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COMMENT

TEXACO INC. v. PENNZOIL CO.: SOME THOUGHTS ON THE LIMITS OF FEDERAL COURT POWER OVER STATE COURT PROCEEDINGS

"[I]f a playwright were to give this case a name, I would suggest he would call it: 'Something Funny Happened on the Way to Austin' or 'to the United States Supreme Court in Washington."**

"[W]hat has developed here, your Honors, was not funny at all."***

INTRODUCTION

While the humor may depend on one's perspective, the litigation between Texaco and Pennzoil has provided a fascinating exposition of federalism. The controversy has pitted Pennzoil, the holder of the largest civil judgment in history, against Texaco, the fifth largest company in the United States, in a confrontation over federalism, comity, judicial restraint and the Anti-Injunction Act.

The contract dispute underlying the federal action evolved from Texaco's acquisition of Getty Oil following a heated tender offer competition against Pennzoil. A few days after Texaco announced the acquisition, Pennzoil sued Getty, its affiliates and Texaco in Delaware state court for damages and equitable relief, alleging that the Getty entities had

** Id. at 95 (Paul J. Curran, arguing for Texaco).
1. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1157 (2d Cir. 1986).
3. This Comment will not discuss the substantive law underlying the lawsuits in Texas and Delaware.

After the January 4th press releases, Getty's investment banker approached Texaco and solicited a competing bid. See Pennzoil Co. v. Getty Oil Co., No. 7425, slip op. at 44-45 (Del. Ch. Feb. 6, 1984) (available Apr. 13, 1986, on LEXIS, States library, Del file). The extent of Texaco's knowledge of the Pennzoil agreement remains disputed. See id. at 46-47. In any event, Texaco offered to purchase all Getty Oil shares for $125 (later raised to $128) per share in cash. Pennzoil declined to make a counterbid. See Amended Complaint of Texaco at 10, Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250 (S.D.N.Y.), aff'd in part and rev'd in part, 784 F.2d 1133 (2d Cir. 1986) [hereinafter cited as Amended Complaint].

Between January 6 and 8, 1984, Texaco and the Getty entities signed definitive agreements. The Getty Oil shareholders then tendered their shares to Texaco. Id. at 10-11 (indication of 1985 is a typographical error).
breached a contract agreeing to the buyout and that Texaco had tortiously induced the breach. On February 6, 1984, the Delaware chancery court denied Pennzoil's motion to enjoin the sale.

Two days later, Pennzoil voluntarily dismissed Texaco from the Delaware action and simultaneously reinstituted suit in Texas. Pennzoil sought $7.53 billion in compensatory damages plus punitive damages. Texaco tried unsuccessfully to quash the dismissal in Delaware and then answered the Texas complaint on March 7, 1984.

In Texas, Judge Anthony J.P. Farris presided over eight months of pretrial motions and discovery. After more than three months of trial and 17,000 transcript pages, and with the case seventy-five percent complete, Judge Farris stepped down due to illness. The case continued

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6. See id. at 47-49. The Delaware court found that a binding agreement could be proved between Pennzoil and Getty but found insufficient likelihood of success on the actual knowledge and active inducement elements of Pennzoil's claim against Texaco to justify injunctive relief, see id. at 47, or for Pennzoil's alternate motion to hold the shares separate, see id. at 48-49.
10. One of the issues in the Texas litigation that carried over into the federal court action concerned the role of Judge Farris. He received a $10,000 campaign contribution from Pennzoil's chief trial counsel, Joseph D. Jamail, on March 7, 1984, two days after Texaco's answer was filed. See Hearing Transcript on Texaco's Motion to Recuse at 18-19, Pennzoil Co. v. Texaco, Inc., No. 84-05905 (Tex. Dist. Oct. 25, 1984). Judge Farris was running unopposed in the primary, and the sum was large by local standards. See id. at 19-20. Mr. Jamail also contributed $10,000 to the Honorable Peter S. Solito, who, as Presiding Judge of Harris County, assigned cases. See Memorandum in Support of Application for Temporary Restraining Order at 5 n.2, Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250 (S.D.N.Y.), aff'd in part and rev'd in part, 784 F.2d 1133 (2d Cir. 1986) [hereinafter cited as Texaco TRO Application]. When Texaco learned of the contribution six months later, it sought recusal, arguing that the contribution and Mr. Jamail's campaign activity on behalf of Judge Farris, combined with discovery and pretrial rulings "uniformly in Pennzoil's favor," created at least the appearance of unfairness. Id. at 5. That motion was denied. Id.
11. See Texaco TRO Application, supra note 10, at 6. Texaco argued that Farris' ill health also contributed to the unfairness of the Texas trial. Texaco contended that Farris
under Judge Solomon Casseb. 12

On November 19, 1985, after four and one-half months of trial and eleven hours of deliberation, the Texas jury announced its verdict for Pennzoil. 13 Judge Casseb subsequently denied Texaco's motion for judgment n.o.v. 14 and entered judgment for $11.12 billion on December 10, 1985. 15 Post-judgment interest accrued at the rate of approximately $3.0 million a day. 16

Under Texas law, to stay execution of judgment pending appeal, an appellant must post a supersedeas bond "in at least the amount of the

maintained a relatively steady trial schedule during Pennzoil's presentation but that his deteriorating health and the consequent intermittent court schedule caused Texaco's presentation to be "disjointed, interrupted and confused." 17 Of the 58 half-days available for Texaco's presentation only 21 were used. 18

12. Id. at 6. Judge Casseb was a practicing lawyer from San Antonio who had been a judge from 1960 to 1968 and who was assigned as a "retired judge" under Texas law. Judge Casseb stated that he had not read the record, would not read it, and would not reconsider any of Judge Farris' rulings. Texaco moved for mistrial. That motion was denied. See Brief for Respondent at 16, Texaco Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986) [hereinafter cited as Texaco Brief].

Texaco's attack on Judge Casseb's qualifications continued after trial. Texaco sought a hearing on whether Judge Casseb met Texas' 12-year service requirement for retired judges. Wall St. J., Feb. 13, 1986, at 18, col. 4. The issue was appealed to the Texas Supreme Court, which ultimately refused to grant a hearing or discovery. 19

Texaco's attacks on Judge Casseb apparently have had some effect on the Texas state action. When Texaco requested a new trial after the verdict, Judge Casseb asked Texaco if it was still questioning his qualifications to preside; told that it was, the judge simply declared: "Y'all are excused." Wall St. J., Mar. 14, 1986, at 18, col. 1.


Among other things, the jury apparently reached its decision based partly on a misunderstanding of the concepts of indemnity and agreement in principle, a belief that Texaco witness Martin Lipton (the "world-renowned and widely respected takeover expert" at Wachtell, Lipton, Rosen & Katz) was not credible, and on Texaco's decision to not offer evidence on damages. See id.


Texaco unsuccessfully challenged the trial court's instructions on New York law as follows: the requirement of actual knowledge as opposed to constructive knowledge that the judge's charge allowed; the judge's instruction that an "agreement in principle" expressly "subject to" the execution of a definitive agreement constitutes an enforceable contract; the need to show active inducement rather than mere knowledge that the other contractual party will be unable to perform; the judge's failure to bar Pennzoil's claim for the value of the reserves rather than the market value of the stock, and without discounting to present value; permitting punitive damages without proof of motivation of ill will or hatred rather than mere economic benefit. See Texaco Brief, supra note 12, at 16-19.

15. See Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250, 253 (S.D.N.Y.), aff'd in part and rev'd in part, 784 F.2d 1133 (2d Cir. 1986). Pennzoil had requested $7.53 billion based on the calculated difference between what it would have cost Pennzoil to get Getty’s reserves under the original deal versus obtaining the oil by exploration. Texaco, for tactical reasons, did not offer any damage evidence or controvert Pennzoil's evidence. See Adler, supra note 13, at 109. The jury awarded punitive damages of $3.0 billion. The amount was determined by a juror's suggestion that the jury award Pennzoil $1.0 billion in punitive damages for each indemnity offered by Texaco. The jury apparently believed that by indemnifying the Getty entities Texaco became liable for their acts. Id.

judgment interests and costs.”

Texas could not possibly post such an amount, and so risked seizure of its assets prior to an appeal of the judgment. However, with Judge Casseb's prodding, the parties agreed to add provisions to the judgment itself that barred Pennzoil from enforcing the judgment and barred Texaco from transferring or encumbering assets except in the ordinary course of business for as long as the trial court retained jurisdiction.

17. Tex. R. Civ. P. 364 provides in part:
   Rule 364. Supersedeas Bond or Deposit
   (a) May Suspend Execution. Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, or making the deposit provided by Rule 14c, payable to the appellee in the amount provided below, conditioned that the appellant shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or Court of Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him.

   (b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

18. The total worldwide surety bond capacity is estimated to be between $1.0 billion and $1.5 billion. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1138 (2d Cir. 1986).

19. Texaco had an estimated $5.0 billion worth of real property in Texas. Id. at 1138.

Under Texas law a judgment creditor may place liens on a judgment debtor’s real property located in Texas immediately after entry of judgment. The judgment lien attaches to all of the judgment debtor’s property in the jurisdiction immediately upon recording and indexing. Tex. Prop. Code Ann. §§ 52.001-006.

In addition, a judgment is enforceable by execution 30 days after its entry or, if a motion for new trial is made, 30 days after its denial, unless the judgment debtor obtains a stay of execution. Such a stay may be obtained for a money judgment, only by posting a supersedeas bond in “at least the amount of the judgment, interest, and costs.” Tex. R. Civ. P. 364(b).

Texaco argued that its right to appeal would be meaningless because Pennzoil could file liens as soon as Judge Casseb’s jurisdiction ended, which would occur at the latest on March 25, 1986. See Texaco Brief, supra note 12, at 20-21 & n.26. Without the stay, Texaco would face liens against its property for the total amount of the judgment. Id.

Texaco contended, and the federal courts agreed, that this would probably force Texaco into bankruptcy or liquidation. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1138 (2d Cir. 1986); Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250, 257 (S.D.N.Y.), aff’d in part and rev’d in part, 784 F.2d 1133 (2d Cir. 1986).

20. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1137 (2d Cir. 1986); Wall St. J., Mar. 14, 1986, at 18, col. 2. The protective provisions were contained in the seventh paragraph of the judgment [hereinafter cited as paragraph 7]. Paragraph 7 prevented Pennzoil from abstracting, registering or executing the judgment while Texaco was prevented from pledging, encumbering or conveying assets outside of the ordinary course of business. Pennzoil was threatened with a new trial should it violate the agreement or file a petition for bankruptcy. See Texaco TRO Application, supra note 10, at 13 n.5.

During negotiations to decide the terms of the portion of the judgment protecting Texaco, both sides were on the brink of drastic action. Texaco had stationed an attorney—protected by a bodyguard—at a telephone outside Judge Casseb's chambers to remain in contact with a Texaco lawyer in New York to facilitate instant filing of bankruptcy papers if the judge entered the full damage award. Meanwhile, Pennzoil had dispatched aides to various county courthouses in order to immediately file liens on Texaco property
Hours before the Texas court entered its decree, Texaco filed a federal complaint in the Southern District of New York.\textsuperscript{21} Texaco sought and obtained from Judge Charles L. Brieant an emergency ex parte temporary restraining order on December 17, 1985 that enjoined Pennzoil from enforcing the Texas judgment.\textsuperscript{22}

Texaco's complaint alleged that the Texas judgment and the Texas lien and supersedeas bond provisions would violate Texaco's rights under the commerce, supremacy, full faith and credit, due process and equal protection clauses of the Constitution, as well as under the Civil Rights Act of 1871,\textsuperscript{23} the Securities Exchange Act of 1934\textsuperscript{24} and rules promulgated thereunder by the Securities and Exchange Commission.\textsuperscript{25}

should the judgment be affirmed without restriction. Wall St. J., Mar. 14, 1986, at 1, col. 6, at 18, col. 2.

Texaco subsequently sought to modify paragraph 7 to prevent Pennzoil from attaching Texaco's property or executing the judgment prior to final appellate review, or alternatively, to require notice and a hearing prior to execution and to clarify the meaning of "ordinary course of business" to ease the fears of Texaco's lenders. See Texaco TRO Application, \textit{supra} note 10, at 16. Pennzoil objected to the modifications and none were made. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1139 (2d Cir. 1986); Texaco TRO Application, \textit{supra} note 10, at 16.

Texaco maintained in federal court that paragraph 7 could not protect it from financial ruin in part because the state court's jurisdiction would expire, at the latest, on March 25, 1986, and with it the protection of paragraph 7. According to Texaco, this deadline and the amount of the bond produced a serious crisis: its bonds were downgraded and its credit lines shrank; unsecured borrowing became unavailable and even secured financing uncertain; suppliers, joint venturers and purchasers of Texaco assets shied away from dealing with it. See Texaco Brief, \textit{supra} note 12, at 2-3 & n.2; Amended Complaint, \textit{supra} note 4, at 5. The Second Circuit seemingly accepted these claims. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1139 (2d Cir. 1986).


\textsuperscript{25} See Amended Complaint, \textit{supra} note 4, at 24-31. Texaco's claims in the Amended Complaint were summarized by the Second Circuit as follows:

(1) that the Texas judgment excessively burdened interstate commerce in violation of the Commerce Clause and frustrated the purposes of the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)(f), by deterring competitive tender offers after a target company [Getty] and a given bidder [Pennzoil] had conducted negotiations . . . ; (2) that the Texas lien and supersedeas bond provisions, by preventing Texaco from effectively prosecuting appeals to the Texas Court of Civil Appeals, the Texas Supreme Court, and eventually to the United States Supreme Court under 28 U.S.C. § 1257(2), were void under the Supremacy, Due Process and Equal Protection Clauses of the United States Constitution . . . ; (3) that the Texas judgment permitted Pennzoil to engage in unlawful conduct in violation of the Securities Exchange Act, 15 U.S.C. §§ 78j, 78m, 78n and Rule 10b-13 thereunder, 17 C.F.R. § 240.10b-13, namely, the purchase of Getty stock other than pursuant to Pennzoil's outstanding tender offer . . . ; (4) that the judgment violated the Full Faith and Credit Clause by disregarding the substantive law of New York, which the parties agreed governed . . . ; and (5) that the judgment was the product of fundamental unfairness in violation of the Due Process Clause . . . .
On December 20, 1985, Pennzoil submitted a cross-motion to dissolve the temporary restraining order and dismiss the complaint for lack of jurisdiction and failure to state a claim. Pennzoil also tendered to Texaco a "stipulation" that purported to give the Texas trial judge the power to substitute federal bond standards in place of the Texas supersedeas bond provisions. The offer was not accepted by the Texas trial judge or by Texaco.

Denouncing the Texas judgment as "absurd," Judge Brieant granted the relief requested by Texaco on all counts on January 10, 1986. Judge Brieant also stated that Texaco would be entitled to litigate the federal claims raised in its complaint even after a final state court decision on the merits. Finally, the court recalculated the maximum damages Pennzoil could conceivably obtain and set Texaco's bond at $1.0 billion.

On appeal, the Second Circuit held that Judge Brieant had properly exercised jurisdiction over Texaco's due process and equal protection

Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1139 (2d Cir. 1986).
All of the claims except for the attack under (2) had been raised in the state proceedings as part of Texaco's motion for a new trial. See id. at 1137.
27. See id. at 257. The effect of Pennzoil's proffered stipulation was much disputed. Judge Brieant found that the stipulation had no effect because the Texas courts had "no power to give a stay pending appeal, except upon full compliance with Rule 364." Id. at 258. Pennzoil contended that the stipulation waived its rights to execute the judgment once the Texas court determined the proper amount of security using the standards of Fed. R. Civ. P. 62. See Brief for Appellant at 11-12 & n.4, Texaco Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986) [hereinafter cited as Pennzoil Brief]. Texaco countered that the waiver could not affect Texas' mandatory statutory requirement. See Texaco Brief, supra note 12, at 27. The Second Circuit concluded that the stipulation did not adequately protect Texaco's interests. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1156 (2d Cir. 1986).
28. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1140 (2d Cir. 1986).
30. See id. at 262. Judge Brieant disclaimed any intent "to sit as a final or intermediate appellate state court as to the merits of the Texas action." Id. at 254. His opinion, however, evaluated the likelihood of success of a Texaco appeal in Texas state courts as part of his application of the Second Circuit's injunction standard. See id. at 253-54. Judge Brieant found "a substantial likelihood of success on a number of [Texaco's] non-federal points for appellate review in Texas," id. at 253, and determined that the federal claims were "fair ground for litigation," id. at 258. He therefore held that injunctive relief was required to guarantee that the Texas security requirements did not deprive Texaco of its right to appeal. See id.
31. See id. at 259.
32. See id. at 254-55. Judge Brieant determined that under New York law no punitive damages could have been awarded and that a reviewing court in Texas would so find. See id. at 254. He then recalculated the compensatory damages based on the difference between what Pennzoil had offered and what Texaco ultimately paid for Getty. Under this formula he found that $800 million was the most Pennzoil could legitimately obtain. See id. at 255.
33. See id. at 261-62. Judge Brieant used the recalculated damage figure plus interest and attorneys' fees to reach this amount for Texaco's security bond. See id.
claims and that he had properly granted injunctive relief for the due pro-
cess claim. Thus Texaco received the guarantee of protection against
enforcement of the Texas judgment it needed to pursue meaningful state
appellate review. With regard to the other claims, however, the Second
Circuit sharply criticized Judge Brieant for "what amounts to an imper-
missible appellate review of issues that have already been adjudicated by
the Texas trial court." Accordingly, the court dismissed the remaining
claims, thereby barring the possibility raised by Judge Brieant that, af-
fter a final Texas decision, the federal court would retain jurisdiction.

The unique circumstances of this case presented the Second Circuit
with two conflicting interests. On one hand, the case implicated the doc-
trines of jurisdiction, the Anti-Injunction Act and abstention, which are
central to the dual judicial system; on the other, the very existence of one
of the world's largest corporations was essentially placed in the hands of
the Second Circuit. Inevitably, the "hydraulic pressures" of this case
revealed deep conflicts inherent in the dual judicial system and the doc-
trines designed to aid the functioning of that system. In light of this
confluence of issues, this Comment seeks to address the doctrines in-
volved and present alternative approaches to the analysis of these
doctrines.

Part I of the Comment discusses the Second Circuit's application of
what is known as the Rooker-Feldman doctrine and its finding of juris-
diction under 28 U.S.C. § 1983. It concurs with the court's conclusion
that Rooker-Feldman concerns barred consideration of many claims, but
notes that the court's extension of the "state action" element of section
1983 probably has little practical value as precedent. Moreover, it sug-
gests that the unique factual considerations that influenced the court
should not have been part of its jurisdictional analysis.

Part II examines the issues underlying the Second Circuit's statement
that jurisdiction under Section 1983 automatically excepts a case from
the purview of the Anti-Injunction Act. This Part reviews the history of
the statute and suggests that the establishment of Section 1983 as a con-
gressionally authorized exception to the Anti-Injunction Act conflicts
fundamentally with abstention doctrine. Moreover, the Second Circuit's
decision illustrates how these inconsistent developments enable federal
courts to define for themselves the circumstances under which they will
enjoin state proceedings.

