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Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings – A Response to Professor Stravitz

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MAKING YOUNGER CIVIL: THE CONSEQUENCES OF FEDERAL COURT DEFERENCE TO STATE COURT PROCEEDINGS

A RESPONSE TO PROFESSOR STRAVITZ

GEORGENE M. VAIRO*

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Section II of this commentary is largely taken from a report prepared by the Committee on Federal Courts, New York State Bar Association, Report on the Abstention Doctrine: The Consequences of Federal Court Deferece to State Court Proceedings (August 30, 1988), published in 122 F.R.D. 89 (1988). The drafting subcommittee, of which this author was the chairperson and principle drafter, included Alan J. Russo, Esq., Andrew P. Saulitis, Esq., and Daniel W. White, Esq. I gratefully acknowledge their contributions to the Report. I also wish to thank Robert L. Haig, Esq., Chairperson of the Committee on Federal Courts for allowing me to use the Report in this Commentary.

Finally, I would like to thank Augustine B. Cheng, Fordham Class of 1989, for his valuable assistance in preparing this Commentary.
IN an often quoted but largely ignored passage, Chief Justice John Marshall declared that the federal courts 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."\(^1\) Although this passage suggests that the exercise of federal jurisdiction is mandatory, many exceptions to this basic proposition have evolved.\(^2\) Some observers believe that one class of exceptions—the judicially created abstention doctrines—prejudices plaintiffs' federal rights.\(^3\) Some are particularly concerned that the abstention doctrines threaten to deprive plaintiffs, particularly indigent plaintiffs, of an effective forum for their federal claims.\(^4\) In contrast, others believe that such concerns are unwarranted and that abstention is mandated by principles of federalism.\(^5\)

More litigants than ever are trying to litigate their cases in federal court.\(^6\) Courts have responded by raising the requirements for admission. For example, the Supreme Court has restrictively applied its test for standing\(^7\) and has modified its test for determining when to imply a

2. The well established doctrine of forum non conveniens, for example, allows federal courts to dismiss actions which, although brought under properly invoked federal jurisdiction, are filed in inconvenient forums. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257-61 (1981); Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-09 (1947).
4. A Subcommittee of the then Committee on Federal Courts of the New York State Bar Association was formed to explore whether the perceptions and concerns raised by the use of abstention were accurate. See infra Section II for the results of the study; see also Zeigler, Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts, 38 Hastings L.J. 665, 684-89 (1987) (Younger abstention routinely results in denial of fundamental constitutional rights).
6. Filings in federal district courts have sharply risen over the last decade. For example, from 1979 to 1988, civil filings increased from 154,666 to 239,634, while between 1981 and 1988, appeals concomitantly increased from 26,362 to 37,524. See Annual Report of the Director of the Administrative Office of the United States Courts 1-13 (1988).
7. There has been a reassessment during the last twenty years on the focus of stand-
private right of action. The Court also has made it more difficult for litigants who are properly admitted to remain in federal court and has greatly expanded the abstention doctrines by which the federal courts defer to state court proceedings. This expansion may be seen as part of the "currently trendy drive toward efficiency" at the expense of insuring vindication of federal rights.

Under the Warren Court, standing simply insured the requisite adversity to sharpen the issues for proper judicial determination. See Flast v. Cohen, 392 U.S. 83, 99 (1968). The role of separation of powers, on the other hand, was to insure that the Court was engaged in judicial, rather than political, business. The Burger/Rehnquist Court's conception of standing doctrine, in contrast, is "built on a single basic idea—the idea of separation of powers." Allen v. Wright, 468 U.S. 737, 752 (1984).

8. After 1975, the Supreme Court appeared to become more restrictive in implying a private right of action under federal statutes. See, e.g., Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 41-42 (1977) (no private right of action under section 14(e) of Securities and Exchange Act). In 1979, the Court modified its test for implying a private right of action when it elevated the factor of legislative intent to preeminent status over factors such as whether the plaintiff was in the intended protected class and whether implying a private right to sue would promote legislative goals. See Cannon v. University of Chicago, 441 U.S. 677, 689-709 (1979). Accordingly, today the inquiry is essentially whether Congress intended to create a private right of action. The Court's test has proven very difficult to meet. See, e.g., Thompson v. Thompson, 108 S. Ct. 513, 520 (1988) (no private right of action under Parental Kidnapping Prevention Act); Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 18 (1981) (no private right of action under Federal Water Pollution Control Act); California v. Sierra Club, 451 U.S. 287, 294 (1981) (no private right of action under section 10 of Rivers and Harbors Appropriations Act of 1899); Touche Ross & Co. v. Redington, 442 U.S. 560, 571-74 (1979) (no private right of action under section 17(a) of Securities and Exchange Act of 1934).

In recent cases involving implied causes of action for damages under the Constitution, the Court has carefully considered its power relative to Congress, and, not surprisingly, has been more reluctant than in the past to imply causes of action under the Constitution. The Court, citing the role of Congress, often has willingly found those "special factors counseling hesitation" against a private right of action. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 135, 146 (1971). For example, in Chappell v. Wallace, 462 U.S. 296 (1983), the Court found that Bivens did not authorize damages actions for enlisted men for alleged acts of discrimination because of the special nature of military service and the availability of administrative relief. See id. at 304-05. In a similar vein, in United States v. Stanley, 107 S. Ct. 3054 (1987), the Court, relying on Chappell, held that a serviceman who voluntarily participated in an army study and was secretly exposed to hallucinogenic drugs did not have a Bivens remedy because the injuries "[arose] out of or . . . in the course of activity incident to service." Id. at 3063 (quoting Feres v. United States, 340 U.S. 135, 146 (1950)); see also Schweiker v. Chilicky, 108 S. Ct. 2460, 2470-71 (1988) (refusing to imply damages remedy for plaintiffs who were wrongfully deprived of federal benefits).

9. For example, in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984), the plaintiffs alleged that conditions at a state mental hospital violated their federal constitutional and statutory rights, as well as their state statutory rights. The Supreme Court held that the eleventh amendment barred a federal court from exercising jurisdiction over violations of state law by state officials. See id. at 106.

10. See infra Section II.

11. See Stempel, A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process, 49 Ohio St. L.J. 95, 193 (1988). Indeed, the Supreme Court's recent summary judgment trilogy—Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)—is designed to and will likely increase the possibility that cases will be disposed of before
The Supreme Court considered related issues in *Pennzoil Co. v. Texaco Inc.* and held that a federal court may not enjoin state appellate procedures in a case in which a state trial court had entered a judgment for billions of dollars. Recently, Professor Howard Stravitz has defended the *Pennzoil* decision on "both theoretical and pragmatic grounds." On an intuitive level, Texaco was not entitled to federal intervention in its state court dispute with Pennzoil. The ease and complacency with which the Supreme Court extended the *Younger* abstention doctrine in a civil context, however, is very disturbing. Indeed, Professor Stravitz's uncritical acceptance of the majority's reasoning shows just how dangerous the increasingly malleable abstention doctrines have become. The Court pays lip service to Chief Justice Marshall's declaration, then proceeds to emasculate a plaintiff's right to choose a federal forum.

This Commentary responds to Professor Stravitz's argument in support of the extension of abstention announced in *Pennzoil* and suggests how the use of abstention might be restrained. Section I will survey the leading Supreme Court abstention cases in order to set forth the basic principles and policies underlying the doctrines, to detail emerging trial. See G. Vairo, *Through the Prism: Summary Judgment and the Trilogy, printed in Trial Evidence, Civil Practice and Effective Litigation Techniques in Federal and State Courts* 207 (1988). This, in turn, can be seen as part of the trend towards curbing the perceived abuses of the federal system through the increased use of sanctions. See Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 190 (1988).


13. See *id.* at 10.


16. Professor Althouse has made the point that the Court has found it "easier and easier" to abstain. See *id.* at 1078.

trends and to identify practical problems. Section II reviews abstention in the United States Court of Appeals for the Second Circuit and the results of the study on abstention by the Committee on Federal Courts of the New York State Bar Association. Section III discusses Professor Stravitz’s thesis that Younger abstention deserves full civil application. This section also explores how the disjointed abstention analysis should be unified and modified to ensure that the doctrine is properly applied.

I. THE ABSTENTION DOCTRINES

There are four basic types of abstention: Pullman, Burford, Colorado River and Younger. Though different policies and purposes originally supported the various forms of abstention, all four doctrines have the same effect: deference by the federal courts to litigation in the state courts.

A. Pullman Abstention

The Supreme Court established the first abstention doctrine in Railroad Commission of Texas v. Pullman Co.18 Plaintiffs were black railroad employees who argued that a Railroad Commission order discriminated against them in violation of the United States Constitution and state statutes. The Supreme Court found that the state law was uncertain and that a favorable ruling for the plaintiffs on state law might obviate the need for the federal courts to decide the constitutional question. Accordingly, the Court ruled that the federal case should be stayed so that the parties could obtain a definitive ruling on state law from the state court. The Pullman doctrine is thus predicated on the twin aims of avoiding premature constitutional adjudication and federalism.

One peculiar characteristic of Pullman abstention is that generally there is no parallel pending state proceeding. Instead, the federal court directs the plaintiff to begin an action in state court on the state law claims. The plaintiff must choose either to litigate both the federal and state claims in the state court, or to litigate only the state claims in state


19. 312 U.S. 496 (1941). In the paradigm Pullman case, a plaintiff alleges constitutional violations and pendent state claims, there is no parallel state proceeding, and the court, in order to avoid constitutional adjudication, abstains to obtain a definitive ruling by the state court on ambiguous state law issues.

