
Amy L. Swingen

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The states bear the primary responsibility for the sexual morality of the public and therefore have a legitimate interest in the regulation of commercial obscenity. The federal judiciary, however, bears the primary burden for ensuring that such regulation does not violate the first amendment of the United States Constitution. This allocation of duties necessarily creates the potential for conflict between state governments and federal courts. Federal courts often seek means of avoiding such friction, especially when the conflict involves strong state interests.

Courts may employ three devices to deal with the state regulatory-federal constitutional conflict, but only two minimize the friction between the state government and the federal court. The alternatives available to a federal court seeking to determine a threshold question of state law in a federal constitutional case are: (1) speculation as to what the state court would decide on the issue; (2) abstention until the parties can bring the issue before the state courts; and (3) certification directly to the state supreme court for a decision on the issue, where state courts provide for it. Speculation, of course, cannot ease tensions concerning the overlapping interests. Of the two more diplomatic solutions, certification provides the more efficient solution.

A recent series of federal court decisions regarding an obscenity statute in the State of Washington provides an example of the context in which the state-federal conflict arises and the impact of the use of the various alternatives. In Brockett v. Spokane Arcades, Inc., the federal district court, the Ninth Circuit, and the Supreme Court ignored the efficient procedural solution of certification, and rejected the more time-consuming abstention as well. The question before the court involved the definition of obscenity. By refusing to allow the Washington Supreme Court to interpret the word “lust” for purposes of the state’s newly enacted moral nuisance statute, the United States Supreme Court needlessly risked a constitutional

adjudication based on an erroneous interpretation of state law. The threshold question of state law presented in *Brockett* could have been easily and efficiently resolved by certifying the question of the proper interpretation of the word “lust” to the Washington Supreme Court. Although certification best facilitates the interpretation of unclear state law in federal constitutional cases such as *Brockett*, the procedure can be improved to encourage its use in first amendment cases.

I. STRANGE BEDFELLOWS: STATE OBSCENITY REGULATIONS AND THE FEDERAL COURTS

Traditionally, the federal courts litigate the constitutionality of state obscenity regulations. Plaintiffs believe that the independence and national outlook of federal judges make them more sensitive to federal rights than state judges. Plaintiffs claiming that state obscenity regulations violate the first amendment, therefore, typically initiate actions in a federal forum. However, since states claim the area of sexual morality as their preeminent domain, federal courts often hesitate to interfere with state legislation designed to protect that morality. This hesitation increases when the state courts have not yet construed the legislation, and the issue involves strong state interests.

A. State Law in Federal Court

When a federal court litigates a case involving a federal constitutional question with a threshold question of unclear state law, the presiding judges must first decide how the state’s highest court would rule on the state law issues. Normally, the federal court will decide the state law issues itself, relying on authoritative state court holdings to indicate how the issues would have been determined if the case had been brought in the state

10. Id.; see also United States v. 12 200-ft. Reels of Super 8mm. Film, 413 U.S. 123, 130 n.7 (1973).
11. See Hamling v. United States, 418 U.S. 87, 113 (1974) (the construction of state obscenity regulation must be left to the state courts) (quoting United States v. 12 200-ft. Reels of Super 8mm. Film, 413 U.S. at 130 n.7).
court. This process allows the federal litigation to proceed uninterrupted and without added delay. When a federal court invalidates a statute based on an erroneous interpretation, the state must enact new legislation in order to implement its objectives. If the federal court incorrectly interprets the statute and yet upholds it, the state must still bring a new action in the state court to establish the proper interpretation of the statute. Thus, since state courts ultimately determine the meaning of their own law, a federal court that construes a state statute in ruling on its constitutionality runs the risk that a later contrary state court interpretation will undermine its holdings. In order to avoid deciding unresolved state law issues themselves, federal courts could instead either abstain on the state law issues or certify questions of state law to the state supreme court.

In recent years, the Supreme Court has abstained from exercising its jurisdiction in conflicts between state regulatory interests and federal constitutional rights. In these cases, the Court has followed Railroad Commission v. Pullman Co. and stayed its proceedings until the state court system had resolved the unclear issue of state law. By abstaining, a federal court forces the plaintiff to commence a new lawsuit in the state trial court to resolve the unclear issues of state law. The parties must work their way through the state appellate system until the state supreme court resolves the state law issue. If the state law questions are not dispositive of

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15. See Lehman Bros. v. Schein, 416 U.S. 386, 394 (1974) (Rehnquist, J., concurring) (a decision of the state law questions by the federal court entailed less delay and expense than certification or abstention).


17. Wells, supra note 3, at 71.


19. In this Note, the term “abstention” refers to the federal court action of remitting a case to the state court for resolution of the state law issues, in the hope that a federal constitutional decision will be avoided. See Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).


22. 312 U.S. 496 (1941).


