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“Our Federalism” in Pennzoil Co. v. Texaco, Inc. or How the Younger Doctrine Keeps Getting Older Not Better

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“Our Federalism” in
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Thomas E. Baker**

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It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.

### I. Introduction

The dean of this generation of federal courts scholars has duly noted:

> There is no more controversial doctrine in the federal courts today than the doctrine of 'Our Federalism,' which teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of the state to enforce its laws in its own courts.¹

This statement proved true once again in the decision of the Supreme Court in _Pennzoil Co. v. Texaco, Inc._,² an important recent extension of the doctrine of "Our Federalism." This Article evaluates _Pennzoil_ in an effort to provoke further analysis of the principle underlying the doctrine of "Our Federalism."

Most law review writing exists more to be written than to be read and then only to be read by other members of the academy. Not so with this Review and this Article. Anticipating a readership of practicing lawyers, of litigators, gives me pause, I must admit. My assignment to write about "Our Federalism" seems to deal with a rather arcane topic in federal jurisdiction. My hope here is to demonstrate just how important and how practical the doctrine is so that some lawyer in some federal court somewhere might participate better in the lawmaking partnership between the bench and the bar. Charles Dickens, who once worked in a law office, observed, "[w]e lawyers are always curious, always inquisitive, always picking up odds and ends for our patchwork minds, since there is no knowing when and where they may fit into some corner . . . ."³

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My purpose then is to get behind the slogan, "Our Federalism," to place it in the context of abstention doctrines generally, to trace the evolution of this particular variety of abstention, to focus on *Pennzoil* and its aftermath, and to speculate about the future of this doctrine that has so intrigued courts, commentators, and counsel.

II. The Doctrine of "Our Federalism"

A. Abstention Generally

"It is a principle of first importance that the federal courts are courts of limited jurisdiction." From the time of the Framers, the federal jurisdiction inquiry has been twofold: first, to determine whether a case comes within the judicial power of article III of the Constitution; and second, to determine whether the case comes within some particular enabling act of Congress.

The Supreme Court has made it plain that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." The abstention doctrines, therefore, identify circumstances in which a federal court possessed of constitutional and statutory jurisdiction over the subject matter of a case nonetheless may "abstain"—by either dismissing or staying the federal proceeding—in deference to a state tribunal.

The various abstention doctrines differ in their requirements and their consequences. Some uncertainty exists about whether there are several abstention doctrines or one doctrine with several applications. In *Pennzoil*, the plurality cautioned, "The various

4. C. Wright, *supra* note 1, at 22.
5. *See* Sheldon v. Sill, 49 U.S. (8 How.) 440, 442 (1850) (federal courts can exercise jurisdiction if authorized by congressional statute and the Constitution); Hodgson and Thompson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809) (a statute cannot extend the jurisdiction of the federal courts beyond the limits of the Constitution); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807) (the Court disclaimed all jurisdiction not given by the Constitution or by the laws of the United States).
6. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (dictum) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. . . . [W]e find this tribunal invested with appellate jurisdiction in all cases arising under the [C]onstitution and laws of the United States.").
types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." Eminent scholars of federal practice have made the additional point that "[t]he number of categories into which the abstention cases are divided is of little significance." For present purposes, the situations justifying federal court abstention may be grouped into four categories for brief identification.8


During this writing, the Federal Courts Study Committee considered a proposal to render the Younger doctrine inapplicable to actions for damages but to leave it otherwise unimpaired as a nonjurisdictional limit on the power of federal courts to enjoin state courts. The other abstention doctrines would have been codified as follows:

(a) A federal court may, in its discretion, abstain from deciding a case otherwise within its jurisdiction if:
   (1) there is substantial uncertainty regarding the meaning or interpretation of a state law that is fairly subject to an interpretation that will render unnecessary a ruling on a federal constitutional issue; or
   (2) the case involves a challenge to an order or other action of a state administrative agency and the state courts have a policy-making, quasi-administrative role in reviewing agency decisions; or
   (3) exercising jurisdiction will unnecessarily duplicate ongoing state proceedings that are far advanced and no special circumstances necessitate adjudication in a federal forum.

(b) In exercising its discretion under subsection (a) of this section, the court shall consider the nature of the federal claim and the likelihood that abstaining will produce excessive delay in its determination.

(c) The court shall, whenever possible, certify a question of state law upon which abstention is ordered to an appropriate state court for prompt resolution. The plaintiff may reserve the right to return to federal court to have any federal issues adjudicated.

(d) Subsections (a)(1) and (2) shall not apply if jurisdiction over the state law issue is based on 28 U.S.C. § 1332.

I. Pullman Abstention.—The oldest and most clearly defined category of abstention was created by the Supreme Court in Railroad Commission v. Pullman Co. The plaintiffs challenged the validity of an order of the Texas Railroad Commission under state law and under the fourteenth amendment of the Constitution. Because the state-law issue was uncertain and could be controlling to obviate the federal constitutional issue, the Supreme Court unanimously ruled that the federal trial should be stayed to allow the parties to obtain a definitive ruling on the state-law issue from a state court. This stay would serve the interest of federalism and perhaps avoid an unnecessary constitutional adjudication. Thus, in the classic Pullman abstention, the plaintiff alleges a constitutional violation as well as a pendent claim under state law. To avoid an unnecessary determination of the constitutional issue, the district court abstains, thereby allowing the parties to obtain a controlling ruling on the ambiguous issue of state law. The rationale governing this category of abstention is to defer to state courts on state-law issues—a judge-created Erie approach with a vengeance.

The Pullman abstention often has been invoked in civil rights suits under 42 U.S.C. § 1983 (§ 1983) challenging the constitutionality of state action in which pendent state-law claims are joined. One subcategory of mandatory Pullman abstention interprets the eleventh amendment to require state courts to decide certain issues of state law even though a federal court exercises jurisdiction over the remainder of the case. For either category to apply, the state law must be "unclear," so that abstaining is not merely a delay toward some inevitable ruling; it is not clear just

12. 312 U.S. at 501.
14. See, e.g., Harrison v. NAACP, 360 U.S. 167 (1959) (federal court should have abstained from deciding the merits of the issues tendered to it and should have retained jurisdiction until Virginia courts had been afforded a reasonable opportunity to construe them).
how unclear the state law must be. Pullman abstention may not be in order if there are compelling reasons for prompt federal adjudication or if the state remedy is somehow inadequate. Today, I would suggest that the Younger doctrine has all but displaced Pullman abstention. Nonetheless, Pullman abstention has content in federal suits brought before a state law has been violated or when the state enactment being challenged does not involve state enforcement. In such situations, other preliminary concerns for justiciability remain, for example, standing and ripeness.

The procedure in Pullman abstention is somewhat odd. At the time of federal court abstention, no parallel state proceeding exists. The plaintiff is directed to file an action in state court on the state-law claims—usually the prudent approach is to seek a declaratory judgment. In state court, the plaintiff may litigate both the state-law issue and the constitutional issue or choose to litigate only the state-law issue by reserving the right to return to the federal court if resolving the state law issue does not obviate the constitutional issue. Usually, the federal court will simply enter an order staying the federal proceedings, but it may dismiss the matter without prejudice to circumvent state-law limitations on ad-

16. See, e.g., Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (abstention from Pullman doctrine was unnecessary, since there was no uncertain question of state law under Hawaii’s Land Reform Act of 1967); Bellotti v. Baird, 428 U.S. 132 (1976) (the district court should have abstained from deciding the constitutional issue until the Massachusetts Supreme Judicial Court clarified the meaning of a 1974 Massachusetts statute concerning abortion); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (since the state statute at issue was unambiguous and there was no uncertain issue of state law, the federal court properly proceeded to decide the federal constitutional claim).

17. See, e.g., City of Houston v. Hill, 482 U.S. 451 (1987) (abstention was inappropriate in case involving first amendment challenge to a municipal ordinance that made it unlawful to interrupt police officers in the performance of their duties).

18. See, e.g., Dombrowski v. Pfister, 380 U.S. 479 (1965) (federal court intervention was necessary to prevent a substantial impairment of freedom of expression resulting from state prosecution under an overly broad state statute regulating expression); Baggett v. Bullitt, 377 U.S. 360 (1964) (federal courts do not automatically abstain when faced with a doubtful issue of state law, particularly where first amendment freedoms are implicated).

19. See infra text accompanying notes 35-60.

20. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). Whether the state court’s findings of facts should be given preclusive effect upon return to the federal forum is an open question. See Allen v. McCurry, 449 U.S. 90 (1980) (nothing in the language or legislative history of 42 U.S.C. § 1983 denies binding effect to a state court judgment when the state court gives parties a fair and full opportunity to litigate federal claims and shows itself willing to protect federal rights).
visory opinions. Alternatively, an appellate litigant can wait to obtain an advisory opinion through the mechanics of certification on the state-law issue from the highest court of the state. This procedure may significantly reduce the expense and delay of obtaining an authoritative interpretation of state law.

2. Burford Abstention.—The Pullman category is easier to define than the next category, which derives its name from Burford v. Sun Oil Co. In general, Burford allowed the federal court to defer to a state’s administration of important state policy and to avoid unnecessary interference and disruption of the state government scheme. Thus, the rationale for Burford abstention is different from the rationale for Pullman abstention, although the effect of requiring the plaintiff to initiate a state proceeding is the same. Burford abstention is invoked more typically in cases that do not involve federal questions. Because no federal issue exists to justify a jurisdiction-retaining stay in the district court, the proper federal disposition is to dismiss the case outright, particularly given the assurance, at least in theory, of Supreme Court review of any significant federal issue.

Furthermore, Burford abstention does not apply when a suit is filed first in federal court and state administrative remedies have not been exhausted. There is no requirement to exhaust administrative remedies in suits under §1983. The Burford decision may be its own best example. In Burford, the Supreme Court ruled that the district court should have abstained in a dispute over the apportionment of oil drilling rights because Texas had established an overall plan of regulation by a state commission with specified state procedures for judicial review.

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22. See, e.g., Virginia v. American Booksellers Ass’n, Inc., 484 U.S. 383 (1988) (Supreme Court certified questions concerning construction of a Virginia state statute to the Virginia Supreme Court since resolution of these questions would assist the Court in its review of first amendment claims). For the procedure of certification to the Texas Supreme Court, see Tex. R. App. P. 114.
24. 319 U.S. at 334.
26. 319 U.S. at 333-34.
in the state regulatory scheme in *Burford* were the existence of complex, specialized factual issues and the central importance of concentrated state judicial review. *Burford* abstention is pure federalism. It is used sparingly, however, because rarely are the circumstances such that a state interest would be unduly impaired by a federal court deciding a case otherwise in its jurisdiction.27 The Supreme Court has never satisfactorily explained which state administrative schemes deserve *Burford* abstention. Consequently, this doctrine may be invoked whenever the exercise of federal jurisdiction arguably disrupts some state administrative procedure, even when the state agency is alleged to be violating federal law.

