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FEDERAL COURT ABSTENTION IN DIVERSITY ACTIONS INVOLVING UNSETTLED STATE LAW: AVOIDING CONSTITUTIONAL ADJUDICATION AND INTERFERENCE WITH STATE AFFAIRS

The doctrine of federal court abstention, when properly invoked, provides a valuable means of avoiding unnecessary constitutional adjudication and unwarranted federal incursions into matters more properly left to the state courts. However, aside from the few narrow areas where the federal abstention doctrine has been codified into statutory form,[1] it remains a "judge-fashioned vehicle"[2] engendering the confusion and uncertainty which frequently accompany the application of such judicially-defined doctrines.[3] Indeed, the Supreme Court has emphasized that abstention is not an automatic rule, but is rather a discretionary doctrine which requires a case-by-case analysis to determine whether there exist the requisite "special circumstances"[4] which warrant its exercise.[5] With such an ad hoc approach, there is little wonder that in applying the abstention doctrine the federal courts "have reached wildly inconsistent results."[6] The recent Fourth Circuit decision in *AFA Distributing Co. v. Pearl Brewing Co.*[7] effectively highlights the difficulty of applying such an imprecisely defined doctrine.

The issue presented by *Pearl Brewing* was whether a federal district court should construe a state statute without the guidance of prior state court interpretation when one construction might raise a potential constitutional conflict involving the contract clause of the Federal Constitution. The district court construed the statute in a manner which avoided the constitutional question, held that the contract in question was not within the purview of the statute as con-

[1]28 U.S.C. § 1341 (1970) (injunctions against state tax); § 1342 (1970) (injunctions against rate orders of state agencies); § 2254 (1970) (federal habeas corpus); § 2283 (1970) (Anti-injunction Statute). The American Law Institute has proposed codification of the whole area of federal court abstention, including the judicially-created factors. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371 (1969) (Official Draft).

[2]England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964).

[3]*See* Pell, *Abstention—A Primrose Path By Any Other Name*, 21 DEPAUL L. REV. 926 (1972). Judge Pell (7th Cir.) exhaustively reviews the many diverse factors which the courts have considered in applying the abstention doctrine.

[4]Propper v. Clark, 337 U.S. 472, 492 (1949).

[5]Baggett v. Bullitt, 377 U.S. 360, 375 (1964).

[6]Wright, *Restructuring Federal Jurisdiction: The American Law Institute Proposals*, 26 WASH. & LEE L. REV. 185, 202 (1969).

[7]470 F.2d 1210 (4th Cir. 1973).

strued, and dismissed the complaint. On appeal, the Fourth Circuit nevertheless found the appropriate "special circumstances" which, in the court's view, warranted abstention. The court thereupon vacated the district court's interpretation of the statute, but affirmed the order of dismissal.

In the course of its opinion, the Fourth Circuit discussed four bases for its decision. The first of these, and the one accorded the greatest weight, was the court's belief that the case presented an inchoate constitutional question which might be avoided by a state court's construction of the statute. Second, the court found that the state court decisions did not provide sufficient guidance to permit a sound construction of the statute by a federal court. Third, the Fourth Circuit concluded that abstention was appropriate to avoid federal interference with the state's statutory scheme of regulation. And finally, almost incidentally, the court rested its decision on the absence of any indication that the plaintiff's cause would be subject to local prejudice in the state courts.

The Fourth Circuit's decision in *Pearl Brewing* is arguably incorrect in two respects. As a threshold matter, it seems doubtful that the potential constitutional question perceived by the court was sufficiently substantial, either standing alone or within the context of the case, to have warranted the heavy reliance the court placed upon it as a ground for abstention. Further, even if the constitutional issue is assumed to be a substantial one, the court's reasoning, in terms of the four substantive bases relied upon to justify abstention, seems open to question. However, inasmuch as the court relied primarily upon only three of these four bases—avoidance of a posssible constitutional question, the existence of an unsettled issue of state law, and avoidance of federal court intervention in state affairs—an analysis of the Fourth Circuit's reasoning must necessarily focus largely upon these three areas.

In order to understand the significance of these grounds for abstention and their relationship to the situation presented by *Pearl Brewing*, it is necessary to examine three generally recognized branches of the abstention doctrine which have particular relevance to the Fourth Circuit's decision.[8] A basic tenet of federal court jurisdiction was described by Mr. Chief Justice Marshall in the landmark case of *Cohens v. Virginia*:[9]

[8]Professor Wright speaks of "abstention doctrines" rather than a single doctrine encompassing many elements. It is conventional, however, to speak of a single abstention doctrine which rests on one or more grounds for justification. This latter approach is adopted here. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 52 (2d ed. 1970); Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815 (1959).

[9]19 U.S. (6 Wheat.) 82 (1824).

> It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.[10]

However, over a century later the Supreme Court placed its imprimatur upon a doctrine which permits the federal courts "to decline the exercise of jurisdiction which is given."[11]

In *Railroad Commission v. Pullman Co.*,[12] the Court announced a doctrine of federal court abstention where "constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."[13] *Pullman*-type abstention rests on the basic premise that where questions of state law are intertwined with federal constitutional questions, it is sometimes the wiser course for a federal court, even when its jurisdiction is properly invoked, to decline to exercise that jurisdiction.[14] Under the *Pullman* approach, a federal court is to refrain from passing on the merits until the litigants have had an opportunity to repair to the state courts. Thus if the state court decision on the state law questions moots the federal constitutional issues, the federal court has been spared an unnecessary constitutional adjudication.[15] Additionally, the Court has

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[10]*Id.* at 100.

[11]*Id.*

[12]312 U.S. 496 (1941).

[13]*Id.* at 498. The case involved a challenge to an order promulgated by the State Railroad Commission, a state regulatory agency. The Pullman Company, invoking federal question jurisdiction, brought the action to enjoin enforcement of the order on the grounds that it violated fourteenth amendment guarantees and that it exceeded the authority granted by the state law establishing the Commission. The Court refused to decide the merits of either issue, reasoning that a state court decision on the state grounds alone could very well settle the case and in so doing obviate the need to rule on the constitutional issue. The Court said: "[t]he resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." *Id.* at 500.

[14]This result was actually foreshadowed in Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908), which required a party to exhaust state administrative remedies before resorting to the federal courts. For a brief outline of the history behind *Pullman*, see Gowen and Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 TEX. L. REV. 194, 195-97 (1964).