24. Field, supra note 23, at 591; Lillich & Mundy, supra note 23, at 890 n.22.
the controversy, the litigants may then return to the federal forum to resolve the federal issues.\textsuperscript{25} By allowing the state courts to rule on the state law issues before adjudication of the federal constitutional issues, \textit{Pullman} abstention minimizes conflicts between the state and federal systems\textsuperscript{26} and avoids unnecessary adjudication of constitutional questions.\textsuperscript{27}

Because of the potential for burdening litigants with extended delay and added expense,\textsuperscript{28} however, federal courts should regard abstention as a narrow exception to their general duty to decide cases properly brought before them.\textsuperscript{29} Courts can justify abstaining only in exceptional circum-

\textsuperscript{25} Field, \textit{supra} note 23, at 591. See \textit{England v. Louisiana State Bd. of Medical Examiners}, 375 U.S. 411 (1964). If the litigants unreservedly submit their federal claims for adjudication along with their state claims, the litigants are bound by the decision of the state court on both sets of issues; only the United States Supreme Court can then overturn the state court decision. \textit{Id.} at 417–19. See \textit{NAACP v. Button}, 371 U.S. 415, 427 (1963). If either party expressly reserves the right to return to the federal forum, however, the parties return to the federal court for decision on the federal issues after the state court has acted on the state law issues. \textit{England}, 375 U.S. at 422; 17 \textit{WRIGHT & MILLER, supra} note 14, § 4243, at 478–79. The federal court, in most instances, retains jurisdiction of the case while the parties seek an authoritative pronouncement of the state law issues in the state courts. Field, \textit{supra} note 23, at 590. See \textit{American Trial Lawyers Ass'n v. New Jersey Supreme Court}, 409 U.S. 467 (1973). Retaining jurisdiction allows the federal court to grant interim relief to protect the parties during the period of abstention. 17 \textit{WRIGHT & MILLER, supra} note 14, § 4243, at 473.


\textsuperscript{27} \textit{Harman v. Forssenius}, 380 U.S. 528, 534 (1965); Field, \textit{supra} note 23, at 590–91. Courts refrain from deciding cases on constitutional grounds whenever possible. See \textit{Spector Motor Serv., Inc. v. McLaughlin}, 323 U.S. 101 (1944); \textit{Burton v. United States}, 196 U.S. 283 (1905). Constitutional adjudication creates tension between the judicial and legislative roles of government because while the legislature can overrule a court's interpretation of a statute by clarifying statutory language, it cannot revive in full a statute that has found unconstitutional. See \textit{R. MNOOKIN, supra} note 16, at 28.

The policy of avoiding unnecessary constitutional adjudication is not absolute, however. Field, \textit{supra} note 18, at 1097. A court may decline to heed the policy for "important reasons." \textit{Siler v. Louisville & Nashville R.R.}, 213 U.S. 175, 193 (1909). For a discussion of the effect of the "important reasons" exception upon \textit{Pullman} abstention, see Field, \textit{supra} note 18, at 1097.

\textsuperscript{28} Abstention results in an independent adjudication in the state judicial system. Lillich & Mundy, \textit{supra} note 23, at 890 n.22. See \textit{England v. Louisiana State Bd. of Medical Examiners}, 375 U.S. 411 (1964). \textit{Pullman} abstention has led to delays of many years in some cases. E.g., \textit{England v. Louisiana State Bd. of Medical Examiners}, 384 U.S. 885 (1966) (five years); \textit{Spector Motor Serv., Inc. v. O’Connor}, 340 U.S. 602 (1951) (seven years); \textit{see also} \textit{United States v. Leiter Minerals, Inc.}, 381 U.S. 413 (1965) (dismissed as moot eight years after abstention ordered).

\textsuperscript{29} \textit{Colorado River Water Conservation Dist. v. United States}, 424 U.S. 800, 813 (1976). Although parties possess no absolute right to federal jurisdiction, Mottolese v. Kaufman, 176 F.2d 301, 302–03 (2d Cir. 1949), Congress has imposed upon federal courts the duty "to give due respect" to litigants' choice of the federal forum for the decision of their constitutional claims. Zwicker v. Koota, 389 U.S. 241, 248 (1967). Escape from that duty is sanctioned only in narrowly limited "special circumstances." \textit{Id.} (citing \textit{Propper v. Clark}, 337 U.S. 472, 492 (1949)). See \textit{also} \textit{Colorado River Water Conservation Dist.}, 424 U.S. at 817 (noting "the virtually unfailing obligation of the federal courts to exercise the jurisdiction given them"); \textit{Hicks v. Miranda}, 422 U.S. 332, 355 (1975) (Stewart, J., dissenting). \textit{But see} \textit{City of Chicago v. Fieldcrest Dairies, Inc.}, 316 U.S. 168, 172–73 (1942) ("Considerations of delay, inconvenience, and cost to the parties, which have been urged upon us, do not call for a different result. For we are here concerned with the much larger issue as to the appropriate
stances where the order to the parties to commence litigation in the state court serves important countervailing interests.30

Courts have been particularly hesitant to abstain when the resulting delay might undermine fundamental constitutional guarantees.31 Delay may be especially harmful in cases involving a first amendment challenge, since postponing the ultimate determination of the constitutional question will likely inhibit the exercise of the very constitutional right for which the plaintiff seeks protection.32 Thus, federal courts have usually found abstention inappropriate when a plaintiff attacks a state statute on its face for deterring constitutionally protected expression.33

In twenty-five states,34 a federal court may refer certified questions of

relationship between federal and state authorities functioning as a harmonious whole.