20. See id. at 498.
21. See id. at 501.
22. See id. at 501-02.
court, with the right to return to the federal court on the constitutional issue.\(^2\)

Several requirements must be satisfied for a court to invoke *Pullman* abstention. First, a federal court will abstain only if the disputed state law is unclear.\(^2\) Some recent Supreme Court decisions suggest the need for serious ambiguity in the state provision.\(^2\) For example, in *Hawaii Housing Authority v. Midkiff*,\(^2\) Justice O'Connor wrote: "[T]he relevant inquiry is not whether there is a bare, though unlikely, possibility that the state court might render adjudication of the federal question unnecessary. Rather . . . 'abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible [to] a limiting construction.'"\(^2\) On the other hand, in *Pennzoil*, Justice Blackmun, in concurrence, would have abstained under *Pullman* even though there was only a mere possibility that the disputed state law would eliminate the need to decide the federal issue.\(^2\) Thus, it remains unclear when state law is sufficiently ambiguous to justify application of *Pullman* abstention.\(^3\)

Second, the federal courts will consider whether the plaintiff has an adequate state remedy. This requirement, arguably the most critical to the *Pullman* doctrine, is grounded in the theoretical parity between the federal and state courts.\(^3\) Although the exact meaning of an adequate state remedy is unclear, the Supreme Court's current test presumes adequacy and makes it nearly impossible for a litigant to show inadequacy. In *Moore v. Sims*,\(^3\) for example, the Court stated: "Abstention is appropriate unless state law clearly bars the interposition of the constitutional

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Federal courts are generally reluctant to abstain in cases involving facial challenges based on the first amendment. In *Hill*, for example, the Court held that abstention was inappropriate where the statute was "'justifiably attacked on [its] face as abridging free expression.'" *Hill*, 482 U.S. at 467 (quoting Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965)). Not all of the Supreme Court justices, however, have accepted this proposition. See *Hill*, 482 U.S. at 476 n.4 (Powell, J., dissenting); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 509-10 (1985) (O'Connor, J., concurring).


28. Id. at 237 (quoting Zwickler v. Koota, 389 U.S. 241, 251 n.14 (1967)).

29. See id. at 29 (Blackmun, J., concurring); see also Althouse, supra note 15, at 1072.


31. Abstention is appropriate only if it is presumed that state courts are as competent as federal courts to decide federal issues. See Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1117 (1977).

More recently, the Court in *Pennzoil* extended this presumption even further: "[W]hen a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary."  

The adequacy inquiry requires courts to determine whether a single state proceeding is likely to resolve the dispute. *Dombrowski v. Pfister,* for example, involved a state statute that was challenged on first amendment grounds. Reasoning that only a series of lawsuits could clarify the statute, the Court held that abstention was inappropriate because "those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal."

*Pullman* abstention raises several procedural issues. A federal court invoking the doctrine will generally stay the proceeding. Some courts, however, may order dismissal without prejudice to remove obstacles to state court jurisdiction. This result demonstrates the irony of the *Pullman* doctrine. One justification for the doctrine is that federalism requires that state courts have the first opportunity to decide an unsettled issue of state law. In *Harris County Commissioners v. Moore,* the Court's decision to dismiss the federal claims to facilitate state court disposition of state claims worked an anomalous result. After disposition of the state claims, the plaintiff's attempt to reassert the pre-existing federal claims in a new federal suit was foiled by the expiration of the statute of limitations. The *Pullman* doctrine, in an attempt to further the concerns of federalism, actually worked to frustrate those aims by preventing exercise of the plaintiff's right to federal adjudication of its constitutional claims.

In addition, even when the federal forum remains open, the cost and delay attendant to abstention may deter the plaintiff's return to the federal forum. Finally, the Supreme Court has not determined what preclusive effect a state court's fact finding will have when the case does return to federal court.

33. *Id.* at 425-26.
35. 380 U.S. 479 (1965).
36. *Id.* at 491; see also *Baggett v. Bullitt,* 377 U.S. 360, 378-79 (1964) (abstention creates piecemeal adjudication and substantial undue delay).
41. *See id.* at 88-89.
43. *See Field,* *supra* note 30, at 1087; *Werhan,* *supra* note 24, at 472.
44. *Cf.* *Allen v. McCurry,* 449 U.S. 90, 103-04 (1980) (issue preclusion from habeas
Some commentators suggest that Pullman abstention has fallen into disuse. Even if this is true, the doctrine is likely to assume greater importance in the wake of Pennzoil. The Court's opinion in Pennzoil seems to merge the frequently invoked Younger v. Harris doctrine with the principles which underlie Pullman abstention. Moreover, Justice Blackmun's concurrence suggested that he would have explicitly invoked Pullman abstention rather than Younger in Pennzoil.

B. Burford Abstention

Burford v. Sun Oil Co. involved a dispute over the apportionment of oil drilling rights. The plaintiff sought an injunction against a state order which deprived it of certain drilling rights. No substantial issues of federal law were involved. The Texas legislature had provided that all cases involving drilling rights were to be handled by one state court in order to prevent inconsistent and confusing judgments. The Supreme Court found that the federal court should defer to the state court because intervention by the federal courts would interfere with that state policy. Accordingly, the Court held that "a sound respect for the independence of state action requires the federal equity court to stay its hand."

Burford abstention requires a federal court to dismiss a pending case with prejudice. Because the typical Burford case involves no federal issue, there is no need for the district court to retain jurisdiction. If any federal issue arises, review may be sought in the Supreme Court.

For many years, federal courts rarely invoked Burford abstention because they seldom found that their intervention would impair sufficiently important state interests. The Supreme Court has not expanded the reach of Burford abstention. In its latest case exploring the doctrine, the Court found that the mere existence of a complex state regulatory or {}

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45. See, e.g., Althouse, supra note 15, at 1070 & n.105.
47. See Pennzoil, 481 U.S. at 11-12. The Court, however, was quick to point out that, because appellants did not raise the issue, Pullman abstention was not explicitly being invoked. See id. at 11 n.9; see also Althouse, supra note 15, at 1071.
48. See Pennzoil, 481 U.S. at 29 (Blackmun, J., concurring).
49. 319 U.S. 315 (1943).
50. Jurisdiction was based on diversity and federal question bases. See id. at 317. The Court, however, found the constitutional question had long since been decided and accordingly treated the case as one based on state law. See id. at 328-331.
51. See id. at 333-34.
52. Id. at 334.
53. In the paradigm Burford case, a federal plaintiff alleges a state law claim in which important state regulatory issues are implicated. Since the state courts are a part of the regulatory process, the federal court abstains out of considerations of comity and respect for the paramount state interest.
54. Such review is circumscribed by the now fully discretionary nature of Supreme Court jurisdiction. See infra note 267 and accompanying text.
The Burford doctrine, however, appears to have experienced a renaissance in recent years in the lower courts. For example, in Law Enforcement Insurance Co. v. Corcoran, the plaintiff asserted a claim against a defunct insurance company which was under the control of a state-appointed rehabilitator. Finding that the state courts were "active partners" in the regulatory process, the federal court affirmed dismissal of the complaint: "[T]he structure of the [state] system serves the state's strong interest in centralizing claims against an insolvent insurer into a single forum where they can be efficiently and consistently disposed of."

While in both Burford and Corcoran the federalism flag was raised, the real problem was more practical: the nature of the disputes required adjudication by one voice. This is true because normally the issue in question requires the allocation of scarce resources, or at least presents a situation in which one or more parties cannot comply with conflicting or inconsistent state and federal court adjudications. In the typical Burford case, no federal question exists; instead, the federal court is asked to resolve a matter of state law. Thus, the only interest which exists is a federal litigant's preference for a federal forum.

The Court's approach to Burford abstention in N.O.P.S.I v. Council of New Orleans partially confirms this point. The plaintiff in N.O.P.S.I did not state claims under state law alone. Rather, the primary claim involved federal preemption. Writing for the majority, Justice Scalia found that the mere presence of complex state administrative processes or a potential for conflict with state law did not justify Burford abstention. Justice Scalia concluded that abstention was improper because "no inquiry beyond the four corner's of the [state's] retail rate order is needed to determine whether it is facially preempted.... Such an in-

57. Id. at 44; see also Roy v. Verchereau, 619 F. Supp. 1323, 1326 (D. Vt. 1985) (Burford abstention appropriate in labor disagreement action even though federal claims were made); Price v. Rust, 527 F. Supp. 569, 575-76 (D. Conn. 1981) (abstention proper when landowner can present claims in state proceeding). On the other hand, in Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370 (N.D.N.Y. 1987), the court found that the plaintiff's challenge the creation of a state agency whose purpose was to take over the plaintiff—a highly regulated business—did not threaten the uniform application of state law and accordingly was not an appropriate case for Burford abstention. See id. at 400.
58. See supra note 52 and accompanying text.
59. Justice Scalia's opinion in N.O.P.S.I. v. Council of New Orleans, 109 S. Ct. 2506 (1989), provides an example. Writing for the Court, he found that Burford abstention was inappropriate because no state law claim was involved. Rather, the plaintiff's claim was based on judicial preemption of state rate making in the energy industry. See id. at 2513-15.
61. See id. at 2514-15. The plaintiff, a utility company, sought reimbursement for the cost of building a nuclear power plant. A federal agency had previously found the plaintiff's participation in the project to be reasonable. The plaintiff argued that the state's refusal to permit full reimbursement violated federal law.
62. See id.
quiry would not unduly intrude into the processes of state government or undermine the state's ability to maintain desired uniformity." 63  Ironically, this language suggests that Burford abstention may be appropriate when there is a need for the federal court to look behind a state order which allegedly violates federal law, thus planting the seed for the doctrine's further growth in the future.