[15]*Pullman*-type abstention has been exhaustively analyzed and discussed. *See, e.g.*, Keilin, *Abstention from Jurisdiction: Accommodation or Abdication?*, 23 ARK. L. REV. 412 (1969); Schoenfeld, *American Federalism and the Abstention Doctrine in the*

pointed out that *Pullman*-type abstention "serves the policy of comity inherent in the doctrine of abstention."[16]

Notions of comity also underlie the second branch of the abstention doctrine relied upon by the Fourth Circuit in *Pearl Brewing*. This type of abstention is properly invoked in cases where federal jurisdiction is based upon diversity of citizenship and the court is asked to decide a question of state law without benefit of a prior ruling on the matter by a state court. The federal court's decision to abstain in such situations turns on the degree of uncertainty that its adjudication of the state law question would entail.[17] If the state law is so unsettled as to prevent a sound federal court decision, abstention may be ordered.[18] However, if the state law question is merely "difficult," abstention is inappropriate.[19] Thus, having found the state law sufficiently unsettled as to preclude a sound construction of the state statute, the Fourth Circuit applied this branch of the abstention doctrine in conjunction with its *Pullman*-type ground for abstention and concluded, "[s]ince in this case the state law is unclear and a state court decision could conceivably avoid a constitutional decision, abstention is appropriate."[20]

While this combination of an inchoate constitutional question with the uncertainty of the state law was particularly persuasive to the court in *Pearl Brewing*, the Fourth Circuit also pointed to avoidance of federal interference in state affairs as a third ground for abstaining. This type of abstention finds its roots in *Burford v. Sun Oil*

Supreme Court, 73 DICK. L. REV. 605 (1969); Nieto, *The Abstention Doctrine*, 40 DENVER LAW CENTER J. 45 (1963); Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815 (1959); Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1959).

[16]Harrison v. NAACP, 360 U.S. 167, 177 (1959).

[17]This branch of the abstention doctrine is, of course, a consequence of the rule announced in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), requiring federal courts in diversity cases to decide state questions according to state law. Among the many problems the *Erie* doctrine raises, perhaps the most crucial one for the purpose of abstention, is at what point the federal court should defer to the state courts in the interpretation of state law.

[18]Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Crawford v. Courtney, 451 F.2d 489 (4th Cir. 1971).

[19]The leading case on the subject is Meredith v. Winter Haven, 320 U.S. 228 (1943), where the Supreme Court refused to order abstention because it found the question of state law merely "difficult." *See also* McNeese v. Board of Ed. for Community Unity School Dist. 187, 373 U.S. 668 (1963); Sutton v. Leib, 342 U.S. 402 (1952); Propper v. Clark, 337 U.S. 472 (1949); Martin v. State Farm Mut. Auto. Ins. Co., 375 F.2d 720 (4th Cir. 1967).

[20]470 F.2d at 1213.

Co.,[21] a case decided shortly after *Pullman. Burford*, like *Pullman*,[22] involved a challenge to an order issued by a state regulatory agency.[23] But unlike the *Pullman* case, the *Burford* Court's rationale for ordering abstention was based upon the extraordinary complexity of the state regulatory scheme,[24] the existence of a clearly outlined state procedure for dealing with the issues raised by the case[25] and the fact that federal court decisions had, on previous occasions, resulted in serious disruptions of the state's policies.[26] After having reviewed these factors, the Court concluded that abstention was appropriate, saying:

> These questions of regulation . . . so clearly involves [*sic*] basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them.[27]

Burford, therefore, stands for the proposition that federal courts may, even when their jurisdiction is properly invoked,[28] abstain from deciding state issues if such a decision might unduly disrupt a state's administration of its own affairs.[29] Applying this *Burford*-type reason-

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[21]319 U.S. 315 (1943).

[22]See note 13 *supra*.

[23]At issue here was an oil proration order issued by the Texas Railroad Commission which was the state administrative body charged with regulating the exploitation of the Texas oil fields. 319 U.S. at 316-18.

[24]The very nature of the system of oil regulation involved in the case dictated that any decision rendered would necessarily involve not only legal considerations, but complex environmental and technological factors as well.

[25]Pointing to the fact that under the Texae regulatory procedure only one particular state court was to hear all challenges to the agency's orders, the Court noted that such an arrangement permitted that state court to develop expertise in the difficult field of oil regulaton and prevented the confusion that would be engendered by permitting many courts to review the agency's orders. Hence, the Court concluded that "the Texas courts are working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry." 319 U.S. at 326.

[26]*Id.* at 327-30.

[27]*Id.* at 332.

[28]Federal jurisdiction in *Burford* was predicated upon diversity of citizenship, 28 U.S.C. § 1332 (1970), and the existence of a federal question, 28 U.S.C. § 1331 (1970). However, it seems that for the sake of its decision, the Supreme Court assumed that diversity alone was sufficient to support jurisdiction. Thus the case was apparently decided on that basis. 319 U.S. at 317-18 (*semble*). *See also id.* at 334 (Douglas, J., concurring).

[29]This same rational was invoked in Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951), to justify abstention. The Court said:

> [This case] does not involve construction of a statute so ill-defined that a federal court should hold the case pending a definitive construction of that statute in the state courts. . . . We also put to one side

ing to the situation presented in *Pearl Brewing*, the Fourth Circuit concluded that abstention was appropriate to avoid what it felt would be a "[p]eripheral and episodic"[30] incursion into the state's statutory scheme of liquor regulation.

Thus, it was the convergence of a *Pullman*-type situation, an unsettled question of state law, and the existence of *Burford*-type considerations which primarily led the Fourth Circuit to conclude in *Pearl Brewing* that the factual setting of the case called for abstention.[31]

Pearl Brewing involved a diversity action brought in the United States District Court for the Eastern District of Virginia by a Virginia beer distributing company (AFA) against a Texas brewery (Pearl). Pearl had terminated AFA's exclusive franchise to distribute its beer, in a manner consistent with the terms of the franchise contract. However, during the period between the execution of the contract and its termination by Pearl, Virginia had enacted a statute providing that liquor distribution franchises of the type in question could not be terminated by a brewery "without just cause or provocation."[32] Relying upon the prohibition of this statute, AFA brought the action seeking to enjoin the termination, alleging that it was without just cause.