31. While courts recognize no per se civil rights exception to the abstention doctrine, the Supreme Court has demonstrated a reluctance to order abstention in cases involving certain civil rights claims. C-Y Dev. Co. v. City of Redlands, 703 F.2d 375, 381 (9th Cir. 1983); see 17 WRIGHT & MILLER, supra note 14, § 4242, at 465-67. But see Harrison v. NAACP, 360 U.S. 167 (1959) (holding that state voting rights enactments should be exposed to state construction before federal courts determine their constitutionality); Lewellyn v. Gerhardt, 513 F.2d 184, 187 (7th Cir. 1975) (finding abstention inappropriate where unsettled questions of state law regarding the constitutionality of a reverter clause may dispose of the federal constitutional issues of due process and equal protection presented); Romero v. Coldwell, 455 F.2d 1163, 1167 (5th Cir. 1972) (abstaining when clarification by state courts might obviate the need for federal constitutional litigation on the issue of state voting rights); Field, supra note 18, at 1131-32 (virtually all constitutional challenges can be brought under the Civil Rights Act).


34. C. WRIGHT, THE LAW OF FEDERAL COURTS 52 (3d ed. 1976); 17 WRIGHT & MILLER, supra note 14, § 4248, at 525.

In the State of Washington, the Federal Court Local Law Certificate Procedure Act allows federal courts to certify questions of state law directly to the Washington Supreme Court when no state decision has interpreted the point of law at issue. Wash. Rev. Code § 2.60.010-090 (1985). Once the Washington Supreme Court receives the question, it permits the parties involved to submit briefs and request oral arguments. Wash. Rev. Code § 2.60.030(4)-(5) (1985). See also UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 52 (1975). By permitting the parties to submit briefs and request oral arguments, the statute ensures that the question certified is presented in a concrete factual setting. Comment, Certification Statutes: Engineering a Solution to Pullman Abstention Delay, 59 NOTRE DAME LAW. 1339, 1356 (1984). The Washington Supreme Court has expressed its eagerness to receive certified questions. See Purse Seine Vessel Owners Ass'n v. Moos, 88 Wn. 2d 799, 567 P.2d 205 (1977) (federal district court should have sought interpretation of state statute through certification procedure).
unsettled state law directly to the state’s highest court for clarification.\textsuperscript{35} Although the federal court still decides the federal constitutional questions presented, certification allows the state’s highest court to construe authoritatively its own law prior to federal court adjudication of the federal constitutional issues.\textsuperscript{36} The federal court normally initiates certification procedures after oral argument on the merits of the case.\textsuperscript{37} The certifying court prepares a certification order to be forwarded to the state supreme court.\textsuperscript{38} The federal court retains jurisdiction but suspends proceedings until it receives a reply from the state supreme court. While theoretically a form of abstention,\textsuperscript{39} certification produces a definitive state court construction of state law with considerably less delay and expense than abstention requires.\textsuperscript{40}

B. Identifying and Regulating Obscenity

1. The Supreme Court Standard

In \textit{Roth v. United States},\textsuperscript{41} the Supreme Court first considered the constitutional implications of state obscenity regulation. The Court first reasoned that the framers of the Bill of Rights wrote the first amendment to protect the free exchange of ideas of social and political importance.\textsuperscript{42} The \textit{Roth} Court further held that obscenity by definition is utterly without such redeeming social importance, and that the first amendment does not protect legally obscene material.\textsuperscript{43} The states, then, were free to enact legislation to regulate obscenity.\textsuperscript{44} The \textit{Roth} Court carefully defined legal obscenity as