A related abstention doctrine was enunciated in Louisiana Power & Light Co. v. City of Thibodaux. 64  In Thibodaux, the Supreme Court held that abstention was proper in a diversity action concerning the scope of the municipal eminent domain power under state law. As in Burford, the Court was concerned with "the maintenance of harmonious federal-state relations in a matter close to the political interests of a State." 65  Thibodaux abstention applies "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." 66  The doctrine has been extended beyond the area of eminent domain. 67

C. Younger Abstention

The Anti-Injunction Act 68  prohibits a federal court from enjoining most pending state proceedings. Three statutory exceptions exist, the most pertinent being when Congress expressly permits an injunction. 69  In Mitchum v. Foster, 70  the Supreme Court held that Congress intended section 1983 actions to be exempt from the Anti-Injunction Act. 71  Thus, the federal courts have the constitutional and statutory power to enjoin state criminal or civil proceedings.

In Younger v. Harris, 72  however, the Supreme Court held that, notwithstanding their statutory and constitutional authority, federal

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63. Id. at 2515.
64. 360 U.S. 25 (1959). In the paradigm Thibodaux case, a plaintiff alleges unclear state law claims of substantial public import and the federal court abstains out of considerations of comity and respect for the paramount state interest.
65. Id. at 29.
66. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976). Abstention is not appropriate when factors which counsel for deference under the Thibodaux standard are missing. See, e.g., County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 187-89 (1959) (abstention inappropriate where state eminent domain law settled); Meredith v. Winter Haven, 320 U.S. 228, 237 (1943) (abstention inappropriate when no state court interference and no public policy or interest is served).
69. The Anti-Injunction Act provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Id.
71. See id. at 242-43.
courts ordinarily should not enjoin state criminal proceedings. Rather, absent a showing of prosecutorial bad faith or harassment, a federal court cannot enjoin a pending state prosecution simply because the statute on which the prosecution is based is unconstitutional.

Younger abstention serves several policies. First, courts of equity should abstain when an adequate remedy at law exists and where the party will not suffer irreparable harm. Second, the doctrine prevents multiple suits where a single action adequately protects the asserted rights. Third, the doctrine promotes the vital consideration of comity: "a proper respect for state functions" or "Our Federalism" require that federal courts refuse to intervene in state proceedings.

Three critical requirements for invoking Younger are that there be a pending state proceeding, that important state interests be at stake and that there be an adequate state forum. As is the case in Pullman abstention, however, the adequacy requirement is easily met. Similarly, the degree of state interest required to justify abstention is minimal. Thus, the only differences between the two doctrines seem to be the procedural posture of the case at the state level when the federal court considers whether to abstain and, in the paradigm case, the immediate remedy sought by the Younger plaintiff.

73. In the paradigm Younger case, there is a pending state criminal proceeding and the state defendant brings a federal action under section 1983 alleging that the state criminal statute is unconstitutional. When the plaintiff has a full and fair opportunity to challenge the constitutionality of the statute in the state proceeding and seeks equitable relief restraining that proceeding, the federal court will abstain out of principles of comity and federalism.

74. See Younger, 401 U.S. at 48-49. Younger abstention is equally inapplicable if the disputed statute is "flagrantly and patently violative of express constitutional protection in every clause, sentence and paragraph . . . ." Id. at 53-54 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

75. According to Professor Redish, there are four theoretical foundations for application of the Younger doctrine:

(1) The desire to avoid affronting state judges by questioning their competence and/or willingness to enforce constitutional rights; (2) the need to prevent federal judicial interference with the accomplishment of state substantive legislative goals; (3) the need to preserve the discretion of state executive officers in general and state prosecutors in particular; and (4) the desire to prevent federal interference with the orderly operation of the state judicial process.


78. See supra notes 32-34 and accompanying text. Indeed, one commentator suggests that the Supreme Court's requirement in Pennzoil that there be "unambiguous authority to the contrary," Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 15 (1987), to overcome the presumption of adequacy amounts to a "requirement that state remedies be exhausted." Althouse, supra note 15, at 1065.

79. See Althouse, supra note 15, at 1053-54. Professor Stravitz recognizes this point in his discussion of the civil cases leading up to, and including, Pennzoil. See Stravitz, supra note 5, at 1000-08.
The Supreme Court has extended *Younger* dramatically to bar injunctions of civil proceedings which implicate important state interests when adequate relief is available in the state court. In addition, *Younger* has been applied to declaratory and other forms of relief. Furthermore, a court should not necessarily dismiss after abstaining under *Younger*. Rather, the federal court may stay the proceeding when the plaintiff alleges claims for monetary relief that cannot be redressed in the state court proceeding.

*Younger* abstention is troubling because it is extremely malleable. For example, the recent extension of *Younger* in *Pennzoil* to purely private civil actions shows that the test for avoiding *Younger* abstention will be difficult for any federal litigant to meet. While the circumstances in *Pennzoil* may have been *sui generis* and the Court in its latest *Younger* case—*N.O.P.S.I. v. Council of New Orleans*—declined to require abstention in a civil context, the doctrine nonetheless has been routinely applied to a host of federal claims.

D. Colorado River Abstention

The final type of abstention serves quite different—and somewhat less lofty—purposes than the first three. *Colorado River* abstention "rest[s] on considerations of [w]ise judicial administration." Not surprisingly, the doctrine had its origins in the busy nature of the lower federal courts:


84. *See id.* at 2517-18.

85. See, e.g., *Allen v. Louisiana State Bd. of Dentistry*, 835 F.2d 100 (5th Cir. 1988) (*Younger* abstention ordered as to equitable claims, but not to damages action); *Marcal Paper Mills, Inc. v. Ewing*, 790 F.2d 195 (1st Cir. 1986) (*Younger* appropriate pending appeal in state court of legal issue raised in unrelated federal action); *see also* notes 142-155 and accompanying text. *But see Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837 (1st Cir. 1988) (defendant may waive *Younger* abstention); *Harris v. Pernsley*, 755 F.2d 338 (3d Cir.) (*Younger* applicable only when state proceedings initiated by state agency or official), cert. denied, 474 U.S. 965 (1985); *Society for Good Will to Retarded Children v. Cuomo*, 652 F. Supp. 515 (E.D.N.Y.) (in action seeking improvement of state mental facilities, bifurcation of federal and state claims more appropriate than abstention), rev'd *on other grounds*, 832 F.2d 245 (2d Cir. 1987).

when parallel federal and state cases proceed concurrently, the federal action is dismissed in order to conserve judicial resources and to clear dockets.  

*Colorado River Water Conservation District v. United States* involved a disagreement over water rights. The United States, while a defendant in parallel state actions concerning water rights, brought an action in federal court involving the same rights. The Supreme Court held that none of the other abstention doctrines applied. Because the federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them, the Court concluded that "[in] the absence of weightier considerations of constitutional adjudication and state-federal relations," dismissal of a concurrent federal action is appropriate only in rare and "exceptional" circumstances.

The Court then listed the factors that lower courts should consider in deciding whether to abstain because of exceptional circumstances: whether the state court already had jurisdiction over the disputed res; whether the federal forum was inconvenient; whether the federal action encouraged piecemeal litigation; and whether the state or federal court first obtained jurisdiction.

Applying these factors, the Court held that a federal statute which permitted suit against the United States in water rights disputes evidenced a federal policy disfavoring piecemeal litigation. Other factors also pointed to abstention. Accordingly, the Supreme Court held that the district court properly dismissed the federal action.

*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, decided seven years after *Colorado River*, provided further indications of the Court's views on this type of abstention. *Moses H. Cone* involved a

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87. *See* Mottolese v. Kaufman, 176 F.2d 301, 303 (2d Cir. 1949). In the paradigm *Colorado River* abstention case, there is a pending state proceeding and a corresponding federal case involving the same or functionally similar claims and parties, no constitutional or federalism problems are presented, and the federal court abstains out of considerations of wise judicial administration.
89. *Id.* at 817.
90. *See id.* at 818.
91. *See id.*
92. *See id.* at 819.
93. These include the absence of a pending federal action when the motion to dismiss was filed; the magnitude of the suit; the inconvenience of the federal forum and the previous United States participation in prior water rights proceedings. *See id.* at 820.
95. Prior to *Moses H. Cone*, the Court upheld the application of *Colorado River* abstention in Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978), a securities case in which there was a pending state action that involved the same factual questions even though the federal plaintiff, who was the defendant in the state court action, could not raise the securities claims in the state court. The value of *Calvert* as a precedent is limited, however, for two reasons. First, the case turned on the rather technical question of whether the rigorous test for granting mandamus was met. *See id.* at 661-62. In addition, the Court's decision commanded only a plurality of the justices. Justice Blackmun, upon
construction dispute in which a hospital sued its contractor seeking a declaratory judgment that the construction company’s claims for delay costs were meritless. The state court granted an ex parte temporary restraining order, which prevented the contractor from seeking an order compelling arbitration. Thereafter, the construction company filed a federal action seeking an order to compel arbitration. The district court granted the defendant’s motion to stay the federal action pending the outcome of the state action. The court of appeals reversed and ordered the district court to enter an order compelling arbitration. The Supreme Court affirmed.