Part III examines the conclusion of both the district court and the
Second Circuit that abstention was not required in deference to the Texas
state proceedings. Part III first sets forth the elements of the abstention

34. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1137 (2d Cir. 1986).
35. See id. at 1143.
36. See id. at 1144.
37. See Pennzoil Brief, supra note 27, at 1-2 (citing Northern Securities Co. v. United
States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting)).
doctrines of Younger v. Harris and Railroad Commission v. Pullman Co. It then explores the Second Circuit's application of the two doctrines. Finally, this Part re applies the principles of federalism and comity underlying abstention and concludes that the federal courts should have at least temporarily abstained from hearing the case until Texaco had presented its challenge to a state court.

I. JURISDICTION

Federal district courts have no power to hear a case unless expressly authorized to do so. Texaco alleged seven causes of action in its amended complaint, asserting jurisdiction under three different federal statutes. Five of these claims challenged various aspects of the rule of law employed by the Texas trial court in deciding this case (Pennzoil rule), as well as the alleged procedural unfairness of that litigation.

39. 312 U.S. 496 (1941).
41. See Amended Complaint, supra note 4, at 24-31.
42. See id. at 6.
43. See id. at 24-31.

Throughout the litigation in federal court Texaco referred to the jury charge given by Judge Casseb as the Pennzoil rule. See id. at 2; Texaco Brief, supra note 12, at 43 n.69. Texaco alleged in its fifth claim that the Judge misinterpreted several aspects of New York's law of tortious interference with contract in his jury charge. See Amended Complaint, supra note 4, at 28-29; Affidavit of Hugh R. Jones at 2, Pennzoil Co. v. Texaco, Inc., No. 84-05905 (Tex. Dist. Ct. Dec. 10, 1985). By employing the phrase "Pennzoil rule," Texaco probably intended to make the jury charge appear the equivalent of a state law. This would have been important in making out the claims under the supremacy and commerce clauses. See infra. Although a shrewd strategy, it ultimately proved unnecessary because the claims were dismissed for lack of subject matter jurisdiction. See infra notes 72-75 and accompanying text.

A brief review of Texaco's claims will provide useful background for analyzing jurisdiction. Texaco's first cause of action alleged that the Pennzoil rule unduly burdens interstate commerce by deterring competing tender offers, in violation of the commerce clause, U.S. Const. art. I, § 8, cl. 3. Texaco based this claim on Edgar v. MITE Corp., 457 U.S. 624 (1982). See Amended Complaint, supra note 4, at 25. This claim, however, differs in two ways from the one in MITE. First, in MITE, the plaintiff proceeded against the state attorney general to enjoin enforcement of the challenged anti-takeover statute. See MITE, 457 U.S. at 626. Texaco, conversely, sued a private party—Pennzoil. See Amended Complaint, supra note 4, at 24. Second, in MITE, the Court held a state statute unconstitutional. See MITE, 457 U.S. at 630. Texaco, however, alleged that the Texas judge's jury charge was unconstitutional. See Amended Complaint, supra note 4, at 2-3, 24.

The second and fourth causes of action alleged that the judgment and the Pennzoil rule violate the supremacy clause, U.S. Const. art. VI, col. 2, because they contravene, respectively, the purposes and policies of the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982), and SEC Rule 10b-13, 17 C.F.R. § 240.10b-13 (1986). See Amended Complaint,
under the supremacy,\textsuperscript{44} commerce,\textsuperscript{45} full faith and credit\textsuperscript{46} and due process clauses\textsuperscript{47} of the Constitution. The two remaining claims each at-


Finally, Texaco's seventh cause of action alleged that the judgment and the Pennzoil rule are the "product of fundamental procedural unfairness, based upon all the surrounding circumstances of the Pennzoil action." Amended Complaint, \textit{supra} note 4, at 30. Although this may be the most meritorious of Texaco's dismissed claims, it also presents the thorniest issues, involving alleged improprieties by and qualifications of the two judges who oversaw the Texas trial. See Motion for Recusal or Disqualification at 2, Pennzoil Co. v. Texaco, Inc., No. 84-05905 (Tex. Dist. Ct. Dec. 10, 1985) (seeking the disqualification or recusal of Judge Anthony J.D. Farris for receiving a $10,000 campaign contribution from Pennzoil's chief trial counsel); Motion to Disqualify at 2, Pennzoil Co. v. Texaco, Inc., No. 84-05905 (Tex. Dist. Ct. Dec. 10, 1985) (challenging the qualifications of Judge Solomon Casseb, who replaced Judge Farris, to sit as a Texas judge); Petzinger & Sullivan, \textit{Texaco-Pennzoil Legal Fight to Feature Wealth of Issues Besides Appeals Bond}, Wall St. J., Feb. 5, 1986, at 6, col. 1, col. 2 (discussing the alleged campaign contribution to Judge Farris).

An interesting sidelight to these allegations is the exchange of letters between Judge Farris and Thomas R. McDade, a partner at Fulbright & Jaworski, the firm that represented Texaco in Texas. See Wall St. J., Mar. 14, 1986, at 1, col. 6. In an unrelated case, Judge Farris, in setting briefing rules, instructed counsel, which included Mr. McDade, not to cite any decisions of White Plains federal judges. \textit{id}. In response to a letter from Mr. McDade expressing hope that the Judge would have the "courage" to lay aside his prejudice toward Texaco, the Judge, in a reference to the "male anatomy," wrote that he "ha[d] more [expletive deleted] than any partner or associate at" Fulbright and Jaworski. \textit{id}. (brackets in original). This exchange suggests that federal intervention has caused friction between the state and federal judicatories in this case. See \textit{infra} notes 92-96.

\begin{itemize}
  \item \textit{supra} note 4, at 24-25, 27-28.
  \item \textit{id}. at 24.
  \item \textit{id}. at 28-29.
  \item \textit{id}. at 29-30.
\end{itemize}
tacked the constitutionality of the Texas supersedeas bond and lien provisions as applied to Texaco under the due process and supremacy clauses.

The Second Circuit's jurisdictional analysis proceeded on two levels. First, the court concluded that the district court had impermissibly acted as an appellate tribunal by hearing Texaco's five claims challenging the Pennzoil rule and the procedural unfairness of the Texas litigation, in violation of the Rooker-Feldman doctrine. Second, the court examined whether the two remaining claims, challenging the application of Texas' bond and lien provisions, stated a cause of action under section 1983 and concluded that these claims were properly entertained by the district court.

This Part reviews the Second Circuit's jurisdictional analysis and proposes an alternative framework. First, it examines the origins and purposes of the Rooker-Feldman doctrine. After reviewing the Second Circuit's application of Rooker-Feldman, this Part concludes that the court frustrated the policies of that doctrine. Second, the state action requirement is analyzed in light of the Supreme Court's concerns and the purposes and policies of the Constitution and section 1983. With respect

49. See Amended Complaint, supra note 4, at 26-28, 29-30. The Second Circuit did not dismiss Texaco's third and sixth claims. The third claim alleged that application of the Texas bond and lien provisions to Texaco violates the supremacy clause, U.S. Const. art. VI, cl. 2, by denying Texaco its right to appeal to the United States Supreme Court under 28 U.S.C. § 1257 (1982). See Amended Complaint, supra note 4, at 26. The sixth claim alleged that the challenged provisions violate the due process and equal protection clauses. U.S. Const. amend. XIV. See id. at 29-30. Both of these claims were brought pursuant to 42 U.S.C. § 1983 (1982). See id. at 6.
50. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1143 (2d Cir. 1986).
51. See id. at 1145-47. The court relied in part on the extraordinary circumstances of this case . . . : a private civil money judgment in an amount unprecedented in the annals of legal history, a clear inability on the part of the judgment debtor to comply with a state law mandating a bond in the full amount of the judgment pending appeal, the prospect that the state appellate court would not rule on the constitutionality of the state law before the judgment creditor acted to enforce the judgment, and the likelihood that immediate enforcement of the Texas lien and bond provisions would lead to irreversible destruction of the debtor . . . thus robbing its right of appeal. Id. at 1157.

Although these concerns are genuine and compelling, they ought not be part of the jurisdictional inquiry. Although the Second Circuit did not explicitly rely on these "extraordinary circumstances" for its analysis of jurisdiction, the court based its entire decision, at least in part, on these circumstances. Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1157 (2d Cir. 1986). The precise effect these facts had on the court's decision is, however, unknown. All that can be done, and all that this Part of the Comment attempts to do, is to understand the court's analysis of the law, assess its validity and propose an alternative approach. This Part concludes that the extenuating circumstances of this case cannot create jurisdiction, regardless of how beneficial federal intervention might be. It does not judge the Second Circuit's intentions nor the desirability of exercising jurisdiction under these circumstances.
to state action this Part concludes that the Second Circuit unnecessarily expanded the reach of the doctrine, thereby diminishing its utility.

A. The Rooker-Feldman Doctrine

The Rooker-Feldman doctrine rests on the precept that federal district courts "possess no power whatever to sit in direct review of state court decisions."52 This rule stems from the interplay of two federal jurisdictional statutes, 28 U.S.C. § 125753 and 28 U.S.C. § 1331.54 Section 1331 grants district courts original jurisdiction over "civil actions arising under" federal law.55 Section 1257 grants the Supreme Court the right to review "final judgments . . . rendered by the highest court of a State in which a decision could be had."56 Because district courts may exercise only original jurisdiction, it follows that they may not exercise the power of appellate review over state or federal decisions. Moreover, section 1257 grants the Supreme Court the right to review state court decisions on the federal level.57 This limit on the scope of federal district court jurisdiction was first articulated by the Supreme Court in Rooker v. Fidelity Trust Co.58 and was later refined in District of Columbia Court of Appeals v. Feldman.59

1. Origins of the Doctrine

In Rooker, the Supreme Court, holding that it would be an impermissible exercise of appellate jurisdiction, refused to allow a federal district court to nullify a judgment that had been affirmed by the Supreme Court of Indiana.60 The Court noted that, had the constitutional issues before it been presented to the state trial court, the state court would have been obligated to decide them.61 Further, if the state court decided these issues incorrectly, the proper course would be review at the state appellate level and, eventually, in the United States Supreme Court.62 The rule stated by the Court is that "no court of the United States other than this

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54. Id. § 1331.
55. See id.
56. Id. § 1257.
57. See id. Congress, by enacting § 1257, has granted the right to review state court judgments to the Supreme Court. See id. In no statute has Congress granted any other federal court the right to review state court judgments. Because federal courts have no jurisdiction unless it is granted by Congress, the Supreme Court's right to review state court decisions is exclusive. See Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 296 (1970); Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1142 (2d Cir. 1986).
58. 263 U.S. 413 (1923).
60. See Rooker, 263 U.S. at 414-15.
61. See id. at 415.
62. See id.
Court could entertain a proceeding to reverse or modify the judgment . . . . To do so would be an exercise of appellate jurisdiction.63

In 1983 the Supreme Court breathed new life into Rooker in District of Columbia Court of Appeals v. Feldman.64 In that case, the Committee on Admissions of the District of Columbia Bar denied Feldman admission although he was already a member of the bar in two neighboring states.65 The Committee’s decision was affirmed by the District of Columbia Court of Appeals on the basis of a District of Columbia bar admission rule requiring that applicants be graduates of an ABA-accredited law school.66 Subsequently, Feldman filed suit in the United States District Court for the District of Columbia alleging inter alia that the Court of Appeals had denied him due process by “arbitrarily and capriciously” denying him admission to the bar.67 On certiorari, the Supreme Court dismissed this claim for lack of subject matter jurisdiction.68

In so holding, the Court extended the rule in Rooker that a district court cannot review state court judgments to encompass situations in which “constitutional claims . . . are inextricably intertwined” with the state court’s judgment.69 The Court reasoned that in such instances “the district court is in essence being called upon to review the state-court decision” and therefore has no jurisdiction.70 The Court focused its attention on whether hearing the claim would engage the district court in questioning the state court’s decision instead of examining the effect review would have on the judgment.71 At the heart of the doctrine lay the

63. See id. at 416.
64. 460 U.S. 462 (1983).
65. See id. at 463-66. Instead of attending law school, Feldman participated in a highly structured program of study, approved by the State of Virginia, in a practicing attorney’s office, and formally audited classes at the University of Virginia Law School. In addition, after serving as a law clerk to a United States District Judge, Feldman was admitted to the bars of Virginia and Maryland. See id. at 466.
66. See Feldman, 460 U.S. at 468. Feldman, aware that District of Columbia’s bar admission rules inflexibly required graduation from an ABA-accredited law school, see D.C. Court Rules 461(b)(3) (current version of rule) (promulgated by the District of Columbia Court of Appeals under authority granted by D.C. Code Ann. § 11-2501(a) (1981)), petitioned the Court of Appeals to waive that requirement in light of his qualifications. Feldman, 460 U.S. at 466. The court refused his request, noting that the rule was designed to prevent the Committee and the Court of Appeals from making individual determinations of the qualifications of each applicant. See id. at 468.
67. See Feldman, 460 U.S. at 468, 469 n.3. The court dismissed one of Feldman’s claims that alleged Rule 461(b)(3) violated his due process rights because it created an irrebuttable presumption that only graduates of ABA-accredited law schools are qualified for admission. See id. at 469 n.3. Feldman also alleged five additional causes of action which, according to the Court, claimed that Rule 461(b)(3) violated the fifth amendment, U.S. Const. amend. V, “‘either on its face or as applied to [him].’” Feldman, 460 U.S. at 469 n.3 (quoting appellant’s brief).
68. See id. at 482-83.
69. See id. at 476, 483 n.16.
70. Id. at 483-84 n.16.
71. See id. at 486. The Court stressed the distinction between a challenge to the constitutionality of a rule as “promulgated” and as “applied.” See id. at 485. Because determining the constitutionality of a rule as promulgated does not require a federal court
limited jurisdiction of federal district courts and the concerns of federalism and respect for state courts.

2. Second Circuit's Application of Rooker-Feldman

The Second Circuit dismissed five of Texaco's seven claims on the basis of Rooker-Feldman. The court recognized that, because all these claims had been raised in the Texas trial court, deciding them would require the district court to determine the correctness of the Texas court's decision. Such action would amount to reviewing claims "inextricably intertwined" with the Texas judgment and would be equivalent to an impermissible appellate review under Feldman.

The court also rejected Texaco's argument that Rooker-Feldman should only preclude federal review of state court judgments that have obtained appellate finality. In so doing, the court found three bases for the doctrine: 1) the obligation and competence of state courts to decide federal constitutional questions; 2) the availability of federal review of state court decisions in the Supreme Court of the United States; and to review a state court decision, a federal court may hear such a claim. See Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1433-33 (10th Cir. 1984), cert. denied, 105 S. Ct. 2019 (1985). Feldman bars only challenges to the application of a state rule to a particular case because such an inquiry requires review of the state court's determination. See Zimmerman v. Grievance Comm., 585 F. Supp. 29, 32 (N.D.N.Y. 1983), aff'd, 726 F.2d 85 (2d Cir.); cert. denied, 104 S. Ct. 2681 (1984); Rosquist v. Jarrat Constr. Corp., 570 F. Supp. 1206, 1210 (D.N.J. 1983).

72. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1137 (2d Cir. 1986).
73. See id. at 1143. Texaco raised its claim of procedural unfairness in Texas through its motion to recuse Judge Farris. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1144 n.7 (2d Cir. 1986); Motion for Recusal or Disqualification, supra note 43. The other four claims dismissed by the Second Circuit were also raised in Texas by Texaco's motion for judgment n.o.v. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1144 n.7 (2d Cir. 1986); Motion for Judgment N.O.V., Pennzoil Co. v. Texaco, Inc., No. 84-05905 (Tex. Dist. Ct. Dec. 10, 1985).
74. See supra notes 69-71 and accompanying text. The district court did not acknowledge Feldman's expansion of Rooker to preclude, not only direct review of state court judgments, but also claims that are "inextricably intertwined" with that judgment. See supra note 69 and accompanying text. Judge Brieant stated that the court was not "attempting to sit as a final or intermediate appellate state court as to the merits of the Texas action." Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250, 254 (S.D.N.Y. 1986), aff'd in part and rev'd in part, 784 F.2d 1133 (2d Cir. 1986). Nevertheless, he proceeded to criticize Texas' application of New York tort law and its assessment of punitive damages, as well as to recomputed the compensatory damages that the Texas court had awarded. See id. at 254-56.

Perhaps Judge Brieant reasoned that because he was not upsetting the Texas judgment, but merely delaying its enforcement, he was not engaging in appellate review. But delaying enforcement of a judgment, even if only temporarily, is also an impermissible appellate review. See Kimball v. Florida Bar, 632 F.2d 1283, 1284 (5th Cir. 1980). The focus of Rooker-Feldman is not the effect a district court's review will have on a state court judgment, but rather whether that federal court must review the merits of a state court's decision. See supra note 70. As the Second Circuit pointed out, the district court's conclusions on the merits of the Texas litigation "amount[ed] to an impermissible appellate review." Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1143 (2d Cir. 1986).

75. See id. at 1142-43.
3) the waste of judicial resources and creation of unnecessary friction attributable to review of state court decisions by federal district courts. The Second Circuit reasoned that these concerns apply equally to district court review of state trial and appellate court decisions.

The Second Circuit found that the two remaining claims had not been raised in the Texas litigation. The court rejected Pennzoil's argument that Rooker-Feldman bars review of claims that could have been raised in state court but were voluntarily withheld by the federal plaintiff. It reasoned that such an interpretation of Rooker-Feldman would "severely impair" the effectiveness of Section 1983 and "ignore Congress' purpose in adopting that statute." The court noted that section 1983 does not require exhaustion of state remedies and allows concurrent state and federal jurisdiction.

3. Analysis of the Second Circuit's Application of the Rooker-Feldman Doctrine

The Second Circuit correctly dismissed the five Texaco claims that had been previously raised in the Texas litigation and the court's analysis accurately reflected the federalism concerns embodied in the Rooker-Feldman doctrine. The claims were previously raised in Texas as defenses and, consequently, were "inextricably intertwined" with the state court litigation because federal adjudication would have required federal judicial review of the state court's decision. To avoid friction with the

76. See id. at 1142. The Second Circuit noted that the efficient operation of our dual judicial system lies at the heart of Rooker-Feldman: "[T]his dual system could not function if state and federal courts were free to fight each other for control of a particular case. . . . [Therefore] it [is] necessary to work out lines of demarcation between the two systems." Id. at 1142 (quoting Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 9 (1940)).

77. See id. at 1142.
78. See id. at 1144.
79. See id.
80. Id.

In addition, the Second Circuit observed that because Texaco had been an involuntary party in the Texas forum, it could not be viewed as forum shopping. See id. at 1144. This curious statement is superfluous to the court's reasoning. Texaco withheld its claims from the Texas court in order to bring them in a federal court in White Plains, New York, presumably because it perceived New York to be the friendlier forum.