3. Colorado River Abstention.—The third category of abstention serves quite different and somewhat less lofty purposes. Rather than avoiding unnecessary constitutional discussions or respecting state sovereignty, the abstention doctrine from *Colorado River Water Conservation District v. United States*28 “rest[s] on considerations of [w]ise judicial administration.”9 This doctrine was developed in the inferior federal courts to conserve scarce judicial resources in the onslaught of burgeoning dockets.30 The Supreme Court has refined a factorial analysis to determine case-by-case when *Colorado River* abstention is appropriate.31 The typical situation involves both a pending state proceeding and a federal proceeding involving parallel claims and parties; furthermore, no constitutional (*Pullman* abstention) or federalism (*Burford* abstention) complications are present. Yet, abstention still may be in

27. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815 (1976) (*Burford* abstention unnecessary because the state law to be applied is fairly well settled); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959) (no exceptional circumstances to justify abstention).

28. 424 U.S. 800 (1976); *see also* Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) (a federal district court’s decision to stay or to dismiss a federal action on grounds of wise judicial administration depends on a careful balancing of several important factors with the balance heavily weighted in favor of the exercise of jurisdiction); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1973) (when there is duplicative litigation in state and federal courts, the decision whether to defer to the state courts is largely committed to the discretion of the district court).


order. The factorial analysis developed by the Supreme Court to determine whether to apply *Colorado River* abstention considers whether the state court has already acquired jurisdiction over some relevant property; how relatively convenient the federal forum is for the parties; whether piecemeal litigation will be avoided; which court first obtained jurisdiction and which proceeding is further along; whether state or federal law provides the rule for decision on the merits; and whether the state process adequately protects the plaintiff's federal rights. Federal courts appear more likely to defer to prior state court proceedings when the state plaintiff has won the race to the courthouse than when the federal suit was filed first. Federal discretion is limited to choosing between abstaining to avoid a wasteful race to judgment or affording a federal plaintiff the choice of the federal forum.

Application of *Colorado River* abstention appears to be even less predictable than the discretion to abstain that this factorial analysis provides to federal courts. Although the Supreme Court has equated a stay with a dismissal, a stay is less problematic for the plaintiff because of the obvious concern for the statute of limitations. Also, issues of preclusion appear more confused here than elsewhere in federal jurisdiction—if that is possible—particularly as regards exclusive federal jurisdiction. For present purposes, it is enough to note that plaintiffs who litigate and lose state claims in state court may be precluded even from bringing an exclusive federal claim in a subsequent federal proceeding.

If this categorical treatment of abstention were to end here, there would not be too much worth noting. The abstention cate-

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32. 424 U.S. at 18.
33. See *Moses H. Cone Memorial Hosp.*, 460 U.S. at 28-29; *Board of Education of Valley View Community Unit School Dist. No. 365U v. Bosworth*, 713 F.2d 1316 (7th Cir. 1983) (federal district court should stay proceedings rather than dismiss them; if the state proceedings do not resolve all issues, parties should have access to the federal courts without the fear that the statute of limitations will have run).
34. See *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) (as a matter of federal law, a plaintiff can bring state law claims initially in state court only at the cost of forgoing subsequent federal antitrust claims.); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978). But cf. *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59 (2d Cir. 1986) (state courts may not grant affirmative relief based on claims for which federal jurisdiction is exclusive; federal district court should not have abstained from hearing antitrust action, since there had been only limited progress in state court).
gories labeled Pullman, Burford, and Colorado River do not amount to much. They remain relatively narrow and they have not evolved much beyond their original doctrinal forms. They account for few decisions and little controversy. The fourth category of abstention—"Our Federalism"—is not like the others. "Our Federalism" has grown remarkably to apply to more cases and carries with it the more profound consequence of depriving the federal plaintiff of any federal forum—before, during, or after the state proceeding—in which to present a constitutional claim. The remainder of this Article addresses the complexity and importance of "Our Federalism."

B. The Younger Decision

The Younger abstention doctrine, sometimes called the non-intervention doctrine and often described euphemistically as the doctrine of "Our Federalism," may be traced back to the 1971 Supreme Court decision in Younger v. Harris35 and five companion cases.36 The most significant and recent sequel, of course, is the Pennzoil decision.37

Before 1971, there were mixed signals from the Supreme Court whether a federal court could enjoin state court criminal proceedings, the issue presented in Younger v. Harris.38 The holdings in the lower federal courts were confused.39 The plaintiff in Younger had been indicted in state court for distributing leaflets

37. See infra Subpart III(B). The literature on the Younger doctrine is both exhaustive and exhausting. Beyond the sources cited in this Article, there is a selective and current bibliography at 17 C. Wright, A. Miller & E. Cooper, supra note 9, § 4242, at 193 n.1. The textual discussion here relies heavily on E. Chemerinsky, supra note 10, at 621-55; P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, The Federal Courts and the Federal System 1383-1438 (3d ed. 1988).
alleged to violate the state criminal syndicalism statute. In federal court, the plaintiff sued the district attorney under § 1983 asking for an injunction against the state court prosecution and alleging a violation of the first and fourteenth amendments. A three-judge district court agreed with the plaintiff, declared the state statute unconstitutional on its face as overbroad and vague, and enjoined any further prosecution.40 On direct appeal, the Supreme Court held that the injunction "must be reversed as a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."41 Justice Black wrote the opinion for the Court in a discursive style relying on feckless history.42 Considerations of equity and comity barred relief. Justice Black invoked a "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."43 The plaintiff could have raised his constitutional claims as a defense in the state criminal proceeding. Here Justice Black invoked the notion of comity: "[T]his underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions."44 He went on to encapsulate this idea in a kind of Irving Berlin lyric, "Our Federalism," which he described as a "recognition of the fact that the entire country is made up of a

41. 401 U.S. at 41.
42. Justice Black was something of an historical positivist.

Portions of the principal opinion in Younger, which was written by Justice Black, read almost like a patriotic hymn in announcing equitable restraint as a tenet of "Our Federalism." Justice Black refers to "comity" as if it were a matter of divine preference; and the phrase "Our Federalism" is coined in such a way as to suggest that its content is both clear and indisputable. Nonetheless, as written, the decision in Younger is very limited and the holding is hardly original.

43. 401 U.S. at 43-44. But see Younger, 281 F. Supp. at 510-11 (finding irreparable injury and no adequate remedy at law).
44. 401 U.S. at 44.
Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This was the Americana jurisprudence of Hugo L. Black. "Our Federalism" was understood to be two-dimensional—state and federal—and inherent in the structure of the Constitution. In this manner, Justice Black denied political victory to both the Federalists and the Anti-Federalists:

[Our Federalism] does not mean blind deference to "States Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Nonetheless, Justice Black did admit that in "extraordinary circumstances" a federal court could enjoin a pending state proceeding. The holding in Younger was that an injunction was not proper merely because the plaintiff invoked the first amendment in a suit under § 1983. The Court suggested three exceptions to the Younger abstention doctrine. First, a showing of bad-faith prosecution or harassment would justify immediate injunctive relief. The Supreme Court has never found the predicate showing of bad faith or harassment, and such holdings in the lower courts are exceedingly rare. Second, the Court suggested in

45. 401 U.S. 37, 44 (1971).
46. Id. Justice Black's account of 1787 federalism seems to belie his theory of the due process clause of the fourteenth amendment; see Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).
47. 401 U.S. at 53-54.
49. 401 U.S. at 48-49.
51. See 17 C. Wright, A. Miller & E. Cooper, supra note 9, § 4255; see also Fiss, Dombrowski, 86 Yale L.J. 1103, 1115 n.36 (1977); Wingate, The Bad Faith-Harassment Exception to the Younger Doctrine: Exploring the Empty Universe, 5 Rev. Litig. 123 (1986).
Younger that a federal court would be justified in restraining a state prosecution under a statute that was “flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph, and in whatever manner and against whomsoever an effort might be made to apply it.” The very holding in Younger runs counter to this exception: two terms before Younger, the Court had invalidated an almost identical statute, yet the statute in Younger was not sufficiently unconstitutional. Additionally, logically this seems to be a curious exception: there appears to be less need for federal court intervention when the merits are so obvious to the state court, unless, perhaps, the logic is that the interference with the state court is trivial in such an obvious case. In any event, the Supreme Court has reversed a holding of flagrant unconstitutionality when the statute could be nothing else but invalid. Third, the Younger opinion concluded that federal issues should be raised in the state tribunal “unless it plainly appears that this course would not afford adequate protection.” This exception has some modest content, and the federal injunction may issue upon a showing of bias in the state tribunal. Again, the actual holdings based on this exception have been rare. Two other exceptions have been added as postscripts to the Younger doctrine: federal intervention is proper if the federal claim cannot be raised in any meaningful way in the state proceeding or if the parties waive application of the Younger doctrine.

57. Justice Stevens believes that Younger abstention should never apply if the constitutional challenge is against the validity of the very state procedures to which the plaintiff would be remitted upon federal court abstention. See Trainor, 431 U.S. at 460, 469 (Stevens, J., dissenting); Juidice v. Vail, 430 U.S. 327, 340-41 (1977) (Stevens, J., concurring).
Given the empty logic of these exceptions to the *Younger* ruling and the rarity of their occurrence, it is understandable why one Supreme Court critic of the *Younger* doctrine has argued that the exceptions require showings that are "probably impossible to make." This Article, therefore, is obliged to return to a consideration of the *Younger* doctrine itself.

C. Related Younger Themes

The *Younger* decision described a doctrine at the intersection of a number of themes in federal jurisdiction. Identifying these themes and how they relate to the abstention principle furthers our understanding of the doctrine. At one level, the holding in *Younger* to prohibit a federal court from enjoining an ongoing state criminal prosecution may be viewed as a not-so remarkable judicial analog to the Anti-Injunction Act, 28 U.S.C. § 2283 (§ 2283). Since 1793, there has been a statute prohibiting federal courts from enjoining state court proceedings. Although not a model of drafting, § 2283 presently establishes a rule of prohibition of injunctions with only three exceptions. The *Younger* opinion makes clear, however, that the abstention doctrine is not based on § 2283. In subsequent holdings, in fact, the Supreme Court has applied *Younger* abstention when § 2283 does not apply.

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This statute relates to a second intersecting theme: whether § 1983 is an express authorization for injunctions under the terms of one of the exceptions to the § 2283 prohibition on injunctions. The Court in Younger did not reach the question, even though the suit was brought under § 1983, but did answer the question in the affirmative the very next year. In Mitchum v. Foster, the Court opined that "the very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law." There is a tension between Younger abstention and the § 1983 jurisdiction. If Younger is understood to create a bar to injunctive relief independent of the bar in § 2283, then a § 1983 plaintiff obtains little comfort from Mitchum, which trumps only § 2283, the Anti-Injunction Act. And we have seen how the Younger exceptions are antipathetic to injunctions. Though technically distinct, Mitchum and Younger pull opposite ways. The former encourages federal courts to enjoin state proceedings, whereas the latter discourages such injunctions to the point of rule-proving exceptions that amount to fantasy. Younger evokes a romanticized federalism of the 1790’s and Mitchum conjures up attitudes of the 1860’s.