The primary issue in the district court involved the proper construction of the Virginia statute, which had not been previously con-

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> those cases in which the constitutonality of a state statute itself is drawn into question. . . . For in this case appellee attacks a state administrative order issued under a valid regulatory statute . . . . [A] federal court has been asked to intervene in resolving [an] essentially local problem . . . .

341 U.S. at 344, 347 (citations omitted).

[30]470 F.2d at 1214.

[31]Because of the somewhat unique nature of these facts, their close interrelationship with the court's reasoning, and their cumulative weight in prompting the Fourth Circuit's decision, they are discussed at some length.

[32]VA. CODE ANN. § 4-80.2 (Repl. vol. 1973). The relevant portion of the statute provides:

> (a) It shall be unlawful for any wholesaler, vintner, winery or brewery, or any officer, agent or representative of any winery or brewery:
>
> . . . .
>
> 2. Unfairly, without due regard to the equities of such wholesaler, vintner, winery or brewery and without just cause or provocation, to cancel or terminate any agreement or contract, written or oral, or the franchise of such wholesaler, vintner, winery or brewery existing on January one, nineteen hundred sixty-four, hereafter entered into, to sell the beer or wine manufactured by the winery or brewery.

strued by the state courts. The precise question was whether the statute applied retrospectively to contracts entered into prior to its enactment. As the Fourth Circuit's opinion recognized, the statute was subject to two possible constructions on this point. The first of these would apply the statute only prospectively and thus would not affect contracts executed prior to its effective date. The second, and only other possible construction, would give the statute a retrospective effect, thereby incorporating the requirement of "just cause" into all contracts in existence on the statute's effective date, as well as those executed subsequently.[33] The district judge construed the statute as having a prospective application only, held that it therefore did not apply to the contract in question, and dismissed the complaint.[34] On appeal, the Fourth Circuit ruled that the district court should have abstained and not construed the Virginia statute, ordered the district court's interpretation of the statute vacated, but affirmed the dismissal.

The Fourth Circuit was thus presented with a *Pullman*-type situation where one interpretation of a previously unconstrued state statute would settle the case, while the alternate construction giving the statute retrospective effect would, in the court's view, raise an issue as to the validity of the statute under the contract clause of the Federal Constitution.[35] The court indicated that if the statute were read to apply retrospectively, it would be open to serious challenge as an unconstitutional impairment of contractual obligation. Indeed, the Fourth Circuit's decision to abstain was in large measure a result of this perceived conflict with the contract clause[36] and the court's

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[33]The Fourth Circuit described the statute as "incredibly ambiguous," and then spelled out the two possible interpretations:

> Section 2 of this statute has an obvious ambiguity. The participial phrase, "existing on January one, nineteen hundred sixty-four," may modify either "franchise" or "such wholesaler, vintner, winery or brewery." The district court in interpreting the statute read "existing on January one, nineteen hundred sixty-four" to modify "wholesaler, vintner, winery or brewery" and, "hereafter entered into" to modify "any agreement or contract."

480 F.2d at 1211-12. See note 32 *supra*.

[34]470 F.2d at 1211.

[35]U.S. CONST. art. I, § 10. This section reads, in relevant part: "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." The court indicated that it was partly the desire to avoid this constitutonal question which motivated the district court to construe the statute to apply only prospectively. 470 F.2d at 1212.

[36]The court pointed out that a state court decision limiting the statute to prospective application only would obviate the need for a constitutional adjudication of the statute: "[s]hould the state courts determine, as the court below held, that Va. Code Ann. § 4-80.2 applies only to contracts entered after the statute's effective date, no

corresponding conclusion that the case called for *Pullman*-type abstention[37] as a means of possibly avoiding this conflict. In justifying abstention on this ground, the court concluded:

> The well-settled doctrine that a federal court will not anticipate a question of constitutional law and the special weight that doctrine carries in the maintenance of harmonious federal-state relations requires that a district court stay its proceedings until a potentially controlling state-law issue is authoritatively put to rest.[38]

In light of the Fourth Circuit's substantial reliance on the possibility of a contract clause conflict and its corresponding application of the *Pullman*-type rationale as a major justification for abstention, it is important to determine as a threshold matter the likelihood of such a conflict. Consequently, the question which arises involves the soundness of the court's fear that a retrospective application of the statute would constitute an invalid "impairment" of the contract in question within the meaning of the contract clause of the Constitution, by requiring "just cause" for termination of liquor franchises.[39]

It cannot be doubted that a state may, in the constitutional exercise of its police power, statutorily impair existing contracts by altering or even voiding them.[40] In a leading case, *Home Building and Loan Association v. Blaisdell*,[41] the Supreme Court upheld a Minnesota statute declaring a moratorium on mortgage debts against a challenge that it unconstitutionally impaired the obligation of contract by encompassing within its provisions mortgages existing at the time of its enactment. The Court pointed out that not only are existing laws read into contracts so as to fix obligations between the parties, but "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."[42] The Court then went on to conclude that the police power of the state

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Contract Clause question would arise." *Id.*

[37]See text accompanying notes 12-16 *supra*.

[38]470 F.2d at 1213.

[39]It is important to note that the statute in question, insofar as its application to the instant case is concerned, would admit of only two possible interpretations: prospective or retroactive application. See notes 32-33 *supra*.

[40]Ohlson v. Phillips, 304 F. Supp. 1152 (D. Colo. 1969), *aff'd*, 397 U.S. 317, *rehearing denied*, 397 U.S. 1081 (1970); East New York Sav. Bank v. Hahn, 326 U.S. 230 (1945); Veix v. Sixth Ward Bldg. and Loan Ass'n, 310 U.S. 32 (1940); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921). *See* Hale, *The Supreme Court and the Contract Clause: III*, 57 HARV. L. REV. 852, 872 (1944).

[41]290 U.S. 398 (1934).

[42]*Id.* at 435.

includes the authority to legislate for the protection of the economic welfare of the state "notwithstanding interference with contracts."[43]

Thus while it would seem fairly well settled that a state normally may not be prevented from an otherwise valid exercise of its general police power on the ground that such an exercise constitutes an impairment of contract,[44] the import of this proposition takes on additional significance in the specific area of state regulation of intoxicating liquors. The Supreme Court has emphasized that the twenty-first amendment,[45] in its explicit grant of liquor regulatory powers to the

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[43]*Id.* at 437. The *Blaisdell* Court made it clear that a state statute is not necessarily invalid even though it would, strictly speaking, transgress the contract clause of the Constitution. The Court stressed that "[t]he economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Id.* This view is not new. Indeed, as early as 1914, the Supreme Court described as "settled" the question of whether the contract clause could override the states' exercise of their police power. Atlantic Coast Line R.R. Co. v. Goldsboro, 232 U.S. 548, 558 (1914). The theory behind this assertion is the idea that private individuals, simply by entering a contract, may not "estop" the state from validly exercising its police power. *See, e.g.*, Guaranty Trust Co. v. Henwood, 307 U.S. 247, 258-59 (1939); Dillingham v. McLaughlin, 264 U.S. 370, 374 (1924).