That is not to say that the tactic should be criticized. Indeed, it was a brilliant litigation strategy, as the results indicate. In choosing White Plains as its forum, Texaco in effect chose the judge, as Judge Brieant is the only federal judge who sits in White Plains. More importantly, forum shopping is not an issue in determining jurisdiction, as it would be, for instance, in applying the Erie doctrine. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); see Hanna v. Plumer, 380 U.S. 460, 468 (1965) (the twin aims of Erie are "discouragement of forum-shopping and avoidance of inequitable administration of the laws"). Consequently, the court did not need to mention the question of forum shopping.

82. See supra note 80 and accompanying text.
83. See supra Part I.A.1.
state court, *Feldman* mandates that any review of those claims must necessarily be left to the Texas appellate courts and ultimately to the United States Supreme Court.\(^{84}\)

In holding the *Rooker-Feldman* doctrine inapplicable to Texaco's constitutional challenges to the bond and lien provisions, the Second Circuit overlooked two important issues. First, the Supreme Court in *Feldman* clearly indicated that "[b]y failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court."\(^{85}\) The rationale of the *Feldman* Court was that state courts must determine constitutional issues and ought to be given the opportunity to interpret a state statute in a way rendering it constitutional.\(^{86}\) By choosing not to challenge the supersedeas bond and lien provisions in the Texas state court system, Texaco orchestrated the litigation to circumvent the *Rooker-Feldman* limitation.\(^{87}\) Strategic withholding of claims could severely limit the application of *Rooker-Feldman*, a development which would foster fragmented and protracted litigation.\(^{88}\)

Second, the Second Circuit's analysis violates the principles of comity and federalism that underlie the *Rooker-Feldman* doctrine.\(^{89}\) The Second Circuit decision offends the very principles it articulated as the basis for the doctrine.\(^{90}\)

The court here propounded not only what the Texas law is, but surmised what the Texas courts would have decided in this particular case with respect to the bond and lien provision challenge.\(^{91}\) The Second Circuit recognized that the supersedeas bond presents an insurmountable hurdle to Texaco's appeal in Texas.\(^{92}\) More importantly, applying the


\(^{85}\) District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 484 n.16 (1983).

\(^{86}\) See *id.*

\(^{87}\) Texaco filed suit in federal court hours before the Texas court entered judgment. See *Pennzoil* Brief, *supra* note 27, at 10. The claims Texaco raised in its federal complaint either had already been raised or could have been presented to the Texas court. See *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1143 (2d Cir. 1986). See *infra* note 98 and accompanying text. Because it chose instead to file suit in federal court, it is an inescapable conclusion that Texaco preferred the federal forum.

\(^{88}\) For example, had Texaco been denied relief in federal court it could still have petitioned the state court for relief. See *Tex. Gov't Code Ann.* § 22.002(a) (Vernon Supp. 1986) (mandamus). The Texas courts would not be precluded from deciding the issue because they could decide the constitutionality of the provisions under the Texas constitution. Therefore, by applying this rule federal courts effectively give plaintiffs two opportunities to litigate their claims, violating one of the principles of federalism. See *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970); *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1142 (2d Cir. 1986).

\(^{89}\) See *supra* note 76 and accompanying text.

\(^{90}\) See *id.*

\(^{91}\) See *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1148 (2d Cir. 1986).

\(^{92}\) *Id.* at 1138.

Based on Texaco's estimates, the worldwide surety bond capacity is between $1.0 bil-
bond and lien provisions in this case likely violates the liberal “open courts” provision of the Texas constitution.\textsuperscript{93} However, the Second Circuit assumed that the Texas courts either would not have recognized this at all, or at least not in a timely manner.\textsuperscript{94} Such an assumption is a greater affront to state courts than the typical \textit{Rooker-Feldman} scenario. Instead of simply reviewing an actual Texas decision on the validity of the challenged provisions, the court imputed a decision to the Texas judiciary and then reversed it.\textsuperscript{95} Such a decision causes unnecessary friction between the state and federal judiciaries, violating one of the basic concerns of \textit{Rooker-Feldman}.\textsuperscript{96}

Further, hearing this case has wasted judicial resources. The Texas trial court already had the case before it but was presented with no opportunity to determine the constitutional issue it would have been re-

\mbox{\textsuperscript{93}} See Tex. Const. art. I, § 13 (Vernon 1984); \textit{see also} Brief of the State of Texas, Intervenor-Appellant at 14-15, Texaco Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986). In \textit{Dillingham v. Putnam}, 109 Tex. 1, 3, 14 S.W. 303, 305 (1890) (cited with approval in \textit{Nelson v. Krusen}, 678 S.W.2d 918, 921 (Tex. 1984)), the Texas Supreme Court struck down a state statute conditioning the right to appeal on posting a supersedeas bond. The Second Circuit distinguished that statute from the bond and lien provisions in \textit{Texaco}, reasoning that the bond in \textit{Dillingham} was a condition to appeal whereas the bond at issue in this case only conditioned supersedeas. Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1148 n.12 (2d Cir. 1986). However, the Second Circuit also found that the bond and lien provisions are probably offensive to the Constitution because they would reduce Texaco's appeal in Texas to a "meaningless ritual." \textit{See id.} at 1154 (quoting \textit{Douglas v. California}, 372 U.S. 353, 358 (1963)). The Second Circuit cannot argue that, for the purpose of the Texas constitution, the bond and lien provisions do not bar Texaco's appeal, while maintaining that, for the purpose of the federal Constitution, the rules effectively nullify Texaco's right to appeal.

\mbox{\textsuperscript{94}} Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1150-51 (2d Cir. 1986).

\mbox{\textsuperscript{95}} \textit{See id.} at 1148-49. The Second Circuit found that the Texas supersedeas provision requires, at a minimum, a bond in the full amount of the judgment plus interest, and additionally, accords the trial judge no discretion in setting the amount of the bond for a money judgment. \textit{See id.} at 1147-49; \textit{see also} Tex. R. Civ. P. 364(b) (supersedeas bond provision for money judgment).

\mbox{\textsuperscript{96}} \textit{See supra} note 76 and accompanying text. Even if the district court properly had jurisdiction, generally "one court should defer action on causes properly within its jurisdiction until the courts of another [jurisdiction] ... already cognizant of the litigation, have had an opportunity to pass upon the matter." \textit{Darr v. Burford}, 339 U.S. 200, 204 (1950).
required to decide. Similarly, the question could have been but was not presented to the Texas appellate courts. Instead, the issue was pursued in two foreign courts while the Texas proceeding ground to a virtual halt. The Second Circuit’s decision in New York is applicable only to the facts at hand. It does not clarify the Texas law for future application or correct any possible defects. Eventually, this same issue may have to be adjudicated by the Texas courts. This unnecessary duplication of efforts served no purpose other than to provide Texaco with what it perceived to be a friendly forum.

Finally, had Texaco proceeded with its plea in the Texas forum, federal review would have been available in the Supreme Court of the United States. This opportunity satisfies the third basis articulated by the Second Circuit for the Rooker-Feldman doctrine. Consequently, the Second Circuit’s refusal to apply Rooker-Feldman to all of Texaco’s constitutional claims may be questionable. Feldman supports the conclusion that issues not raised in state court may be denied a federal forum altogether. Further, the principles articulated by the court as the foundation of the Rooker-Feldman doctrine are equally implicated by hearing the two permitted claims as by hearing the five claims dismissed by the court. Moreover, applying the Second Circuit’s narrow application of the doctrine contravenes the Supreme Court’s oft-stated concern for federalism and respect for state courts.

B. The Section 1983 Claims

After finding that two of Texaco’s Section 1983 claims survived Rooker-Feldman analysis, the Second Circuit considered whether those

97. SeeTexaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1144, (2d Cir. 1986) (the third and sixth claims were never raised in the Texas courts).
98. Had Texaco presented its constitutional claims to Judge Casseb and lost, it could have directly petitioned the Texas Court of Civil Appeals for a writ of mandamus to compel the trial court to reduce the bond. See Tex. Gov’t Code Ann. § 22.002(a) (Vernon 1986). Arguably, this may have been an “extraordinary” remedy for abstention purposes. But it was available if Texaco had genuinely wanted to appeal the judgment in Texas. Moreover, mandamus may not be such an extraordinary remedy. See Transcript of Oral Argument, supra note 10, at 62-63. See infra notes 361, 412 and accompanying text.
99. Although technically the case was active, only the motion for a new trial was pending, and that motion was never heard by the court.
100. See supra note 81.
102. See supra note 76 and accompanying text.
103. See supra notes 85-86 and accompanying text.
104. See, e.g., Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (rejecting argument that federal judges are more capable or willing to adjudicate constitutional issues in denial of habeas corpus relief for fourth amendment violation); Younger v. Harris, 401 U.S. 37, 43-44 (1971) (the “longstanding public policy against federal court interference with state court proceedings” stems from “the notion of ‘comity,’ that is, a proper respect for state functions”); see also Koury, Section 1983 and Civil Comity: Two for the Federalism See-saw, 25 Loy. L. Rev. 659, 660-61 (1979) (discussing the relation between § 1983 and federalism).
claims satisfied the jurisdictional requirements of a Section 1983 claim. The court considered both elements of a Section 1983 claim, but focused on the state action requirement of the fourteenth amendment because it was the dispositive jurisdictional inquiry in this case. However, the court mechanically decided this question without due regard for the policies of the state action requirement, Section 1983 and the fourteenth amendment.

1. Statutory Requirements and the State Action Standard

Section 1983 is not designed to redress every wrong. First, a plaintiff must allege a deprivation of a federal constitutional or statutory right and satisfy the requirements for that underlying claim. Additionally, a deprivation is not actionable under Section 1983 unless it occurs "under color of" state law. In this case, the underlying claim was based on the fourteenth amendment, which requires state action. Because state action necessarily satisfies Section 1983's color of state law requirement, the appropriate inquiry in Section 1983 cases premised on the fourteenth amendment is whether the defendant's conduct constituted state action.

The law is clear that one need not be a state official to be subject to a...
Section 1983 suit. The Supreme Court addressed the issue of when private conduct becomes state action in Lugar v. Edmondson Oil Co. In Lugar, the Edmonson Oil Company sued Lugar to recover a debt. Pursuant to Virginia law, Edmondson sought a pre-judgment attachment of Lugar's property by means of an ex parte petition. The court clerk, relying solely on the allegations in the petition, issued a writ of attachment, which the county sheriff executed. The trial judge dismissed the attachment when Edmondson failed to substantiate the allegations of the petition at the post-attachment hearing. Lugar then sued Edmondson under Section 1983, alleging a deprivation of property without due process of law. On certiorari, the Supreme Court held that Edmondson's conduct under the state pre-judgment attachment statute was state action sufficient to satisfy the color of state law requirement. In so doing, the Court articulated a two step analysis for determining when a private action ought to be considered state action:

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

2. Application of the Standard by the Second Circuit

The Second Circuit found that Texaco's allegations clearly stated a threatened deprivation of its right to appeal to a state appellate court as guaranteed by the due process clause of the fourteenth amendment, and to the United States Supreme Court by 28 U.S.C. § 1257. The court


116. Id. at 924.

117. Id.

118. Id.

119. Id. at 925.

120. Id.

121. See id. at 942.

122. Id. at 937.

123. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1145 (2d Cir. 1986). If Pennzoil had deprived Texaco of its right to appeal, a deprivation would have taken place. However, there has been only a potential deprivation because Texaco never attempted to set the amount of the bond in Texas. Moreover, if a deprivation had occurred, Texas, not Pennzoil, would be responsible for it. The challenged provisions were enacted by the Texas Supreme Court and a Texas official would have approved the amount of the bond. See Tex. R. Civ. P. 364(a); Tex. Gov't Code Ann. § 22.004 (Vernon Supp. 1986). Therefore, had Texaco sued Texas or the officials charged with enforcing the bond and lien provisions, there would be no doubt as to the deprivation. More important, there would be no state action issue because conduct by Texas officials necessarily would be state
proceeded to decide whether Pennzoil's conduct was state action by applying the two part test set out in *Lugar.*

By invoking the bond and lien provisions, *Pennzoil* would exercise a "right or privilege created by the State." Consequently, the Second Circuit found that Texaco had easily satisfied the first requirement of *Lugar.* While acknowledging that it was the more difficult question, the court also held that Pennzoil could "fairly be said to be a state actor," thereby satisfying the second prong of *Lugar.*

The court based the latter conclusion on two facts. First, Pennzoil would necessarily invoke the aid of state officials in order to enforce the judgment. Second, the court found that Pennzoil, not the State of Texas, would make the ultimate decision to enforce the judgment.

The Second Circuit focused its inquiry on the concerted action of Pennzoil and state officials. The court found that the "panoply of activities undertaken together by Pennzoil and state officials" was sufficient to constitute state action.

Judge Mansfield, writing for a unanimous panel, found these facts indistinguishable from *Lugar* because the plaintiff in that case had also invoked the aid of state officials and the decision action. See *infra* note 134. One reason Texaco decided against suing Texas officials may have been to avoid antagonizing the Texas courts. Another possible explanation is that venue would have been proper only in Texas federal court. See 28 U.S.C. § 1391(b) (1982) (venue exists only where "all defendants reside, or [where] the claim arose").

In finding, without discussion, that Texaco had alleged a sufficient deprivation to state a cause of action under § 1983, the Second Circuit implicitly assumed that Texaco would have found no relief in the Texas courts and would have been required to post a bond that could not be posted. See *supra* note 92. However, this assumption may not be correct. See Tex. R. Civ. P. 365(b) (appellate court may reduce amount of bond if excessive); Tex. Gov't Code Ann. § 22.002(c) (Vernon Supp. 1986) (supreme court may issue writ of mandamus to compel compliance with state law). See *infra* note 93 and accompanying text.

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124. See *Texaco Inc. v. Pennzoil Co.,* 784 F.2d 1133, 1145-47 (2d Cir. 1986).
126. See *Texaco Inc. v. Pennzoil Co.,* 784 F.2d 1133, 1145 (2d Cir. 1986) (quoting *Lugar,* 457 U.S. at 937 (1982)).
127. *Lugar,* 457 U.S. at 937 (1982); see *Texaco Inc. v. Pennzoil Co.,* 784 F.2d 1133, 1145 (2d Cir. 1986).
128. See *Texaco Inc. v. Pennzoil Co.,* 784 F.2d 1133, 1145, 1147 (2d Cir. 1986) (quoting *Lugar,* 457 U.S. at 937 (1982)).
129. *Texaco,* 784 F.2d at 1145-46.
130. See *id.* at 1147. Under Texas procedure, the judgment would have become enforceable 30 days after denial of Texaco's motion for a new trial. See Tex. R. Civ. P. 329(c), (e), (f). To enforce the judgment, Pennzoil would have had to present an abstract of the judgment to the court clerk, who would then issue a writ of execution. See Tex. R. Civ. P. 622, 629. The county sheriff would then seize Texaco's property. See Tex. R. Civ. P. 630.
131. See *Texaco Inc. v. Pennzoil Co.,* 784 F.2d 1133, 1146 (2d Cir. 1986).
132. See *id.* By focusing on the "panoply of activities," *id.,* by Pennzoil and Texas officials the Second Circuit engaged in the "single-minded search for the moving hand of governmental actor." See L. Tribe, *supra* note 112, at 105 (Supp. 1979). This search, as Professor Tribe argues, does not address the real issue of the state action analysis—how state rules allocate power between governmental and private parties. See *id.* § 18-5, at 1162 (1978).
to attach was unilaterally made by the private party.133

3. A Proposed State Action Analysis

The Second Circuit's mechanical application of the Lugar test did not consider important principles underlying the state action analysis. When determining whether a private party is a state actor, both the purposes of the state action inquiry and the policies behind Lugar ought to be considered in addition to the two prong test.134

The fourteenth amendment protects individuals from deprivations of federal rights by state governments.135 This protection is necessary because governmental acts carried out with the full force and authority of the state present greater potential for constitutional deprivations than purely private acts.136 To provide this protection, the Constitution imposes limits on the exercise of governmental power. Therefore, the state action inquiry should focus on whether the nature of the power that caused the alleged deprivation is in fact state power.137

State power may be divided into two components. The first is the authority to regulate conduct by making laws. The first prong of the Lugar test incorporates this component by focusing on the state rule pursuant to which the private party acts.138 When a private party acts pursuant to a state law or rule of conduct, however, it is not necessarily acting as the

133. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1146 (2d Cir. 1986). The difference between the two procedures is that the ex parte petition in Lugar consisted only of the allegations of one party, whereas the ex parte petition in Texas is the judgment itself, which in this instance is the decision of a Texas court, arrived at after a four and one-half month jury trial. This ought to be an important distinction in determining state action. See infra Part I.B.2.

134. The state action analysis set forth below only applies to cases where the § 1983 defendant is a private party acting with official involvement. When the defendant is a state official state action is obvious. When the defendant is a purely private party, the Supreme Court has outlined various tests to determine whether the private party may be considered a state actor. See J. Nowak, R. Rotunda & J. Young, supra note 112, at 502-25.


137. See Evans v. Newton, 382 U.S. 296, 299 (1966) (when private parties are endowed with governmental powers they are subject to constitutional limitations).

The state involvement in such action is passive—the state merely refrains from proscribing the conduct. Therefore, although the private party acts with the consent of the government it does not have the affirmative support necessary for state action.

The second component of state power is the authority to enforce a state rule or law. This aspect of state power is affirmative. The state not only consents to but lends its enforcement power to the conduct. Such affirmative support of private acts has been present in every case in which the Supreme Court held that private conduct constituted state action. Moreover, in addition to affirmatively supporting the private conduct, the state permits the private party to make the decision to employ the state's enforcement powers. Therefore, courts ought not focus on the involvement of state officials, but rather on the extent to which the state cedes its enforcement power to a private party.

The Third Circuit embraced this approach to the state action analysis in Cruz v. Donnelly, holding that a store manager who had the plaintiff state law or rule is not enough to convert private conduct into state action). See supra note 122 and accompanying text.


141. Compare id. at 165 (mere consent by the state, even in statutory form, does not provide the “encouragement” necessary for state action) with Lugar v. Edmondson Oil Co., 457 U.S. 922, 941-42 (1982) (defective procedural scheme will be subject to constitutional restraint if the state aids the private party in enforcing it).