This raises another point: is Younger a common-law or a constitutional doctrine? If the Younger holding is common law, then

67. 401 U.S. at 55 (Stewart, J., concurring).
69. Id. at 242.
70. See supra text accompanying notes 48-60.
72. See infra text accompanying notes 82-83.
73. See E. Chemerinsky, supra note 10, at 627. There is no small academic issue of constitutional law that may be raised against the Younger abstention doctrine:
a specific statute could authorize federal court injunctions against state court prosecutions. As noted above, the Court in *Mitchum* held that § 1983 was an express statutory authorization for such injunctions. Logic compels the conclusion that this explicit congressional authorization trumps the common law, and *Younger* would not apply in § 1983 suits, except that *Younger*, although decided before *Mitchum*, was a § 1983 suit. In the alternative, if *Younger* is deemed a constitutional doctrine, then, at least, the Court's logic was flawed to decide the constitutional issue before addressing the statutory issue whether § 2283 barred relief. Remember that the *Pullman* doctrine is based on avoiding unnecessary resolution of a constitutional issue. This is a professor's issue, however, inasmuch as *Mitchum*, decided the next year, held that § 1983 was an exception to § 2283. The Supreme Court has yet to address whether *Younger* is based on the Constitution or on common law. It is not much of a criticism today to note that *Younger* and *Mitchum* were decided in the wrong order, except to note that "[u]nder *Younger*, Congress's authority is uncertain." Generally, abstention may best be conceptualized as a prudential exercise of judicial discretion in the interpretation of statutes conferring jurisdiction, resembling such principles as limits on standing, ripeness and mootness or the elaborations of pendent and ancillary jurisdiction.

Justice Black's equity rationale provides another thematic perspective of the *Younger* Doctrine. A first-year law school principle is that a court will not issue an injunction when there is an adequate remedy at law. *Younger* abstention bars a federal court

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from issuing an injunction because the state court proceeding is available for the constitutional issue. This is somewhat procrustean: "[T]he usual equity maxim relates to refusing injunctions if money damages are sufficient; it has no direct relevance to one court refusing to hear an issue because another court can do so." Then there is the debate over whether the opportunity to raise constitutional claims in a state court is either an adequate or appropriate substitute for the federal forum. Still, there is no denying the strength of the countervailing principle of equity to refrain from enjoining pending criminal prosecutions. Honoring this principle in the Younger situation simultaneously honors federalism.

Although it is best known as a precedent for interpreting the eleventh amendment, the enigmatic holding in Ex parte Young sounds an important theme related to the Younger doctrine. In that famous fiction, the Court ruled that the federal suit seeking an injunction against enforcement by the Attorney General of a state regulation was against Attorney General Young for purposes of the fourteenth amendment, yet, against Mister Young for purposes of the eleventh amendment. This fiction of federalism made possible federal equitable intervention in state proceedings, and the ruling has been "indispensable to the establishment of constitutional government and the rule of law." Younger and Ex parte Young are two adjustments of federalism existing in open tension.


79. 209 U.S. 123 (1907).

80. id. at 149-50.

Justice Black invoked the complementary concept of comity as another theme in the *Younger* analysis. Preventing the federal courts from enjoining state prosecutions eliminates a certain effrontery in our dual court system. But federalism is not designed for efficiency and harmony, and the question to consider is how much jurisdictional rules ought to depend on the philosophy of "I'm OK; You're (Not) OK." This aspect of comity—judicial federalism—centers on the issue of parity. This is a matter of assumption: should the tenets of federal jurisdiction be based on a preference for a federal forum to decide issues of federal law. This underlying debate has gone on since the drafting of article III and will continue as long as we have a dual court system. Basically, the argument concerns whether federal judges are somehow "better" than state judges and therefore dispense a "juster" justice.

Although it has a wider application, another theme intersecting at *Younger* abstention is the *Rooker-Feldman* doctrine. The abstention mechanism permits a federal court to refrain from exercising jurisdiction and to defer to ongoing state proceedings. The mechanism applies only if the federal court possesses subject-matter jurisdiction. The district court must decide whether it has jurisdiction before deciding whether to abstain. This is not terribly profound, but it can be dispositive. Under the statutory scheme, district courts have original jurisdiction over federal questions and the Supreme Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State." Since district courts have only original jurisdiction, the inevitable logic is that a district court has no jurisdiction to hear appeals from state courts. This conclusion was the unremarkable holding in *Rooker*
v. Fidelity Trust Co.86 Once a state court has adjudicated an issue, only the state appellate courts, and afterwards the Supreme Court, may conduct a direct review of the matter.87 This rule was reaffirmed in District of Columbia Court of Appeals v. Feldman: there the Supreme Court deemed situations in which "constitutional claims ... are inextricably intertwined" with the state court judgment should be included in the rule that a district court cannot directly review a state court judgment.88 Thus, the Rooker-Feldman doctrine has some overlap with the procedures under the Younger abstention doctrine.89

In a case involving Younger abstention, a party to a pre-existing proceeding in a state court invokes constitutional rights to begin a second independent proceeding in federal court, in which the party requests a federal injunction to end the proceeding in the state court. This sequence should be distinguished from the mechanism of removal. In a case involving removal, a civil action or a criminal action is commenced in a state court and the state defendant exercises a statutory right to remove the entire case to federal court, where it is decided by a federal judge. This removal is possible when the state defendant is a federal official, any person who is denied or cannot enforce in state court a right under a law providing equal civil rights, or any person who is being sued for doing an act under authority of a law providing for equal rights or for refusing to do an act on the grounds that it would be inconsistent with such a law.90 Younger abstention and the removal statutes are separate and distinct themes.

The last mentioned theme that intersects with the Younger doctrine is res judicata/collateral estoppel, also known in the modern parlance as claim preclusion/issue preclusion.91 The

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86. 263 U.S. 413 (1923).
Supreme Court has held that the failure to appeal a state criminal conviction does not bar prospective federal declaratory and injunctive relief to prevent further prosecution under the same statute. The claim preclusive and issue preclusive effects of federal lower court declaratory judgments obtained by particular plaintiffs, however, remains uncertain. Whether a lower federal court may enjoin a pending state prosecution initiated against a previously successful plaintiff to an action for a declaratory judgment and the extent to which other parties may rely on the preclusive effect of such an earlier declaratory judgment are open questions.

Understood within the context of these various principles of federal jurisdiction, the nonintervention rule of Younger keeps the federal court from interfering in the state proceeding. This nonintervention is a norm of federal jurisdiction, although at times competing norms support federal intervention. This complexity is just what one would expect in a doctrine that partakes of such basic constitutional values.

D. Radiants of the Younger Abstention Doctrine

The issue decided in Younger, the case, was momentous but narrow: the propriety of a federal court enjoining a contemporaneous state criminal trial. The principle of federalism in Younger, the doctrine, radiates in different directions and in varying degrees. Here considered briefly are six directions in which the doctrine extends: declaratory judgments when state proceedings are pending, declaratory judgments when state proceedings are not pending, injunctive relief when state proceedings are not pending, state administrative proceedings, injunctions against state and local executive officers, and state civil cases when the government is a party and between private parties.

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93. See Steffel v. Thompson, 415 U.S. 452, 470-71 (1974); id. at 477 (White, J., concurring); id. at 482 n.3 (Rehnquist, J., concurring).

94. See Collins, supra note 48.

1. Declaratory Judgments When State Proceedings are Pending.—The first issue of extension was whether the Younger doctrine applied to a request for declaratory relief from a plaintiff who was subject to a pending criminal prosecution in state court. The answer came in a companion case to Younger, which held that the principles of the main decision were fully applicable to actions for declaratory judgments. Justice Black, author for the Court, concluded in Samuels v. Mackell that "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid." The emphasis in Younger was that constitutional issues should be decided in the state court within the pending criminal prosecution. The Court held, therefore, that "in cases where the state criminal prosecution was begun prior to the federal suit . . . where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." Nothing should be made of the tantalizing adverb "ordinarily," for the Court blinked at fine distinctions between injunctive and declaratory relief to conclude that "the practical effect of the two forms of relief will be virtually identical." A related issue that remains unresolved is whether a federal court may provide monetary relief to an individual who is a criminal defendant in state court when the federal action for damages arises from the same episode that is the subject of the state prosecution. The Supreme Court has indicated only that a stay of the federal damage action is appropriate in that situation.

2. Declaratory Judgments When State Proceedings are Not Pending.—In Steffel v. Thompson, decided a few terms after

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Younger, a unanimous Supreme Court held that a federal court could enter a declaratory judgment when there was no ongoing state criminal prosecution. 101 "When no state criminal proceeding is pending at the time the federal complaint is filed," the Court concluded that the Younger principle did not apply since "federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." 102 This precedent establishes the proposition that a federal court may issue a declaratory judgment if state criminal proceedings are threatened, as in Steffel, but not actually pending. Of course, the "case or controversy" requirement of article III otherwise must be satisfied, as is true in all declaratory actions. 103

Just what constitutes a pending state proceeding is somewhat undetermined. Younger and Samuels, one of the companion cases, make it evident that abstention is triggered by a state indictment or information. The Supreme Court has deemed a grand jury investigation sufficient to justify at least a federal court stay of an action for damages. 104 Some members of the Court have said that "any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief." 105

Just when a state prosecution is pending is a fluid concept. In Hicks v. Miranda, the Supreme Court ruled that a federal court could not enter a declaratory judgment after a state prosecution was commenced, even though the state prosecution was filed the day after the filing of the federal action. 106 The Court held that "where the state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of Younger v. Harris should apply in full force." 107 This holding gives the state prosecutor, in effect,

102. Id. at 462.
106. 422 U.S. 332 (1975).
107. Id. at 349.
the power to remove an action for a declaratory judgment from federal court by beginning a prosecution against the federal plaintiff in a state court at some preliminary stage of the federal suit: 108

Hicks reveals that the Court's comity rationale is not a principle of mutuality, but one of unilateral deference to state courts. State judiciaries need not defer to the federal court's interest in deciding constitutional claims that are properly within their jurisdiction, but federal courts must dismiss cases as soon as state litigation is commenced. 109

3. Injunctive Relief When State Proceedings are Not Pending.—Although a few Justices offered their views, the Court's decision in Steffel did not address whether a federal court could issue an injunction in the absence of a state court proceeding; 110 the holding dealt only with declaratory judgments, although the majority observed in dictum "that a declaratory judgment will have less intrusive effect on the administration of state criminal laws" than would an injunction. 111 The next year, however, the Court decided Doran v. Salem Inn, Inc., 112 a case within the purview of Steffel in which no action was pending in state court. The Court ruled that a preliminary injunction could issue, without satisfying the exceptions to the Younger doctrine, to preserve the status quo while the district court considered whether to grant declaratory relief. 113 The Court seemed to imply, however, that a permanent injunction might be treated differently because "a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." 114

In another case within the purview of Steffel, the Court ignored this implied distinction. According to the holding in Wooley v. Maynard, 115 a permanent injunction may issue so long as there is no proceeding pending in state court. Although there is a

108. Id. at 357 (Stewart, J., dissenting); see Fiss, supra note 51, at 1135-36.
111. Id. at 469.
112. 422 U.S. 922 (1975).
113. Id. at 930.
114. Id. at 931.
general policy against federal courts enjoining enforcement of
criminal statutes, the Court concluded that an injunction was ap-
propriate under "exceptional circumstances" upon "a clear showing
that an injunction is necessary in order to afford adequate protec-
tion of constitutional rights." The facts before the Court were
exceptional in that the federal plaintiff had been prosecuted three
times in five weeks under a particular statute. In order to uphold
the injunction, the Court held the statute to be unconstitutional. Thus,
under the Younger abstention doctrine, both preliminary and
permanent injunctions are treated the same as declaratory judg-
ments.