[44]Cases involving statutes similar to Virginia's have arisen in the field of state regulation of automobile sales franchises. The case most nearly on point with the instant one is Willys Motors v. Northwest Kaiser-Willys, 142 F. Supp. 469 (D. Minn. 1956), which involved a state statute allowing the cancellation of automobile franchises only upon the showing of "just cause." The contract at issue in that case had also been entered prior to the enactment of the statute. The court acknowledged that there had been an impairment of the contract, but pointed out that this did not mean that the impairment constituted a violation of the contract clause. The court stressed that the state, in a valid exercise of its police power, could legitimately pass legislation which would, technically speaking, impair contracts, yet not violate the contract clause of the Constitution. The court reasoned that since protection of the economic welfare of the state is an element of the police power, and since the statute appeared reasonably related to such economic welfare, this was indeed a valid exercise of the state's police power and as such could not be defeated on the grounds that it impaired existing contracts. *Accord*, Khul Motor Co. v. Ford Motor Co., 270 Wis. 488, 71 N.W.2d 420 (1955) (on rehearing).

The First Circuit has reached a contrary conclusion on an essentially similar set of facts involving Puerto Rico's Dealer's Contract Law. However, that court, rather than striking down the statute on impairment of contract grounds, invalidated it as depriving wholesalers and manufacturers of property without due process of law. On appeal the Supreme Court reversed and remanded with instructions to refrain from adjudicating the case until the Puerto Rican Supreme Court had an opportunity to place its own construction on the statute. However, in its per curiam opinion, the Court placed great stress on the Spanish tradition of Puerto Rico and indicated that federal courts should take special care when construing Puerto Rican laws in the Anglo-Saxon tradition. Fornaris v. Ridge Tool Co., 423 F.2d 563 (1st Cir.), *rev'd per curiam*, 400 U.S. 41 (1970).

[45]U.S. CONST. amend. XXI. Section Two of this amendment provides, in relevant

states, gives state governments an even broader sweep of control in this particular area than they possess in the areas traditionally encompassed by the police power.[46]

It was this extraordinary power of the states over liquor control, as well as the general police power, that led the Nebraska District Court to conclude in *Hodges v. Fitle*[47] that a city ordinance prohibiting nude dancing in bars was not invalid on the grounds that it impaired the performers' contracts. The plaintiffs in that case were exotic dancers whose contracts called for nude performing. Their grounds for attacking the ordinance included the argument that the ordinance, by banning nude dancing, unconstitutionally impaired their previously executed contractual agreements to perform. The court sustained the ordinance on the theory that the power of the state to regulate liquor distribution and related activities was sufficient to uphold the law, despite impairment or even partial destruction of the dancers' contractual obligations.[48]

In light of these authorities, a serious question arises as to the soundness of the Fourth Circuit's conclusion in *Pearl Brewing* that

part: "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Supreme Court has ruled that the power granted the states by the twenty-first amendment permits not only *complete* prohibition of the manufacture, sale, transportation or possession of intoxicants, but also the power to allow any of these activities only under definitely prescribed conditions, since the greater power includes the lesser. Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939). *See also* State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, *rehearing denied*, 299 U.S. 623 (1936).

[46]California v. LaRue, 409 U.S. 109, 114 (1972), *rehearing denied*, 410 U.S. 948 (1973). In this case, regulations issued by the California Department of Alcoholic Beverage Control prohibiting explicit sexual live entertainment and films in bars were challenged on first and fourteenth amendment grounds. Yet in the face of this challenge, the Court upheld the regulations as a valid exercise of state control over liquor and its incidents, even though such regulations in a different context would transgress the Court's own statements on freedom of expression:

> We do not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene under *Roth* and subsequent decisions of this Court. . . . But we do not believe that the State regulatory authority in this case was limited to . . . dealing with the problem it confronted within the limits of our [prior] decisions . . . .

409 U.S. at 116.

[47]332 F. Supp. 504 (D. Neb. 1971).

[48]The ordinance was also challenged on the grounds that it violated first and fourteenth amendment rights and was vague and overextensive, in addition to the argument that it violated the contract clause of the Constitution. The court sustained the ordinance against these other arguments. *Id.*

the case presented a potential conflict with the contract clause of the Constitution. Undoubtedly the possibility of a constitutional question existed, but many cases arguably present constitutional issues which are of little significance to the final resolution of the case. Indeed, it has been pointed out that most cases could be said to ultimately involve some constitutional questions.[49] However, the clear trend of the law points to the conclusion that while "the constitutionality of the [Virginia] statute under the Contract Clause . . . *might* be brought into question,"[50] the likelihood that a persuasive argument could be made is, in fact, minimal. Thus, it would appear that the "inchoate constitutional question"[51] which concerned the Fourth Circuit did not deserve the weight the court ascribed to it.[52]

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[49]In Gully v. First Nat'l Bank, 299 U.S. 109 (1936), Mr. Justice Cardozo alluded to the possibility of a constitutional question arising in virtually every case and the corresponding need to set reasonable bounds:

> If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself . . . . To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary *and those that are merely possible*. We shall be lost in a maze if we put that compass by.

Id. at 118 (emphasis added).

[50]AFA Distrib. Co. v. Pearl Brewing Co., 470 F.2d 1210, 1212 (4th Cir. 1973) (emphasis added).

[51]*Id.*

[52]The Supreme Court has characterized the determination by a federal court as to whether to abstain as a "threshold inquiry." Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341, 347 (1951). The Court has also indicated that in making such a threshold determination in cases raising the possibility of a federal constitutional question, the court must determine if the question is of sufficient substance to warrant abstention: "[w]here the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide a *substantial constitutional question*, considerations of equity justify a rule of abstention." Baggett v. Bullitt, 377 U.S. 360, 379 n.15, *quoting*, Public Util. Comm'n v. United Fuel Gas Co., 317 U.S. 456, 463 (1943) (emphasis added). However, the abstention cases do not clearly indicate what test a court is to apply in determining whether the constitutional question is "substantial" enough to justify declining jurisdiction.