145. Cf L. Tribe, supra note 112, at 105 (Supp. 1979). Professor Tribe has recast the state action inquiry in terms of distribution of authority between governmental and private actors. He argues that when a plaintiff challenges the constitutionality of a state rule rather than the conduct of a state official, the proper inquiry is “whether the challenged . . . rule of law can validly distribute authority among governmental and private actors as it purports to do.” Id. This framework, although more generalized, can encompass the foregoing articulation of the appropriate state action inquiry where a private party acts with the aid of state officials. It is also important to note that the analysis proposed by this Comment does not focus on whether the state has delegated a sovereign function. As Professor Tribe points out, such an inquiry enmeshes the court in a determination of what is a sovereign function. See id. at 108-09. This inquiry is, however, imprecise. See Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1008 (1984) (defining a governmental function is a difficult task).

detained and strip-searched by the police was not a state actor under \textit{Lugar}.\textsuperscript{147} The Third Circuit interpreted \textit{Lugar} to emphasize the reliance pre-judgment attachment places on the judgment of the private party.\textsuperscript{148} The court concluded that "when the state creates a system permitting private parties to substitute their judgment for that of a state official or body, a private actor's mere invocation of state power renders that party's conduct actionable under § 1983."\textsuperscript{149}

The facts of \textit{Texaco} resemble \textit{Cruz} more than \textit{Lugar} in that the challenged Texas provisions did not involve a pre-judgment attachment. Rather, the decision on the need for the judgment was made by a Texas court after a four and one-half month jury trial. Although Pennzoil will decide \textit{when} to enforce the judgement, it has not substituted its discretion for that of the state in deciding \textit{whether} to award the judgment.\textsuperscript{150} If the Second Circuit is correct that merely invoking the aid of state officials constitutes state action, then every judgment creditor becomes a state actor, exposing private parties to virtually limitless constitutional litigation.\textsuperscript{151} This could not have been intended by the \textit{Lugar} Court.\textsuperscript{152} Giving state action such an interpretation strips it of any import whatever. Indeed, if a private party becomes a state actor every time he invokes the aid of a state official, the state action inquiry becomes meaningless. Although the Second Circuit strained to limit the reach of its decision to the "extraordinary circumstances of this case,"\textsuperscript{153} its mechanical analysis of state action can do nothing but further blur the boundaries of this already imprecise constitutional doctrine.\textsuperscript{154}

\begin{itemize}
  \item \textsuperscript{147} See \textit{Cruz}, 727 F.2d at 80, 82. Employees of an A & P store called the police after Cruz had aroused their suspicions. The police brought Cruz into the manager's office, where the store manager allegedly accused Cruz of shoplifting and ordered the officers to conduct a search. See \textit{id.} at 80 (quoting Complaint § 9).
  \item \textsuperscript{148} See \textit{id.} at 81-82. The court found that the police had exercised independent discretion in investigating the crime and had not acted pursuant to a prearranged plan. Therefore, the court held the manager was not a state actor. See \textit{id.}
  \item \textsuperscript{149} See \textit{id.} at 82.
  \item \textsuperscript{150} The Second Circuit seemed to acknowledge that whether the state or the private party makes a decision is relevant to the state action inquiry. See \textit{Texaco Inc. v. Pennzoil Co.}, 784 F.2d 1133, 1147 (2d Cir. 1986). The court, however, focused on the wrong decision. The Second Circuit found the relevant exercise of discretion was the decision of when to enforce the judgment. See \textit{id.} But if the judgment is offensive, the relevant decision is whether there ought to have been a judgment at all. This decision was made by the state of Texas through its trial court. Moreover, the trial court decided the timing of enforcement, at least to a certain extent, in the much disputed paragraph 7 of the judgment, which forbade Pennzoil from executing the judgment for as long as the trial court retained jurisdiction. See \textit{supra} note 20.
  \item \textsuperscript{151} Recognizing this potential, the courts have held that mere invocation of legal procedures does not constitute state action. See \textit{Dennis v. Sparks}, 449 U.S. 24, 28 (1980); \textit{Hinman v. Lincoln Towing Serv.}, \textit{cert. denied}, 105 S. Ct. 1845 (1985) 771 F.2d 189, 193 (7th Cir. 1985); \textit{Dahlberg v. Becker}, 748 F.2d 85, 93 (2d Cir. 1984).
  \item \textsuperscript{152} See \textit{Lugar}, 457 U.S. at 937 (unless action is "chargeable to the State[,] ... private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them").
  \item \textsuperscript{153} \textit{Texaco Inc. v. Pennzoil Co.}, 784 F.2d 1133, 1157 (2d Cir. 1986).
  \item \textsuperscript{154} See \textit{Burton v. Wilmington Parking Auth.}, 365 U.S. 715, 722 (1961) ("[T]o fashion
In sum, both Section 1983's purposes as well as the Lugar Court's concerns, suggest that the state action inquiry should focus on whether the private party has its judgment substituted for that of the state in determining whether to employ the state's enforcement power to cause a deprivation of constitutional rights. Because in this case the state of Texas did not substitute Pennzoil's discretion for its own in awarding the judgment, Pennzoil ought not "fairly be said to be a state actor." Consequently, the federal court should not have asserted jurisdiction under sections 1983 and 1343 to hear this case.

C. Summary

The circumstances of this case were indeed "extraordinary." Although these facts may provide good reason for a federal court to desire to intervene, a federal court cannot decide to hear a case because public policy would seem to favor it. Rather, federal courts have power to decide only cases that Congress expressly authorizes. Hearing this case not only violates the Rooker-Feldman doctrine, but also extends the scope of private conduct that constitutes state action beyond the Supreme Court's intent. If the Second Circuit's jurisdictional analysis was affected by the "extraordinary circumstances" of this case, it would have provided more guidance to future courts by addressing these concerns more openly. Instead, by trying to justify a possibly result-oriented decision on technical grounds, the court blurred subtle distinctions in important constitutional doctrines.

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155. See Cruz, 727 F.2d at 82. The district court relied heavily on Henry v. First Nat'l Bank, 595 F.2d 292 (5th Cir. 1979), in granting Texaco injunctive relief. This case, however, can be distinguished on two grounds. First, the state money judgment at issue in Henry was "essentially based on [an] underlying injunction" that was "at odds with the First Amendment." Id. at 299. Second, that case was decided three years before Lugar. The Fifth Circuit found state action in Henry because the defendant possessed an immediately enforceable judgment. Id. at 299. Based on the foregoing analysis this conclusion would have been different after Lugar. See supra notes 150-51 and accompanying text.


157. Texaco alleged that it had suffered painful economic effects. It had difficulty obtaining financing from its usual sources because of the Texas judgment and the uncertainty surrounding the bond requirement; partners had abandoned plans for joint ventures; and Moody's and Standard & Poor's had downgraded Texaco's securities, effectively keeping Texaco out of the credit market. Texaco Brief, supra note 12, at 2. Moreover, if Texaco had gone bankrupt, the economic effects would have reverberated throughout the national economy. See Amended Complaint, supra note 4, at 20-22. In fact, 12 states filed amicus curiae briefs with the Second Circuit describing the economic devastation a collapse of Texaco would cause. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1136 (2d Cir. 1986). These fears were not unfounded. Texaco is the fifth largest corporation in the United States. Fortune, April 29, 1985, at 266. It employs 55,000 people around the world, and is an important supplier of fuel for United States armed forces. Wall St. J., Mar. 14, 1986, at 1, col. 6. In light of these facts, it is evident that the financial collapse of Texaco should have been avoided if at all possible.
II. APPLICATION OF THE ANTI-INJUNCTION ACT

By affirming jurisdiction under Section 1983, the Second Circuit determined that a federal court has the power to hear a challenge to state court procedure arising out of an ongoing state proceeding. The finding of Section 1983 jurisdiction also meant that the Anti-Injunction Act did not bar the injunctive relief requested by Texaco. The Second Circuit's decision gave only brief consideration to this statutory barrier because established interpretation categorically exempts Section 1983 claims from the Act's ban on injunctions of state court proceedings. Instead, federal courts rely on the judge-made Younger doctrine to determine the propriety of such injunctions. This Part argues that the current approach to the Act fosters inconsistent judicial decisions and frustrates legitimate congressional goals. The Second Circuit's decision illustrates the malleability of Anti-Injunction Act analysis and the consequent potential for contrived results.

The current anti-injunction statute, 28 U.S.C. § 2283, provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The simple language belies the tortuous path of judicial interpretations that led to the present version.

To better understand how the present approach to the Act evolved, it will first be necessary to consider the history of the statute prior to Mitchum v. Foster, the 1972 decision that established Section 1983 as an expressly authorized exception to Section 2283. Next, a brief survey of the conflicting developments since Mitchum—contraction of Section 1983 jurisdiction and expansion of the reach of the Younger doctrine—will be offered. The inconsistency of these two developments with Mitchum will be viewed in light of other recent federalism decisions. The conclusions of this analysis will in turn be applied to the issues raised in Texaco Inc. v. Pennzoil Co.

A. Historical Development of the Anti-Injunction Act

1. Early History

The source of the current Anti-Injunction Act can be traced to a sen-
tence in the 1793 amendment to the Judiciary Act, the intent and purpose of which is unclear. The few early decisions involving federal injunctions of state court proceedings were not definitive. In 1872, however, the Supreme Court interpreted the Act as an absolute bar to federal injunctions of state proceedings. In the 1874 recodification,


Some twentieth century Supreme Court opinions have contended that regardless of the motivation for the original statute, the meaning is clear on its face: "nor shall a writ of injunction be granted to stay proceedings in any court of a state." Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335 (current version at 28 U.S.C. § 2283 (1982)); see Mitchum, 407 U.S. at 231-33; Younger, 401 U.S. at 43-45 (1971); Toucey, 314 U.S. at 132.

Recent commentators have argued persuasively that this language has been taken out of context. In fact, they contend, the clause was originally targeted only at individual Supreme Court Justices, and the intent—far from being to set forth a broad dictate of federalism—was part of an effort to ease the burdensome circuit riding duties of the justices. See Mayton, Ersatz Federalism under the Anti-Injunction Statute, 78 Colum. L. Rev. 330, 332-33 (1978); Reaves & Golden, The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coast Line Railroad, 5 Ga. L. Rev. 294, 296-99 (1971); see also Taylor & Willis, supra, at 1170 (attributing historical source of the Act to a letter from Supreme Court Justices complaining of circuit riding duties rather than to any intent to limit federal court jurisdiction). The position that the clause was not intended to bar all federal court intervention in state proceedings is supported by the availability and use of other writs to effect stays of state proceedings at that time. See Mayton, supra, at 336-37; Note, Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent, 38 U. Chi. L. Rev. 612, 613-14, 624 (1971) (discussing Congress’ awareness of the availability and use of other writs and concluding that Congress did not intend to prohibit these other forms of effecting stays of state court proceedings).

168. See Mayton, supra note 167, at 338-44 (early federal courts did stay state court proceedings; when federal courts refused to stay such proceedings, they did so without reference to the 1793 statute); Reaves & Golden, supra note 167, at 297-98 (Supreme Court’s early decisions did not rely on the 1793 Act when refusing to stay state court proceedings, which implies that anti-injunction clause applied only to individual Justices rather than to federal courts generally); Taylor & Willis, supra note 167, at 1172 n.21 (noting infrequency of decisions applying the statute). See also infra note 169.

169. See Watson v. Jones, 80 U.S. (13 Wall.) 679, 719 (1872). But see Mayton, supra note 167, at 346 (discussing lack of support for view that the 1793 statute was intended to bar injunctions of state proceedings); Reaves & Golden, supra note 167, at 297-99 (discussing lack of precedent for Court’s decision); Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 366-67 (1930) (stating that no decisions were expressly based on the statute from 1807 to 1872). In a lengthy opinion the Court’s only reference to the statute was to state that “the act of Congress of March 2d, 1793, as construed in the cases of Diggs v. Wolcott, and Peck v. Jenness, are equally conclusive against any injunction from the Circuit Court . . . .” Watson v. Jones, 80 U.S. (13 Wall.) 679, 719 (1872) (footnotes omitted).

Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch) 179 (1807), a case often relied on as the first instance of the anti-injunction clause, was a one-sentence decision that did not men-
the language of the 1793 statute was changed to reflect such an absolute ban.\footnote{170}

Despite the revision’s seemingly unambiguous language, federal courts established broad statutory and judicial exceptions to the Anti-Injunction Act in the decades that followed.\footnote{171} However, in \textit{Toucey v. New York Life Insurance Co.},\footnote{172} Justice Frankfurter departed sharply from prior interpretations,\footnote{173} finding the Act to be a clear-cut prohibition of federal court injunctions of state court proceedings. Justice Frankfurter attacked the implied exceptions to the anti-injunction statute as inconsistent with Congress’ intent.\footnote{174} He explicitly based his strict interpretation on Congress’ desire to avoid friction between federal and state courts by preventing interference in state judicial proceedings.\footnote{175}

\begin{itemize}
\item The Court in \textit{Toucey} relied, see \textit{id.} at 131, suggested two additional exceptions in the case law—actions to test the constitutionality of state statutes and injunctions sought by the United States government. \textit{Taylor & Willis, supra} note 167, at 1190-94. The latter exception has since been accepted by the Court. See \textit{Leiter Minerals, Inc. v. United States}, 352 U.S. 220, 227-28 (1957).
\item Other commentators writing prior to \textit{Toucey} found that the exceptions to the Anti-Injunction Act were so entrenched that, for practical purposes, “the statute has long been dead.” \textit{Durfee & Sloss, supra} note 167, at 1169.
\end{itemize}
Congress responded to *Toucey* by enacting the present version of the anti-injunction statute in 1948.\(^{176}\) Aside from restoring the specific relitigation exception that *Toucey* had rejected, the revised statute did little to clarify the ambiguity of its predecessors.\(^{177}\) Nonetheless Frankfurter, interpreting the revised statute in a later decision, found "a clear-cut prohibition qualified only by specifically defined exceptions."\(^{178}\) The policy Frankfurter relied on for this interpretation was what he perceived as Congress' "historic prohibition against federal interference with state judicial proceedings."\(^{179}\)

Following Justice Frankfurter's lead, the Court continued to interpret the prohibition broadly and construe the exceptions narrowly in the decade that followed. In *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*,\(^ {180}\) Justice Black maintained that the source of the original anti-injunction statute was the need to avoid friction within the dual legal system.\(^ {181}\) This view implied that more than just the language of the Anti-Injunction Act itself barred federal court interference in state court proceedings. In contrast to earlier decisions, which relied solely on congressional intent in striking down federal injunctions of state proceed-


\(^{177}.\) The revisers stated that "the revised section restores the basic law as generally understood . . . prior to the Toucey decision." 28 U.S.C. § 2283 (1982) (Historical & Revision Notes). It is unclear whether Congress thereby intended to restore all of the pre-*Toucey* exceptions, or just the relitigation exception at issue in the case. See *Mitchum v. Foster*, 407 U.S. 225, 236 (1972) (Congress intended to restore the law as it was before *Toucey*); *Mayton*, supra note 167, at 349-50 (same); *Reaves & Golden*, supra note 167, at 303-05 (suggesting that the matter is uncertain); *Redish*, The Anti-Injunction Statute Reconsidered, 44 U. Chi. L. Rev. 717, 722 (1977) (suggesting that both the language and the intent of Congress are uncertain) [hereinafter cited as Redish I]. But see *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 515 n.1 (1955) ("the quoted phrase [from the Reviser's Note] refers only to the particular problem which was before the Court in the *Toucey* case").

\(^{178}.\) *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 516 (1955). But see id. at 523 (Warren, C.J., dissenting) ("[T]he express purpose of § 2283 was to contract—not expand—the prohibition of § 265. . . . To read § 2283 literally . . . ignores not only this legislative history but also over a century of judicial history.").

\(^{179}.\) *Id.* at 514. This view was essentially the same view that Frankfurter had expressed in *Toucey*, 314 U.S. at 135, the case Congress overruled by name. See 28 U.S.C. § 2283 (1982) (Historical & Revision Notes).


\(^{181}.\) See *id.* at 286. Based on this interpretation of the statute's history, Black concluded that any injunction against state court proceedings . . . must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction.

*Id.* at 287.
ings.\textsuperscript{182} Black implied that the nature of the dual judicial system itself required that federal courts not interfere. Black's invocation of "the fundamental constitutional independence of the States and their courts"\textsuperscript{183} to limit federal injunctive power reappeared in his doctrine of "Our Federalism" articulated the following year in \textit{Younger v. Harris}.\textsuperscript{184}

In \textit{Younger}, Justice Black began by characterizing the Act as an unambiguous ban on federal court interference since its inception in 1793.\textsuperscript{185} This assertion was made even though the source and intent of the original Act have never been certain and in actual practice the statute has seldom been interpreted as an absolute ban.\textsuperscript{186} Nonetheless, Black went on to identify the two policies he claimed underlay the Act. First, equity required irreparable harm and no adequate remedy at law.\textsuperscript{187} Second was the more vital consideration—comity.\textsuperscript{188} He found that comity required

\begin{quote}

a proper respect for state functions, a recognition of the fact that the entire country is made up of a 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.\textsuperscript{189}
\end{quote}

\textsuperscript{182} See \textit{supra} notes 172-79 and accompanying text.


\textsuperscript{184} 401 U.S. 37 (1971). The substantive elements of what has become known as the \textit{Younger} doctrine and the Second Circuit's application of the doctrine will be discussed in Part III of this Comment.

\textsuperscript{185} Black stated:

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Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. In 1793 an Act unconditionally provided: '[N]or shall a writ of injunction be granted to stay proceedings in any court of a state ...' 1 Stat. 335, c. 22, § 5. A comparison of the 1793 Act with 28 U.S.C. § 2283, its present-day successor, graphically illustrates how few and minor have been the exceptions granted from the flat, prohibitory language of the old Act. \textit{Younger}, 401 U.S. at 43.

It has been noted that Justice Black's opinion "disregard[s] such intervening events as the Civil War, the fourteenth amendment, the Civil Rights Act [and] the federal jurisdictional grants of the Reconstruction era." Gibbons, \textit{Our Federalism}, 12 Suffolk U.L. Rev. 1087, 1104 (1978).

\textsuperscript{186} 401 U.S. 37 (1971). The substantive elements of what has become known as the \textit{Younger} doctrine and the Second Circuit's application of the doctrine will be discussed in Part III of this Comment.

\textsuperscript{187} Black relied on Toucey v. New York Life Ins. Co., 314 U.S. 118 (1941), for this version of the statute's history. \textit{See Younger}, 401 U.S. at 43 n.3. As authority, \textit{Toucey} is vulnerable to criticism both because it represented such a sharp break from past Supreme Court interpretations and because Congress expressly overruled it. See \textit{supra} notes 167-72. Commentators writing since \textit{Toucey} have challenged the accuracy of its view of the Anti-Injunction Act's history. Much of the research regarding the context of the original anti-injunction clause has occurred since then. See Mayton, \textit{supra} note 167, at 332-38; Reaves & Golden, \textit{supra} note 167, at 294-99. See generally \textit{supra} notes 167-69.

\textsuperscript{188} \textit{See Younger v. Harris}, 401 U.S. 37, 43 (1971).

\textsuperscript{189} \textit{Id.}
Based on this view of federalism, the Court overturned the federally-issued injunction in *Younger* without reaching the question of whether Section 1983 was an expressly authorized exception to the Anti-Injunction Act.\(^{190}\)

By relying on comity, equity and federalism rather than on the anti-injunction statute, the Court in *Younger* essentially freed itself from Congress' intent as to the circumstances, if any, under which federal courts could enjoin state court proceedings.\(^{191}\) Henceforth, the Court could overturn federal court injunctions based on free-standing notions of comity, even though the injunctions involved exceptions to the Act expressly authorized by Congress.\(^{192}\) Only against this background can the limits of the *Mitchum* decision be understood.

