvenience of the federal forum, the order in which the state and federal proceedings were commenced, and the need to avoid duplicative litigation.[215] None of these factors have any roots in the structural principle which seems to give vitality to the constitutionally compelled abstention doctrines previously discussed. Rather, these factors seem to be purely the product of an understandable judicial desire to make life simpler for all concerned. However laudable this impulse, it is virtually impossible to claim that the Constitution compels the result. It may well be that the critics of abstention have a strong case to level against the *Colorado River* doctrine, for it is plainly a refusal to exercise federal jurisdiction that is not dictated by the necessity of honoring the Constitution by policing the outer limits of federal jurisdiction.

IV. Conclusion

Although it has become fashionable in recent years to attack the abstention doctrines as violative of the Constitution it is far more plausible to regard the abstention doctrines as compelled by the Constitution. The constitutional roots of these doctrines lie in the mixed strand of textual, historical, and doctrinal arguments that combine to produce a powerful constitutional principle of structure: the idea that the judicial power of the United States is implicitly limited in order to preserve a zone of residual state authority to make and enforce the states' own law, free of federal interference. The abstention doctrines struggle to breathe life into this principle while at the same time maintaining fidelity to the time-honored constitutional principle that the courts must exercise the jurisdiction that has been legitimately bestowed upon them. Given this obligation of federal courts to exercise their jurisdiction,

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214. Lee & Wilkins, *supra* note 101, at 359 (quoting *Colorado River*, 424 U.S. at 817).

215. *Colorado River*, 424 U.S. at 818-19.

> their failure to do so can most easily be explained by positing a judicial recognition that, in a dual sovereignty system, each sovereign must be master of its own laws. Like a mountain range that has been thrust upward by the collision of tectonic plates, abstention is a doctrine that has grown up by the collision of constitutional principles.[216]

Except for the *Colorado River* doctrine, when abstention appears to be discretionary, that does not reflect a lack of constitutional foundation so much as it illustrates the continually shifting and hard-to-locate frontier of federal and state sovereignty. The fact that the Court struggles to articulate, defend, and preserve these hard-to-fathom doctrines is evidence of its dedication to the constitutionally required task of policing the border between federal and state judicial power.

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216. Massey, *supra* note 31, at 82.