4. State Administrative Proceedings.—The Younger decision
has its origin in judicial federalism, the comity inherent in our
nation's system of dual courts. The Supreme Court's extension of
the Younger doctrine has not been so restricted.

The Court first applied the Younger abstention doctrine to
state administrative proceedings in Middlesex County Ethics Com-
mittee v. Garden State Bar Association. In that case, the plain-
tiffs sued in federal court, alleging that their first amendment rights
were being violated in an ongoing administrative investigation by
a state bar ethics committee. The Supreme Court affirmed the dis-
trict court's decision to dismiss the suit in deference to the state
proceeding, holding that "[t]he policies underlying Younger are
fully applicable to noncriminal judicial proceedings when impor-
tant state interests are involved." The administrative investiga-
tion was sufficiently "judicial" in that the state supreme court
supervised the bar ethics committee system and reviewed the
result. The state's interest in assuring the professional conduct of
lawyers was "extremely important." Beyond this, the Court's
opinion was not terribly specific.

The Middlesex County decision could have been narrowed to
the facts: the bar disciplinary proceedings were an adjunct to the
state judicial system. Despite this aspect of Middlesex County, the

116. Id. at 712.
117. Id. at 715.
119. Id. at 432.
120. Id. at 434.
potential for expanding the abstention doctrine was realized a few years later in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*121 A teacher at a church-run school filed a complaint with the state civil rights commission alleging various violations of her rights, including unlawful gender discrimination. The school invoked the first amendment in a plea in bar before the commission and also filed a suit in federal court seeking to enjoin the state administrative hearing. The federal trial court entered a judgment on the merits. The Supreme Court held that the district court "should have abstained from adjudicating this case under *Younger v. Harris* . . . and later cases."122 The Court re-emphasized that the *Younger* abstention doctrine extended to state administrative proceedings "in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim."123 The Court reasoned that eliminating gender discrimination was an important state interest and found that the procedures for state judicial review of the administrative proceeding provided an adequate opportunity to raise the constitutional issues.124

The holding in *Dayton Christian Schools* potentially broadened federal court deference to state administrative agencies in a profound way.125 Last Term, however, the Supreme Court gave no sign of applying the rule so broadly. In *New Orleans Public Service, Inc. v. Council of New Orleans*,126 the Court declined to extend the *Middlesex County* principle to a city council's ratemaking process that was being challenged in federal court under a theory of pre-emption. Instead, the Court held that

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121. 477 U.S. 619 (1986); see Edwards, *supra* note 42 at 1028-29.
122. 477 U.S. at 625.
123. *Id.* at 627; see also *Gibson v. Berryhill*, 411 U.S. 564, 576-77 (1973).
124. 477 U.S. at 629.
125. In a curious footnote, the Court distinguished *Patsy v. Board of Regents*, 457 U.S. 496 (1982), which held that one need not exhaust state administrative remedies before bringing a lawsuit under § 1983. 477 U.S. at 627 n.2. If no administrative proceeding is pending, a plaintiff may sue in federal court without exhausting state administrative remedies; once an administrative proceeding is initiated, the federal court should abstain, at least if the state interest is important and the procedures are adequate. *Id.*
Younger abstention was not appropriate. The controlling inquiry was "the importance of the generic proceedings to the state." Regulating intrastate retail rates of electric utilities was important. The Court seemed to minimize at least some of the potential for expansion in Middlesex County and Dayton Christian Schools to say that "it has never been suggested that Younger requires abstention in deference to a state judicial proceeding reviewing legislative or executive action." In recasting those two earlier opinions, the Court pointed out that those administrative proceedings were not yet at an end when the federal court proceeding was begun. Now we are told that the Court has "never squarely focused" on whether the Younger rule prevents a challenge to a final administrative proceeding in federal court. Thus, although it remains to be seen, this Younger radiant may no longer be as vibrant as it once was. Future decisions also will need to clarify the blurred distinctions between this extension of Younger and the Burford abstention doctrine.

5. Injunctions Against State and Local Executive Officers.—Perhaps the most curious possible extension of the Younger abstention doctrine is found in the hints in Supreme Court opinions about a federal court's authority to consider constitutional challenges to state and local executive actions. The first such implication was made in O'Shea v. Littleton. Plaintiffs brought suit in federal court under § 1983, alleging that the municipal court officials intentionally discriminated against blacks in setting bail and in sentencing. The Supreme Court held that the case or controversy requirement was not satisfied in that the dispute was not yet ripe. The opinion went on, however, to suggest that the principle behind the Younger doctrine should apply: "This seems to us nothing less than an ongoing federal audit of state criminal proceedings which

127. Id. at 2520.
128. Id. at 2516.
129. Id. at 2518.
130. Id. at 2518 n.4.
132. See id. at 2513-15 (discussing Burford); see also supra text accompanying notes 23-27.
134. Id. at 495-99.
would indirectly accomplish the kind of interference that *Younger v. Harris* . . . and related cases sought to prevent." \(^{135}\) This conclusion was not a direct application of *Younger*, since there was no pending state proceeding—a certain doctrinal condition—and since the challenge raised was to the very adequacy of the state court system to decide these matters—a clear exception to the doctrine. The Court best may be understood to have invoked an analogy, expressing the "concern that constant federal court monitoring of state courts would inevitably entail federal judicial interference with ongoing state proceedings of a sort clearly prohibited in *Younger.*" \(^{136}\)

That the Court had in mind application of, rather than mere analogy to, *Younger* abstention to state and local executive actions is suggested, however, by the decision in *Rizzo v. Goode*. \(^{137}\) Finding substantial evidence of racial discrimination in patterns of police brutality and concluding that department disciplinary procedures were inadequate, the district court issued an injunction to reform the police procedures. The Supreme Court refused federal relief because the case or controversy requirement was not satisfied; the alleged injury was not "real and immediate." \(^{138}\) What a small, unnamed minority of police officers might do to plaintiffs in the future based on their subjective evaluation of the deterrence of existing procedures was described by the Court as too speculative and conjectural. Repeating the invocation of the *Younger* doctrine in *O'Shea*, the Court sounded an "Our Federalism" call for judicial restraint even in matters of state and local executive action:

Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch.

\(^{135}\) *Id.* at 500.


\(^{137}\) *423 U.S. 362* (1976).

\(^{138}\) *Id.* at 371-73.
of an agency of state or local governments such as petitioners here.\textsuperscript{139}

The Court elaborated on this theme again in \textit{City of Los Angeles v. Lyons}.\textsuperscript{140} Again, the Court held that the article III requirement of a case or controversy was not satisfied.\textsuperscript{141} The plaintiff did not establish a sufficiently real and immediate threat that without justification or provocation he would be subjected again to the challenged police chokehold procedure. In an alternative holding that assumed standing, the Court ruled that notions of equitable restraint would bar any federal injunctive relief against the police department, and directed the lower courts to practice "restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws in the absence of irreparable injury which is both great and immediate," and cited \textit{Younger v. Harris}.\textsuperscript{142} The Supreme Court explicitly invoked "normal principles of equity, comity, and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities."\textsuperscript{143} This extension of \textit{Younger} abstention does not appear to be waning.\textsuperscript{144}

\textbf{6. State Civil Cases When the Government is a Party and Between Private Parties.}—As the \textit{Younger} abstention doctrine was extended to apply to state civil proceedings, the tentative effort in the lower federal courts was to describe a threshold below which there would be no abstention. Extrapolating from the doctrine’s criteria, the lower courts focused on whether the state proceedings were ongoing, of an inherently judicial nature, and sufficiently important to deserve deference under \textit{Younger}.\textsuperscript{145} The lower courts were expressly reluctant to extend \textit{Younger} abstention beyond the Supreme Court holdings.\textsuperscript{146} The high Court’s parallel precedent has

\begin{itemize}
\item \textsuperscript{139} \textit{Id.} at 380.
\item \textsuperscript{140} 461 U.S. 95 (1983).
\item \textsuperscript{141} \textit{Id.} at 105.
\item \textsuperscript{142} \textit{Id.} at 112.
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{146} \textit{Id.} at 939.
\end{itemize}
had a momentum of its own, however, toward extending the doctrine. This momentum culminated in *Pennzoil Co. v. Texaco, Inc.* That higher precedent is chronicled in the next part of this Article.

III. *Pennzoil Co. v. Texaco, Inc.*

A. The Momentum of Precedent

The decision in *Younger* arose in the particular context of a state criminal proceeding. In a series of holdings, however, the Supreme Court extended the doctrine, first to civil proceedings in which the state was a party and then to civil suits between private parties. Hence, the characterization of the proceeding does not control. The controlling question is a broader one: whether the exercise of the equity power of the federal court will do violence to "Our Federalism." In other words, the question is whether a federal injunction will "unduly interfere with the legitimate activities of the states."\(^{147}\)

The first Supreme Court decision to apply *Younger* abstention in a civil context was *Huffman v. Pursue, Ltd.*\(^{148}\) Under a state statute declaring the exhibition of obscene films to be a nuisance, state officials sued a theater in state court and obtained a state court judgment closing the theater for one year. Forgoing the state appeal, the theater owner sued in federal court under § 1983 seeking declaratory and injunctive relief. A three-judge district court enjoined the state court’s judgment under the first and fourteenth amendments to the extent that it applied to films that had not yet been adjudged obscene; but on direct review, the Supreme Court reversed and held that the district court should have abstained.\(^{149}\) Concluding that *Younger* obliged abstention, the Court reasoned that the state nuisance proceeding was "more akin to a criminal prosecution than are most civil cases."\(^{150}\) The majority emphasized that the state was a party in the civil nuisance proceeding "in aid of and closely related to" criminal obscenity statutes and, there-


\(^{149}\) 420 U.S. at 611-12.

\(^{150}\) *Id.* at 604.
fore, "an offense to the state’s interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding." There was no showing made on any of the Younger exceptions. The majority expressly stated that this holding was not a "general [pronouncement] upon the applicability of Younger to all civil litigation."

The dissent in Huffman described the holding as "obviously only the first step" toward extending the Younger abstention doctrine to state civil proceedings generally. The second foot fell in Trainor v. Hernandez, a case in which the state welfare department brought a civil fraud proceeding in state court to recover welfare benefits from a recipient who allegedly concealed personal assets. Under a state statute, the department obtained a writ of attachment against the recipient's savings account. The recipient sued in federal court to challenge the constitutionality of the state attachment statute and sought injunctive and declaratory relief. The Supreme Court held that Younger abstention did apply, again emphasizing that, as a party to the suit, the state was performing a sovereign function: "Both the suit and the accompanying writ of attachment were brought to vindicate important state policies such as safeguarding the integrity of those programs. The state authorities also had the option of vindicating these policies through criminal prosecutions." Again, the Court expressly declined to decide whether to extend Younger v. Harris to all civil suits.