### 2. *Mitchum v. Foster*

*Mitchum v. Foster*,\(^ {193}\) a case involving a federal court injunction of a state nuisance action,\(^ {194}\) stands for the proposition that Section 1983 is an "expressly authorized" exception to the anti-injunction statute.\(^ {195}\) Justice Stewart surveyed the statutes previously determined to be congressionally authorized exceptions to Section 2283.\(^ {196}\) From these exceptions he derived the following test: "whether an Act of Congress ...
could be given its intended scope only by the stay of a state court proceeding.” Applying the test to Section 1983, the Mitchum Court concluded that Congress intended the statute to enshrine the federal courts as guardians of the people against unconstitutional state action, including actions of state courts.

The Court thus determined that Congress did not intend the Act to bar federal court injunctions in Section 1983 cases. However, the Court emphasized that the Younger doctrine might still do so. In essence the Court’s holding meant that Congress’ intent to make federal court injunctions against state proceedings available to Section 1983 plaintiffs could be circumvented by the Court under the Younger doctrine. The authority for the Court’s position again derived from the purported intent of Congress in enacting the 1793 statute to protect the dual legal system by barring injunctions.

3. Developments since Mitchum v. Foster

Two developments since the Mitchum decision have intensified the clash between the view in Mitchum that Congress intended federal courts to be able to enjoin state courts in Section 1983 actions and the view in Younger that principles of federalism generally bar federal court injunctions of state court proceedings. First, Supreme Court decisions since 1972 have retreated from Mitchum’s broad interventionist interpretation of Section 1983. Recent decisions have limited the scope of Section 1983

197. See id. at 238; see also Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 632 (1977) (plurality opinion of Rehnquist, J.) (applying Mitchum test to federal antitrust law).

198. See Mitchum, 407 U.S. at 242 (“The very purpose of section 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, ‘whether that action be executive, legislative, or judicial.’”) (quoting Ex parte Virginia, 100 U.S. 339, 346 (1879)).

For an exhaustive examination of the legislative history of the fourteenth amendment and the predecessor to § 1983 that supports the Mitchum Court’s interventionist view, see Zeigler, A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction, 1983 Duke L.J. 987.

199. See Mitchum, 407 U.S. at 243. The concurring opinion was solely concerned with the importance of applying Younger to the cases. See id. at 243-44 (Burger, C.J., concurring).

200. See supra note 191.

201. See Younger v. Harris, 401 U.S. 37, 43 (1971); see also Juidice v. Vail, 430 U.S. 327, 335 n.11 (1977) (overturning a federal court injunction based on “the applicability, wholly independent of a statutory codification, of the longstanding policies which inhere in the notions of comity and federalism”).

The circularity of the Younger opinion—relying on an obscure clause in a 1793 statute to support abstaining from enforcing the subsequently-enacted Civil Rights Act of 1871—has been pointed out. See Redish I, supra note 177, at 738; Whitten, supra note 192, at 673. Arguments that the conditions that led to the enactment of the Civil Rights Act of 1871 no longer concern Congress do not resolve this problem because Congress has more recently recodified § 1983 than it has the Anti-Injunction Act. See Redish I, supra note 177, at 738 n.100.
by narrowly interpreting the deprivation\textsuperscript{202} and "under color of state law"\textsuperscript{203} elements, while expanding doctrines of immunity.\textsuperscript{204} These decisions depreciate the importance of Section 1983, thereby undercutting Mitchum's vitality.\textsuperscript{205}

Second, the \textit{Younger} doctrine is no longer limited to its original context of criminal cases.\textsuperscript{206} At a minimum, \textit{Younger} now also applies to civil actions where the injunction interferes with "important state interests."\textsuperscript{207} Because courts require action "fairly attributable to the State"\textsuperscript{208} as an element of Section 1983, virtually every Section 1983 action will involve a state interest.\textsuperscript{209} In these situations, the Supreme Court has uniformly invalidated injunctions based on the \textit{Younger} doc-

\begin{itemize}

\item\textsuperscript{203} Although it seems that the state action cases are as much of "a conceptual disaster area" as ever, see Friendly, \textit{The Public-Private Penumbra—Fourteen Years Later}, 130 U. Pa. L. Rev. 1289, 1290 (1982) (quoting Black, \textit{The Supreme Court, 1966 Term—Foreword}, 81 Harv. L. Rev. 69, 95 (1967)), some recent cases indicate an ongoing attempt to limit the concept. See Polk County v. Dodson, 454 U.S. 312, 324-26 (1981) (actions of a public defender were not under color of state law even though he was a full-time state employee performing official activities); cf. Carpenters & Joiners of Am. v. Scott, 463 U.S. 825, 836-39 (1983) (claimed conspiracy to deprive plaintiff of first amendment rights insufficient for a \textsection{1985(3) claim because not racially based). See generally Blackmun, \textit{Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away}, 60 N.Y.U. L. Rev. 1, 24-26 (1985) (discussing Supreme Court's narrow construction of state action and color of state law in civil rights cases).


\item\textsuperscript{205} See Kreimer, \textit{The Source of Law in Civil Rights Actions: Some Old Light on Section 1888}, 133 U. Pa. L. Rev. 601, 605 n.18 (1985) (criticizing Court's limits on \textsection{1983 as inconsistent with legislative intent); Zeigler, supra note 198, at 1044 (criticizing \textit{Younger} doctrine as contrary to congressional intent in enacting Reconstruction jurisdictional statutes). See generally \textit{Developments in the Law—Section 1983 and Federalism}, 90 Harv. L. Rev. 1133, 1174-75 (1977) (describing Court's retreat from expansive interpretation of \textsection{1983 based in part on vaguely-expressed concerns of federalism) [hereinafter cited as \textit{Developments}].

\item\textsuperscript{206} Younger v. Harris, 401 U.S. 37 (1971) and its five companion cases all concerned state criminal proceedings. See supra note 190.

\item\textsuperscript{207} See Moore v. Sims, 442 U.S. 415, 423 (1979) (state interest in civil child abuse proceedings is sufficient to invoke the \textit{Younger} doctrine); see also Trainor v. Hernandez, 431 U.S. 434, 444 (1977) (state interest in safeguarding the fiscal integrity of public assistance programs sufficient to invoke the \textit{Younger} doctrine); Judice v. Vail, 430 U.S. 327, 335 (1977) (state interest in contempt proceedings sufficient to invoke the \textit{Younger} doctrine). See generally Zeigler, supra note 198, at 1039-41 (summarizing lower court extensions of \textit{Younger} to civil cases).

\item\textsuperscript{208} Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

\item\textsuperscript{209} See supra notes 151-54 and accompanying text. \textit{Cf. Developments, supra note 206,}

\item\textsuperscript{200}
trine without considering Congress’ intent that injunctions be available.\textsuperscript{210}

This result seems particularly incongruous in light of the Supreme Court’s exposition of federalism in other contexts. With one glaring exception,\textsuperscript{211} Congress has allocated governmental power in the federal system virtually without judicial interference since the New Deal.\textsuperscript{212} Indeed, the most recent case concerning the limits federalism places on Congress concludes that striking down congressional legislation as “inconsistent with established principles of federalism” was simply not a proper judicial exercise.\textsuperscript{213} Instead, the only redress for supposed transgressions by Congress against state sovereignty was held to lie in the states’ representation in Congress and their role in selecting the executive and legislative branches of government.\textsuperscript{214}

These federalism decisions call into question the legitimacy of the
Younger doctrine's limits on Section 1983 injunctions. It seems anomalous for the Court to use this vague federalism doctrine to restrict Congress' command that Section 1983 offer a "uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." when the Court has eschewed such a role for itself elsewhere. If it is further accepted that "[t]he predecessor of § 1983 was... an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment," such a restriction seems particularly unwarranted.

The Supreme Court's fundamentally inconsistent approach to the Anti-Injunction Act maximizes the opportunity for judicial manipulation of Section 1983 and Younger analyses to achieve the desired result in an individual case. This Comment contends that such was the case in

(1985); see also Choper, supra note 212, at 1560-65 (states' rights are protected through representation in Congress and role in selecting the President).

It has been argued that this political protection is not available to the states against federal judicial action. See Developments, supra note 205, at 1186-87. This view does not take sufficient account of the procedural posture of abstention cases. Prior to deciding whether to abstain, a federal court must first find jurisdiction based on the Constitution and federal statutes. See Redish II, supra note 191, at 74; Whitten, supra note 192, at 650-51. The states are protected by federal courts against congressional overreaching through the jurisdictional inquiry. Moreover, they can exercise political checks in legislating federal court jurisdictional statutes. In contrast, by abstaining, the federal courts are refusing to exercise jurisdiction despite Congress' command that they do so. Therefore, abstention in this context is not a federalism question; rather it is a separation of powers problem. See Redish II, supra note 191, at 76-79.

The illegitimacy of the Court's refusal to exercise congressionally mandated jurisdiction is underscored by the fact that Congress has already made its policy determination as to the proper role of federal courts vis-a-vis state courts in the form of the Anti-Injunction Act and the exceptions to it, as well as other limits on federal court power. See Redish II, supra note 191, at 86 (stating that because Younger's "considerations represent merely the Supreme Court's social judgment about the relative competence of state and federal courts or about the harm caused by federal review of state policies, they are illegitimate judicial incursions into an area where Congress has already spoken"); cf. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 403 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."). In the face of abstention, Congress has no way to force courts to use admittedly constitutional jurisdiction which Congress has mandated. Unlike the states, Congress has no recourse.

216. Id. at 238.
217. See Field I, supra note 192, at 717 n.157 ("the Younger doctrine does not fit with Mitchum v. Foster and with the purposes of the Civil Rights Act"); Redish II, supra note 191, at 88 ("if Mitchum is valid, Younger abstention represents an effective reversal of the congressional decision to make section 1983 an exception to the Anti-Injunction Act"); Whitten, supra note 192, at 650-51 (stressing the inconsistency of Younger with Mitchum's finding that § 1983 was an express exception to the Anti-Injunction Act); Zeigler, supra note 198, at 990 (criticizing Younger and its progeny as "wholly inconsistent with the congressional purposes" of § 1983).
218. See Fiss, Dombrowski, 86 Yale L.J. 1103, 1128 (1977) (noting that Younger doctrine has a malleability not present in statutory limits); Redish II, supra note 191, at 88 ("the combined effect... of the Court's decisions in Younger and Mitchum is that the
Texaco Inc. v. Pennzoil Co. 219

B. The Second Circuit's Application of the Anti-Injunction Act

Faced with this contradictory Supreme Court precedent, the Second Circuit stressed Mitchum's interventionist rationale while limiting the scope of the Younger doctrine. After finding that jurisdiction existed under Section 1983, the court announced that it "need not tarry over" the prohibition in the Anti-Injunction Act. 220 The court relied on Mitchum to except the injunction from this congressional statement of federalism and comity. 221

The court then proceeded to consider Younger, concluding that

[accepting Pennzoil's argument that [Texas' interests in protecting judgments and in the constitutionality of state statutes] are sufficient to mandate abstention would broaden Younger to cover almost every § 1983 case and thus undermine the Supreme Court's holding in Mitchum ... that federal courts are empowered by § 1983 to enjoin ongoing state proceedings. 222

Accordingly, the Second Circuit declined to use Younger to overturn the injunction.

The court next applied traditional equitable analysis—balancing the potential financial disaster to Texaco against the consequences to Pennzoil—to determine whether the Second Circuit's standard for preliminary injunctive relief had been met. 223 Concluding that the hardship to Pennzoil from the injunction was heavily outweighed by Texaco's need for relief, 224 the court affirmed the order for an injunction. 225 The opinion ended on a cautionary note, however, emphasizing that the "extraordinary circumstances" of the case were "unlikely ever again to recur." 226

C. Rethinking the Second Circuit's Anti-Injunction Act Analysis

The Second Circuit's opinion underscores the degree to which collapsing the Anti-Injunction Act inquiry into a search for jurisdiction followed by Younger analysis permits unbounded judicial discretion. The Supreme Court's approach to federal court injunctions of state court pro-

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219. 784 F.2d 1133 (2d Cir. 1986).
220. See id. at 1147.
221. See id.
222. Id. at 1149.
223. See id. at 1152-56.
224. See id. at 1155.
225. See id. at 1156.
226. Id. at 1157.
ceedings gives insufficient attention to congressional goals with respect to Section 1983 and the Anti-Injunction Act. By removing Congress' intent from consideration, courts may base their decisions on their own judgments of the respective roles of state and federal courts.

The Second Circuit's resolution of the Younger question in *Texaco Inc. v. Pennzoil Co.* did not sufficiently consider the Supreme Court's extension of the Younger doctrine since *Mitchum*. In a case factually indistinguishable from *Mitchum, Huffman v. Pursue, Ltd.*, the Court overturned an injunction based on the Younger doctrine. Therefore, it seems fair to predict that if *Mitchum* were decided today, the Court might well dismiss the action based on Younger's progeny. The ease with which the Second Circuit avoided the nonintervention imperative of Younger illustrates that this sort of inquiry, in which courts consider an abstract conceptual doctrine such as comity within a concrete balancing of the interests of the parties and the public, lends itself to arbitrary decisions.

The arbitrariness of the Younger analysis in *Texaco Inc. v. Pennzoil Co.* is further demonstrated by the grounds the court used to limit the precedential value of its decision. The magnitude of the civil judgment, Texaco's inability to comply with the state bond requirement, and the "prospect" that the state court would not rule prior to the "irreversible destruction" of Texaco were all deemed to distinguish Texaco's plight from other Section 1983 plaintiffs. These factors bear on Texaco's im-

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227. See supra note 217.
228. See supra note 218.
231. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 598 (1975). Again, rather than appeal the state court order, the defendant obtained a federal court injunction against enforcing the state court order. *Id.* The Supreme Court used the Younger doctrine to overturn the federal court injunction. See *id.* at 611-13.
232. 784 F.2d 1133 (2d Cir. 1986).
233. See *id.* at 1157. The Second Circuit thus seemed to accept Texaco's proffered
pending deprivations and the lack of adequate opportunity to litigate in state court, not on the state's interests. Arguably, these concerns are not different in kind from those faced by any civil defendant who loses and cannot afford to post a state-required appeals bond.

Because the Second Circuit found Texas' countervailing interest in the constitutionality of its own procedures to be relatively minor, future state court litigants presumably should also be entitled to federal court protection from the unfair effects of state court procedures. The Second Circuit used Texaco's admittedly high stakes to demonstrate the fundamental inconsistency of Younger's constricting grip on Mitchum's interventionist rationale. Under the circumstances of the case, forcing Texaco to risk financial hemorrhage for the sake of the Supreme Court's vaguely-enunciated Younger doctrine seemed "absurd." Despite the Second Circuit's attempt to reseal the breach, these same principles should apply to other Section 1983 plaintiffs.

In the end, one is left with the words of Professor Tribe in his closing remarks for Pennzoil that "the most serious guarantee for freedom and equality is in the rule of law. And if you bend that rule for Texaco, I think you will break it for all of us." The application of Younger abstention doctrine routinely requires judges to bend the Section 1983 exception to the Anti-Injunction Act. Perhaps the Second Circuit's strategically narrow decision will provide the lever to break Younger's barrier for other Section 1983 plaintiffs.

III. ABSTENTION DOCTRINES

The post-Civil War Civil Rights Acts, and particularly Section 1983, have worked a "vast transformation" in our dual system of courts. The expansion of Section 1983 jurisdiction and the con-

234. See supra note 222 and accompanying text.
236. Transcript of Oral Argument, supra note 10, at 116 (Prof. Laurence Tribe).
quent decline in the importance of the Anti-Injunction Act in these actions has made almost every state court proceeding susceptible to federal court injunction. The Supreme Court has devised doctrines of self-restraint in part to avoid the conflict between state and federal courts inherent in the application of Section 1983. These judicial doctrines require a federal court to refrain from deciding certain cases even where it may properly exercise jurisdiction under Section 1983 and the Anti-

noted that "[§] 1983 was enacted . . . as § 1 of the Civil Rights Act of 1871. That Act, and the Judiciary Act of 1875, which granted the federal courts general federal question jurisdiction, completely altered Congress' pre-Civil War policy of relying on state courts to vindicate rights arising under the Constitution and federal laws." Id. at 617 (citations omitted); see also Mitchum, 407 U.S. at 242 ("[The] legislative history [of the Civil Rights Act of 1871] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights . . ."); F. Frankfurter & J. Landis, The Business of the Supreme Court 64 (1927) ("Sensitiveness to 'states' rights,' fear of rivalry with state courts and respect for state sentiment, were swept aside by the great impulse of national feeling born of the Civil War. . . . The new exertions of federal power were no longer trusted to the enforcement of state agencies.").

239. See supra Part I. For example, § 1983 and its jurisdictional statute, § 1343(3), have been expanded beyond "personal liberty" and now provide redress for "wrongful deprivations of property" as well. Lynch v. Household Fin. Corp., 405 U.S. 538, 543 (1972).

240. See supra Part II. Section 1983 has been held to be an exception to the Anti-Injunction Act. Mitchum v. Foster, 407 U.S. 225, 242-43 (1972). One commentator has noted that the Lynch decision in "combination with Mitchum makes the anti-injunction act almost a dead letter wherever a plaintiff asserts a claim based on the Constitution, as distinguished from a federal statute." H. Friendly, Federal Jurisdiction: A General View 99 (1973).

241. See Aldisert, On Being Civil to Younger, 11 Conn. L. Rev. 181, 218 (1979). This commentator points out that "whatever a state court does may be deemed as state action and thus be described as a § 1983 deprivation in a federal complaint; it must be recognized that the state substantive law of tort, contract, and property may be wrapped in the tinsel and glitter of real or imagined constitutional deprivations." Id. See supra note 123 and accompanying text.


The abstention doctrines are most frequently applied to cases involving a federal constitutional challenge to state action. However, they also apply to other forms of federal jurisdiction. See infra note 243.
Injunction Act.\footnote{243}

This Part of the Comment discusses abstention as it has been developed in \textit{Younger v. Harris}\footnote{244} and \textit{Railroad Commission v. Pullman Co.}\footnote{245} and their progeny. It suggests that in light of the principles underlying these decisions, the district court should have declined to intervene until it was clearer that Texas courts could not provide Texaco with a hearing on its due process claims. It concludes, however, that the standards for abstention under \textit{Younger} and \textit{Pullman} abstention are sufficiently flexible to support the Second Circuit's finding that neither doctrine mandated abstention.

\section{A. Younger Abstention}

\textit{Younger} abstention is a recent extension of the Court's abstention doctrine. It was first articulated in 1971 by Justice Black, writing for the Court in \textit{Younger v. Harris}\footnote{246}. Justice Black relied on sweeping principles of comity and federalism to justify limitation of federal court ju-

\footnote{243. For a discussion of the role of abstention, see 17 C. Wright, A Miller & E. Cooper, Federal Practice and Procedure §§ 4241-4242 (1978); Redish II, supra note 191.