The Moses H. Cone Court added two more factors to the Colorado River abstention test: whether federal or state law controls the issue in dispute and whether the state proceeding will adequately protect the rights of the party seeking to invoke federal jurisdiction. Analyzing the Colorado River abstention factors, the Court found that the Federal Arbitration Act indicated Congressional intent to permit piecemeal litigation if necessary to secure the enforcement of arbitration agreements; that it was irrelevant that the state action had advanced further; and finally, that the state court action might not adequately protect the construction company’s federal rights. Therefore, the Court concluded that abstention would be unwarranted.

Moses H. Cone warned that the decision to abstain under Colorado River’s “exceptional circumstances” test “does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.” Despite this caveat, lower federal courts have readily found the exceptional circumstances necessary to justify abstention. In fact, an overcrowded docket alone may be enough to in-

whom the plurality depended for its decision, clearly distinguished himself from the Court’s rationale. See id. at 667-68 (Blackmun, J., concurring).

96. See Moses H. Cone, 460 U.S. at 7.
97. See id.
98. See id.
99. See id. at 8.
100. See id. at 23-26.
101. See id. at 26.
104. See id. at 19.
105. Id. at 16.
106. See, e.g., Lumbermens Mut. Casualty Co. v. Connecticut Bank & Trust Co., 806 F.2d 411, 415 (2d Cir. 1986) (Colorado River appropriate to prevent inconsistent judgments and to facilitate apportionment of insurance defense costs); Fuller Co. v. Ramon Gill, Inc., 782 F.2d 306, 310 (1st Cir. 1986) (Colorado River appropriate because state court competent to decide issues); Lumen Constr., Inc. v. Brant Constr. Co., 780 F.2d 691, 696-97 (7th Cir. 1985) (Colorado River invoked to defer to earlier state interpleader action, even though additional parties existed in the federal action); Vega Arriaga v. J.C. Penney, Inc., 658 F. Supp. 117, 122 (D.P.R. 1987) (Colorado River appropriate to prevent piecemeal litigation); DeVona v. City of Providence, 652 F. Supp. 683, 686 (D.R.I. 1987)
voke Colorado River abstention.

More importantly, the Court has applied the doctrine and ordered abstention in cases involving federal claims. In Arizona v. San Carlos Apache Tribe,107 the Court held that federal suits brought by Indian tribes to adjudicate water rights disputes are subject to dismissal under Colorado River abstention.108 Thus, Arizona suggests that Colorado River abstention may be appropriate even where state courts will be adjudicating federal claims.109

Colorado River abstention often presents the problem of res judicata and exclusive federal jurisdiction. In Will v. Calvert Fire Insurance Co.,110 the Court refused to grant mandamus in a securities case in which the district court invoked Colorado River abstention.111 When a federal plaintiff loses a state court breach of contract action, as happened in Calvert, the question exists whether the state court judgment will preclude litigation of a federal securities claim. In support of preclusion, it can be argued that a state defendant must raise related claims as compulsory counterclaims in the first proceeding and that res judicata or collateral estoppel bar any subsequent action. Indeed, the Supreme Court has stated that a judgment by either a federal or state court would ordinarily be res judicata in the other.112 The implicit conclusion from Calvert,
however, argues against this result because the defendant in such a case cannot raise exclusively federal claims—such as securities claims—in the state court action.

Years later, in *Marrese v. American Academy of Orthopaedic Surgeons*, the Supreme Court held that plaintiffs who litigated and lost state unfair competition claims in state court may be precluded from bringing their related exclusively federal claims in a subsequent federal action. From this precedent, it can be argued that the state defendant/federal plaintiff in a *Calvert*-type situation may also be precluded. On the other hand, the state defendant/federal plaintiff in *Calvert*, because of the inability to choose the forum, is in a worse position than the plaintiffs in *Marrese*. In *Calvert*, the state defendant/federal plaintiff was brought into the state court, while the *Marrese* plaintiffs initiated both the state and federal actions. The Court of Appeals for the Second Circuit has concluded that preclusion probably would not apply under these circumstances.

Another procedural problem dogs application of *Colorado River* abstention. Courts have frequently discussed whether the federal courts, when invoking *Colorado River* abstention, should stay or dismiss the federal action. Although the *Colorado River* Court affirmed the district court's dismissal and the *Moses H. Cone* court equated a stay with a dismissal, stay orders are generally less disastrous for plaintiffs because of potential problems with statute of limitations. Accordingly, most courts will grant a stay rather than a dismissal. For example, in *Board of Education of Valley View School District v. Bosworth*, the Court of Appeals for the Seventh Circuit invoked *Colorado River* abstention in an action by a school board alleging due process violations for failure to distribute tax revenues to local entities. The Court found, however, that the district court should have stayed rather than dismissed the action.

The Supreme Court has become quite adept at guarding the federal

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114. See id. at 384-86.
115. See Andrea Theatres, Inc. v. Theatre Confections, Inc., 787 F.2d 59 (2d Cir. 1986).
118. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983). The *Moses H. Cone* Court, while equating the effects of a stay with dismissal, expressly reserved decision as to which procedure is correct when *Colorado River* is applied. See id. at 28; see also *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 n.21 (1978) (issue whether to stay or to dismiss without prejudice unanswered).
119. See, e.g., supra note 116 and cases cited therein.
120. 713 F.2d 1316 (7th Cir. 1983).
121. See id. 1321-22.
courthouse door. Lower courts, acknowledging the Court's signal, have vigorously applied the abstention doctrines. The Court of Appeals for the Second Circuit provides a perfect example of a lower court's enthusiastic application of abstention doctrines.

II. A Case Study: Abstention in the Second Circuit

The purpose of the Committee on Federal Courts Report\textsuperscript{122} was to explore whether the abstention doctrines have led to loss of federal rights or undue delay. The Committee's study provided information to track the consequences of the various abstention doctrines since 1971, the year in which the Supreme Court decided its landmark abstention case, \textit{Younger v. Harris}.\textsuperscript{123}

A. Doctrinal Developments

The Second Circuit has always been a strong proponent of abstention. Indeed, what has come to be known as \textit{Colorado River} abstention had its antecedents in a doctrine developed much earlier in the Second Circuit. In \textit{Mottolese v. Kaufman},\textsuperscript{124} shareholders brought a derivative action on behalf of a New York corporation against its directors and a number of corporations. At the time the plaintiffs brought the suit, however, there was a pending state action involving substantially the same issues and same defendants. As a result, the district court judge stayed the federal proceeding. The Second Circuit, noting that "equity has always interfered to prevent multiplicity of suits,"\textsuperscript{125} denied the petition for mandamus.\textsuperscript{126}

The Second Circuit has routinely applied \textit{Colorado River} abstention to conserve scarce judicial resources in cases where there was a parallel state court proceeding.\textsuperscript{127} In \textit{Arkwright-Boston Manufacturers Mutual

122. To obtain data about the practical impact of abstention, a questionnaire was developed. \textit{See} Appendix A. The questionnaires were mailed to plaintiffs' attorneys in reported cases in which the United States Court of Appeals for the Second Circuit had ordered abstention since 1971. Follow-up interviews were conducted with many of the attorneys.

Because the Committee was concerned chiefly with the types of abstention that may lead to loss of federal claims, the Report focused on cases in which federal claims were asserted. It was not possible to locate attorneys for all the plaintiffs. Thirty-nine questionnaires were mailed out, and responses were received with respect to about half the cases. Publicly available information was researched to supplement the information received from the attorneys. While this study cannot in any sense be described as scientific, the cases for which information was obtained appear to represent a reasonable cross-section of the range of abstention cases and issues. Accordingly, the Committee believed that certain conclusions could validly be drawn and recommendations made from what was learned.

124. 176 F.2d 301 (2d Cir. 1949).
125. \textit{Id.} at 303.
126. \textit{See id.} at 304.
127. \textit{See}, e.g., \textit{General Reinsurance Corp. v. CIBA-GEIGY Corp.}, 853 F.2d 78, 81-82 (2d Cir. 1988) (\textit{Colorado River} appropriate when deference to state proceeding to deter-
Insurance Co. v. City of New York, for example, an insurance company brought a subrogation action in federal court against various New York entities for damages arising from a 1983 power blackout. After the federal action was filed, similar actions were instituted in New York state courts. Applying the exceptional-circumstances test announced in Colorado River and Moses H. Cone, the Second Circuit upheld the district court's decision to abstain. The court noted that there were no federal law issues involved that weighed against surrender. In addition, consolidation of cases in state court would avoid piecemeal litigation and would lead to more efficient adjudication of the issues, which exclusively involved questions of local law.

Pullman is also widely applied in the Second Circuit. The Second Circuit routinely applies Pullman abstention in section 1983 actions, leaving the state courts to decide such cases on state law grounds. In addition, the court invokes Pullman in cases where a pending state court proceeding exists.