Some light is shed by the Supreme Court's treatment of the somewhat analogous problem of what a substantial federal question is for the purposes of federal court jurisdiction under 28 U.S.C. § 1331 (1970). The Court has indicated that where the reliance on federal law is obviously without merit, foreclosed by prior authoritative decisions, or frivolous, then the claim of federal jurisdiction is not substantial and must be denied. Levering and Garrigues Co. v. Morin, 289 U.S. 103 (1933). The American Law Institute, in the Commentary on its recent proposals for revising the scope of federal jurisdiction, reviewed the cases and concluded: "this requirement of sustantiality of the federal claim . . . indicates only that the federal claim must be one fairly arguable on the merits." AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDIC-

Viewing *Pearl Brewing* in this light, it is reasonable to conclude that it did not present a constitutional question sufficiently substantial to serve as a basis for abstention.[53] Rather, the abstention issue becomes simply a matter of the propriety of a federal court construing

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TION BETWEEN STATE AND FEDERAL COURTS 176-77 (1969) (Official Draft). If "fairly arguable on the merits" is accepted as a reasonable formulation of the test of substantiality for federal jurisdictional purposes, can it also be said to be the proper test of a constitutional question for abstention purposes? It would seem to be an inappropriate test because the decision as to jurisdiction occurs prior to the decision on abstention. This point is perhaps best illustrated by an example.

Assume that a case is brought before a federal district court with federal jurisdiction predicated on the existence of a constitutional question. The court must, at the very outset, make a jurisdictional determination as to the sufficiency of the alleged constitutional issue. If the court concludes that the constitutional claim is "fairly arguable on the merits," then it should accept jurisdiction as properly invoked. Only *after* this threshold jurisdictional decision is made may the court consider the issue of abstention. And, if in so doing, the court looks to the substantiality of the constitutional question as a factor in its consideration of the abstention issue, it must necessarily apply a stricter test of that substantiality than it did when passing on the jurisdictional question. This conclusion clearly follows from a consideration of the location of the jurisdictional and abstention "thresholds" in the decisional process. If the jurisdictional test represents the bare minimum of substantiality that a constitutional question must possess in order to even bring the case within the purview of the federal court, then a fortiori the test for determining whether, as a matter of discretion, to exercise that jurisdiction must apply a "higher" standard of substantiality.

The issue therefore reduces itself to whether the constitutional question in *Pearl Brewing* was sufficiently "substantial" in the sense of constituting a basis for abstention. While it seems at least arguable that the contract clause issue might suffice for jurisdictional purposes in other circumstances, it is by no means clear that it was substantial enough to meet the more stringent requirements of the abstention test. And although jurisdiction in *Pearl Brewing* was predicated upon diversity of citizenship, thus obviating the need to make the initial jurisdictional determination, the Fourth Circuit arguably would have been better advised to apply the stricter abstention test to the substantiality of the contract clause question, rather than concluding that the mere possibility of such a question arising was sufficient to serve as its primary ground for ordering abstention.

[53]The American Law Institute apparently felt so strongly that a constitutional question must be "substantial" in order to warrant abstention that the term was used in its recently proposed codification of the abstention doctrine:

> (c) A district court may stay an action, otherwise properly commenced . . . , on the ground that the action presents issues of State law that ought to be determined in a State proceeding, if the court finds:
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> . . .
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> (2) that abstention from the exercise of federal jurisdiction is warranted . . . by the likelihood that the necessity for deciding a *substantial* question of federal constitutional law may thereby be avoided . . . .

AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371(c)(2) (1969) (Official Draft) (emphasis added).

a state statute involving liquor regulation in a diversity case, without benefit of a prior state court pronouncement on the subject. Acknowledging that abstention is inappropriate merely to avoid the decision of "difficult" questions of state law,[54] the Fourth Circuit nevertheless found that the state law was so unsettled that its decision would amount to little more than an educated guess as to the construction which a state court would apply.[55] Hence, the court in *Pearl Brewing* concluded that abstention was appropriate to avoid a tentative federal decision which might be emasculated by a later state court determination.[56]

Since the Virginia statute involved in the case will admit of only two possible interpretations,[57] the question, therefore, is whether, despite the unsettled nature of the state law regarding its proper construction, the circumstances presented in *Pearl Brewing* were such as to preclude a sound construction of the statute by a federal court. The Fourth Circuit found sufficient authority in the rules of statutory construction as announced by the Virginia courts to support either statutory interpretation, and hence concluded that this lack of guidance called for an exercise of its power of abstention.[58] This absence of guidance in state law for the resolution of a state question should not, however, be dispositive of the question of the applicability of this type of abstention. The Supreme Court has stressed that abstention is improper solely to avoid the decision of "difficult" questions of state law,[59] especially in cases like *Pearl Brewing* in which federal jursdiction is based on diversity of citizenship.[60] Also, the

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[54]470 F.2d at 1212-13. See text at notes 17-20 *supra*.

[55]Because federal jurisdiction in *Pearl Brewing* was predicated upon diversity of citizenship, the court was obliged by the rule of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), to interpret the state statute in the same manner a state court would interepret it.

[56]470 F.2d at 1212.

[57]See notes 32-33 *supra*.

[58]470 F.2d at 1212.

[59]Propper v. Clark, 337 U.S. 472 (1949); Meredith v. Winter Haven, 320 U.S. 228, 234 (1943).

[60]The necessity for retaining jurisdiction in diversity cases presenting merely "difficult" questions of state law was explained in Meredith v. Winter Haven, 320 U.S. 228, 236 (1943):

> Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine.

See also Martin v. State Farm Mut. Auto. Ins. Co., 375 F.2d 720 (4th Cir. 1967); Pierce v. Ford Motor Co., 190 F.2d 910 (4th Cir. 1951); Gowen and Izlar, *Federal Court*

Court has ruled that the federal courts should, as a matter of fairness, as well as in deference to the statutory grant of jurisdiction, "give due respect to the suitor's choice of a federal forum."[61] On the other hand, the Court has recognized that in some situations, the federal court's construction cannot help but be merely a forecast of an authoritative state court ruling on the matter and may subsequently be rendered unnecessary or even overturned by a state court's later controlling decision.[62] Because of these conflicting considerations, questions of the soundness of the Fourth Circuit's ultimate decision to abstain cannot be satisfactorily resolved solely by reference to the "unsettled issue of state law" theory of abstention invoked by the court. Consequently, the third branch of the absention doctrine relied upon in *Pearl Brewing* must be examined.