The Court has developed various categories of abstention to handle particular problems that arise in a system of federalism. See, e.g., Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817-18 (1976) (federal courts for reasons of "wise judicial administration" may dismiss a case if there is a concurrent proceeding in state court); Younger v. Harris, 401 U.S. 37, 43-54 (1971) (federal courts may not enjoin state criminal prosecutions); Burford v. Sun Oil Co., 319 U.S. 315, 332-34 (1943) (abstention is appropriate to avoid unnecessary conflict with specialized aspects of complicated regulatory scheme); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498 (1941) (abstention is warranted when an unsettled question of state law is the subject of constitutional attack). The scope of \textit{Younger} has subsequently expanded. See infra notes 250-60 and accompanying text.

\footnote{244. 401 U.S. 37 (1971). For a discussion of \textit{Younger} abstention, see infra Part III.A.

\footnote{245. 312 U.S. 496 (1941). \textit{Pullman} abstention is discussed in infra Part III.B.

\footnote{246. 401 U.S. 37 (1971). The federal plaintiff, Harris, had been indicted under a California law that made it illegal to advocate the use of violence to overthrow the government. \textit{Id.} at 38 & n.1. He filed suit in the federal district court to enjoin Younger, the Los Angeles district attorney, from prosecuting him, claiming that the prosecution inhibited his right of free speech. \textit{Id.} at 38-39. A three-judge district court panel, relying on the Court's decision in \textit{Dombrowski} v. Pfister, 380 U.S. 479 (1965), issued the injunction on the grounds that the California statute was vague and overbroad. \textit{Younger}, 401 U.S. at 40, 50. In \textit{Dombrowski}, the Court held that federal courts could enjoin state officers from prosecuting or threatening to prosecute under a state statute that was so broad and vague that it interfered unconstitutionally with first amendment rights. \textit{Dombrowski}, 380 U.S. at 490-92. \textit{Dombrowski} was interpreted as marking a major change in federal-state relations. See C. Wright, supra note 40, at 322. Many read the decision as meaning that "every person prosecuted under state law for conduct arguably protected by the First Amendment could, by murmuring the words 'chilling effect,' halt the state prosecution while a federal court . . . passed on the validity of the statute and the bona fides of the state law enforcement officers." \textit{Id.} at 322. The Court rejected this interpretation in \textit{Younger}, stating that an incidental "chilling effect" of a statute is not enough to render it unconstitutional. \textit{See Younger}, 401 U.S. at 51.

\footnote{247. \textit{Younger}, 401 U.S. at 44. Black referred to the notions of comity and federalism to explain the doctrine of "Our Federalism," which he defined as "a system in which there is sensitivity to the legitimate interests of both State and National Governments,}
risdiction under Section 1983 and held that, absent extraordinary circumstances, federal courts must not enjoin pending state criminal proceedings.

1. Elements of Younger Abstention

The Supreme Court has expanded the Younger abstention doctrine beyond its roots in criminal proceedings. Younger now requires federal courts to abstain from interfering in an ongoing state proceeding when an important state interest is implicated and the state proceeding provides an adequate opportunity to present the federal constitutional claims.

The scope of state interests requiring Younger deference has yet to be adequately defined by the Supreme Court. At present the Court has

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." Id.

248. The Court recognized two narrow exceptions to the prohibition against federal intervention: where the prosecution is brought in bad faith to harass the defendant, id. at 49, and where the statute under which the prosecution is brought is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Id. at 53-54 (quoting Watson v. Buck, 313 U.S. 379, 402 (1941)).

These exceptions are inconsistent with one of the Court's justifications for Younger deference. See supra notes 349-50 and accompanying text. If state courts are as competent to protect constitutional rights as federal courts, then presumably state courts are equally competent to dismiss a prosecution brought in bad faith or to invalidate a patently unconstitutional statute. See Redish, The Doctrine of Younger v. Harris: Deference in Search of a Rationale, 63 Cornell L. Rev. 463, 474 (1978) [hereinafter cited as Redish III].

249. Younger, 401 U.S. at 41.

250. See Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); Moore v. Sims, 442 U.S. 415, 423 (1979); Trainor v. Hernandez, 431 U.S. 434, 440, 461 (1977); Judice v. Vail, 430 U.S. 327, 330 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 602 (1975). A state proceeding is considered ongoing despite the completion of the underlying state trial if the state litigant has not exhausted his state claims. See id. at 607-09; see also City of Columbus v. Leonard, 443 U.S. 905, 908 (1979) (Rehnquist, J., dissenting) ("The federal action must be dismissed not only where it threatens to interfere with active state proceedings but also where state proceedings have ended because of the failure of the federal plaintiff to appeal an adverse state decision."); denying cert. to City of Columbus v. Leonard, 565 F.2d 957 (5th Cir. 1978); C. Wright, A. Miller & E. Cooper, supra note 243, § 4253 at 565 ("If a state proceeding was pending at a time that invokes the Younger rules, those rules remain applicable through the completion of all state appellate remedies.").

In the absence of a pending state proceeding, "considerations of equity, comity and federalism have little vitality." Steffel v. Thompson, 415 U.S. 452, 462 (1974).


253. See Martori Bros. Distribs. v. James-Massengale, 781 F.2d 1349, 1354 (9th Cir. 1986) ("The Supreme Court has not yet provided any type of analytical framework for determining whether, for abstention purposes, a vital state interest is present."); Redish
explicitly declared six state interests sufficiently important to warrant Younger abstention: 1) criminal proceedings, 2) quasi-criminal proceedings, 3) proceedings brought to vindicate the regular operation of the state's judicial system, such as contempt, 4) proceedings brought to protect the financial viability of the state's social programs, 5) proceedings brought to protect abused children, and 6) state bar disciplinary proceedings. Nevertheless, beyond these individual applications of Younger, "detailed exposition of the nature and scope of the relevant state interests has been virtually nonexistent."

III, supra note 248, at 465 ("The Court's words rarely go beyond the ambiguous rhetoric of Younger itself or the superficial and conclusory assertion that failure to invoke Younger deference will jeopardize the viability of a certain state institution or state interest."); Soifer & Maegill, supra note 210, at 1214-15 ("[T]here is no single goal that can reasonably be imputed to the entire Court that justifies or even adequately explains the Younger doctrine."); Theis, Younger v. Harris: Federalism in Context, 33 Hastings L.J. 103, 185 (1981) ("The most troublesome aspect of Younger is the amorphous nature of 'comity,' a slogan that has no logical stopping place and few, if any, historical boundaries . . . .").

254. See Younger, 401 U.S. at 43-54.

255. See Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975). In Huffman, a county sheriff and prosecuting attorney brought state nuisance proceedings to close an adult movie theater. Id. at 595. The state court closed the theater. Id. at 598. Rather than pursue an appeal through the state judicial system, the defendant brought a federal action to declare the nuisance statute unconstitutional and unenforceable. Id. The Court held that the state's interest in a nuisance proceeding, which is closely related to its criminal laws, is important enough to mandate Younger abstention. Id. at 604-05.

256. See Juidice v. Vail, 430 U.S. 327, 335 (1977). Vail, the state court defendant, had repeatedly failed to obey court orders. Id. at 329-30. A contempt order was entered against him and upon failure to pay the fine, the defendant was jailed. Id. After he paid the fine and was released, Vail brought an action in federal court to enjoin the state judges from using their statutory contempt powers, alleging deprivation of fourteenth amendment rights. Id. at 430. The Court held, "[a] State's interest in the contempt process, through which it vindicates the regular operation of its judicial system . . . is . . . an important interest." Id. at 335.

257. See Trainor v. Hernandez, 431 U.S. 434, 444 (1977). In the underlying state action in Trainor, the Illinois Department of Public Aid filed a lawsuit to recover wrongfully received public welfare funds. Id. at 435-36. The defendants were accused of fraudulently concealing funds while applying for and receiving public aid. Id. at 435. The defendants brought suit in federal court rather than filing an answer in state court. Id. at 437-38.

258. See Moore v. Sims, 442 U.S. 415, 423 (1979). In Moore, the state filed suit to have children of suspected child abusers taken from parents and delivered into the temporary custody of a social service agency. See id. at 419-22. The district court preliminarily enjoined Texas from prosecuting any state suit under the challenged statute until its constitutionality was settled. Id. at 421-22. The Supreme Court reversed, holding that the removal of a child in a child abuse context is "in aid of and closely related to criminal statutes" and hence an important state interest. Id. at 423 (quoting Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975)).

259. See Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434-35 (1982). The federal plaintiff in Middlesex, an attorney, sharply criticized an ongoing criminal proceeding at a press conference. See id. at 428. He was charged with violating New Jersey bar disciplinary rules. Id. Instead of filing an answer, he filed suit in federal district court contending that the disciplinary rules violated his first amendment rights. Id. at 429. The Supreme Court ordered abstention, holding that the state has an important interest in maintaining the integrity of the attorneys it licenses. Id. at 434-35.

Even if *Younger* abstention would otherwise be warranted, it is inappropriate when the pending state proceeding does not provide the parties with an adequate opportunity to air the constitutional issues.\(^{261}\) The Supreme Court's decisions provide little guidance on what constitutes an adequate opportunity to present constitutional claims.\(^{262}\)

2. The Second Circuit's Application of *Younger*

Applying *Younger* to the facts of *Texaco Inc. v. Pennzoil Co.*\(^{263}\) the Second Circuit held that although there was clearly an ongoing state judicial proceeding,\(^{264}\) no state interests of the type required for *Younger* abstention were implicated.\(^{265}\) The mere existence of an ongoing state judicial proceeding was insufficient to create state interests requiring *Younger* abstention. The court further determined that, even if an important state interest had been at stake, the Texas proceeding did not provide Texaco with an adequate opportunity to present its due process challenges.\(^{266}\)

The Second Circuit held that neither Texas' interest in protecting judgment creditors nor its interest in the constitutionality of its statutes required abstention.\(^{267}\) It distinguished Texas' interest in the underlying state action from the state interests recognized by the Supreme Court in the *Younger* line of cases: "In each of [the *Younger*] cases the state government or a state official was a party to the action which the federal court was being asked to enjoin and had a direct stake in the outcome."

\(^{261}\) See, e.g., Middlesex Ethics County Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) (the third requirement for *Younger* abstention is an opportunity in the state proceedings to raise constitutional challenges); Moore v. Sims, 442 U.S. 415, 430 (1979) ("only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims"); Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (*Younger* "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved.").

\(^{262}\) See Hernandez v. Finley, 471 F. Supp. 516, 518 (N.D. Ill. 1978), aff'd sub nom. Quern v. Hernandez, 440 U.S. 951 (1979). In Moore v. Sims, 442 U.S. 415 (1979), the Court held that a district court must abstain unless "state law clearly bars the interposition of the constitutional claims." Id. at 425-26. Accordingly, it would stand to reason that in the absence of such a bar an adequate opportunity is available. In Trainor v. Hernandez, 431 U.S. 434 (1977), it was uncertain whether the federal plaintiffs could raise their due process challenges in the state attachment proceedings below. See *id.* at 447. Because it was an issue "heavily laden" with local law, the Court remanded the matter to the district court for a decision on this matter. See *id.* at 447-48. On remand the district court found that the Hernandezes could not present their federal claims in the state attachment proceeding. See Hernandez v. Finley, 471 F. Supp. 516, 519-20 (N.D. Ill. 1978), aff'd *sub nom.* Quern v. Hernandez, 440 U.S. 951 (1979).

\(^{263}\) 784 F.2d 1133 (2d Cir. 1986).

\(^{264}\) See *id.* at 1149 ("Since the third condition [that there be an ongoing state proceeding] is clearly met in the present case, we need not discuss it.").

\(^{265}\) See *id.* at 1149-50.

\(^{266}\) See *id.* at 1150-51. See *infra* note 337 and accompanying text.

\(^{267}\) See *id.* at 1149. The Second Circuit reasoned that finding these interests to be sufficient to require *Younger* abstention would seriously undermine the Supreme Court's holding in *Mitchum v. Foster*, 407 U.S. 225 (1972), see *supra* note 240, because a similar interest exists in every state proceeding. See *Texaco Inc.*, 784 F.2d at 1149.
It concluded that since an injunction of Pennzoil did not prevent Texas from "acting to vindicate a state policy or to punish an infraction of state rules," Younger abstention was unwarranted. Further, the court expressly limited its holding that the Texas bond and lien provisions were unconstitutional to the "unique and extraordinary circumstances of [this] case." Texas' interests in protecting judgment creditors and in the constitutionality of its statutes were therefore "relatively minor."

Turning to the adequacy of the Texas state procedures, the Second Circuit found that Texas mandamus procedures were too uncertain and in any event too slow to provide the timely relief Texaco needed. The court reasoned that any state procedure is inadequate unless the parties may "with certainty obtain a resolution of constitutional claims from the state courts." Because mandamus is an "extraordinary" writ granted only in exceptional circumstances, the court held that it could never be considered adequate for Younger purposes. Further, the Second Circuit determined that even if Texaco had been granted a writ of mandamus, this relief would have been inadequate because mandamus proceedings were too slow to provide Texaco with the timely relief needed. The court found that the protection against Pennzoil's execution of the Texas judgment provided by paragraph 7 of the Texas judgment would have expired long before Texas courts could resolve Texaco's challenge to the supersedeas bond requirement.

3. A Reaplication of Younger Principles to Texaco Inc. v. Pennzoil Co.

In the Younger cases, the Supreme Court has made limited holdings

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268. Texaco Inc., 784 F.2d at 1149.
269. Id. at 1150.
270. Id.
271. Id. ("The Texas lien and bond provisions will in most other circumstances continue to be respected and enforced as written by the Texas legislature and the Texas Supreme Court.").
272. See id. at 1151.
273. See id. at 1151-52.
274. Id. at 1151.
275. Id.
276. See id. at 1151-52. To apply for a writ of mandamus, Texaco would first have to ask the trial court to disregard the supersedeas bond rule, which the Second Circuit noted it would probably refuse to do. See id. at 1151. Further, the Second Circuit reasoned, even if Texaco were granted a writ of mandamus there was no assurance that the Texas appellate court would grant a stay of execution pending its determination on the constitutionality of the bond and lien provisions. Id.
277. See paragraph 7 supra note 20 and accompanying text.
278. Texaco Inc., 784 F.2d at 1152. The protection provided by paragraph 7 expired once the trial court lost jurisdiction over the case. Id. at 1137. See supra note 20. The Second Circuit determined that the jurisdiction would terminate by March 25, 1986. See id. at 1137 n.3. At the time Texaco moved for a preliminary injunction before the district court, the judgment would not have expired before February 9, 1986. See Texaco Brief, supra note 12, at 21 n.26.
and has declined to extend these holdings beyond the facts of each case.\(^279\) However, in deciding these cases the Court has used broad rationales\(^280\) and language\(^281\) that would support abstention from all pending state proceedings. The Second Circuit based its finding that there were no "important" state interests to warrant abstention on a narrow reading of Supreme Court precedent. This reliance on the specific holdings of these cases supports a finding that *Younger* abstention was unwarranted in *Texaco Inc. v. Pennzoil Co.* In each of the *Younger* cases decided by the Court, the state has had a direct interest in the state court proceed-

\(^{279}\) See *Trainor v. Hernandez*, 431 U.S. 434, 445 n.8 (1977) (abstaining from proceedings brought by the state to recover welfare payments, but stating "we have no occasion to decide whether *Younger* principles apply to all civil litigation"); *Juidice v. Vail*, 430 U.S. 327, 336 n.13 (1977) (Rehnquist, J.) (abstaining from bar disciplinary hearings, and "saving" for another day the question of "the applicability of *Younger* to all civil litigation") (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 (1975)); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607 (1975) ("Informed by the relevant principles of comity and federalism, at least three Courts of Appeals have applied *Younger* when the pending state proceedings were civil in nature.

\(^{280}\) The Court in *Younger* relied on the doctrine that courts of equity normally will not interfere in criminal proceedings. *Younger*, 401 U.S. at 43-44. A "more vital consideration," however, was respect for the notions of comity and federalism. *Id.* at 44. Justice Black described comity in part as a 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." *Id.* The concept of federalism is characterized by the Court as representing a "system in which there is sensitivity to the legitimate interests of both State and National Governments." *Id.* The Court in subsequent decisions has continued to rely on these broad principles. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982); *Moore v. Sims*, 442 U.S. 415, 423 (1979); *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977); *Juidice v. Vail*, 430 U.S. 327, 334 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 601, 604 (1975). These decisions have done little to clarify the *Younger* analysis. See text accompanying *supra* notes 253 and 260.

\(^{281}\) See, e.g., *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("*Younger v. Harris*, and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.") (citation omitted); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). In *Huffman*, Justice Rehnquist offered four reasons why considerations of federalism and comity apply to civil proceedings as well as to criminal proceedings:

- Interference with a state judicial proceeding [1] prevents the state not only from effectuating its substantive policies, but also [2] from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also [3] results in duplicative legal proceedings, and [4] can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles."

*Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)); see also *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 479-80 (1977) (dictum) (*Younger* is "designed to allow the State an opportunity to 'set its own house in order' when the federal issue is already before a state tribunal"). If the Court's language in these decisions is followed, "important" state interests are irrelevant in a *Younger* analysis.
ings. If one party lost, the state stood to have a particular policy frustrated. The only relevant interests at stake in the Texas proceeding, however, were those of two private litigants, Texaco and Pennzoil. As the Second Circuit found: "The state interests at stake in this proceeding differ in both kind and degree from those present in the six cases in which the Supreme Court held that Younger applied."283

The Court's unwillingness to articulate clear standards delimiting Younger abstention, however, permits wide latitude in the application of the doctrine.285 Although amply justified by the Court's holdings, the Second Circuit's "important" state interest analysis contravenes the basic principles underlying the Younger doctrine. Younger and its progeny relied on broad principles of comity and federalism.286 These considerations apply whenever a federal court is asked to enjoin state court proceedings, regardless of whether there is an "important" state interest in the proceeding.287 For example, the Anti-Injunction Act referred to in Younger as the statutory embodiment of federalism289 does not distinguish a proceeding in which an important state interest is present from one in which it is not.290

Federal court injunctions of state court proceedings violate the notion of comity inherent in our dual court system. State courts share equally with federal courts the responsibility "to guard, enforce, and protect every right granted or secured by the Constitution of the United States." Supreme Court decisions emphasize that federal courts should not intervene in a state proceeding because doing so impliedly


283. Texaco Inc., 784 F.2d at 1149.

284. See Whitten, supra note 192, at 596 ("[T]he court has failed to articulate a workable, principled formula for allocating responsibility for constitutional adjudication between the two systems of courts."). See also supra note 253.