The application of Pullman has also erected barriers for class action plaintiffs seeking to adjudicate their claims in federal court. In Pineman v. Oechslin, plaintiffs brought a class action suit challenging the constitutionality of Connecticut's revised State Employees Retirement Act. The Second Circuit abstained, holding that the state court should have

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128. 762 F.2d 205 (2d Cir. 1985).
129. See id. at 212.
130. See id. at 211.
131. See id.
132. See, e.g., Catlin v. Ambach, 820 F.2d 588, 591 (2d Cir. 1987) (Pullman appropriate when dispute concerns a dispositive interpretation of New York residency statute for children); West v. Village of Morrisville, 728 F.2d 130, 134 (2d Cir. 1984) (Pullman appropriate where parties can efficiently obtain a state court interpretation on state law that moots federal claim).
133. See, e.g., Winters v. Lavine, 574 F.2d 46, 69 (2d Cir. 1978) (Pullman appropriate where a state court proceeding could decide whether New York's medicaid statute covered religious nursing homes); Shelton v. Smith, 547 F.2d 768, 770 (2d Cir. 1976) (Pullman appropriate when pending state court proceeding concerning parental visitation rights exists).
the opportunity to address the state law issue of the suit.\textsuperscript{135} State courts, however, are generally hostile to class actions.\textsuperscript{136} Abstention in such situations generally exacerbates the already complex problems plaintiffs have in bringing class action suits.

The Second Circuit has injected new life into \textit{Burford} abstention, particularly in the area of state regulation of insurance.\textsuperscript{137} In addition, the court has adopted a broad view of the doctrine, extending \textit{Burford} abstention far beyond its strict doctrinal basis. For example, the Second Circuit has applied \textit{Burford} abstention in the absence of complex issues of state law.\textsuperscript{138} In addition, the circuit has been willing to apply \textit{Burford} when federal interests are implicated. In \textit{New York State Association for Retarded Children, Inc. v. Carey},\textsuperscript{139} for example, the court abstained on \textit{Burford} grounds in order to avoid conflict with New York's administration of its Medicaid system even though federal funding of Medicare implicates substantial federal interests.\textsuperscript{140}

The Second Circuit routinely applies the principles of abstention announced in \textit{Younger v. Harris}\textsuperscript{141} when state court criminal proceedings are involved.\textsuperscript{142} In addition, the Second Circuit has extended abstention to dismiss federal actions bearing upon non-criminal proceedings, including those in which civil rights claims are raised under section 1983.\textsuperscript{143}

\begin{itemize}
  \item \textsuperscript{135} See id. at 605-06.
  \item \textsuperscript{136} See infra note 178 and accompanying text.
  \item \textsuperscript{137} See, e.g., Corcoran v. Anda Ins. Co., 842 F.2d 31, 34-37 (2d Cir. 1988) (\textit{Burford} abstention proper where Superintendent of Insurance attempted to recover proceeds allegedly due under reinsurance agreements); Law Enforcement Ins. Co. v. Corcoran, 807 F.2d 38, 43-44 (2d Cir. 1986) (\textit{Burford} abstention proper where insurer brought declaratory judgment action against Superintendent of Insurance), \textit{cert. denied}, 481 U.S. 1017 (1987); Levy v. Lewis, 635 F.2d 960, 963-65 (2d Cir. 1980) (\textit{Burford} abstention proper where plaintiff brought suit against Superintendent of Insurance who, as liquidator, had terminated retirement benefits).
  \item \textsuperscript{138} Levy, 635 F.2d at 964.
  \item \textsuperscript{139} 727 F.2d 240 (2d Cir. 1984).
  \item \textsuperscript{140} See id. at 245; see also Grossman v. Axelrod, 466 F. Supp. 770, 779 (S.D.N.Y. 1979) (abstention appropriate when unclear state law regarding Medicaid system is matter of substantial state concern), \textit{aff'd}, 466 F.2d 768 (2d Cir. 1981).
  \item \textsuperscript{141} 401 U.S. 37 (1971).
  \item \textsuperscript{142} See, e.g., Davis v. Lansing, 851 F.2d 72, 76-78 (2d Cir. 1988) (abstention appropriate when criminal defendant attempts to avoid prosecution by challenging constitutionality of peremptory jury challenges).
  \item \textsuperscript{143} See, e.g., Friedman v. Beame, 558 F.2d 1107, 1110-11 (2d Cir. 1977) (indicating the Second Circuit's view that it was not yet decided if \textit{Younger} should apply to pending administrative hearing); McCune v. Frank, 521 F.2d 1152, 1158 (2d Cir. 1975) (\textit{Younger} abstention appropriate after administrative proceedings concerning personal appearance of officer); McDonald v. Metro-North Commuter R.R. Div., 565 F. Supp. 37, 39-40 (S.D.N.Y. 1983) (\textit{Younger} applied to bar a federal action where administrative charges were filed, but not yet heard); Schachter v. Whalen, 445 F. Supp. 1376, 1381 (S.D.N.Y.) (\textit{Younger} abstention was proper where there was an ongoing administrative investigation of physician who allegedly had been improperly prescribing drugs), \textit{aff'd on other grounds}, 581 F.2d 35 (2d Cir. 1978); Youth Int'l Party v. McGuire, 572 F. Supp. 1159, 1164 (S.D.N.Y. 1983) (abstention appropriate when opportunity to raise constitutional claims in administrative proceedings exists); Lang v. Berger, 427 F. Supp. 204, 214-15 (S.D.N.Y. 1977) (abstention appropriate during administrative proceeding to determine
The net effect is a judicial limitation of the federal forum for civil rights plaintiffs with actionable section 1983 claims. This creates a tension between the statute expressly affording a federal forum and the judicially-crafted policies expressed in the various abstention doctrines.

Two recent Second Circuit cases illustrate this tension. First, *Christ the King Regional High School v. Culvert* involved a claim that the New York State Labor Relations Board's ("SLRB") exercise of jurisdiction over a church-affiliated high school violated the Establishment and Free Exercise Clauses of the United States Constitution. The district court dismissed the school's complaint on preemption grounds. The Court of Appeals for the Second Circuit affirmed. In so doing, the Second Circuit, relying on *Ohio Civil Rights Commission v. Dayton Christian Schools*, applied the Younger principles of federalism and comity to the state administrative proceedings. In deciding whether abstention was appropriate in *Culvert*, the Second Circuit considered whether there was an ongoing state proceeding, so found in the SLRB proceeding; whether an important state interest was involved, so found in the State's "compelling interest in regulating the duty to bargain collectively;" and whether the federal plaintiff had an adequate opportunity for judicial review of his constitutional claims during or after the state proceeding, so found in the availability of New York's C.P.L.R. article 78 proceeding against state officials subsequent to the SLRB proceeding.

*Culvert* demonstrates the ease with which a federal court can now rebate a plaintiff to state court by declining to hear a case properly before it. The *Culvert* test is very flexible: many forms of "state action" may be characterized as an "ongoing state proceeding"; virtually any state interest can be described as "important;" and reliance on the mere existence of Article 78 or similar review procedures presumes, prospectively,


By abandoning the ... requir[ement] that the State have a substantive interest in the ongoing proceeding, an interest that goes beyond its interest as adjudicator of wholly private disputes ... the Court cuts the *Younger* doctrine adrift from its original doctrinal moorings which dealt with the States' interest in enforcing their criminal laws ... .

*Id.* at 30 n.2 (Stevens, J., concurring).

the ability of state courts to provide adequate remedies for violations of federal law. Furthermore, the mere existence of such review is cold comfort to a plaintiff challenging present state interference with federal constitutional rights.

The Second Circuit reached a similar result in University Club v. City of New York. There, private clubs brought section 1983 claims alleging that public accommodation anti-discrimination legislation was being applied unconstitutionally to deprive the clubs of their constitutional rights to freedom of association, privacy, due process and equal protection. The Second Circuit, as it did in Culvert, held that the district court should have abstained under the Dayton Christian Schools test. The court found that the enforcement proceeding by the New York City Commission on Human Rights constituted an ongoing state proceeding, that elimination of prohibited sex discrimination was an important state interest and that an article 78 proceeding provided an adequate opportunity for judicial review of constitutional claims.

After Culvert and University Club, it is clear that Younger abstention may override the statutorily-created federal forum for section 1983 cases, particularly when there exists an ongoing state administrative proceeding. While the Supreme Court's refusal in N.O.P.S.I. v. Council of New Orleans to permit Younger abstention may signal that the Court intends to limit the broad application of Younger to civil proceedings, as in the case of Colorado River abstention, the temptation for lower courts to go their own way in refining and applying the various abstention tests will likely prove too strong. Moreover, Justice Scalia's opinion in N.O.P.S.I. leaves the door open for Younger abstention whenever the state proceeding is "judicial in nature." Chief Justice Rehnquist and Justice Blackmun, in concurrence, seem to invite further expansion.

B. The Practical Effects of Abstention

In its empirical examination of post-Younger abstention cases that have reached the Court of Appeals for the Second Circuit, the Committee focused on whether abstention had the practical effect of frustrating or unduly delaying the adjudication of federal claims. The abstention doctrines rest on the presumption that relegating a litigant to a state court proceeding, in which an initial decision on federal claims is made, will not entail any unacceptable injury to federally protected interests. This strong presumption may be dispelled, however, if the very process

151. 842 F.2d 37 (2d Cir. 1988).
152. See id. at 40.
153. See id.
155. See id. at 2516-20.
156. Id. at 2521.
157. See id. at 2521 (Rehnquist, C.J., concurring).
of abstention—including satellite litigation in the appropriate forum—frustrates or unduly delays the adjudication of federal claims. The results of the Committee’s inquiry suggests that there have been varied impacts with respect to three broad and overlapping categories of cases: cases in which federal claims were asserted in the context of a civil dispute of a classwide or institutional nature; cases in which federal claims were brought in the context of criminal or disciplinary proceedings; and cases in which federal claims were brought to gain a tactical advantage in pending state court proceedings. Cases which illustrate each of these categories are discussed below.