\begin{itemize}
\item \textsuperscript{35} See Field, \textit{supra} note 23, at 605; Comment, \textit{supra} note 34, at 1349.
\item \textsuperscript{36} 17 WRIGHT & MILLER, \textit{supra} note 14, § 4248, at 529-30.
\item \textsuperscript{37} \textit{Id.} at 530; C. SERON, CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES 8 (Federal Judicial Center 1983). Although the parties are not barred from requesting certification, the court is best situated to determine its own level of confidence in its interpretation of state law. 17 WRIGHT & MILLER, \textit{supra} note 14, § 4248, at 530.
\item \textsuperscript{38} See UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, 12 U.L.A. 52 (1975), upon which state certification statutes generally are based. 17 WRIGHT & MILLER, \textit{supra} note 14, § 4248, at 525.
\item \textsuperscript{39} 17 WRIGHT & MILLER, \textit{supra} note 14, § 4241, at 441; Comment, \textit{supra} note 34, at 1354.
\item \textsuperscript{40} Bellotti v. Baird, 428 U.S. 132, 150-51 (1976); Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974); Comment, \textit{supra} note 34, at 1349. While the certification procedure is frequently criticized because of the delay it can cause, see, e.g., Mattis, \textit{Certification of Questions of State Law: An Impractical Tool in the Hands of Federal Courts}, 23 U. MIAMI L. REV. 717, 725-27 (1969), certification is less time-consuming and less costly than abstention. Field, \textit{supra} note 23, at 605-06. A survey of federal judges shows that the median time to obtain a state court answer to a certified question is only six months, C. SERON, \textit{supra} note 37, at 15, while abstention may cause a delay of many years. See \textit{supra} note 28.
\item \textsuperscript{41} 354 U.S. 476 (1957).
\item \textsuperscript{42} \textit{Roth}, 354 U.S. at 484.
\item \textsuperscript{43} \textit{Id.} at 485.
\item \textsuperscript{44} \textit{Id.} at 484-85.
\end{itemize}
material that the average person, applying contemporary community standards, would find appeals to the prurient interest, further specifying that such material has a tendency to excite lustful thoughts.\textsuperscript{45}

The Supreme Court refined this definition of obscenity in \textit{Miller v. California},\textsuperscript{46} restricting obscenity to works that: (1) depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (2) lack serious literary, artistic, political, or scientific value.\textsuperscript{47} The \textit{Miller} Court emphasized that it would not propose regulatory schemes for the states,\textsuperscript{48} but cautioned that statutes designed to regulate obscenity must be carefully limited in order not to impinge upon constitutionally protected speech.\textsuperscript{49} The Court stated that the regulations, either as written or construed, must not run afoul of the specific guidelines set forth in \textit{Miller}.\textsuperscript{50}

2. \textit{Washington Legislation}

In 1982, the Washington state legislature enacted a dual system of civil and criminal penalties for those who deal in obscenity or prostitution.\textsuperscript{51} The statute declared any place selling "lewd matter" to be a "moral

\textsuperscript{45} \textit{Id}. at 487 n.20, 489. The Court defined "material which deals with sex in a manner appealing to prurient interest" as:

\textit{I.e.}, material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines prurient, in pertinent part, as follows:

"...Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . . ."  

\textit{Pruriency} is defined, in pertinent part, as follows:

"...Quality of being prurient; lascivious desire or thought. . . ."

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), viz.:

"...A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . ."

\textit{Id}. at 487 n.20.

\textsuperscript{46} 413 U.S. 15 (1973).

\textsuperscript{47} \textit{Miller}, 413 U.S. at 24. The \textit{Miller} Court did not attempt to further define "prurient" as used in the \textit{Roth} Court's definition and expressed doubt as to whether a single definition of "prurient" was desirable or possible. \textit{Id}. at 30. See supra note 51.

\textsuperscript{48} \textit{Miller}, 413 U.S. at 25.

\textsuperscript{49} \textit{Id}. at 23-24.

\textsuperscript{50} \textit{Id}. at 25. The Court has noted that the construction of state obscenity legislation is to be left to the state courts. Hamling v. United States, 418 U.S. 87, 113 (1974) ("[W]e must leave to state courts the construction of state legislation . . . .") (quoting United States v. 12 200-ft. Reels of Super 8mm. Film, 413 U.S. 123, 130 n.7 (1973)).


1243
nuisance." It further equated "lewd matter" with "obscene matter." It then defined these terms as any matter that: (1) lacks serious literary, artistic, political, or scientific value when considered as a whole and in the context in which it is used; (2) explicitly details patently offensive representations of specific sexual conduct; and (3) the average person, applying contemporary community standards, would find appeals to the prurient interest when considered as a whole. The legislature defined "prurient" as "that which incites lasciviousness or lust." The statute did not further define the word "lust." Although an earlier Washington Supreme Court decision had established the court's willingness to interpret state obscenity regulations in conformity with the Miller guidelines, the Washington courts had not had an opportunity to construe the word "lust" as used in the statute when opponents of the statute challenged it in federal district court.

II. THE FACTS AND HOLDINGS OF BROCKETT

In Brockett v. Spokane Arcades, Inc., sellers of sexually explicit material challenged the constitutionality of the newly enacted Washington moral nuisance statute in federal district court. Plaintiffs argued that the inclusion of "lust" in the statutory definition of "prurient" rendered the statute unconstitutionally overbroad. They asserted that "lust" reached material that aroused only a normal interest in sex. Declaring abstention inappropriate in first amendment cases because of the delay, the district court reached the merits and upheld the constitutionality of the statute.