The next important precedent for applying Younger abstention to civil proceedings in state court brought by the state government was Moore v. Sims. The state agency had removed children from their home under the authority of an emergency ex parte order of a state court giving the agency temporary custody. The parents successfully sued in federal court on a procedural due process challenge to the state procedures. The Supreme Court held that the district court should not have exercised jurisdiction but should have abstained under the Younger doctrine. Again,

151. Id.
152. Id. at 607.
155. Id. at 444.
156. Id. at 444-45 n.8. But see id. at 450 (Brennan, J., dissenting).
158. Id. at 423.
the state was a party and the civil proceeding was in aid of and closely related to criminal statutes. The majority seemed intent on broadening the rationale to make *Younger* abstention "fully applicable to civil proceedings in which important state interests are involved."¹⁵⁹ Yet again, the majority formally eschewed decision of that issue.¹⁶⁰ It began to appear that the term "important" applied whenever a state agency had statutory authorization to sue in state court. Such authorizations were the proper object of federal court deference "unless state law clearly bars the interposition of the constitutional claim."¹⁶¹

During the same Term *Trainor v. Hernandez* was decided, the Supreme Court for the first time applied the *Younger* abstention doctrine to a state civil proceeding in which the state was not a party litigant in *Juidice v. Vail.*¹⁶² Individual debtors were held in contempt in state court in supplemental proceedings brought by their judgment creditor. The contemnors filed suit in federal court seeking injunctive and declaratory relief against the state contempt proceeding. Although the actual parties in the state court, the creditors and debtors, were private litigants, the Supreme Court placed emphasis on the state's interest in state court contempt proceedings. The Court explained that the "State's interest in the contempt process, through which it vindicates the regular operation of its judicial system . . . is of sufficiently great import to require application of the principles of [the *Younger* line of] cases."¹⁶³ The majority located the state court contempt power "at the core of the administration of a State's judicial system,"¹⁶⁴ and admitted that the decision went further along the continuum from *Younger* criminal prosecutions to *Huffman*/quasi-criminal nuisance proceedings to *Juidice*/contempt proceedings. But labels—criminal, quasi-criminal, civil—did not control. What mattered were the federal interference with state interest and the affront to the state judiciary that were to be avoided by abstention. Once

¹⁵⁹. *Id.*
¹⁶⁰. *Id.* at 423 n.8. *But see id.* at 435-36 (Stevens, J., dissenting).
¹⁶¹. *Id.* at 425-26. *But see id.* at 436-37 (Stevens, J., dissenting).
¹⁶³. *Id.* at 335.
¹⁶⁴. *Id.*
again, the Court issued the standard disclaimer that the holding did not necessarily extend Younger to all state civil proceedings.165

On the eve of the decision in Pennzoil Co. v. Texaco, Inc., the question remained open, at least technically, whether Younger abstention had application to state civil suits between private parties in which the state government was not a litigant.166 In that decision, the Supreme Court once again asymptotically approached the issue.167

B. The Decision168

The facts in Pennzoil Co. v. Texaco, Inc.169 are almost certainly familiar to anyone reading this Article.170 The dispute began with negotiations towards a merger and acquisition by Pennzoil of Getty Oil.171 Texaco eventually purchased Getty Oil for a higher price than Pennzoil had agreed to pay, and Pennzoil sued Texaco in state court for tortious interference with contract.172 The state court jury returned a Brobdingnagian verdict for Pennzoil: $7.53 billion in actual damages and $3 billion in punitive damages. Once the state court entered judgment, Pennzoil could execute the judgment under state law unless Texaco filed an $11 billion supersedeas bond.173 Since that bond amount was beyond the realm of finan-

165. Id. at 336 n.13. But see id. at 345 (Brennan, J., dissenting).


167. "[T]he Court resolved this uncertainty and applied Younger to private civil matters." E. Chemerinsky, supra note 10, at 644.


170. See generally 481 U.S. at 3-6.


172. Both Pennzoil and Texaco had incorporated in Delaware, so there was no diversity jurisdiction to allow removal to federal court. See 28 U.S.C. §§ 1332, 1441 (1982); supra text accompanying note 90.

cial possibility, Texaco filed suit in a federal district court challenging the bond requirement under due process and equal protection. In turn, Pennzoil urged Younger abstention. The district court granted a preliminary injunction against Pennzoil to prevent execution of the state court judgment. The Court of Appeals for the Second Circuit affirmed. The Supreme Court reversed, with all nine justices agreeing in the judgment. Four justices joined a "Powellian" opinion, concluding that "[t]he courts below should have abstained under the principles of federalism enunciated in Younger v. Harris."

The majority invoked three principles underlying abstention. First, the notion that equity should not interfere when a remedy at law is adequate, especially in a criminal law case, was repeated again in familiar litany and with familiar irrelevancy to the case sub judice, a civil suit between two private litigants. The Court's analysis next invoked the hackneyed quotation of "Our Federalism." Recognizing the momentum of Supreme Court precedent, the Court found Younger abstention to apply not only to state criminal prosecutions but also to pending proceedings "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity


177. 481 U.S. at 10. Justice Powell authored the majority opinion and was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia. Id. at 3. Justice Scalia wrote a concurring opinion, in which Justice O'Connor joined, asserting that there was no Rooker-Feldman issue. Id. at 18 (Scalia, J., concurring). Justice Blackmun would have had the district court abstain under the Pullman doctrine rather than the Younger doctrine. Id. at 27 (Blackmun, J., concurring). Justices Brennan, Marshall, and Stevens thought that abstention was inappropriate, but each would have ruled against Texaco on the constitutional merits. Id. at 18 (Brennan, J., concurring in the judgment); id. at 23 (Marshall, J., concurring in the judgment); id. at 29 (Stevens, J., concurring in the judgment).

In this line of cases, close divisions of the Justices are the norm and concurring and dissenting opinions are common. For the box scores, see Note, supra note 89, at 1069-71.

178. Id. at 17.
between the States and the National Government." The third principle underlying Younger is the more direct concern in Pullman abstention: "avoid[ing] unwarranted determination of federal constitutional questions." When a federal court reaches the constitutional issue based on an assumed interpretation of a state law, the constitutional holding is vulnerable to being rendered "meaningless"—akin to a post hoc advisory opinion—by some subsequent state court redetermination of the state law issue. This fact of judicial federalism is more obvious in diversity jurisdiction and Pullman abstention, but has been noted in earlier Younger discussions. This principle has new significance after Pennzoil, especially in cases like Pennzoil in which the state constitution has a provision parallel to the federal clause that is subject to definitive state court interpretation.

The Court once again emphasized the second principle, the indeterminate inquiry into the importance of the state interest that the Court had followed to extend "Our Federalism" to pending state civil proceedings from Younger to Huffman to Trainor to Moore to Juidice. The Court reasoned that Juidice was controlling. The decision to abstain in Pennzoil, like the decision in Juidice, "rest[ed] on the importance to the States of enforcing the orders and judgments of their courts." This reasoning broadened the Younger abstention doctrine. Contempt is integral to the State's court system and the state was indirectly a party in the person of Juidice, the state judge whose contempt order required that

179. Id. at 11; see supra Subpart III(A).
184. See supra Subpart III(A).
185. 481 U.S. at 13.
186. 481 U.S. 1, 13 (1987).
Vail be arrested, jailed, and fined. In *Pennzoil Co. v. Texaco, Inc.*, the Court was unwilling to draw a line between the contempt power and the State's interest in ensuring that Pennzoil, a private litigant, could collect on the judgment against Texaco: "Both *Juidice* and this case involve challenges to the processes by which the State compels compliance with the judgments of its courts." The Court insisted that this state interest went beyond the State's undifferentiated interest in the civil jurisdiction of its court system. Almost as if to mock commentators as much as to answer disagreeing Justices, the Court dropped the almost obligatory footnote that its "opinion does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court." Finally, the Court rejected the argument that an exception to *Younger* should apply because Texaco had not satisfied its burden of showing that the state courts did not offer an adequate forum to hear and decide the federal constitutional issues. Texaco had not in fact presented the constitutional claims, or any claims for that matter, to any state appellate court. Therefore, the Court assumed an adequacy in state procedures, absent unambiguous and controlling state law authority to the contrary. This strict a standard may amount to the functional equivalent of a requirement that state appellate court remedies be exhausted.

C. The Importance of This Precedent

*Pennzoil Co. v. Texaco, Inc.* is a serious precedent of uncertain dimension. A narrow reading is possible and also is consistent with the language and logic of the opinion; namely, *Pennzoil* is simply an application of *Juidice* and does not extend

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189. 481 U.S. at 13-14.
190. *Id.* at 14 n.12. *But see id.* at 30 n.2 (Stevens, J., concurring in judgment).
193. *See Althouse, supra* note 168, at 1075.
Younger abstention beyond the important state interest of enforcement of court orders: "Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments are obtained." On the other hand, a broad reading is possible and consistent with the language and logic of the opinion: Pennzoil finally extends Younger abstention to all state civil proceedings, footnote disclaimers notwithstanding: "So long as those challenged statutes relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand." These two sentences are back-to-back in the opinion. Thus, the "correct" interpretation depends on which sentence is emphasized, and the final answer depends on the emphasis of a majority of the Court some time in the future.

One who takes the narrow view and interprets Pennzoil as an incremental precedent might anticipate the next increment. Perhaps the Court will combine Younger abstention in private suits with challenges to prejudgment attachments. In this way, the abstention doctrine might begin to have the effect of removing from federal court procedural due process challenges to state procedures. Thus, the precedent may just be the latest in a line of "Our Federalism" decisions.

One who takes a broader view and interprets Pennzoil as a more profound decision of "Our Federalism" might consider the future of the abstention doctrine. First, there is that intriguing—at least to professors of federal jurisdiction—footnote nine. The majority explained that Pullman abstention was not raised in the Supreme Court and would not be considered, and then offered this dictum:

We merely note that considerations similar to those that mandate Pullman abstention are relevant to a court's decision whether to abstain under Younger. The various types of abstention...

195. 481 U.S. at 14.
198. See Lebbos v. Judges, 883 F.2d 810 (9th Cir. 1989); Comment, supra note 168, at 233-34.
199. 481 U.S. at 11 n.9.
tion are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.  

This dictum could be understood to reinforce a broad interpretation that Younger abstention applies whenever a federal plaintiff is seeking to enjoin state court proceedings. Indeed, one of the attorneys for Pennzoil has concluded that "[a]s a result of the Pennzoil decision, the Younger abstention doctrine no longer applies only where there is a pending case . . . . Instead, it applies to any case where pending state judicial proceedings are structurally capable of resolving the problem." The message in the footnote might presage a kind of grand unified theory of abstention on the level of generality of the "Our Federalism" slogan. In other words, categories of abstention would be merged, distinctions between the categories would be blurred, and abstention would become a conclusory label. Like too many other issues in constitutional law, it would amount to ad hoc balancing in which the weighing of the interests is done "off the books" by some judicial sleight of hand. This balancing could result in fewer abstentions or more abstentions, depending on the judges' attitudes towards federalism. The various categories of abstention might merge into an omnibus abstention doctrine. On the other hand, the Court was careful in this dictum to differentiate between the two categories of abstention, in effect re-emphasizing their separateness. Given the overall momentum of the precedent radiants and their combined force, reinforced by the judicial attitudes they portray, this footnote, at least, holds the potential for much greater deference to state courts.