285. Compare Martori Bros. Distribs. v. James-Massengale, 781 F.2d 1349, 1355 (9th Cir. 1986) (Younger abstention is inappropriate unless the underlying state proceeding is either criminal in nature, in aid of or related criminal proceedings or fundamental to the operation of its courts with Lynch v. Snepp, 472 F.2d 769, 775 (4th Cir. 1973) ("A district court . . . cannot enjoin a state civil proceeding unless [it] finds that the state proceeding cannot eliminate the threat to the plaintiff's right."). cert. denied, 415 U.S. 983 (1974).

286. See supra note 247.

287. See text accompanying infra notes 291-99.


289. Younger, 401 U.S. at 43 (Anti-Injunction Act is manifestation of Congress' long-standing "desire to permit state courts to try state cases free from interference by federal courts.").

290. See supra Part II.

questions a state judiciary’s ability to recognize and vindicate federal constitutional claims. Federal intervention in a proceeding remains an insult to state judges even when no “important” state interest is at stake. In both cases federal intervention implies that the state judiciary is unwilling or unable to interpret the Constitution or protect federal rights.

The other principle behind Younger, federalism, prohibits undue interference by federal courts in legitimate activities of the states. Providing a competent forum to vindicate federal constitutional challenges and overseeing trial court dispositions of constitutional issues are both “legitimate activities” of the state. In characterizing the Younger doctrine as “designed to allow the State an opportunity to ‘set its own house in order’ when the federal issue is already before a state tribunal,” the Supreme Court has emphasized the relevance of this aspect of federalism to Younger. A federal court deprives the state of this opportunity when it enjoins a state court proceeding even though the state may have no interest in the underlying proceeding itself.

The Supreme Court has recognized that federal intervention in an ongoing proceeding is one of the major sources of federal-state friction. As the Second Circuit stated with regard to the Rooker-Feldman doctrine, “we have two ‘essentially separate legal systems.’ ‘[T]his dual system could not function if state and federal courts were free to fight each other for control of a particular case.’” Reserving Younger deference for those state court proceedings in which an “important” state interest is present leaves the majority of state judicial proceedings vulnerable to federal injunction. If Younger abstention is limited in this manner, then many of the problems it was meant to redress remain unresolved.

If these aspects of comity and federalism are sufficient to invoke Younger abstention, then the Second Circuit should have refused to enjoinder Pennzoil from executing the Texas judgment. In upholding the district court’s injunction, the Second Circuit implied that the Texas

upon them the obligation to apply the supreme Law of the Land.”), cert. denied, 415 U.S. 983 (1974).
293. See Redish III, supra note 248, at 476 n.80.
299. See supra note 241 and accompanying text.
The judiciary was incapable of vindicating Texaco's constitutional claims. It also denied Texas one of its legitimate functions under our system of federalism, that of providing a forum for federal constitutional challenges that arise during the course of state court proceedings. Whether these concerns alone are sufficient to invoke Younger abstention remains unresolved by the Supreme Court decisions to date because in each of its previous Younger holdings there was an alternative state interest that justified abstention.

The Second Circuit also found that Younger abstention was inapplicable because Texas' rules did not provide adequate procedures for adjudication of Texaco's federal claims. This finding was critical because an adequate state forum for presentation of a party's constitutional challenges is a prerequisite to abstention under Younger. The Second Circuit, however, erred in holding unequivocally that state mandamus proceedings never constitute an adequate forum under Younger. Justice Rehnquist, writing for the Court in Moore v. Sims, has stated that "the federal court should not exert jurisdiction if the plaintiffs 'had an opportunity to present their federal claims in the state proceedings.'" He continued, "abstention is appropriate unless state law clearly bars the interposition of the constitutional claims." Texas law does not clearly deprive Texaco of the opportunity to raise its due process challenge. In fact, review of a Texas case cited by the Second Circuit indicates that application of the supersedeas bond has been successfully challenged.

300. The Texas judge who presided over the first part of the trial in Texas was clearly insulted by the district court's intervention. While presiding over a later unrelated case, Judge Farris has been quoted as admonishing Texaco's Texas trial counsel: "Do not cite any decisions by White Plains, N.Y., federal judges." See Wall St. J., Mar. 14, 1986, at 1, col. 6. See also supra note 43 (discussing exchange of letters between Texaco counsel and Judge Farris on a related matter).

301. See supra notes 295-96 and accompanying text.

302. See supra notes 294-95 and accompanying text.

303. See Texaco Inc., 784 F.2d at 1150-52. For a discussion of the Second Circuit's finding that mandamus proceedings were inadequate, see supra notes 272-78 and accompanying text.

304. See supra notes 252, 261 and accompanying text.


306. Id. at 425 (quoting Juidice v. Vail, 430 U.S. 327, 337 (1977)).

307. Id. at 425-26.

Contrary to the Second Circuit's assertion, Texaco Inc., 784 F.2d at 1151, other federal courts have explicitly found mandamus proceedings adequate in the Younger context and have refused to intervene when this alternative was open to the parties in state court. See Lynch v. Snepp, 472 F.2d 769, 775-76 (4th Cir. 1973) (since the overbreadth of the court order may be cured "by an immediate appeal to the state appellate courts, the use of prerogative writs by those courts, or even by defending at the final trial" defendant's remedy at law is adequate), cert. denied, 415 U.S. 983 (1974); Winslow v. Leh, 577 F. Supp. 951, 953 (D. Colo. 1984) (since federal court plaintiffs could raise state claims in state court by writ of certiorari as well as by "certain extraordinary writs," federal court injunctive relief was inappropriate). But see Traughber v. Beauchane, 760 F.2d 673, 684 (6th Cir. 1985) (abstention inappropriate where only procedure available to raise federal claims was by writ of mandamus); Holmes v. New York City Hous. Auth., 398 F.2d 262, 267 n.7 (2d Cir. 1968) (same).
through mandamus proceedings.\textsuperscript{308}

The Second Circuit's decision that Texas procedures were inadequate was also premature. Its finding has merit only if one accepts Texaco's assertion that it needed immediate relief.\textsuperscript{309} This premise, however, is open to question. Texaco was already protected by paragraph 7, the provision within the Texas trial court judgment that precluded execution of the judgment by Pennzoil.\textsuperscript{310} By Texaco's own admission, this provision would have protected it for at least two months while it sought relief from the supersedeas bond provision in the Texas courts.\textsuperscript{311} Although Texaco alleged injury in that interim period,\textsuperscript{312} it is questionable whether such damage should be attributed to the judgment or, rather, to the uncertainty of the appeal.\textsuperscript{313} Further, it is doubtful that Texaco would suf-


\textsuperscript{309} Texaco alleged that it was on the "verge of bankruptcy" prior to obtaining a temporary restraining order from the district court. See Texaco Brief, supra note 12, at 2.

\textsuperscript{310} See paragraph 7, supra note 20.

\textsuperscript{311} The Texas judgment was entered on December 10, 1985, see Texaco Brief, supra note 12, at 19. At the time that Texaco's motion for a preliminary injunction was made, the earliest the provisions of paragraph 7 would expire was February 9, 1986. See Texaco Brief, supra note 12, at 21 n.26.

\textsuperscript{312} Texaco challenged the adequacy of paragraph 7 as protection on two grounds. First, its temporary nature would affect Texaco's ability to borrow money and to receive supplies. Second, because paragraph 7 did not allow Texaco to engage in transactions other than "in the routine and ordinary course of business" others were reluctant to deal with them due to uncertainty over whether transactions would be permitted. Id. at 20-21.

Specifically, Texaco asserted, and the district court acknowledged, that the following events occurred immediately after the Texas judgment was entered:

- the market for Texaco's long-term debt securities disappeared;
- its credit ratings were downgraded from investment grade to non-investment grade;
- it was forced to withdraw from the commercial paper market;
- its bank credit lines were lost;
- it became unable to obtain unsecured bank financing;
- it became unable to obtain most secured financing;
- firms contemplating commercial ventures with Texaco withdrew from them;
- companies already engaged in ventures with Texaco found their own financial standing severely impaired.

Id. at 21 n.27; see Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250, 253 (S.D.N.Y.), aff'd in part and rev'd in part, 784 F.2d 1133 (2d Cir. 1986).

\textsuperscript{313} Texaco claimed that "the uncertainty as to what will happen when the provisions of Paragraph 7 of the Judgment expire or are otherwise vacated or modified threatens Texaco's present ability to obtain the financing required to run and preserve its business . . . ." Amended Complaint, supra note 4, at 5.

Both the Second Circuit, see Texaco Inc., 784 F.2d at 1152-53, and the district court, see Texaco, Inc. v. Pennzoil Co., 626 F. Supp. 250, 253 (S.D.N.Y.), aff'd in part and rev'd in part, 784 F.2d 1133 (2d Cir. 1986), however, found that the potential bankruptcy of Texaco, which could occur if Pennzoil enforced the judgment, would satisfy the "irreparable harm" standard necessary for injunctive relief.

Texaco's assertion that the "uncertainty" of paragraph 7 was causing irreparable harm is suspect for two reasons. First, it is more probable that the judgment itself and not uncertainties regarding relief was the prime catalyst for the financial community's reaction. Even if an appeal were guaranteed, the victim of an $11.8 billion judgment, the largest in history, should reasonably expect a certain degree of hesitation by the financial community. Second, Texaco's assertion that the nation's fifth largest corporation would
fer irreparable harm. \footnote{314} The Second Circuit, in finding the Texas mandamus proceedings inadequate, did not rely on this allegation. Instead it was influenced by its expectation that the protective provision would have expired before the Texas courts could act. \footnote{315}

Rather than assuming that the Texas judiciary could not have acted quickly enough to save Texaco, the Second Circuit should have deferred until the Texas procedures were proved inadequate. \footnote{316} Not only is such deference proper under the \textit{Younger} abstention doctrine, but it also would have conformed with principles of \textit{Pullman} abstention.

\subsection*{B. Pullman Abstention}

\textit{Pullman} abstention was first articulated by Justice Frankfurter writing for a unanimous Court in \textit{Railroad Commission v. Pullman Co.} \footnote{317} \textit{Pullman} held that when a federal constitutional claim is premised on an unsettled question of state law, a federal court should abstain from hearing the federal claim in order to permit the state court to adjudicate the underlying state-law question. \footnote{318} The premise of \textit{Pullman} is that federalism

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\footnote{314}{As described above, see \textit{supra} note 313, it is unlikely that the uncertainties in the interim period under paragraph 7 would cause Texaco to go into bankruptcy. Even accepting the reactions of the financial community alleged by Texaco, see \textit{supra} note 312, it is hard to believe that a company so large could not survive a few months of tightened cash flow and lost expansion opportunities.}

\footnote{315}{Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1151-52 (2d Cir. 1986) (before Texas Supreme Court could act on Texaco's challenge to the supersedeas bond rule, "Par. 7 of the Texas judgment [would have] long since expired, [and] Pennzoil would have executed its $11.12 billion judgment, forcing Texaco down the path of no return").}

\footnote{316}{See \textit{supra} note 312.}

\footnote{317}{\textit{Pullman} Co. v. Railroad Comm'n, 33 F. Supp. 675, 676 (W.D. Tex. 1940), \textit{rev'd}, 312 U.S. 496 (1941). The Supreme Court remanded the case to the district court for abstention because it was unclear whether the Commission's order was authorized by the Texas statute, which empowered it "to prevent 'unjust discrimination [in the rates, charges and tolls of such railroads] . . . and to prevent any and all other abuses' in the conduct of [their business]."
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\footnote{318}{See \textit{supra} note 313. It is unlikely that the uncertainties in the interim period under paragraph 7 would cause Texaco to go into bankruptcy. Even accepting the reactions of the financial community alleged by Texaco, see \textit{supra} note 312, it is hard to believe that a company so large could not survive a few months of tightened cash flow and lost expansion opportunities.}

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suffer bankruptcy due to the financial community's restrictions is doubtful. Texaco itself did not believe that bankruptcy was necessary. Though the company was poised and ready to declare bankruptcy immediately following the announcement of the Texas judgment, only the inclusion of paragraph 7 stopped it from doing so. \textit{See} Wall St. J., Mar. 14, 1986, at 1, col. 6.

\footnote{314}{As described above, see \textit{supra} note 313, it is unlikely that the uncertainties in the interim period under paragraph 7 would cause Texaco to go into bankruptcy. Even accepting the reactions of the financial community alleged by Texaco, see \textit{supra} note 312, it is hard to believe that a company so large could not survive a few months of tightened cash flow and lost expansion opportunities.}

\footnote{315}{Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1151-52 (2d Cir. 1986) (before Texas Supreme Court could act on Texaco's challenge to the supersedeas bond rule, "Par. 7 of the Texas judgment [would have] long since expired, [and] Pennzoil would have executed its $11.12 billion judgment, forcing Texaco down the path of no return").}

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}

\footnote{318}{See \textit{supra} note 313. It is unlikely that the uncertainties in the interim period under paragraph 7 would cause Texaco to go into bankruptcy. Even accepting the reactions of the financial community alleged by Texaco, see \textit{supra} note 312, it is hard to believe that a company so large could not survive a few months of tightened cash flow and lost expansion opportunities.}
is best served when federal courts refrain from deciding constitutional issues based on "forecasts" of what state law may be.319 Such deference serves two purposes: federal-state tension is minimized and potentially unnecessary constitutional adjudication is avoided.320

1. Elements of Pullman Abstention

Courts routinely require that three conditions be met before Pullman abstention is warranted.321 First, there must be an unsettled question of state law. An otherwise clear state law is unsettled for Pullman purposes if there is a fair possibility that the state statute violates a provision of the state constitution having no counterpart in the federal Constitution.322

Zwickler v. Koota, 389 U.S. 241, 244 n.4 (1967). The Supreme Court has made an exception to this procedure for cases from Texas. See Harris County Comm'r's Court v. Moore, 420 U.S. 77, 88-89 (1975). The Texas Supreme Court has ruled that it cannot grant declaratory relief under state law if a federal court retains jurisdiction over the federal claim. See United States Life Ins. Co. v. Delaney, 396 S.W.2d 855, 863 (Tex. App. 1965). Therefore for Texas cases, the Supreme Court adopted the course of ordering dismissal without prejudice. See Harris County, 420 U.S. at 88-89.

319. See Pullman, at 499-501 ("In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court.") (citation omitted). In a later decision, Justice Frankfurter, while noting that Pullman and its progeny were cases in equity, stated, "[t]hey reflect a deeper policy derived from our federalism." See Louisiana P. & L. Co. v. Thibodaux, 360 U.S. 25, 28 (1959).

320. See Juidice v. Vail, 430 U.S. 327, 347 (1977) (Stewart, J., dissenting) (federal courts should abstain where "'state-court construction may obviate or significantly modify the federal questions seemingly presented, thus avoiding 'unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication'"") (quoting Harmon v. Forssenius, 380 U.S. 528, 534 (1965)); Reetz v. Bozanich, 397 U.S. 82, 86-87 (1970) (federal court should abstain if "'[a] state court decision ... could conceivably avoid any decision under the [Constitution] and [hence] avoid any possible irritant in the federal-state relationship"); Pullman, 312 U.S. at 498-501 ("'exercising a wise discretion, [federal courts ] restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary'").


322. See Harris County Comm'r's Court v. Moore, 420 U.S. 77, 84 (1975) (abstention is appropriate where the "uncertain status of local law stems from the unsettled relationship between the state constitution and a statute"); Reetz v. Bozanich, 397 U.S. 82, 86-87 (1970) (per curiam) (abstention ordered where unconstrued state law is subject to challenge under a related constitutional provision); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 641 (1959) ("[W]hen the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily.").

The Supreme Court, however, has cautioned that if the state constitutional provision simply mirrors the controlling federal provision, abstention is inappropriate. Hawaii Hous. Auth. v. Midkif, 467 U.S. 229, 237 n.4 (1984); Examining Bd. of Eng'r's v. Flores de Otero, 426 U.S. 572, 598 (1976); Harris County Comm'r's Court v. Moore, 420 U.S. 77, 84 n.8 (1975).

Most state constitutions have some form of due process clause and some form of equal
Second, this state law question must be subject to a resolution that would either obviate the need for a constitutional decision or at least substantially change the focus of such an inquiry.323 Finally, the state must provide an adequate procedure to resolve the state law issue.324 Because answers to state law questions can be pursued in state courts through the certification process325 or by bringing a declaratory law action in state court,326 case law provides little guidance on whether an alternative procedure is adequate.327

When these requirements are met, the principles of federalism and avoidance of unnecessary constitutional decisions mandate abstention.

2. Application of Pullman

The Second Circuit held that the meaning of the Texas supersedeas bond rule was "crystal clear"328 and thus declined to abstain under the Pullman doctrine. The court based its decision both on the language of the rule itself329 and on its application by Texas courts.330 The State of Texas, as intervenor, argued that the meaning of the supersedeas bond rule was unsettled because, as applied to Texaco, it violated the "open courts" provision of the Texas constitution.331 The Second Circuit gave

323. See Stephens v. Tielisch, 502 F.2d 1360, 1362 (9th Cir. 1974).
324. See Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 306 (1979); Harris County Comm'r's Court v. Moore, 420 U.S. 77, 83 (1975); Pullman, 312 U.S. at 498.
325. Many states have adopted certification procedures. See C. Wright, A. Miller & E. Cooper, supra note 306, § 4248, at 525 & n.9 (listing states that allow certification). Certification is a procedure that allows the federal court to refer the state law issue directly to the state's highest court for resolution. See Field, The Abstention Doctrine Today, 125 U. Pa. L. Rev. 590, 606-07 (1977).
326. If the certification procedure is unavailable, ordinarily the federal plaintiff will bring a suit for declaratory judgment. See C. Wright, A. Miller & E. Cooper, supra note 243, § 4243, at 474.
327. See Field II, supra note 324, at 1144 ("The case law is less than clear . . . as to which remedies are adequate."). "The state procedure should be deemed inadequate whenever it is so cumbersome that the individual litigant suffers substantial prejudice in addition to that necessarily accompanying the abstention procedure." Id. n.200 (1974).
328. See Texaco Inc., 784 F.2d at 1148.
329. See id. ("The meaning of the Texas lien and bond provisions is far from uncertain. On the contrary, the language of Tex. R. Civ. P. 364 and Tex. Prop. Code Ann. §§ 52.001 et seq., is crystal clear."). For text and discussion of the supersedeas bond rule, see supra notes 17 and 19.
330. See Texaco Inc., 784 F.2d at 1148 (Texas courts have refused to reduce supersedeas bonds below the amount dictated by Rule 364 even though the party seeking to appeal the decision claimed he could not post the required amount). For a discussion of cases cited, see infra note 366.
331. See Brief of State of Texas, Intervenor-Appellant at 14-15, Texaco Inc. v.
short shrift to Texas’ contention. “Pullman abstention,” the court wrote, “may not be predicated on the possibility that a state court could interpret the broad language of the state constitution to overrule a state statute or rule.”

3. A Reapplication of Pullman

While the Pullman test is well defined, because its standards are flexible the results of applying the doctrine can vary widely depending upon the individual who makes the determination.