53. Id. § 7.48A.010(2).
54. Id. § 7.48A.010(2)(a)-(c).
55. Id. § 7.48A.010(8). The majority of state obscenity statutes leave the word "prurient" undefined, although some define it as "shameful or morbid." Brockett, 105 S. Ct. at 2803 n.13. The only exceptions are Washington, New Hampshire (defining a "prurient interest" as an "interest in lewdness or lascivious thoughts"), id., and Mississippi (defining "prurient" as "a lustful, erotic, shameful, or morbid interest in nudity, sex, or excretion"). Id. Enforcement of the Mississippi statute has been enjoined, because, inter alia, the inclusion of the word "lust" would permit the statute to reach protected materials. Goldstein v. Allain, 568 F. Supp. 1377, 1385 (N.D. Miss. 1983), appeal stayed pending trial on the merits, No. 83-4452 (5th Cir. June 20, 1984).
58. Spokane Arcades, 544 F. Supp. at 1038. Plaintiffs also argued that the word "lust" should be voided for vagueness. Id. However, the ultimate disposition of the case did not turn on this argument.
59. Id. Plaintiffs alleged that the word "prurient" has a more circumscribed meaning and pointed to case law noting in dicta that prurient interest entails a shameful or morbid interest in nudity, sex, or excretion. Id.
60. Id. at 1037.
61. Id. at 1049.
The Ninth Circuit Court of Appeals reversed. Although the court agreed that abstention was inappropriate, it disagreed with the lower court's resolution of the merits. Although the Roth Court had defined "prurient" in terms of lust in 1957, the appellate court concluded that the word "lust" was now understood as referring to a healthy, normal human reaction rather than to any shameful or morbid appetite. Thus, the court held that the inclusion of the word "lust" in the definition of "prurient" allowed the Washington moral nuisance statute to reach constitutionally protected materials. The Ninth Circuit reasoned that any application of the statute would rest upon a determination of obscenity by reference to the unconstitutionally overbroad definition, and therefore the court invalidated the statute in its entirety.

The Supreme Court reversed and remanded. Without definitively construing "lust," the Supreme Court held that the statute should have been invalidated only insofar as the word "lust" includes a normal interest in sex. Chief Justice Burger and Justices Rehnquist and O'Connor concurred on the grounds that the federal courts should have abstained and allowed the Washington courts an opportunity to construe the state law. The concurring justices contended that the Ninth Circuit's conclusion that the statute reached expression protected by the first amendment rested on a strained interpretation of the word "lust." These justices found the decision of the court of appeals to be a premature interference with the enforcement of state law, especially since the Washington Supreme Court was agreeable to accepting certified questions from the federal courts.

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63. 725 F.2d at 488.
64. Id. at 491. The court relied on a recent edition of Webster's New International Dictionary, an interview with President Jimmy Carter published in Playboy magazine, the A.L.I.'s 1962 Official Draft of the Model Penal Code, and the dicta of other courts that had considered the issue. 725 F.2d at 490–91.
65. J-R Distribs., 725 F.2d at 491.
66. Id. at 493 n.11.
67. Id. at 496.
69. Id. at 2800. The Court stated that "other things being equal" Brockett might not be a case for deferring to the appellate court's interpretation of lust. Id. It also implied that plaintiffs' argument that the meaning of lust had changed since Roth was questionable. Id. at 2800 n.10.
70. Id. (O'Connor, J., concurring).
71. Id. at 2805.
72. Id. Justices Brennan and Marshall dissented because they felt that the Court had failed to describe obscenity except by reference to vague concepts that lacked clear delineation between protected and unprotected speech. Id. at 2805–06 (citing Paris Adult Theaters I v. Slaton, 413 U.S. 49 (1973) (Brennan, J., dissenting)).
The Supreme Court instructed the Ninth Circuit to reconsider its facial invalidation of the Washington moral nuisance statute. On remand, the parties reached a settlement which called for striking the statute’s definition of “prurient,” leaving the term undefined. Thus, the proper interpretation of the word “lust” as used in the statute is now moot.

III. ANSWERING A QUESTION WITH A QUESTION

The federal courts litigated the threshold question in *Brockett* for nearly four years without ever conclusively determining the proper interpretation of the word “lust” as used in the Washington moral nuisance statute. Ironically, the lower federal courts had declined to abstain on the ground that such a procedure would impermissibly delay the adjudication. Neither the district nor the appellate court explicitly considered certifying the state law question. Certification, however, represents an efficient means for allowing state courts to construe their own laws, avoiding both the excessive delays and expenses of abstention and the risks of federal court speculation on unresolved state law.