Assuming, as has been suggested, that the issues in *Pearl Brewing* presented little or no likelihood of a substantial constitutional conflict,[63] the Fourth Circuit's *Burford*-type justification for abstention[64] on the grounds of avoiding federal interference with a state regulatory scheme takes on greater significance. Indeed, *Burford*-type abstention is particularly applicable where, as in *Pearl Brewing*, the area of state regulation involved is the distribution and sale of alcoholic beverages. As the Fourth Circuit noted, control of liquor is within "the peculiarly exclusive dominion of the states."[65] Thus, the notions of comity which prompted the Supreme Court in *Burford*[66] to order abstention appear similarly applicable to the situation presented by *Pearl Brewing*.[67]

Abstention in Diversity of Citizenship Litigation, 43 TEX. L. REV. 194, 201 & n.42 (1964).

[61]Zwickler v. Koota, 389 U.S. 241, 248 (1968).

[62]Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941). However, this point was made in the context of a case raising a substantial constitutional question and hence its thrust was to provide additional support for abstaining to avoid a perhaps unnecessary constitutional adjudication. The instant discussion, on the other hand, is predicated upon the absence of a constitutional question substantial enough to warrant abstention of its own weight.

[63]See text accompanying notes 37-53 *supra*, suggesting that the contract clause issue perceived by the Fourth Circuit is, in light of the authorities, of questionable merit.

[64]See text accompanying notes 21-30 *supra*.

[65]470 F.2d at 1214.

[66]Burford v. Sun Oil Co., 319 U.S. 315 (1943). See notes 24-25 *supra*.

[67]The considerations which led the *Burford* court to order abstention included the complexity of the state law question, the existence of a state-defined procedure for resolving the case and the damage to state policy caused by prior federal court pronouncements. On the other hand, under this analysis the sole justification for invoking this type of abstention in *Pearl Brewing* was the exclusive nature of state regulation

Considerations of comity also served as the primary rationale for abstention in *Alabama Public Service Commission v. Southern Railway Co.*,[68] a case involving a situation similar to that in *Burford*,[69] in which the Supreme Court stressed the importance of public policy considerations in the discretionary exercise of a federal court's power to abstain. In ordering the lower courts to abstain, the Court concluded:

> Considering that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies," the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case.[70]

And though the fact that jurisdiction in *Pearl Brewing* was predicated upon diversity of citizenship tends, because of the Congressional policy inherent in the grant of diversity jurisdiction, to militate against abstention,[71] it would nevertheless seem that the exclusiveness of the states' power to regulate liquor so involves matters of state policy as to serve as ample justification for a *Burford*-type abstention.

Thus, if *Pearl Brewing* may be seen as presenting no more than an unsettled question of state statutory construction, and not the "inchoate constitutional question"[72] that the Fourth Circuit found persuasive in ordering abstention, it would then appear that the court's decision to abstain in order to avoid interfering with Virginia's statutory scheme of liquor regulation was a sound one and was based upon ample authority. However, the Fourth Circuit concluded the case presented the possibility of a constitutional question sufficiently substantial to serve as its primary rationale for abstention. It is there-

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of alocholic beverages. However, because such exclusive control is constitutionally mandated and because of the Supreme Court's clear policy of avoiding federal encroachments on this control, it would appear that the construction of the statute in *Pearl Brewing* was a matter sufficiently bound up with the state's interest and policies to warrant a *Burford*-type abstention.

[68]341 U.S. 341 (1951).

[69]Like *Burford*, *Southern Railway* also involved an action to enjoin enforcement of an order issued by a state regulatory agency. And as in *Burford*, jurisdiction in *Southern Railway* was based on diversity of citizenship and the existence of a federal question. The *Southern Railway* court invoked *Burford*-type abstention, concluding that the issues of state law were more properly left to the state courts. *Id.*

[70]*Id.* at 349 (footnotes omitted).

[71]The Supreme Court has stressed that the Congressional policy underlying the diversity statute, 28 U.S.C. § 1332 (1970), argues strongly for retention of jurisdiction by a federal court in cases brought on the basis of diversity of citizenship. Meredith v. Winter Haven, 320 U.S. 228 (1943). See note 60 *supra*.

[72]470 F.2d at 1212.

fore necessary to examine the court's reasoning in light of this basic premise in order to determine the soundness of its decision within the context of the court's conception of the case.

Beginning with this premise—that a retrospective application of the Virginia statute would raise a substantial contract clause question—the Fourth Circuit reasoned that since the state courts had not spoken authoritatively as to the proper interpretation of the statute and the Virginia rules of construction did not provide sufficient guidance, abstention was proper in order to give the state courts an opportunity to rule on the matter. In so concluding, the Fourth Circuit felt that it was avoiding a possibly unnecessary decision on the constitutionality of the statute because a state court ruling, limiting it to prospective application, would obviate the need to reach the constitutional question. However, in light of the crucial fact that the statute was open to only two possible constructions regarding its application, serious questions arise as to the soundness of this reasoning.

The Supreme Court has ruled that a federal court, when faced with a previously unconstrued state statute, must presume that the state courts will interpret the statute so as to avoid constitutional conflicts.[73] Notably, the Fourth Circuit recently applied this rule in *Blasecki v. City of Durham*,[74] a case involving a constitutional challenge to a local criminal ordinance. In that case the court upheld the constitutionality of the ordinance, despite the absence of a state court ruling on its construction. The court characterized as "elementary" the proposition that if more than one construction of a statute is possible, the one which will permit the upholding of the constitutionality of the statute should be applied.[75] In *Blasecki*, the ordinance was susceptible to several constructions, while in *Pearl Brewing* the statute was open to only two.[76] The district court in *Pearl Brewing* construed the statute in the manner which effectively avoided the contract clause question.[77] Hence, had the Fourth Circuit applied the *Blasecki* rule of presumption here, it might well have concluded that the district court's interpretation was a valid one even without a controlling state court ruling. This conclusion would have been dispositive of the case. For, by accepting the presumption that state courts

[73]Baggett v. Bullitt, 377 U.S. 360, 375 (1964); Fox v. Washington, 236 U.S. 273, 277 (1915). *Cf.* United States v. Harriss, 347 U.S. 612, 618 (1954); Poulos v. New Hampshire, 345 U.S. 395 (1953).