The primary ambiguity in the Pullman analysis lies in the requirement that state law be “unsettled.” The facial clarity of Texas' supersedeas bond provision and the long line of cases requiring compliance with the rule lend strong support for the Second Circuit's finding that the law was “settled.” However, Texas' argument that the supersedeas bond provision was unsettled was also valid. Even a state law that is clear on its face is unsettled for Pullman purposes if the state law at issue violates Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986). The State of Texas argued that making a grant of a legal right contingent on an impossible condition such as conditioning the right to stay judgment on payment of a $12 billion supersedeas bond violated the “open courts” provision of the Texas constitution. See id.

332. Texaco Inc., 784 F.2d at 1148 n.12.
334. See id. The courts have not developed a precise standard of how uncertain a state law must be. See J. Moore, supra note 333, at 2107.
335. For the text of the statute, see supra note 17.
336. See Mudd v. Mudd, 665 S.W.2d 128, 129-30 (Tex. Ct. App. 1983) (by writ of mandamus, appellant moved that the supersedeas bond be reduced to $642,313.78 plus interest, the minimum required by statute; the court of appeals granted the motion, holding that, while the rule required bond to be posted at least in the amount of judgment plus interest, this did not authorize trial court to set bond amount so in excess of minimum as to be inequitable); Anderson v. Pioneer Bldg. & Loan Ass'n, 150 S.W.2d 445, 446-47 (Tex. Civ. App. 1941) (Anderson requested the appeals court to enjoin the execution of judgment pending appeal arguing that she could not afford to post bond, and her house would be taken from her before she could appeal the judgment); Bryan v. Luhning, 106 S.W.2d 403, 403-04 (Tex. Civ. App. 1937) (suit in trial court over title to race horse and $400 winnings; judgment was awarded against Bryan; Bryan alleged that he was unable to post bond, requested an injunction to restrain execution of the judgment; court of appeals held that a party must file supersedeas bond in order to suspend judgment); Dunlap v. Rotge, 85 S.W.2d 650, 651 (Tex. Civ. App. 1935) (allegations by property owners that they were financially unable to stay execution of sale of home by supersedeas bond pending appeal were not grounds for substituting writ of injunction restraining execution of sale for supersedeas bond); Cleveland v. Alpine Lumber Co., 70 S.W.2d 257, 257 (Tex. Civ. App. 1934) (per curiam) (court not authorized to restrain sale of home pending appeal except by supersedeas bond).

The Second Circuit interpreted Mudd as an instance when a Texas court refused to reduce the bond to an amount appellant could afford. See Texaco Inc., 784 F.2d at 1184. On the contrary, the Texas Court of Appeals reduced the supersedeas bond amount from the $4,000,000 set by the trial court to $700,122.02, which was the minimum required by the statute and the amount appellant requested. See Mudd v. Mudd, 665 S.W.2d 128, 129 (Tex. Ct. App. 1983).
a provision of a state constitution having no counterpart in the federal Constitution.\^337

The Texas “open courts” provision\^338 differs on its face from the due process clause of the fourteenth amendment.\^339 It reads in part that “[a]ll courts shall be open, and every person for an injury done him . . . shall have remedy by due course of law.”\^340 In addition to the provisions’ facial dissimilarity, the Texas Supreme Court has interpreted the “open courts” provision as encompassing unique rights not contained in the due process clause of the federal Constitution.\^341

In addition to the facial and substantive dissimilarity of the relevant provisions, Texas court decisions have not settled the constitutionality of the Texas supersedeas bond rule. The Second Circuit cited to a line of Texas decisions that held that a supersedeas bond must be posted in the full amount of the judgment before execution on the judgment may be stayed in concluding that Texas law was settled on the issue.\^342 None of these cases, however, specifically involved a challenge to the constitutionality of the rule under the “open courts” provision of the Texas constitution. The holdings in these cases were based on the terms of the statute

\^337. See supra note 322 and accompanying text.

\^338. Tex. Const. art. 1, § 13. The “open courts” provision states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” Tex. Const. art. 1, § 13. The “open courts” provision is one of two due process clauses in the Texas constitution, the other being embodied in § 19. See infra note 341.

\^339. U.S. Const. amend. XIV, § 1, cl. 3. In contrast to Texas’ “open courts” provision, the due process clause of the fourteenth amendment states: “[N]o State shall deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1, cl. 3.


\^341. See Nelson v. Krusen, 678 S.W.2d 918, 922 (Tex. 1984). In Nelson the court ruled that a two-year statute of limitations for an action arising out of medical malpractice violates the open courts provision of the state constitution if it cuts off a cause of action before a party knows or reasonably should know he is injured. See id. at 922. The plaintiffs in Nelson were the parents of a three-year old infant diagnosed as having muscular dystrophy, a disease impossible for the parents to detect at an earlier age. See id. at 920, 923. The court held that because the statute of limitations required the plaintiffs to do the impossible in order to pursue their legal remedies, the statute was unconstitutional under the open courts provision. See id. at 923.

Statutes of limitation that cut off a party’s right of action before a party knows of injury do not violate the federal due process clause. See Brubaker v. Cavanaugh, 741 F.2d 318, 320-21 (10th Cir. 1984); Mathis v. Eli Lilly, 719 F.2d 134, 137-41 (6th Cir. 1983); Jewson v. Mayo Clinic, 691 F.2d 405, 411 (8th Cir. 1982).

The Nelson court also noted that the “open courts” provision of the Texas constitution is not coterminous with the due process clause embodied in § 19 of the Texas constitution. See Nelson v. Krusen, 678 S.W.2d 918, 921 (Tex. 1984).

The § 19 due process clause of the Texas constitution basically mirrors the federal due process clause: “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” Tex. Const. art. 1, § 19.

\^342. See Texaco Inc., 784 F.2d at 1148. For a discussion of these cases, see supra note 336 and infra note 343.
and did not directly address the constitutionality of the statute itself.\textsuperscript{343} Because Texas raised a challenge to the constitutionality of the provision,\textsuperscript{344} it would be inappropriate to determine that such holdings have "settled" how the Texas courts would rule on such a claim.\textsuperscript{345}

More importantly, the Second Circuit could have held that Texas law was unsettled as it applied to Texaco regardless of past Texas court decisions on the issue. The facts of this case are so unusual that no previous Texas court adjudication could possibly have settled the constitutionality of the bond under these circumstances.\textsuperscript{346} In each of the Texas cases cited by the court, though a particular party could not raise the bond, it was theoretically possible for the bond to be raised.\textsuperscript{347} The Second Circuit's own justification for holding the Texas bond rules unconstitutional as applied to Texaco was that the amount of the bond would be impossible for anyone to post.\textsuperscript{348} In holding Texas law to be settled in a case that the Second Circuit itself distinguished from previous Texas decisions,\textsuperscript{349} the court implied that Texas courts would have either failed to

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\textsuperscript{343} See, e.g., Mudd v. Mudd, 665 S.W.2d 128, 130 (Tex. Ct. App. 1983) (Rule 364 does not authorize trial court to set a bond that would be grossly inequitable); Anderson v. Pioneer Bldg. & Loan Ass'n, 150 S.W.2d 445, 446-47 (Tex. Civ. App. 1941) ("court was not empowered through writ of injunction to restrain sale of home; plaintiff must file a supersedeas bond according to statute in order to suspend judgment"); Bryan v. Luhning, 106 S.W.2d 403, 404 (Tex. Civ. App. 1937) ("the Legislature has conferred a statutory right on the party obtaining judgment to have execution issued thereon" in the absence of a supersedeas bond); Dunlap v. Rotge, 85 S.W.2d 650, 651 (Tex. Civ. App. 1935) (a writ of injunction cannot be substituted for a supersedeas bond); Cleveland v. Alpine Lumber Co., 70 S.W.2d 257, 257-58 (Tex. Civ. App. 1934) (per curiam) (dismissing request for injunction because unclear what kind of relief plaintiff sought, but stating in dictum that judgment can be stayed only by supersedeas bond).

\textsuperscript{344} See supra note 331.

\textsuperscript{345} The Second Circuit cited Anderson v. Pioneer Bldg. & Loan Ass'n, 150 S.W.2d 445 (Tex. Civ. App. 1941) to show that Texas courts have refused to permit any flexibility in the supersedeas bond rule. See Texaco Inc., 784 F.2d at 1184. In Anderson, the Texas court refused to reduce the bond amount even though this decision meant that a 66-year-old woman who lived on an old-age pension might lose her home. Anderson, 150 S.W.2d at 445-46.

The Second Circuit emphasized that the Texas supersedeas bond rule was unconstitutional only as applied because of the impossibility of posting a $12 billion bond. See Texaco Inc., 784 F.2d at 1150. Logically, under the Second Circuit's limitation of its decision, it would have upheld the constitutionality of the supersedeas bond rule as applied to Anderson had she challenged the statute because the amount of the bond required in Anderson was not impossible to post. See supra note 336.

\textsuperscript{346} See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133, 1150 (2d Cir. 1986) ("[W]e are not called upon to declare the Texas lien and bond provisions to be unconstitutional on their face but only as applied to the unique and extraordinary circumstances of this case, which are unlikely ever to recur because here obtaining a $12 billion bond is impossible.")) (emphasis added).

\textsuperscript{347} See supra note 336.

\textsuperscript{348} See Texaco Inc., 784 F.2d at 1150.

\textsuperscript{349} See id. ("Our exercise of federal jurisdiction under § 1983 does not open any floodgates. On the contrary, ours is a narrow holding limited to the unusual circumstances of this case. The Texas lien and bond provisions will in most other circumstances continue to be respected and enforced as written by the Texas legislature and the Texas Supreme Court.").
recognize this distinction or imposed an impossible condition on Texaco. In doing so, not only did the Second Circuit impute an unsound decision to the Texas judiciary, but, by failing to abstain, the court also deprived the Texas courts of the opportunity to decide the constitutionality of their bond rule as applied to these circumstances.

Because the Second Circuit determined that the Texas supersedeas bond rule was clear,\textsuperscript{350} it did not address the remaining \textit{Pullman} requirements. Under the second requirement of \textit{Pullman} a federal court need not abstain if a federal constitutional decision will be necessary regardless of state court construction of state law.\textsuperscript{351} Had the Texas courts modified the bond requirement under the state constitution, there would have been no need for the district court or the Second Circuit to decide the question under the federal Constitution.

Finally, \textit{Pullman} abstention would not have been appropriate unless the court found that the state law issue could be resolved under Texas procedures.\textsuperscript{352} In analyzing Texaco's claim under the \textit{Younger} doctrine, the Second Circuit held that Texas courts did not provide Texaco with adequate procedures to raise its constitutional claims.\textsuperscript{353} There is basis for the Second Circuit's conclusion that an "extraordinary" writ such as a writ of mandamus is an inadequate procedure,\textsuperscript{354} but a contrary finding would also be supportable. Texaco was protected from financial collapse by paragraph 7 of the Texas trial judgment,\textsuperscript{355} and Texas case law indicates that Texas' writ of mandamus has been used to reduce the bond amount set by a trial court.\textsuperscript{356}

Because the facts of this case satisfied the three requirements of \textit{Pull-

\textsuperscript{350} See \textit{supra} note 328 and accompanying text.

\textsuperscript{351} See \textit{supra} note 323 and accompanying text.

\textsuperscript{352} See \textit{supra} note 324 and accompanying text.

\textsuperscript{353} See \textit{supra} notes 272-76 and accompanying text.

\textsuperscript{354} See \textit{Texaco Inc. v. Pennzoil Co.}, \textit{supra} F.2d 1133, 1151 (2d Cir. 1986). Two other circuits have held that if the only procedure available is through mandamus proceedings, then abstention is not merited. See \textit{Traughber v. Beauchane}, 760 F.2d 673, 684 (6th Cir. 1985) (abstention inappropriate where only procedure available to raise federal claims was by writ of mandamus); \textit{Holmes v. New York City Hous. Auth.}, 398 F.2d 262, 267 n.7 (2d Cir. 1968) (same).

\textsuperscript{355} See paragraph 7, \textit{supra} note 13.

\textsuperscript{356} See \textit{Mudd v. Mudd}, 665 S.W.2d 128, 129 (Tex. Ct. App. 1983). Mudd reduced a supersedeas bond that had been set in excess of the statutory minimum by writ of mandamus. See \textit{supra} note 308.

The Fourth Circuit in \textit{Lynch v. Snepp}, 472 F.2d 769 (4th Cir. 1973), \textit{cert. denied}, 415 U.S. 983 (1974), held that an order which prohibited federal plaintiffs and other members of the public from entering school property was "possibly overbroad" but refused to enjoin the state court under \textit{Younger} in the absence of a showing that the overbreadth "[could not] be cured by an immediate appeal to the state appellate courts, the use of prerogative writs by those courts, or even by defending at the final trial on the merits before the superior court." \textit{Id.} at 775-76. In \textit{Winslow v. Leh}, 577 F. Supp. 951 (D. Colo. 1984), the district court refused to enjoin collection of a state court judgment under both \textit{Pullman} and \textit{Younger} because the federal plaintiff could raise a due process challenge in state court through a writ of certiorari "as well as certain extraordinary writs." See \textit{id.} at 952-53.
man, the Second Circuit could have invoked Pullman and abstained while Texas courts settled the underlying state law questions.

Though the Supreme Court has developed tests for determining whether Younger or Pullman abstention is warranted, the criteria used are too ambiguous to provide substantive guidance. The standards are particularly undefined regarding the still-developing Younger doctrine, but even the relatively settled Pullman doctrine permits equally "correct" but inconsistent results. The Second Circuit's application of the Younger and Pullman doctrines can be criticized as not giving enough attention to the principles of comity and federalism underlying Younger and Pullman. However, a fair analysis cannot conclude that its decision to enjoin Pennzoil was erroneous given the flexibility of the Younger and Pullman abstention tests.

CONCLUSION

The unique facts of this case have illuminated subtle tensions in the complex doctrines of federalism and jurisdiction. Texaco's federal claims placed the Second Circuit in an unenviable position. The potential devastation of one of this nation's largest corporations inevitably weighed heavily on the three members of the panel. Before hearing this case, the court had to satisfy the requirements of jurisdiction, the Anti-Injunction Act and abstention. The potential impact of this decision on the role of the federal courts within the dual judicial system makes a thorough evaluation of the fundamental precepts of these doctrines imperative. This Comment has attempted to set forth the relevant avenues of inquiry and to propose an analytical framework rooted in the principles underlying jurisdiction, the Anti-Injunction Act and abstention.

Traditionally, to avoid friction between state and federal courts, the Rooker-Feldman doctrine barred federal jurisdiction over claims that either have been previously raised in state court or that raise issues "inextricably intertwined" with prior state court litigation. Many courts, including the Second Circuit, declined to apply this doctrine to cases in which the federal claim had not yet been raised in state court. However, the principles of federalism and comity underlying Rooker-Feldman suggest that even claims that have not been raised in state court may be denied a federal forum. When federal court intervention would generate friction between state and federal courts and waste judicial resources, and Supreme Court review would otherwise be available, a principled application of the doctrine should bar federal jurisdiction.

Section 1983 provides a remedy for deprivations, occurring under color of state law, of rights secured by the Constitution of the United States. When a private party is alleged to have violated Section 1983, courts have generally inquired whether the private party's conduct was the type of "state action" proscribed by the Constitution and Section 1983. The Second Circuit, like many other courts, focused this inquiry on whether state officials had participated in the challenged conduct.
However, because the Constitution imposes limits on the exercise of governmental power, the inquiry should focus on the nature of the power exercised by the private party. For a private party to truly act as the state it must not only invoke a state procedure. It must also substitute its judgment for that of the state in deciding to employ the government's power. By thus examining the nature of the private conduct, rather than the role of state officials, the inquiry would directly address the Constitution's concerns with limiting the exercise of governmental power.

Because Section 1983 actions are excepted from the Anti-Injunction Act's limits on federal court injunctions of state proceedings, extension of Section 1983 jurisdiction mandates reanalysis of the proper role of the Act. The present approach to the Act exempts Section 1983 actions from this congressional ban while simultaneously imposing judicially-created Younger doctrine to deny injunctive relief to Section 1983 plaintiffs. From the Anti-Injunction Act's obscure origins to later interpretations of the Act as a fundamental congressional policy aimed at preserving the dual court system, the principles of federalism and comity underlying the Act have been applied inconsistently.

Injunctions of state court proceedings in Section 1983 actions were determined to be expressly authorized exceptions to the Anti-Injunction Act based on the broad congressional objectives of Section 1983. Despite the conclusion that Section 1983 empowers federal courts to intervene to protect individuals against unconstitutional state court actions, the Supreme Court continues to deny federal injunctions under the Younger doctrine. The substitution of judicial determinations under Younger for analysis of congressional intent under the Anti-Injunction Act deposes Congress from its role in determining federal court power in relation to state courts. The court's approach to the Act also frustrates the congressional objectives expressed in Section 1983. The inherent conflict between Mitchum's finding that Congress intended Section 1983 to authorize injunctions and Younger's invocation of federalism to deny such injunctions should not be resolved by piecemeal adjudication.

Finally, the expansion of Section 1983 jurisdiction and the consequent collapse of the Anti-Injunction Act have combined to bestow enlarged significance on the doctrines of abstention. As a result, abstention under such bases as the Younger and Pullman doctrines exist as the most important embodiments of comity and federalism. Unfortunately, the malleability of the applicable doctrinal standards can negate the impact these abstention doctrines have on the role of the federal courts in a dual judicial system. Therefore, care must be exercised to include considerations of comity and federalism in abstention analysis.

Under Younger abstention federal courts have declined to abstain by finding either that the relevant state interest falls outside the few interests previously recognized by the Supreme Court as important or that state procedures are too uncertain or slow to provide adequate relief. The mechanical application of Younger, however, contravenes the principles
of comity and federalism underlying the doctrine, which should be considered regardless of the state interest implicated. Likewise, analysis of state procedures should be made with the due respect to the state judiciary required by federalism and comity. If not applied along with these considerations, the technical Younger standards are susceptible to interpretations contrary to the principles underlying Younger itself.

Pullman abstention requires that when a federal constitutional claim is premised on an unsettled question of state law, federal courts should abstain from hearing the federal claim to allow the state courts the opportunity to decide the underlying state law question. Abstention under Pullman minimizes federal-state tension and avoids potentially unnecessary constitutional adjudication. The requirements for invoking Pullman abstention as adopted by the Supreme Court are also susceptible to varying conclusions. As a result, under both Younger and Pullman abstention, the criteria on which a decision must lie can be too vague and malleable to provide substantive guidance, a situation that can only be remedied by principled consideration of the notions of federalism and comity that underlie the doctrine of abstention.

The doctrines and standards of jurisdiction, the Anti-Injunction Act and abstention provide guidance to federal courts in most cases. The pressing facts of Texaco Inc. v. Pennzoil Co., however, forced the Second Circuit to resolve unforeseen and novel interpretations and extensions of these doctrines. The unique circumstances of this case thrust the court into an area devoid of explicit precedent, but not without guidance. By focusing on the principles of comity and federalism inherent in a dual judicial system, courts faced with similar dilemmas will find themselves equipped to reach principled, consistent and just decisions.

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