A. Solutions of the Majority and the Concurrence

The Supreme Court majority opinion in *Brockett* compounded the error of the lower federal courts by continuing to refuse to allow the Washington state courts the first opportunity to construe their own statute. A federal statutory interpretation of Washington’s use of the word “lust” creates a precedent of limited applicability and delays the conclusive resolution of the issue by the state courts. In contrast, a state court decision on the issue

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73. *Brockett*, 105 S.Ct. at 2804.
76. In *Reetz v. Bozanich*, 397 U.S. 82 (1970), the Supreme Court stated that the proper exercise of federal jurisdiction requires unsettled questions of state law to be decided in state courts prior to federal court consideration of the underlying federal constitutional issues. *Id.* at 85 (citing City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 640–41 (1959)). Mere lack of clarity as to the state law, however, is usually not held to be sufficient to trigger abstention. See M. Redish, *supra* note 18, at 235.
78. See Wright, *supra* note 18, at 322–23 (1967); Note, *supra* note 77, at 749 n.72. When a state statute is obviously unconstitutional if read one way and is constitutional if read another, state courts are likely to adopt the constitutional interpretation. Field, *supra* note 18, at 1117. The clear unconstitutionality of one interpretation may justify the federal court determination that the state court would adopt the constitutional interpretation. *Id.* A state court, however, may well choose to strain the
would have furthered the evolution of state law and policy by providing a
nonspeculative interpretation of the unclear law. In addition, the regulation
of obscenity is a particularly sensitive area of state law. The Supreme
Court in Brockett, therefore, should have allowed the Washington Supreme
Court to decide the threshold state law question.

The concurrence recommended abstention under Pullman. Although
this course of action would avoid the risk of federal court error in deciding
state law questions, it is an inefficient way to resolve the threshold question
in Brockett. The litigants, perceiving the added delay and expense of
abstention, might have submitted all issues to the state court for determina-
tion in order to save what time and costs they might. They would have thus
waived their right to litigate the federal constitutional issues in federal
court, arguably the forum with more expertise. In addition, the expecta-
tion of a consistent policy of abstention might deter future litigants from
pursuing their right to a federal forum from the outset if they know they will
inevitably be bounced back to the state court. Discouraging access to the
federal courts is particularly inappropriate when plaintiffs wish to litigate
federal constitutional rights. Thus, the practical consequences of Pullman
abstention make it generally unacceptable in first amendment
cases.

B. Certification Procedures

The threshold question in Brockett could have been resolved most
expeditiously by certifying a question to the Washington Supreme Court on
the proper interpretation of the word "lust" as used in the Washington
moral nuisance statute. Had the court limited the word "lust" to behavior of

meaning of the statute in order to preserve the constitutionality of the seemingly unconstitutional
construction. Id. Therefore, even if a federal court is certain that the state courts will construe a
challenged state statute so as to preserve its constitutionality, it may justifiably conclude that the state
judiciary instead of the federal should make that determination. Id. at 1118.

79. Note, supra note 77, at 749 n.72.
80. See Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1035 (5th Cir. 1981). Brockett, however,
may signal a disinclination of the Supreme Court to retreat from control over state obscenity regula-
tions.
81. Throughout her opinion, Justice O'Connor referred only to abstention, but in the final
paragraph stated that a federal court decision in this case was particularly gratuitous when a certification
procedure was available. Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794, 2805 (1985) (O'Connor,
J., concurring).
82. Litigants usually do forego their right to return to the federal forum. Ryckman, Land Use
Litigation, Federal Jurisdiction, and the Abstention Doctrines, 69 CALIF. L. REV. 377, 405 n.157
(1981); Field, supra note 23, at 591.
83. Field, supra note 23, at 591; Field, supra note 18, at 1087.
85. See supra text accompanying note 32.
a nonprotected nature, the federal constitutional challenges would have been moot. If the Washington Supreme Court had held that “lust” included behavior that a federal court later found to be protected, the federal court would have at least addressed the federal constitutional issues without basing its decision on guesswork.

Certification, of course, serves no purpose if the state supreme court refuses to answer the proffered question. The Washington Supreme Court possesses both the procedural authority and the policy underpinnings to enhance the chances of certification acceptance. The Washington Constitution empowers the Washington Supreme Court to accept a broad range of certified questions, including definitional questions. Although the court, in an unpublished opinion, has refused a certified question because the question ultimately involved a federal constitutional question, the issue to be certified in Brokeret need not present a constitutional question. The question could have read: How does the Washington Supreme Court construe the word “lust” as used in section 7.48A.010(8) of the Revised Code of Washington? Such a question would not directly entail a Washington Supreme Court ruling on the statute’s constitutionality under the first amendment. Rather it would require a construction of state law, independent of any federal law on the issue.