1. Civil Disputes of a Classwide or Institutional Nature

The first category of cases presents the greatest potential for abstention to frustrate or delay federal actions. The eleven years of litigation in Pineman v. Oechslin\textsuperscript{159} illustrates the type of damaging results which abstention doctrines may produce. In 1977, state employees filed a federal action challenging the constitutionality of state statutory amendments which "rais[ed] the retirement eligibility ages for female [state] employees so that they equaled the ages required for male employees, [and which] reduced benefits for female employees."\textsuperscript{160} In 1980, the district court granted summary judgment for the plaintiffs, holding that the statutory amendments impaired the state's contractual obligations, in violation of the contract clause of the United States Constitution.\textsuperscript{161}

In 1981, the Second Circuit, relying on Pullman and Burford, vacated and remanded that judgment, holding that abstention was appropriate to afford state courts the opportunity to adjudicate a state law aspect of the plaintiffs' claim.\textsuperscript{162} The Second Circuit, however, directed the district court to retain jurisdiction pending the state courts’ resolution of the state law question.\textsuperscript{163} Accordingly, from 1981 to 1985, the plaintiffs unsuccessfully litigated the state law issue in the Connecticut trial and appellate courts.\textsuperscript{164} In 1985, the plaintiffs returned to the federal courts, which eventually dismissed their constitutional claims on the merits.\textsuperscript{165}

The prolonged and serpentine history of the Pineman case suggests that—particularly in cases involving federal claims asserted in a civil dispute of a classwide or institutional nature—the federal courts should carefully weigh the risks of impeding and unduly delaying the adjudication of federal claims against the objectives which might be achieved by abstention.

\textsuperscript{159} 637 F.2d 601 (2d Cir. 1981), cert. denied, 481 U.S. 1017 (1987).
\textsuperscript{160} Id. at 603.
\textsuperscript{162} See Pineman, 637 F.2d at 605-06.
\textsuperscript{163} See id. at 606 n.9.
Mendez v. Heller, 166 although decided on justiciability grounds rather than a specific abstention doctrine, further illustrates the potential for delay in federal claim adjudication which may be imposed by nonintervention doctrines. In Mendez, the plaintiff sought a divorce, but did not satisfy New York's two-year residency requirement. 167 Proceeding on the assumption that a divorce complaint would be rejected on jurisdictional grounds by the state courts, the plaintiff filed a civil rights suit in the Eastern District of New York in 1987, individually and on behalf of all other persons similarly situated, challenging the constitutionality of the New York residency requirement. A three-judge federal court dismissed the suit for want of a justiciable controversy. 168 Appeal was taken to the United States Supreme Court, which directed that a timely appeal be taken to the Second Circuit Court of Appeals. 169 The Second Circuit affirmed the dismissal of the complaint in 1976, determining that none of the state-official defendants were properly named and that the plaintiff was required to present her claim initially to the New York courts. 170

Approximately two years passed between the commencement of the federal litigation in Mendez and the Second Circuit decision requiring that the plaintiff assert her claims in the state forum. In the interim, the United States Supreme Court upheld the constitutionality of an Iowa durational residency statute, 171 thus persuading the plaintiff in Mendez not to pursue a federal constitutional challenge to the New York statute in the state forum. Mendez, like Pineman, suggests that, particularly in the context of class or institutional litigation, the federal courts should consider carefully the risk that nonintervention doctrines may frustrate or unduly delay the adjudication of federal claims.

On the other hand, there may be instances where federal court intervention, at least in the presence of ongoing state court proceedings, may delay adjudication of federal claims in state court. For example, Cannady v. Valentin, 172 which involved claims that homeless families with children had been denied lawful emergency housing by state and city officials in violation of federal and state constitutional and statutory provisions, was first presented to the federal courts in a very different posture from those cases mentioned above. Unlike Pineman and Mendez, in Cannady the federal courts confronted a situation in which there was a pending state litigation brought on behalf of a proposed class similar to the proposed federal court class; 173 the pending state court litigation in-

166. 530 F.2d 457 (2d Cir. 1976).
170. See Mendez, 530 F.2d at 459-61.
172. 768 F.2d 501 (2d Cir. 1985).
volved many of the same claims subsequently raised in the federal action; certain local governmental officials were defendants in both actions; and the state court had granted interim equitable relief to the plaintiffs three months before the commencement of federal litigation. 174

In Cannady, the Second Circuit, relying on Colorado River and Burford, affirmed the district court's decision staying federal litigation pending the resolution of the prior, parallel state court action. 175 The Second Circuit voiced the concern that "intervention by a federal court . . . might only delay a prompt resolution of this dispute." 176 The litigation of abstention questions in Cannady has had no apparent dilatory effect on the adjudication of federal claims. While the state court action is still pending, the preliminary injunctive relief granted therein remains in effect. 177

Pineman and Mendez stand in stark contrast to Cannady and indicate that, in general, abstention serves to frustrate and unduly delay resolution of federal claims in class action suits. Moreover, discussions with counsel for plaintiffs in institutional and classwide litigation confirmed the perception that abstention is a significant bar to the timely and effective adjudication of federal claims. Counsel noted two principal ways in which they view state courts as potentially ineffective for the litigation of federal claims.

First, some lawyers perceive state courts as being hostile to class actions, generally ill-equipped to manage them and unfamiliar with their operation. In particular, state court class actions against government agencies are considered inappropriate. Counsel reported that state courts consider a single-plaintiff declaratory judgment action sufficient because courts presume that an agency will comply with the court's decision on a classwide basis. Attorneys pointed out to the Committee that difficulties arise when the agency does not comply with the singular judgement. In that event, no persons similarly situated receive the benefits of a state plaintiff's favorable determination. Instead, aggrieved parties must bring separate and costly additional suits—a particular hardship in cases involving small amounts of money.

Attorneys consider New York state courts particularly inadequate to handle class actions because the New York state class action rules do not embrace the three different types of class actions provided for under Federal Rule of Civil Procedure 23(b). 178 Under the federal rules, it is much

174. See id. at 23-24, 484 N.Y.S.2d at 987.
175. See Cannady, 768 F.2d at 503.
176. Id.
easier to persuade a court to certify a Rule 23(b)(2) class action for injunctive relief than it is to obtain certification of a damages class action under Rule 23(b)(3). One reason for this is that Rule 23(b)(3) adds additional requirements. Since New York requires that any class action meet rigorous requirements similar to those imposed by Federal Rule 23(b)(3), it follows that it will be very difficult to persuade state court judges to certify class actions in any type of case. In institutional litigation, the key forms of relief are declaratory and injunctive relief. Accordingly, the inability to obtain class certification in these types of cases denies federal plaintiffs their federal procedural rights.

The second source of frustration of federal rights reported to the Committee is the prospect of undue delay in the state court system in complex cases. In a flagrant example, *Levy v. Lewis*, there was a delay of seven years between the affirmance of dismissal by the Second Circuit on abstention grounds, and the denial of the federal claim by a state court-appointed referee. Plaintiffs in *Levy* brought a federal class action alleging that the termination of retirement benefits of former employees of an insurance company by the New York Superintendent of Insurance, acting as liquidator of the company, violated federal and state law. The Second Circuit, relying on *Burford, Younger and Colorado River*, ordered abstention as to the claims for benefits. According to counsel those benefits claims are still unresolved almost eight years later. In the meantime, three of the five named claimants have died.

2. Federal Claims Brought During Criminal or Disciplinary Proceedings

Abstention issues also arise when plaintiffs assert federal claims in the context of state criminal or disciplinary proceedings. In general, how-

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180. It is clear that when Article 9 of the New York C.P.L.R. was adopted in 1975, the intent was to liberalize the use of class actions in New York. See J. Weinstein, H. Korn & A. Miller, New York Civil Practice ¶ 901.01, at 9-6 to 9-9 (1989). Studies have shown, however, that New York state courts continued to interpret Article 9 very restrictively. See id. at 9-21. On the other hand, some commentators have stated that there were some positive developments. See id. at 9-21 to 9-24. In any event, there is no doubt that Article 9 contains sufficient discretionary devices for refusing to certify a given case as a class action.


183. 635 F.2d 960 (2d Cir. 1980).

184. See id. at 962.

185. See id. at 963-67.
ever, interviews with counsel and a review of reported decisions indicate that abstention in this type of case does not present as great a risk of frustration or unacceptable delay in adjudication of federal claims as does abstention in classwide or institutional civil disputes.

In *Davis v. Lansing*, the Second Circuit recently affirmed, on abstention grounds, the dismissal of a state criminal defendant’s federal habeas corpus petition, where the state defendant was on trial in state court. The Second Circuit rejected the suggestion that “a federal court exert control over [the defendant’s] state trial,” and pointed out that “he can raise any constitutional claims on direct appeal in the state courts if he is convicted.”

*Erdmann v. Stevens* is an example of abstention in the context of disciplinary proceedings. In September, 1971, an attorney brought a federal action to enjoin disciplinary proceedings against him, contending that the proceedings violated his federal constitutional rights and section 1983. After the district court dismissed the action, the Second Circuit, relying on *Younger v. Harris*, affirmed on abstention grounds. The Second Circuit rendered its decision in April, 1972, less than seven months after federal litigation commenced. In subsequent state court litigation, the New York Court of Appeals ultimately dismissed the disciplinary proceedings on non-federal grounds.