There are any number of other intriguing thematic questions about the Pennzoil holding: How much of the enthusiasm for this

200. Id.


neo-abstention version of "Our Federalism" is properly attributable to a concern of self-restraint to preserve scarce federal judicial resources? Will the decision be understood as a precedent for exhaustion of state court remedies under § 1983? Does it have the effect of overruling *Mitchum v. Foster*, which held that § 1983 is an exception to the Anti-Injunction Statute, § 2283? Does the *Younger* deference now owed to state courts oblige deference any time the state courts are open to hear the constitutional issue? What does *Pennzoil* contribute to the debate over parity? Is the presumption of adequacy in the state forum ever rebuttable, in theory and as a practical matter? Should Congress, if it can, legislate in this area and, if so, would it help? Is the preclusive effect of not taking an appeal in the state court system complete and absolute?

The Court's analysis in *Pennzoil* thus raises more questions than it answers, as is fitting of a self-described "complex of considerations." Within the complex of *Younger* abstention and, more particularly, within the radiant of precedent extending the doctrine to civil cases, the Court has provided some answers, tentative though they be.

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No trend of decisions by this Court has been stronger—for two decades or more—than that toward expanding federal jurisdiction at the expense of state interests and state court jurisdiction. Of course, Congress also has moved steadily and expansively to exercise its preemptive power to displace state and local authority. Often decisions of this Court and congressional enactments have been necessary in the national interest. The effect, nevertheless, has been the erosion of federalism—a basic principle of the Constitution and our federal union.


204. *See supra* note 125.

205. *See supra* text accompanying notes 68-72.

206. *See supra* text accompanying note 201.

207. *See supra* text accompanying note 83.

208. *See supra* text accompanying notes 47-60.

209. *See supra* text accompanying notes 73-74; *supra* note 10.

210. *See supra* text accompanying notes 91-93.

211. 481 U.S. 1, 11 n.9 (1987).

The line of expansion resulting in the application of *Younger* abstention to civil proceedings has been traced above.\(^{213}\) The *Younger* abstention doctrine had its origin in a federalism concern for state criminal prosecutions. This concern became more attenuated in *Huffman, Trainor, Moore, and Juidice*. The expansion of the doctrine in other directions served to accentuate this trend.\(^{214}\) Therefore, the decisional analysis in *Pennzoil* is best understood as an extension of precedent rather than an abrupt departure. As the *Younger* analysis has expanded to recognize more state interests, the Court apparently has found it easier and easier to conclude that these state interests were sufficiently important to command deference.

If we pick up the abstention story with *Juidice v. Vail*\(^{215}\)—the decision the *Pennzoil* majority deemed controlling\(^{216}\)—we can appreciate the state of the art of the Court’s state interest analysis. In *Juidice*, the Court recognized that previous applications of *Younger* abstention in civil cases had closely resembled criminal prosecutions and that the state was a party litigant.\(^{217}\) Technically, *Juidice* involved a private suit on a defaulted personal loan. The creditor had sued in state court and won a default judgment. The debtor, Vail, failed to pay the judgment, and the creditor’s attorney, under the state procedures, served him with a subpoena to appear and to give some explanation for the refusal to pay. When the debtor failed to appear, a state judge, Juidice, ordered him to appear to show cause why he should not be held in contempt. When he again failed to respond, the debtor was held in contempt and arrested and was released after he had paid a fine. The debtor then became a named plaintiff in a federal class action challenging the constitutionality of the state collection procedures.

In *Juidice*, the federal injunction would have run against the state judge named in the federal complaint. In *Pennzoil*, the federal injunction would have run against Pennzoil barring it from

\(^{213}\) See supra Subpart III(A); see also Annotation, *Supreme Court’s Views as to Application to Noncriminal Proceedings of Rule Against Federal Judicial Intervention in Pending or Threatened State Proceedings*, 73 L. Ed. 2d 1416 (1984).

\(^{214}\) See supra Subpart II(D).


\(^{216}\) 481 U.S. 1, 13 (1987).

\(^{217}\) 430 U.S. at 333-34.
seeking to enforce the state court judgment. Once upon a time, this would have been a distinction worthy of federalism note: the federal plaintiff in Juidice, unlike the federal plaintiff in Pennzoil, was asking the federal court to intervene in the state court procedure for contempt, a power the Court there described as "at the core" of the power of the state judiciary. In Pennzoil, the state's interest was less direct and more derivative. Understood this way, the state's interest, which the state itself had described as sufficiently neutral that it would acquiesce in federal court intervention, was "essentially nothing more than the interest of state courts in remaining free from federal judicial intrusion." This conclusion would equate the state's interest in protecting the state court judgment for a judgment creditor in Pennzoil with the general state interest in providing a neutral trial forum in any civil suit. Read this way, Pennzoil was a "perfunctory state interest analysis" and "a rather dramatic new extension of Younger . . . to a case with no state official as defendant."

But reconsider Pennzoil. Pennzoil's use of state procedure to enforce its judgment was the state action that gave the federal court jurisdiction under the § 1983 "color of law" requirement. When a private party invokes the active participation of state officials to seize property, the state action requirement of the fourteenth amendment is satisfied. The Supreme Court must have acquiesced in the Second Circuit's conclusions of law to have had subject matter jurisdiction to decide the abstention issue. Therefore, the closer analysis is that the Supreme Court did not order abstention in a case purely or exclusively between two private parties. In Pennzoil, the judgment creditor had in effect risen to the

218. See Althouse, supra note 168, at 1080 (quoting Juidice, 430 U.S. at 335).
219. 481 U.S. at 19 (Brennan, J., concurring in the judgment); see Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1136 n.1 (2d Cir. 1986), rev'd, 481 U.S. 1 (1987); see also supra note 59 and accompanying text.
220. Althouse, supra note 168, at 1053.
221. Id. at 1082. The state's interest may have been exaggerated by the open courts provision in the state constitution. See 481 U.S. 1, 11-12 (1987).
222. Althouse, supra note 168, at 1082.
223. See Note, supra note 212, at 324-25 (quoting Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1136 n.1 (2d Cir. 1986), rev'd, 481 U.S. 1 (1987)).
224. 481 U.S. at 30 n.1 (Stevens, J., concurring in the judgment).
level of a state actor.226 This holding vindicated a state’s interest at least closer to the core of the state court system than appears on first reading, perhaps as well on successive reading by some. Thus understood, the interest in providing for dispute resolution is not alone a sufficiently important state interest to warrant Younger abstention.227 This reading is supported by the repetition in Pennzoil of the by now obligatory footnote that the holding does not reach the question whether Younger abstention is appropriate whenever a civil proceeding is pending in a state court.228 Therefore, the Pennzoil holding does not necessarily oblige automatic abstention whenever a state suit is pending. After the state court trial is complete, however, the state court’s interest in enforcing the decision is important and justifies federal abstention. This consideration is akin to an exhaustion requirement, which is somewhat analogous to the Colorado River criterion for determining which proceeding is primary by comparing the progress of the federal action with that of the state action.229 The majority in Pennzoil seemed to invoke this type of analysis in its careful statement that “we have addressed the situation that existed . . . . when this case was filed in the United States District Court.”230

Finally, we might speculate, along with a thoughtful commentator, that the Supreme Court has played out the analysis of state interests in the Younger abstention doctrine and that the Court ought to rethink “Our Federalism” to pursue an analysis of federal interests.231 This suggestion of returning to first principles would highlight the federal interest in Younger abstention: “an ideal of abstention in deference to pending state court proceedings when to do so will result in speedy attention to federal defenses, increased familiarity with federal law and expertise in handling it, and greater responsiveness by state courts in vindicating federal interests.”

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226. See Note, supra note 212, at 324-25.
228. 481 U.S. 1, 14 n.12 (1987).
229. See supra text accompanying notes 28-34; supra note 125.
230. 481 U.S. at 17-18.
231. Althouse, supra note 168, at 1083-90. “Given the supremacy of federal law and the role of the federal courts in protecting federal rights, the state interest model has long been a puzzling inversion of the intended order . . . .” Id. at 1090.
rights." Viewed from this federal perspective, the holding in *Pennzoil* does not appear so far removed from the original holding in *Younger*. The concept of "Our Federalism" contemplates the supremacy of federal law, the role of federal courts, and the preservation of the constitutional order through the effective and efficient functioning of the dual system. Should the Court pursue this intriguing line of analysis, it may be the most significant impact of *Pennzoil Co. v. Texaco, Inc.* Considered from this perspective of the federal interest thus described, the case arguably presented a more appropriate occasion for abstention than did the original decision in *Younger v. Harris*.

Just what this might portend for federal jurisdiction is highly uncertain. Abstention is supposed to be "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the federal court's order to the parties to return to the state court would clearly serve an important countervailing interest. Federal interest analysis may allow the exception to swallow the rule.

**D. Interpretation by the Supreme Court**

As we have seen, various commentators predicted that the holding in *Pennzoil* would increase the applications of *Younger* abstention most dramatically. Besides a few brief mentions, the precedent has figured prominently in only one later Supreme Court decision (as of the time this Article was written), *New Orleans Public Service, Inc. v. Council of New Orleans*, which was discussed above. The regulated public utility's effort to distinguish *Younger* abstention by raising an issue of pre-emption was

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233. *But cf.* 481 U.S. 1, 30 n.1 (Stevens, J., concurring in the judgment).
234. See Althouse, *supra* note 168, at 1090.
237. 109 S. Ct. 2506 (1989); *see supra* text accompanying notes 126-32.
If the state courts were to be presumed capable of deciding a constitutional issue involving civil rights, there was no reason to suppose them incapable of deciding a question of pre-emption. Instead, the Court held that the *Younger* abstention doctrine did not apply in this ratemaking procedure, which under the Court's precedents was not "judicial in nature." Such a legislative function did not come within the restrictions of "Our Federalism." The majority's explanation of how to identify a state interest for purposes of *Younger* abstention was most relevant to this Article: "We do not look narrowly to its interest in the outcome of the particular case—which could arguably be offset by a substantial federal interest in the opposite outcome; rather, what we look to is the importance of the generic proceedings to the state." Whether this is an inadvertent rejection of the federal interest analysis cannot be determined, since that theory apparently has not yet made the transition from law reviews to briefs.

### E. Interpretation by the Lower Courts

A "Goldilocks" reading of the *Pennzoil* opinion—not too narrow, not too broad, but just right—has escaped the lower federal courts so far. This quick sampling of decisions in the courts of appeal is rather inconclusive. What *Pennzoil* ultimately will add to or take away from the *Younger* abstention doctrine still remains to be seen. Here are a few preliminary applications of *Pennzoil Co. v. Texaco, Inc.* worth a brief note.