Even if the federal courts had asked for a federal constitutional determination, however, the Washington Supreme Court no longer seems to follow the “ultimately federal constitutional question” restriction. Indeed, the Washington Supreme Court has sought to encourage federal

86. See In re Elliot, 74 Wn. 2d 600, 617, 446 P.2d 347, 358 (1968); e.g., Hart v. Peoples Nat’l Bank, 91 Wn. 2d 197, 588 P.2d 204 (1978).

87. Elliot, 74 Wn. 2d at 617–18, 446 P.2d at 358 (referring to Thiry v. Atlantic Monthly Co., 74 Wn. 2d 679, 445 P.2d 1012 (1968)). This portion of the Thiry opinion was not published, nor did Elliot clearly explain the earlier case’s factual or legal posture. Although the Elliot opinion did not refer to the Thiry opinion by name, only two certified questions were directed to the Washington Supreme Court during this time period.

88. Presumably, however, the Washington Supreme Court would want to construe the statute as broadly as the language permits, yet consistently with the constitutional guidelines set forth in Miller. Although federal constitutional questions are not to be certified, the parties should discuss them in their presentation to the state court, so that the state court may decide the state question in light of the federal constitutional concerns. 17 WRIGHT & MILLER, supra note 14, § 4248, at 530.

courts to use the certification process to clarify issues of state law in federal constitutional cases.90

For the sake of judicial economy, certification should have occurred at the district court level of the Brockett litigation.91 However, certification at any stage in the litigation would have been preferable to speculative adjudication on the threshold state law question in Brockett.

IV. SUGGESTED MODIFICATIONS OF THE CERTIFICATION PROCEDURE

To make certification a more attractive method to resolve state law questions in federal constitutional cases, courts such as the Washington Supreme Court should implement procedures to reduce delays inherent in the certification process. The court could adopt a docketing system that gives first priority to certified question cases in which delay presents a significant threat to the exercise of constitutional rights.92 Alternatively, the court could establish a policy of granting docket priority in any case in which the federal court requests expediency.93 Although the final decision

90. See, e.g., Purse Seine Vessel Owners Ass'n v. Moos, 88 Wn. 2d 799, 806, 567 P.2d 205, 209 (1977) (certification procedure provides a simple and practical way for federal court to seek answers to state law questions and avoid federal and state court conflict).

Not all states are as receptive to certified questions as is Washington. The Georgia Supreme Court, for example, refused a certified question that sought the definition of terms in a statute governing the display and distribution of sexually explicit materials to minors. American Booksellers Ass'n v. Webb, 254 Ga. 399, 329 S.E.2d 495, 498 (1985). The plaintiffs had advanced various hypothetical fact patterns in a declaratory judgment action and had requested interpretation of the statute's application in each context. Id. at 498. The Georgia Supreme Court found that no facts were presented to create an actual controversy and declined to answer on the grounds that the question was anticipatory. Id.

Under the Washington constitution, however, the absence of an actual controversy would not prevent the court from answering a certified question. In re Elliot, 74 Wn. 2d 600, 611–12, 446 P.2d 347, 355 (1968). Furthermore, the Washington Supreme Court reasons that certified questions do not call for advisory or anticipatory opinions. Id. at 610–11, 446 P.2d at 354.

91. The Washington Supreme Court will accept a certified question from any of the federal courts. WASH. REV. CODE § 2.60.020 (1985). Although all states that have certification statutes or court rules allow certification from the United States Supreme Court and federal courts of appeals, not all states permit questions from federal district courts or other federal courts. 17 WRIGHT & MILLER supra note 14, § 4248, at 525; Comment, supra note 34, at 1349.

92. The Washington certification statute allows the supreme court to adopt procedures and rules of practice that will facilitate the use of the certification procedure. WASH. REV. CODE § 2.60.030(7) (1985).

93. Washington currently has no statutory provision granting certified questions docket priority. However, the supreme court may accelerate the disposition of any review proceeding on the court's motion calendar. See Wash. R. App. P. 18.12. State courts should expect adequate reasons from certifying federal courts for expediency requests to ensure that the privilege will not be abused. See Thiry v. Atlantic Monthly Co., 74 Wn. 2d 679, 445 P.2d 1012 (1968) (Hale, J., dissenting) (noting that the district court's request to act "quickly and expeditiously" was unsupported). Because certification
to grant docket priority would rest with the court, federal courts could earmark certified questions deserving immediate attention. By granting docket priority to appropriate certified questions, the court would encourage federal courts to certify questions of state law in cases involving federal constitutional questions.94

In addition, federal courts could fashion their certification orders to mitigate the dangers of delay. In certifying a question, a federal court could set a specific date upon which to resume the litigation and reconsider the state issue in question, specifying that the answer to the certified question will be incorporated into the decision at that time.95 The parties would be instructed to return to federal court on that date to proceed with the federal litigation, regardless of whether an answer from the state court is forthcoming.96 By adjusting the certification order to the case before it, a federal court could permit the state court the opportunity to address state law questions without sacrificing the need for expediency in federal constitutional cases.