[74]456 F.2d 87 (4th Cir.), *cert. denied*, 409 U.S. 912 (1972).

[75]*Id.* at 93.

[76]See text accompanying notes 32-33 *supra*.

[77]The district court limited the statute to prospective application only. 470 F.2d at 1212. See note 33 *supra*.

will rule so as to avoid constitutional conflicts, and by viewing the district court's construction as the only one possible under the circumstances which prevents such a constitutional problem, it becomes evident that the district court's interpretation could have been sustained and its dismissal on the merits affirmed on the basis of that interpretation.[78] Another result of this analysis is to reduce substantially the persuasiveness of the court's *Burford*-type reasoning that abstention was proper so as to avoid interference with state affairs. For if it is presumed that the district court interpreted the statute in the same manner that a Virginia court would have construed it had it been afforded the opportunity, it could hardly then be argued that the federal court's construction interferes with the state's statutory scheme of liquor regulation. The district court would merely be applying the law of the state as would one of the state's own courts.[79] And in a diversity case, this is precisely the responsibility that the *Erie* doctrine places on the federal courts.

It is difficult, therefore, to understand the Fourth Circuit's conclusion that *Pearl Brewing* presented the "special circumstances"[80] that warrant abstention, especially in view of the court's recognition of the strong Congressional policy underlying the grant of diversity jurisdiction as militating against abstention.[81]

In addition to acknowledging that the legislative policy inherent in diversity jurisdiction argues strongly against abstention, the Fourth Circuit noted the great cost that abstention entails in terms of time and money by compelling partial adjudication in several

[78]This result would also be consistent with the approach advocated by the American Law Institute. This approach would prohibit abstention unless there is a "serious danger" that the federal court's decision of state law might be at variance with the view that the state court may ultimately take. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1371(c)(2) (1969) (Official Draft). In light of the circumstances presented in *Pearl Brewing*, there would seem little "serious danger" that a state court would reach a conclusion contrary to that of the district court.

[79]In Hill v. James Walker Memorial Hosp., 407 F.2d 1036 (4th Cir. 1969), the Fourth Circuit was faced with a situation somewhat analogous to that presented in *Pearl Brewing*. *Hill* was also a diversity case which raised a question of state law upon which the state courts had never directly ruled. Nevertheless, the court proceeded to decide the case on the merits "as the [state supreme court] would if confronted with the issue." 407 F.2d at 1039. The *Hill* court was apparently of the opinion that the lack of a state court decision precisely on point did not prevent it from reaching and deciding the merits of the case.

[80]470 F.2d at 1213; *cf.* Zwickler v. Koota, 389 U.S. 241, 248-49 (1967); Propper v. Clark, 337 U.S. 472, 492 (1949).

[81]See notes 60 and 71 *supra*.

courts.[82] Indeed, the Supreme Court has recognized the consequences of a federal court's exercise of its power to abstain: "[a]bstention operates to require piecemeal adjudication in many courts . . . thereby delaying ultimate adjudication on the merits for an undue length of time . . . ."[83] However, despite these considerations, the court in *Pearl Brewing* concluded that the case presented one of "the relatively rare instances" in which the value of abstention within the framework of federalism outweighs its costs.[84]

It is undoubtedly true that under certain circumstances the value of abstention outweighs the cost it entails. However, it is not altogether certain that this was the situation in *Pearl Brewing*. This point becomes especially clear in light of the court's ultimate disposition of the case. In addition to vacating the district court's construction of the statute, the Fourth Circuit also affirmed the dismissal of the complaint, though not on the merits. In *Doud v. Hodge*[85] the Supreme Court specifically held that dismissal is improper in cases involving constitutional issues along with the state law questions. However, several years later the Court retreated from this strict approach and described retention of jurisdiction pending the outcome of a state court adjudication of the state questions as merely the "better practice."[86]

Whether summary dismissal was the "better practice" in *Pearl Brewing* is open to question.[87] The result of disposing of a case without a decision on the merits and without ordering retention of jurisdiction by the lower federal court was the subject of analysis in *England v. Louisiana State Board of Medical Examiners*.[88] The Court

[82]470 F.2d at 1213. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 384 U.S. 885 (1966) (six year delay of decision on the merits because abstention was ordered); United States v. Leiter Minerals, Inc., 381 U.S. 413 (1965) (dismissed as moot eight years after abstention was ordered); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951) (seven year delay).

[83]Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964) (citations omitted).

[84]470 F.2d at 1213. However, it has also been said that the cost of abstention is "an unnecessary price to pay for our federalism." England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 426 (1964) (Douglas, J., concurring). *See also* Currie, *The Federal Courts and the American Law Institute; Part II*, 36 U. CHI. L. REV. 268, 317 (1969).

[85]350 U.S. 485 (1956).

[86]Zwickler v. Koota, 389 U.S. 241, 244 n.4 (1967).

[87]Indeed, the Fourth Circuit confessed to difficulty in deciding whether, on remand, the district court should retain jurisdiction. It concluded: "[w]e think it the 'better practice' on the facts of this case to require the parties to submit all questions to the state court." 470 F.2d 1210, 1214 (4th Cir. 1973).

[88]375 U.S. 411, 415-17 (1964).

there pointed out that dismissal of a case on the basis of the "judge-fashioned vehicle"[89] of abstention where the federal court's jurisdiction is properly invoked not only deprives the litigants of their statutory right to a federal forum, but also compels them to expend additional time and monies in protracted litigation. And while the Court acknowledged that an appeal from the highest state court to the Supreme Court may be available to the litigants, nevertheless they have, by virtue of the principles of res judicata, lost the advantages of federal fact-finding when forced to go to trial in a state court.[90]

Thus, in dealing with the issue of abstention a federal court must balance the policies favoring declining jurisdiction against the costs that abstention entails, such as prolonged and piecemeal litigation, increased expenditures of time and money, and the potential denial of the litigants' statutory rights. As a part of this balancing process, the federal court has a duty to scrutinize closely those factors which, in the court's view, call for abstention in order to determine if they are sufficient to warrant its exercise. In concluding that abstention was appropriate and thus affirming the order of dismissal, the Fourth Circuit relied heavily upon the possibility of a constitutional issue which would appear to be of questionable substance.[91] It is therefore doubtful whether, on balance, the possibility of such a constitutional question being raised warranted a summary dismissal of the action, thereby compelling the litigants to begin again in the state courts. The words of Mr. Justice Douglas in his concurring opinion in the *England* case seem particularly relevant here:

> Whether or not we agree . . . that the present case involves no substantial federal question, it certainly borders on the insubstantial; and a District Court, if it has that view of the case, should be allowed in its discretion to decide the whole case at

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[89]*Id.* at 415.