The lower federal courts continue to apply the three-prong test announced in *Middlesex County* when deciding whether or not to abstain from a case based upon *Younger*. *Younger* abstention is required if: (1) there are pending state judicial proceedings; (2) the state proceedings implicate important state interests; and (3)

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238. 109 S. Ct. at 2516.
239. *Id.* at 2519.
240. *Id.* at 2516.
242. See Lebbos v. Judges of Superior Court, 883 F.2d 810 (9th Cir. 1989); Partington v. Gedan, 880 F.2d 116 (9th Cir. 1989); Pincham v. Illinois Judicial Inquiry Bd., 872 F.2d 1341 (7th Cir. 1989); Hoai v. Sun Ref. and Mktg. Co., Inc., 866 F.2d 1515 (D.C. Cir. 1989); Polykoff v. Collins, 816 F.2d 1326 (9th Cir. 1987).
the state proceedings provide an adequate opportunity to raise federal questions.\textsuperscript{243}

In \textit{Polykoff v. Collins},\textsuperscript{244} owners of several adult book and video stores filed an action in federal district court seeking injunctive relief and a judgment declaring unconstitutional a state statute proscribing the sale of obscene items. The district court denied the motion for a temporary restraining order, but set a hearing for a preliminary injunction. Before the scheduled federal hearing, the state district attorney filed a second declaratory judgment action in a state court seeking to have the same statute declared constitutional by the state court. The district attorney for the state then filed a motion to dismiss in the federal district court, arguing that the federal court should abstain because of the proceeding pending in state court and because the owners lacked standing. The federal district court rejected these arguments but ultimately denied the owners’ requests for federal injunctive and declaratory relief and the owners appealed.

The Ninth Circuit held that \textit{Younger} abstention would have been inappropriate because the state’s interest was not important enough to satisfy the second prong of the \textit{Middlesex County} test.\textsuperscript{245} The court of appeals reasoned that since the declaratory judgment action in state court did not involve state enforcement of its statutes or “compliance with the judgments of its courts,” the state’s interest did not meet the \textit{Pennzoil} test of being “so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.”\textsuperscript{246} The court of appeals seems to have distinguished the case from \textit{Pennzoil} in that \textit{Pennzoil} involved an action to prevent enforcement of a state statute which was specifically designed to give effect to the state court’s judgment. Since the Ninth Circuit left alone the district court’s determination that the owners had standing, there must have been at least a threatened enforcement of the state obscenity statute. The determinative difference, therefore, appears

\textsuperscript{243} Middlesex County Ethics Comm. v. Garden State Bar Ass’n, 457 U.S. 423, 432 (1982); see supra text accompanying notes 118-32.

\textsuperscript{244} 816 F.2d 1326 (9th Cir. 1987); see also Nilsson v. Ruppert, Bronson & Chicarelli, 888 F.2d 452 (6th Cir. 1989).

\textsuperscript{245} 816 F.2d at 1332.

\textsuperscript{246} Id. at 1332-33.
to be that the federal court's construction of the statute would have no effect upon the state court's judgment. Responding to the state district attorney's argument that abstention was appropriate to allow the state court to give the statute a narrowing construction, the court of appeals noted that the state supreme court already had definitively construed the statute.247 Such "[a]n 'abstract possibility' " that the state court might render adjudication of the federal question unnecessary did not require Pullman abstention.248 In Pennzoil, the Supreme Court had noted that the considerations for avoiding unwarranted determinations of constitutional issues expressed in Pullman were also relevant in determining the propriety of Younger abstention;249 however, since Pullman abstention was unwarranted because the state obscenity statute was unambiguous, the Ninth Circuit's holding reveals no inconsistency with Pennzoil. Moreover, the decision of the court of appeals may have anticipated the federal interest analysis described above and concluded that a prompt decision of the federal question was appropriate.

The Court of Appeals for the District of Columbia also applied the three-prong test of Middlesex County in Hoai v. Sun Refining and Marketing Co.250 The case involved a contract dispute. The plaintiff, A, filed suit in the D.C. Superior Court against B and C. Subsequently, A and C entered into a consent agreement which was ratified by the superior court. B was not a party to the consent hearing in superior court. Thereafter, B filed a federal question action in federal court against A. B's suit did not attack the earlier Superior Court decree in any way. It was a separate action altogether. A moved to dismiss on abstention grounds. The court of appeals held abstention was not appropriate: "The Superior Court simply ratified a voluntary agreement between [A] and [C]. The consent order did not represent an exercise of the Superior Court's independent judgment and [B] has not attacked that judgment."251 Thus, the court of appeals found no legitimate basis for applying the Younger-Pennzoil principles of abstention. That the

247. Id. at 1334.
248. Id.
250. 866 F.2d 1515 (D.C. Cir. 1989).
251. Id. at 1519.
judgment of the Superior Court was not being attacked seems to have controlled, more so than that the ratification did not require any independent judicial consideration. If the federal court action had been used to set aside some state court enforcement of the breached consent agreement that previously had been ratified by the state court, the abstention holding would have been different.

The *Pennzoil* emphasis on comity and federalism was emphasized in *Partington v. Gedan*. The federal plaintiff was an attorney who had been charged with ineffective assistance of counsel under state supreme court rules. After state proceedings were instituted against him, plaintiff filed suit in federal district court under § 1983. The district court concluded that abstention was appropriate because the plaintiff could have raised his constitutional challenges in the ongoing state court proceeding, and the Court of Appeals for the Ninth Circuit affirmed.

All three parts of the *Middlesex County* test were satisfied. The court of appeals quickly declared that the nature of the proceedings constituted an important state interest and that the state proceedings were ongoing. Then the court gave attention to the last prong, which deals with the plaintiff's ability to present the federal constitutional claims in state court. Taking its cue from *Pennzoil*, the court of appeals observed that "Federal Courts 'cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims.' " Quoting further from *Pennzoil*, the court of appeals held that since the plaintiff had not yet attempted to present his federal claims in the related state proceedings, the federal court would "assume that state proceedings will afford an adequate remedy." As was true of Texaco, the plaintiff simply failed to carry the burden of proof to overcome this presumption, and his argument against abstention likewise failed.

The Ninth Circuit held that the *Younger* abstention requirements were satisfied in *Lebbos v. Judges of Superior Court*. A
judgment was filed against an attorney. Under the authority of a state statute, a judge appointed a receiver who under another state statute sought to collect on the judgment by invading the attorney’s business affairs and by seizing real property owned in trust by her daughter. The attorney filed suit in federal district court seeking an injunction to prevent any further collection efforts by the receiver and to have the statutes declared unconstitutional. The district court abstained, and the Ninth Circuit affirmed.\textsuperscript{258} The Ninth Circuit cited \textit{Pennzoil} for the proposition that the \textit{Younger} doctrine should be applied to civil proceedings when the state’s interest in the proceeding is so important that exercise of the federal judicial power would disregard the comity between the states and the federal government.\textsuperscript{259} In this case, the state’s interest was the same as that argued in \textit{Pennzoil}, i.e., administering certain aspects of its judicial system. The court of appeals found that any action by the federal trial court would have interfered with an ongoing state proceeding that was being conducted in order to enforce compliance with the state court’s judgments.\textsuperscript{260}

Another sample decision illustrates how subtle the precedential influence of \textit{Pennzoil} has been to date. In \textit{First Alabama Bank of Montgomery v. Parsons Steel}, the Eleventh Circuit ultimately found that \textit{Younger} abstention was not appropriate because there was no important state interest presented in the case.\textsuperscript{261} Basically, the plaintiff defaulted on a note in favor of a bank. The bank foreclosed under the terms of the security agreement. The plaintiff sued the bank in state court, alleging that the bank had defrauded him. Approximately two months later, plaintiff sued in federal district court alleging that the same conduct that gave rise to the suit under state law also violated relevant federal statutes. The federal action was bifurcated and proceeded to a judgment before the state action. The federal court found in favor of the bank. The bank then returned to state court and argued that the state action was barred by res judicata and moved for summary judgment. The motion was denied by the state court and the court proceeded to a jury verdict in favor of plaintiff in the amount of $4,000,000.

\textsuperscript{258} Id. at 811.
\textsuperscript{259} Id. at 814-15.
\textsuperscript{260} Id. at 815.
\textsuperscript{261} 825 F.2d 1475 (11th Cir. 1987).
The bank then brought an injunction action in federal court seeking to halt further prosecution of the state court action. The district court granted the injunction, and the state court stayed the action.

One of the main issues before the Eleventh Circuit was whether the district court should have abstained from enjoining an ongoing state civil proceeding. The court of appeals curiously concluded that the state court action did not implicate any important state government interest.\textsuperscript{262} Paradoxically, the court went on to cite \textit{Middlesex County} and gave somewhat short shrift to \textit{Pennzoil}. The court justified its holding by observing, \textquote{The State action involved in this case was merely a private action between private parties in which the State of Alabama had no interest beyond \textquote{its interest as adjudicator of wholly private disputes}.} The court of appeals thus distinguished \textit{Pennzoil}.\textsuperscript{264} This may be precedential evidence of the narrow reading of \textit{Pennzoil}. In response to Justice Stevens's concurrence, the majority opinion in \textit{Pennzoil} invoked an \textquote{Our Federalism} distinction between the state's interest in enforcing a verdict or judgment already rendered from the more general, and presumably less important, state's interest in the adjudication of wholly private disputes. The former is particular and preserves already expended state judicial resources from being rendered a nullity or being wasted in a given case. The latter is general and a generic police power for dispute resolution that is not even exclusive to the state.\textsuperscript{265} The implication from the Eleventh Circuit, therefore, was that Alabama's abstract interest in resolving the private dispute was significantly less important than Texas's interest in preserving the integrity of its jury's verdict and applicable state enforcement procedures.

A federal interest analysis in applying \textit{Younger} abstention principles was evident in the Third Circuit's analysis in \textit{Ford Motor Co. v. Insurance Commissioner of Pennsylvania}.\textsuperscript{266} Two cases were consolidated for appeal. In each case, a declaratory

\textsuperscript{262} Id. at 1483.
\textsuperscript{263} Id. (quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14 n.12 (1987)).
\textsuperscript{264} Id.
\textsuperscript{266} 874 F.2d 926 (3d Cir. 1989).
judgment action was brought in federal district court to challenge a state statute on constitutional and federal preemption grounds. In each case, the institution of state administrative proceedings to revoke the federal plaintiff’s licenses to sell insurance was followed by a motion to dismiss in federal court on abstention grounds. The Third Circuit determined that all three prongs of the Middlesex County test had been met. There was an ongoing state proceeding, and the state had an important interest in regulating its insurance industry. Moreover, the court of appeals cited Dayton Christian Schools for the proposition that “state administrative proceedings that do not provide an opportunity for the resolution of the claimant’s constitutional contention, are adequate for Younger abstention if the state’s judicial review of the administrative proceeding provides opportunity for a de novo hearing of the constitutional claim.” Nevertheless, the court of appeals determined that abstention was improper. The court of appeals held that invocation of the supremacy clause “requires review of the state interest to be served by abstention, in tandem with the federal interest that is asserted to have usurped the state law.... ‘[T]he notion of “comity” embodied by the Younger doctrine is “not strained when a federal court cuts off state proceedings that entrench upon the federal domain.” ’ Since the state statute was unambiguous, and thus not subject to a narrowing construction, the “federal interest in insuring the unhindered enforcement of federal law” overrode the state interest. Although the Pennzoil precedent did not figure prominently in the Third Circuit’s analysis, pre-emption cases may be the first area in which the analysis of federal interests in Younger abstention will take hold.