3. Federal Claims Brought to Gain a Tactical Advantage in Pending State Court Proceedings

Where federal cases have been brought, at least in part, to gain a tactical advantage in pending state proceedings, abstention does not appear to present as great a risk of frustration or undue delay in adjudication of federal claims as does abstention in classwide or institutional civil disputes.

In *Powers v. Coe*, for example, the state criminal trial of a former state official charged with obstruction of justice was scheduled to begin in March, 1983. One day before his criminal trial was to commence, the

186. 851 F.2d 72 (2d Cir. 1988).
187. See id. at 78.
188. Id. at 76.
190. See *Erdmann*, 458 F.2d at 1207.
191. See id. at 1210-12.
plaintiff filed a section 1983 action in federal court against state prosecutors, challenging their conduct of grand jury proceedings leading to the prosecution and seeking an injunction against his criminal trial.\(^{195}\) The federal district court, relying on \textit{Younger}, denied the injunction motion and the trial proceeded.\(^{196}\) Three weeks later, the former state official pleaded guilty to some of the state charges and his section 1983 action was ultimately dismissed on the merits.

C. Conclusions and Recommendations

In sum, the Committee's examination of the Second Circuit's post-\textit{Younger} abstention cases suggests that the risk that abstention will have the practical effect of frustrating or unduly delaying the adjudication of federal claims is greatest in cases involving federal claims arising from administrative proceedings and asserted in civil disputes of a classwide or institutional nature. In those cases, the federal courts should be particularly careful to weigh such risks against the objectives which might be achieved by abstention. Federal courts should also assess whether abstention might actually result in more rather than less litigation, litigation of longer duration or piecemeal litigation.

The Committee on Federal Courts made the following recommendations:\(^{197}\)

1. Federal courts should pay greater attention to the Supreme Court's command that abstention be invoked only under exceptional circumstances,\(^ {198}\) particularly in civil and administrative cases.

2. When there is a need to resolve a novel, unclear issue of state law, federal courts should use, as an alternative to abstention, state certification procedures\(^ {199}\) to obtain advisory opinions from the states' highest courts.\(^ {200}\)

3. In deciding whether to invoke abstention, the district court should hold a hearing to consider, in addition to the traditional criteria, the following: the anticipated duration of the state court proceeding; whether any delay seriously prejudices the federal rights involved; the degree of preclusive effect of the state court determination on the federal claims; the impact of a state forum on litigants' ability to maintain class litigation where appropriate; the probable familiarity of state courts with the federal law in question; and other factors which may be present in the

\(^{195}\) See \textit{id.} at 100.

\(^{196}\) See \textit{id.} at 98.


\(^{200}\) See, e.g., Griffin Hosp. v. Commission on Hosps. & Health Care, 782 F.2d 24, 25-26 (2d Cir. 1986) (Connecticut certification procedure should be employed to prevent undue delay associated with \textit{Pullman} abstention).
case, bearing on the relative competence of state courts to decide federal questions and related facts in the first instance.

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

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

III. SOME THOUGHTS ON MAKING YOUNGER CIVIL

A. Why Professor Stravitz is Wrong

Professor Stravitz complains that the "Supreme Court has never satisfactorily explained why Younger abstention should be limited to a pending state criminal or civil enforcement proceeding." 201 He goes on to state that "the doctrine's theoretical foundation ... support[s] its application in civil as well as criminal litigation." 202 The problem with Professor Stravitz' argument is the problem with abstention in general and Younger abstention in particular. Both Professor Stravitz and the Supreme Court assume the correctness of the expressed policy and theoretical foundations of Younger abstention without any critical analysis or apparent concern for the consequences of the doctrine. 203 This lack of critical analysis, however, is not warranted given the substantial interests negatively affected by the abstention doctrines, especially, as the Committee's Report shows, in institutional litigation.

Enough has been written on whether the Court was wrong in looking to equitable principles to justify Younger. 204 Moreover, Professor Stravitz has correctly noted that the Court itself has largely abandoned the equity argument in favor of a purely federalism rationale. 205 Merely raising federalism, however, poses the risk of major abdications of federal jurisdiction in the face of plaintiff's right to invoke a federal forum.

Professor Stravitz recites the four federalism bases that Professor Redish has extrapolated from the Supreme Court's Younger cases:

(1) The desire to avoid affronting state judges by questioning their competence and/or willingness to enforce constitutional rights; (2) the

201. Stravitz, supra note 5, at 999.
202. Id.
203. Professor Stravitz indicates that he sanctions full application of the Younger doctrine to civil proceedings "[w]ithout entering the debate concerning the wisdom of Younger itself." Id.
204. See, e.g., M. Redish, supra note 75, at 298-302; Soifer & Macgill, supra note 17, at 1178; Wechsler, supra note 17, at 875-88; Whitten, supra note 17, at 678-83.
205. See Stravitz, supra note 5, at 1007-08; see also Juidice v. Vail, 430 U.S. 327, 334 (1977) (predominant underpinnings of Younger are comity and federalism, not involvement in the criminal process).

Last term, however, the Court in N.O.P.S.I. v. Council of New Orleans, 109 S. Ct. 2506 (1989), suggested that the basis for the federal courts' power to abstain stemmed from its "discretion in determining whether to grant certain types of relief." Id. at 2513.
need to prevent federal judicial interference with the accomplishment of state substantive legislative goals; (3) the need to preserve the discretion of state executive officers in general and state prosecutors in particular, and (4) the desire to prevent federal interference with the orderly operation of the state judicial process.\textsuperscript{206}

Professor Stravitz agrees with Professor Redish that the second and third rationales have been undermined and "should be accorded little or no weight."\textsuperscript{207} Although he criticizes the first and fourth rationales, Professor Redish asserts that they possess greater legitimacy than the second or the third rationales.\textsuperscript{208} After discussing all four rationales and tracing the development of \textit{Younger} abstention outside of the criminal context through \textit{Pennzoil}, Professor Stravitz posits a novel justification for abstention: \textit{Younger} "is a judicially-created forum allocation device."\textsuperscript{209}

Professor Stravitz is, in a sense, on to something here: abstention has more to do with a judicial philosophy about the proper role of the federal courts than it does about true federalism. If Professor Stravitz is correct, the question then becomes: what power does a federal court have to decide to relegate a case to a state forum?

Professor Stravitz, unfortunately, begs the question. He argues that the application of \textit{Younger} to civil litigation in \textit{Pennzoil} "will not result in a wholesale abdication of federal authority"\textsuperscript{210} because state interests rarely are implicated in a private action, thus making \textit{Younger} abstention appropriate only in the preliminary injunction stage or enforcement of judgment stage of the litigation.\textsuperscript{211} Raising the federalism flag again, he declares: "It would be offensive to federalism for a federal court to intrude into the state judicial process at these stages of litigation."\textsuperscript{212} He does not explain, however, why it is more intrusive at these points, nor does he explain why in some cases, even under \textit{Younger}, it would be appropriate for the federal court to intervene.\textsuperscript{213} Moreover, Professor Stravitz ignores that even if \textit{Younger} abstention is not appropriate, \textit{Pullman}, \textit{Colorado River} or perhaps \textit{Burford} abstention may be and the federal plaintiff may be required to commence a state court action. The Court is actually deciding as a matter of forum allocation that it would prefer the state courts to handle the claim.

In the context of the preferred federalism justifications, civil cases of

\begin{itemize}
  \item \textsuperscript{206} Redish, \textit{supra} note 75, at 298.
  \item \textsuperscript{207} Stravitz, \textit{supra} note 5, at 1008.
  \item \textsuperscript{208} See Redish, \textit{supra} note 75, at 298-302.
  \item \textsuperscript{209} Stravitz, \textit{supra} note 5, at 1030; \textit{see also} Werhan, \textit{supra} note 24, at 450-52 (judicial doctrines arising from federalism act to allocate cases between federal and state courts).
  \item \textsuperscript{210} Stravitz, \textit{supra} note 5, at 1029.
  \item \textsuperscript{211} See \textit{id}. These are the stages when a plaintiff could argue that the state court judge is acting under color of state law to deprive the plaintiff of a federally secured right, thereby implicating section 1983.
  \item \textsuperscript{212} \textit{Id}. at 1030.
  \item \textsuperscript{213} Actually, the preliminary injunction stage and the post-enforcement stage may be the most critical stages of the private litigation, and, generally, may be the only stages in which there may be state action subject to federal control.
\end{itemize}
an institutional nature implicate state competency and willingness to enforce federal rights. Despite the Court's pronouncement in *N.O.P.S.I. v. Council of New Orleans*,²¹⁴ it is only a short step away for the Court to find that federalism means a desire to avoid federal interference with state institutional or agency processes. As discussed earlier, the meaning of "judicial in nature" is unclear.²¹⁵ Indeed, the state's interest in *N.O.P.S.I.*—the rates charged by a utility—are far greater than Texas' interest in helping Pennzoil resolve a private dispute.