[90]Recognizing the basic unfairness in such a result, the Court in *England* fashioned a procedure which insures that the litigants may have a federal forum for at least their federal issues. This procedure provides that a federal court which chooses to abstain, rather than dismissing the case outright, should suspend the proceedings, retaining jurisdiction, and remit the parties to the state courts. The litigants may then present just the state issues to the state court while reserving the right to return to the federal court to try any of the federal issues remaining after the state court's determination. *Id.* at 419-22.

This procedure has been criticized on two grounds. First, the state court may feel that it is unable to decide the state issues since its decision would be no more than an advisory opinion. And second, even if the state court agrees to decide the state issues subject to the reservation, this procedure still entails delay and piecemeal adjudication. C. WRIGHT, LAW OF FEDERAL COURTS § 52, at 198-99 (2d ed. 1970).

[91]See text accompanying notes 39-53 *supra*.

> once, avoiding the state litigation completely—free of interference here or in the Court of Appeals.[92]

These sentiments would appear equally applicable to *Pearl Brewing*, in view of the insubstantial nature of the constitutional question.

In addition to the questions which have been raised regarding the *Pearl Brewing* court's decision to abstain as a means of avoiding a constitutional adjudication, the rendering of an unguided decision on an unsettled aspect of state law, and federal intervention in state policies,[93] another, more mechanical aspect of the case is worthy of note. The Fourth Circuit relied largely on the theory that where a case involves the interpretation of a state statute fairly open to interpretation, and a state court ruling may obviate the need to adjudicate the constitutionality of the statute, the federal courts should refrain from passing on the constitutionality of the statute until the state court has had a reasonable opportunity to construe it.[94] However, on the facts of *Pearl Brewing* as they appear in the court's opinion, this reasoning is arguably inapposite. The statute was open to two possible constructions, one of which would raise potential contract clause questions while the other would avoid constitutional conflict completely. The district court applied the latter interpretation and dismissed the case.[95] By so ruling, the district court rejected the construction leading to a possible constitutional challenge and hence avoided the need to pass on the validity of the statute under the contract clause. With this procedural background, it is difficult to understand the Fourth Circuit's justification of abstention on the

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[92]375 U.S. at 430 (Douglas, J., concurring).

[93]In addition to these three primary grounds for abstention, the Fourth Circuit also discussed a fourth rationale for its decision; the plaintiff-appellant was a corporate citizen of Virginia and hence had "no reason to fear a provincial locally oriented court." 470 F.2d at 1213-14. Though this fear of local prejudice may, in extreme cases, be a persuasive reason for refusing to abstain, it can hardly be said that the absence of local prejudice constitutes an *affirmative* justification for abstention. To treat it otherwise would be to ignore the Congressional grant of diversity jurisdiction, 28 U.S.C. § 1332 (1970), and the policy underlying that grant as enunciated by the Supreme Court. Bank of the United States v. Beveaux, 9 U.S. (5 Cranch) 61, 87 (1809). The Fourth Circuit admittedly did not rely heavily upon the absence of local prejudice as a basis for abstention. However, since the court treated it as "[a]n additional justifying factor," 470 F.2d at 1213, it is important to point out that the lack of local prejudice does not affirmatively "justify" abstention. Rather, it serves as an important requirement which must be met before abstention can be invoked, but which cannot, of its own force, provide a positive ground for abstention. It would therefore seem that the Fourth Circuit's reliance upon this factor as one of its four substantive bases for abstention is arguably misplaced.

[94]470 F.2d at 1211-12.

[95]*Id.* at 1211.

grounds of avoiding an unnecessary constitutional adjudication, for this is precisely the effect of the district court's decision. Of course, had it accepted the alternative construction, the district court would then have possibly been faced with a need to reach the issue of the constitutionality of the statute. Hence, by disposing of the case on the non-constitutional issue, the district court acted completely in accord with the announced policy of the Supreme Court that federal courts should, where reasonably possible, avoid the necessity of a constitutional adjudication by deciding a case on grounds that eliminate the need for such a decision.[96] It therefore appears that the Fourth Circuit, in justifying abstention on the basis of avoiding the decision of a constitutional question, relied upon an argument which is singularly unpersuasive in light of the district court's treatment of the case.

The Fourth Circuit's decision in *Pearl Brewing* is therefore subject to serious question in terms of both the substantive grounds advanced in support of abstention and the internal logic of the decision itself. An analysis of the issues raised by the case and the court's attempt to resolve them points to at least two conclusions. First, and most importantly, is that the court invoked the discretionary doctrine of abstention in a case which, as a threshold matter, arguably did not call for such treatment. Particularly, the court's perception of a constitutional issue and its conclusion that the issue was sufficiently substantial to serve as a primary rationale for abstention are open to criticism. Second, at least some of the substantive grounds the court relied upon were perhaps inapposite and unpersuasive within the context of the case. Admittedly, the exercise of the power of abstention is subject to the discretion of the court and requires the weighing of a variety of factors.[97] Even allowing for the elasticity that such a formulation permits, it is nevertheless suggested that the grounds advanced by the Fourth Circuit to justify its decision in *Pearl Brewing* do not, even when taken together, sufficiently counterbalance those factors militating against such a decision so as to warrant the court's summary invocation of its abstention power.

However, such confusion is, unfortunately, more the rule than the exception as federal courts struggle to balance the policies inherent in the concept of federalism against the exigencies of federal court

[96]Mr. Justice Brandeis emphatically made this point in his well-known concurring opinion in Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (see cases cited therein). For recent affirmations of this principle, *see, e.g.*, Alexander v. Louisiana, 405 U.S. 625 (1972); Rosenberg v. Fleuti, 374 U.S. 449 (1963); United States v. Five Gambling Devices, 346 U.S. 441 (1953).

[97]Louisiana Power and Light Co. v. Thibodaux, 360 U.S. 25, 28 (1959).