267. Id. at 932-33.
268. Id. at 932.
270. Id.
271. See supra text accompanying notes 231-34.
272. The Third Circuit in Ford Motor Co. explained:

Although Pennsylvania’s interest in the regulation of its insurance industry is significant, there exists a countervailing significant federal interest in insuring the unhindered enforcement of federal law. Balancing these interests in the present cases, we are persuaded that the scales weigh decidedly in favor of federal intervention so that the federal courts could determine the extent to which [40 Pa. Cons. Stat. Ann. § 641 (Purdon 1987 Supp.)] had been preempted.

874 F.2d 926, 934 (3d Cir. 1989).
One last court of appeals decision, also from the Third Circuit, deserves attention. In *Schall v. Joyce*, a debtor brought suit in federal district court to challenge the constitutionality of the state’s procedures for confession of judgment. The plaintiff sought a declaratory judgment and a temporary restraining order to prevent a sheriff’s sale of her home pursuant to a confession of judgment which had been obtained in an *ex parte* state court proceeding. At the hearing for the temporary restraining order, the district court directed the plaintiff to go to state court to seek a stay of the sheriff’s sale and to try to open or to strike the confessed judgment entered against her in state court. The state court stayed the execution of the judgment; therefore, the district court denied the temporary restraining order.

The federal defendant then filed a motion to dismiss. The district court issued a stay pending resolution of the state court proceedings, but did not explain its reasoning. The plaintiff appealed. While the federal appeal was pending, the state court opened the state judgment that had been entered against the plaintiff. The Third Circuit first analyzed the district court’s stay. The court of appeals found that the purpose of “[the district court’s] stay was ‘to require all or an essential part of the federal suit to be litigated in a state forum.’” Therefore, the stay was a final, appealable abstention order.

The appellees argued that the *Younger* abstention doctrine obliged an affirmance of the district court’s order, and the court of appeals agreed. Applying the *Middlesex County* test, the court quickly dispensed with the first and third prongs. The “difficult question” was “[w]hether the state proceedings implicate an important state interest.” In determining this issue, the court

273. 885 F.2d 101 (3d Cir. 1989).
276. 885 F.2d at 102, 106 n.1.
277. *Id.* at 106-07.
278. 885 F.2d 101, 107 (3d Cir. 1989).
of appeals found that the *Pennzoil* decision was directly on point: "In both cases, the parties sought relief in federal court after a judgment had been entered, and in both cases, the relief sought in the federal court would have rendered nugatory, at least to some extent, the effect that the state court judgment would ordinarily have had under state law."  

The court found appellant's attempts to distinguish *Pennzoil* unpersuasive. The fact that the confession of judgment was rendered *ex parte* provided "no basis for concluding that the state's interest in it is weaker than the state's interest in a judgment after a hearing. In both cases, the state has seen fit to make its full power available to execute the judgment." The fact that the case involved a request for declaratory relief did not distinguish *Pennzoil*, since a declaratory judgment would have had the same effect on the state court proceeding as an injunction. Moreover, the Supreme Court's holding in *Steffel v. Thompson*—declaratory relief is appropriate when no state proceeding is pending prior to the initiation of the federal suit—was found inapplicable in *Schall* because "[t]he Supreme Court has clearly stated that a case which has proceeded to judgment is still pending for *Younger* purposes as long as appellate remedies have not been exhausted." Therefore, according to the Third Circuit, "the fact that the state court has subsequently opened the judgment by confession does not relieve the federal courts of a duty to abstain." Finally, the fact that the plaintiff had made a formal motion for class certification did not distinguish *Pennzoil*, because the plaintiff in *Pennzoil* could also have obtained class certification, and the court of appeals felt "confident that such a motion would not have changed the result in *Pennzoil*."  

The issues in *Schall* closely parallel those in *Pennzoil*; therefore, *Schall* contributes a great deal toward understanding the scope of *Pennzoil* as a precedent. The Third Circuit found that critical to the determination of *Pennzoil* was "the importance to

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279. *Id.* at 109.
280. *Id.*
281. 415 U.S. 452 (1974); see supra text accompanying notes 101-03.
282. 885 F.2d at 110.
283. 885 F.2d 101, 110 (3d Cir. 1989).
284. *Id.* at 111.
the States of enforcing the orders and judgments of their courts." 285 Based on this measure, the court of appeals determined that "Pennzoil bars a federal court from granting relief from unconstitutional state court civil proceedings only in cases in which the federal relief would render the state court’s orders or judgments nugatory, as long as the other two Middlesex prongs are satisfied and there are no exceptional circumstances." 286 Citing the Court’s footnote in Pennzoil to the effect that Younger abstention is not “‘always appropriate whenever a civil proceeding is pending in a state court,’ " the court of appeals read Pennzoil to say:

the . . . principle that the state’s interest in litigation initiated by private persons is less weighty than other state interests protected by Younger may still have some room to operate, as it suggests that the federal courts may, in an appropriate case, interfere with an ongoing privately initiated state proceeding in which the state court has not yet rendered judgment even if Younger would preclude such interference in a case in which the state had already entered judgment. 287

The court of appeals majority’s response to the dissenting judge also is of interest. The dissent attempted to limit Pennzoil to its facts and asserted that the majority opinion left “only the proverbial needle’s eye in which to find Younger inapplicable." 288 Yet the majority rejected assertions that the size of the judgment and the greater time and effort involved in the state proceedings in Pennzoil distinguished it. 289 Responding to the dissent’s argument that the majority opinion could “be used to support abstention almost any time related suits are pending in state and federal courts[,]" 290 the majority observed:

The presence of two parallel law suits and the prospect of a race to judgment does not run afoul of Younger. What runs afoul of Younger, if each of the three Middlesex prongs is met and absent exceptional circumstances, is for a defendant in state court who has had a judgment entered against her . . . to decline

286.  Id. (emphasis added).
287.  Id. at 109 (emphasis added) (quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14 n.12 (1987)).
289.  Id. at 111.
290.  Id. at 114.
to pursue available state remedies such as an appeal or a motion to open the judgment but go instead into federal court to have the state judgment entered against her declared void.\textsuperscript{291}

This statement appears to say nothing more than that the \textit{Younger-Pennzoil} doctrine, as applied to civil cases, does not extend as far as in criminal cases. The institution of state court proceedings in which the constitutionality of a state criminal law is at issue is automatically a ground for \textit{Younger} abstention in the federal court. According to \textit{Schall}, a similar suit instituted in state court involving the constitutionality of a state civil statute does not automatically require federal court abstention.\textsuperscript{292}

The precedent in \textit{Pennzoil} seems to have had the effect of increasing the invocations of the \textit{Younger} abstention doctrine. This is particularly so with respect to the extended radiant of state civil suits. Its influence on the outcomes of those analyses is less certain, at least on a preliminary view. If nothing else, this sampling suggests that the \textit{Pennzoil} opinion is the new starting point of analysis for \textit{Younger} abstention issues in civil cases.

IV. Conclusion

The basic analytical weakness in the \textit{Younger} abstention doctrine has to do with Justice Black's ill-conceived attempt in 1971 to resolve irrevocably the ever-present and ever-changing issues of federalism by invoking the vague slogan "Our Federalism." This slogan has allowed for an expansion of the doctrine beyond its rationale. More seriously, its static definition basically misconceives the dual system of state and federal courts: "Federal and state powers ebb and flow relative to one another in response to messy and mutable social, political, and economic conditions. They cannot be contained by a formula, least of all a rigid one."\textsuperscript{293}

Abstention doctrine has provided mixed results in the cases and has received mixed reviews from commentators.\textsuperscript{294} Has it had

\begin{itemize}
\item \textsuperscript{291} Id. at 112.
\item \textsuperscript{292} See supra Subpart III(A).
\item \textsuperscript{293} Soifer & Macgill, supra note 71, at 1168; see also P. Finkleman, \textit{An Imperfect Union: Slavery, Federalism and Comity} 4 (1981) ("Comity" is the "courtesy or consideration that one jurisdiction gives by enforcing the laws of another, granted out of respect and deference rather than obligation.")
\item \textsuperscript{294} See Bator, \textit{The State Courts and Federal Constitutional Litigation}, 22 \textit{Wm. & Mary L. Rev.} 605 (1981); Redish, supra note 74; Shapiro, \textit{Jurisdiction and Discretion}, 60 \textit{N.Y.U. L. Rev.} 543 (1985).
\end{itemize}
much effect? One recent law review effort at a statistical study to quantify the doctrine concluded that "Younger and the other abstention doctrines are not foreclosing federal courts from hearing significant numbers of § 1983 or Bivens actions." This conclusion, of course, must be qualified to note that these Supreme Court precedents may have a profound ex ante effect that discourages plaintiffs from filing their claims in state court. Furthermore, this conclusion was quantitative, not qualitative. However, federal jurisdiction is also qualitative. This explains the recommendations of a recent empirical study conducted by the Committee on Federal Courts of the New York Bar Association:

1. Federal courts should pay greater attention to the Supreme Court’s command that abstention be invoked only under "exceptional circumstances," particularly in civil and administrative cases.
2. When there is a need to resolve a novel, unclear issue of state law, federal courts should consider using the New York certification procedures, rather than abstaining, because the certification procedure is less likely to cause undue delay, and the federal court maintains primary jurisdiction over the case.
3. When deciding whether abstention should be invoked, the district court should hold a hearing at which the following issues should be carefully considered, in addition to traditional abstention criteria:
   a) the anticipated duration of the state court proceeding;
   b) whether any delay seriously prejudices the federal rights involved;
   c) the degree of preclusive effect of the state court determination on the federal claims;

295. Note, supra note 61, at 859.
296. After examining the Second Circuit’s post-Younger abstention holdings, the Committee found that
   (a) The risk that abstention will have the practical effect of frustrating or unduly delaying the adjudication of federal claims appears to be greatest in cases involving federal claims arising from administrative proceedings and asserted in civil disputes of a Classwide or institutional nature.
   (b) Particularly in those cases, the federal courts should carefully weigh such risks against the objectives which might be achieved by abstention.
   (c) Federal courts should also assess whether abstention might actually result in more rather than less litigation, of longer duration, and whether piecemeal litigation might be engendered.

d) the impact of a state forum on litigants' ability to maintain class litigation where appropriate;
e) the probable familiarity of state courts with the federal law in question; and
f) other factors which may be present in the particular case, bearing on whether the state courts are as competent at deciding federal questions and related facts in the first instance as are the federal courts.

4. An abstaining federal court should generally stay, rather than dismiss, the federal action in order to insure that the federal courthouse door remains open and fully accessible to the federal plaintiff.

5. In appropriate cases, the abstaining federal court should consider granting interim equitable relief to insure the protection of federal rights while the issues are resolved in the state court proceeding.297

These recommendations should be the tactical focus of litigators embroiled in a dispute involving the Younger abstention doctrine.

This Article has been an academic effort to get behind the encysted phrase “Our Federalism”—to get the reader to think about the idea of federalism.298 Federalism cannot “mean all things to all people.”299 The Younger line of cases down to Pennzoil Co. v. Texaco, Inc. recognizes a “recrudescent federalism” in which state courts are viewed as primary guardians of individual rights.300 It remains to be seen how much Pennzoil will carry forward this view. Perhaps the only certain aspect of the underlying federalism in the long run may be an inherent uncertainty:

The question of the relation of the States to the federal government cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.301

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297. New York State Bar Ass'n, supra note 296, at 106-07.
300. Baker, supra note 83, at 848.