A federal court could also mitigate against the chilling of first amendment rights during the period of certification by granting interim relief. Federal courts could enjoin the enforcement of a challenged statute, either in whole or in part, until they determine its constitutionality.97 Such interim relief would reduce the risks of certification without foregoing its benefits.98
Interim injunctive relief has been criticized as inconsistent with the doctrine of federalism underlying both abstention and certification, because it necessarily entails a federal court interfering with a state's program. However, a federal court that couples its certification order with an injunction interferes less with state interests and programs than does a court that fails to certify a state law question in an appropriate case.

Where the federal court's certification order limits the time by which the state court must answer the certified question, the preliminary injunction will be correspondingly limited. Because the state supreme court presumably recognizes the harm caused to the state by the delay in enforcement of the statute occasioned by interim injunctive relief, it will act with all possible speed to further minimize the delay. Once the state court issues its response to the certified question, the federal court could modify or lift the injunction. The state incurs much greater harm from inaccurate

99. *Id.* at 75.

100. *Id.* A grant of interim relief rests in part upon the federal court's evaluation of the merits of the plaintiff's case. *Id.* at 68. To the extent that even a tentative constitutional determination interferes with the operation of a state program, the underlying principle that state courts should decide issues of state law seems to be abrogated. *Id.* at 68-69. The harm, however, is less than that inflicted when a federal court declines to seek state court input. *Id.* at 68. Moreover, if the harm to the plaintiff absent interim relief would be substantial and the hardship to the defendant minimal, a federal court may grant interim relief without deciding the likelihood of the plaintiff's success on the merits, providing that the plaintiff has raised substantial questions presenting legitimate grounds for litigation. *Id.* at 70.

101. Cf. Wells, supra note 3, at 71 (applying this rationale to abstention cases). Moreover, a federal court's refusal to certify or abstain does not preclude an injunction against enforcement of the controverted statute during the pendency of the federal litigation. Although the federal courts in *Brockett* refused to certify or abstain on the state law question, the enforcement of the Washington moral nuisance statute has nonetheless been enjoined throughout the entire four-year period of litigation on the threshold state law question. Press Release from Kenneth O. Eikenberry, Attorney General of the State of Washington (Mar. 14, 1986) (copy on file with the Washington Law Review). Surely this is more of an intrusion upon state interests than an injunction of approximately six months duration issued in order for the state supreme court to resolve definitively the statutory question.

102. Wells, supra note 3, at 71.

103. See Fed. R. Civ. P. 60(b)(5) (court may relieve party from judgment or order when "it is no longer equitable that the judgment should have prospective application"); Lee v. Bickell, 292 U.S. 415, 425-26 (1934). See generally Note, Finality of Equity Decrees in the Light of Subsequent Events, 59 HARV. L. REV. 957, 963-66 (1946).

Normally, the definitional component of a statute cannot be enjoined without also enjoining enforcement of the entire statute. American Booksellers Ass'n v. Webb, 590 F. Supp. 677, 687 (N.D. Ga. 1984). However, the fact that the challenged portion of the statute was in a definitional segment would not prevent partial enjoinder in *Brockett* since "lust" was only one of two words used to define "prurient." *Wash. Rev. Code § 7.48A.010(8) (1982).* Thus, the federal court could enjoin enforcement only as to "lust" while allowing the statute to stand utilizing the term "prurient." See American Booksellers Ass'n, 590 F. Supp. at 687 ("[S]o long as a discrete provision of a challenged act may be given legal effect standing alone, and it does not plainly appear that its separate enforcement would be wholly contrary to the intent of the state legislature, the provision should be viewed separately for purposes of determining the propriety of interim relief during the period of abstention.").

However, the Washington moral nuisance statute was also challenged on the grounds that the statute's
construction of the statute than from interim relief, which merely causes delay in achieving the state’s objective and not total frustration of the objective itself.\textsuperscript{104}

V. CONCLUSION

Ideally, the threshold state law question in \textit{Brockett} should have been resolved through the use of certification. The federal district court should have certified a question to the Washington Supreme Court on the proper interpretation of the word “lust” as used in the Washington moral nuisance statute, requesting and giving reasons for expediency. The certification order should have limited the time for response, so that the federal litigation would not be indefinitely stayed if the Washington Supreme Court failed to honor the request for expediency.

The federal court also should have enjoined enforcement of the statute for the time period specified in the certification order, premising its injunction upon the parties’ good faith effort to litigate expeditiously the certified issue before the Washington Supreme Court. Granting interim relief and fashioning the certification order so as to minimize delay, the federal court could have simultaneously promoted accuracy in the determination of state law and avoided chilling of first amendment rights.

\textit{Amy L. Swingen}

\footnotesize{\textsuperscript{104} Cf. Wells, \textit{supra} note 3, at 71.}