Additionally, Professor Stravitz places the Supreme Court in the exalted role as the final arbiter of the scope of its own jurisdiction. While the Court has always played a role, it is axiomatic that Congress has the final authority for such decisions.²¹⁶

**B. What Does Federalism Really Mean?**

The Committee on Federal Court's Report shows that the danger of abstention is most pronounced in civil cases involving state institutions and agencies, rather than in cases in which a state court criminal, or quasi-criminal, defendant files a reactive federal lawsuit. Commentators who favor abstention generally do so because of the vital principles of equitable restraint, comity and federalism that are raised in cases involving criminal prosecutions.²¹⁷ When the *Younger* Court as well as commentators speak of federalism, however, they are not simply referring to simplistic notions of states' rights.²¹⁸ Rather, they are deferring to a state's interest in enforcing state law and their competence to decide fairly any federal issues that are raised, at least once a criminal or quasi-criminal proceeding is commenced.

Federalism has become a monolithic euphemism for states' rights, but more properly should be viewed as a continuum. Federalism as a properly applied doctrine would recognize that the greater the state's legitimate interest, the more intrusive and inappropriate will be federal intervention. Conversely, the greater the federal interest, the greater the need for federal intervention.²¹⁹

When a state commences a prosecution—assuming no bad faith—the

²¹⁴. See *supra* notes 60-63 and accompanying text.
²¹⁵. See id.
²¹⁷. See, e.g., Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 Geo. L. J. 99, 102-03 (1986) (Colorado River abstention unjustified and "is most urgently in need of pruning from the abstention tree.").
state's valid generic interest in enforcing its laws attaches. Indeed, in some sense, the state defendant has lost the race to the courthouse. Bowing to judicial economy, together with the state interest in enforcing its laws, the federal court arguably should stay its hand. The federal court should abstain, not because the federal issue sought to be raised by the criminal defendant is unimportant, but rather because an adequate forum has already been invoked to handle the case. A reactive federal lawsuit would serve to complicate the state's important generic interest in enforcing its laws without federal intervention in an ongoing state proceeding and strain judicial resources. Assuming that parity exists between state courts and federal courts in handling criminal matters and that there is an adequate opportunity to raise the federal claims in state proceedings, state defendants should be accorded just as speedy relief in the state courts as in the federal courts. Thus, the plaintiff's interest and the federal interest in securing immediate protection of federal rights will not be impaired. In the rare cases in which the state defendant can demonstrate bad faith or the need for prompt intervention, the Committee's recommendation of allowing interim federal relief is available. On balance, in this class of cases, state interests in avoiding federal intervention arguably outweigh the need or propriety of federal intervention.

In civil cases of an institutional nature, however, the state's interest is much weaker. In most cases, there is no pending state judicial proceeding. Rather, the plaintiff brings an original action against state officials alleging federal law violations along with any pendant state claims. Although state interests are implicated whenever state policies or actions are alleged to violate federal law, they are not as pronounced as when a state acts affirmatively to enforce its laws.

In addition, in the typical case, the federal plaintiff initiates the litigation over the matter in dispute by commencing a federal action. These cases generally will not be reactive cases. All that is at stake at the commencement will be the federal plaintiff's right to invoke the federal forum to protect federal rights. For the federal court to abstain in this situation would be "blind deference to State's Rights" unless some

221. In Steffel v. Thompson, 415 U.S. 452 (1974), the Court held that in the absence of a state criminal proceeding, a federal court could grant declaratory relief. See id. at 475.
222. State judges routinely decide federal constitutional defenses. See Althouse, supra note 217, at 1490.
223. See Althouse, supra note 217, at 1532-34. The Court of Appeals for the Second Circuit, in University Club v. City of New York, 842 F.2d 37 (2d Cir. 1988), and Christ the King Regional High School v. Culvert, 815 F.2d 219 (2d Cir. 1987), cert. denied, 484 U.S. 830 (1987), however, seems to have ruled that state interests may be as strong in the civil context as in the criminal context. See supra notes 144-153 and accompanying text.
224. Ironically, Pennzoil was a reactive case in which the federal plaintiffs sought to enjoin a pending state proceeding. Such rare cases make federal intervention less desirable and more problematic because the first and fourth of Professor Redish's rationales are implicated. See supra note 73 and accompanying text.
state interest can be articulated that outweighs the various federal interests at stake: for example, the plaintiff's interest in a federal forum and the federal interest in maintaining the supremacy of federal law. Extending Younger abstention to civil cases without identifying specific state interests which compel federal deference "strains fundamental assumptions" underlying the Younger doctrine.226

Although it may be true that there is no widespread disregard for federal rights in state appellate courts,227 it is the plaintiff's right to choose a federal forum. This right is even more compelling when the federal plaintiff is not an involuntary state court defendant. It is less compelling when the party seeking the federal forum is a state defendant in a case involving the state as plaintiff or prosecutor.228

C. Rethinking Abstention Again

Now that courts have abandoned an independent equity justification for Younger abstention, the policy justifications for each abstention doctrine, including Burford229 and Colorado River, can fairly be said to be based on federalism—specifically, on the notion that it is in the national interest to let each system, state and federal, do what it does best. Presumably, that means that each forum should adjudicate issues arising out of its own law, especially in cases which implicate the forum's interests.230 Because the existence of an important state interest plays a prominent role in both Pullman231 and Younger232 abstention, and increasingly in Burford analysis,233 there are compelling reasons to unify the doctrines under a single, easily applicable doctrine. Because no federal interests—such as federal claims—are implicated in most Burford cases, abstention is less problematic. In Younger and Pullman, however, federal claims are asserted, and accordingly, courts should be more reluc-

228. In Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), the Court refused to allow the state court defendant to remove a state action for the collection of taxes to federal court. See id. at 13-14. One of the claims was for a declaration that the federal ERISA statute did not preempt state tax laws. See id. at 24.
230. See Althouse, supra note 217, at 1504-05. Now that the Supreme Court has recognized the applicable law to be a factor in Colorado River abstention, see supra note 100 and accompanying text, even that doctrine falls within this framework.
231. See Nassen v. City of Homewood, 671 F.2d 432, 440 n.7 (11th Cir. 1982).
232. See Althouse, supra note 15, at 1075-78; supra note 77 and accompanying text.
tant to abstain. Additionally, the question of adequacy of the state proceeding is a component of each doctrine.\footnote{234}

A new approach to abstention, therefore, should unify the existing doctrines based on those factors which require federal deference to state courts in certain instances.\footnote{235}

1. The Committee's Recommendations

The Committee on Federal Court's recommendations\footnote{236} ought to be seriously considered and incorporated as part of a unified analysis. Federal courts should pay greater attention to the need for exceptional circumstances in order to justify abstention, extending this requirement to all forms of abstention, not simply \textit{Colorado River} abstention. This recommendation complements this author's proposal to place the burden of persuasion on the proponent of abstention.\footnote{237}

In addition, federal courts should make greater use of state certification procedures. Indeed, the Supreme Court has encouraged the use of state certification procedures that provide for advisory opinions.\footnote{238} Certification is preferable to abstention for two reasons: it generally takes less time than abstention\footnote{239} and the preclusive effects of the state court decision are minimized because state courts generally are deciding the issue as a pure matter of law.\footnote{240} Next, a hearing to consider the various factors pertinent to an abstention decision would ensure a careful balanc-

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\footnote{235. In \textit{Pennzoil}, the Supreme Court majority noted: "[t]he various types of abstention are not rigid pigeonholes into which the federal courts must try to fit cases. Rather, they reflect a complex set of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." \textit{Pennzoil Co v. Texaco Inc.} 481 U.S. 1, 11 n.9 (1987). \textit{But see} N.O.P.S.I. v. Council of New Orleans, 109 S. Ct. 2506, 2513 (1989) (after quoting the above language in \textit{Pennzoil}, concluding that "policy considerations supporting \textit{Burford} and \textit{Younger} are sufficiently distinct to justify independent analyses.").}

\footnote{236. See supra note 198 and accompanying text.}

\footnote{237. See supra note 243-260 and accompanying text.}

\footnote{238. See \textit{Virginia v. American Booksellers Assoc.}, 108 S. Ct. 636, 643 (1988) (Virginia Supreme Court should be given first opportunity to interpret a statute prohibiting display of sexually explicit material to juveniles); \textit{City of Houston v. Hill}, 482 U.S. 451, 470 (1987) ("The certification procedure is useful in reducing the substantial burdens of cost and delay that abstention places on litigants."). Commentators support increased use of certification as a means of ameliorating the costs of \textit{Pullman} abstention. See, e.g., Werhan, supra note 24, at 472 n.91.}


\footnote{240. The state court ruling is merely an advisory opinion. Because there will be no binding judgment, the federal court will be free to apply the rule of law to the facts of the case.}
ing of the federal and state interests, as well as the federal plaintiff’s interests. Finally, federal court retention of jurisdiction while state adjudication proceeds would ensure the availability of federal relief on an ongoing basis should any unforeseen problems arise when abstention is ordered. 241

Federal courts should, in addition, consider several other factors in such a unified approach.

2. The Burden of Proof

A federal plaintiff has the burden of pleading and proving that subject matter jurisdiction exists. 242 In deciding whether to abstain, a federal court typically puts the burden of proving that the court should retain jurisdiction on the plaintiff. 243 That approach is incorrect. Assuming a colorable federal claim, 244 the plaintiff is entitled to invoke the federal forum and to have the claims asserted heard by an Article III judge. 245 Accordingly, the burden of proof when deciding abstention issues should be on the proponent of abstention.

The question of whether to abstain is analytically similar to the question of whether a government official may claim an immunity, which is treated as an affirmative defense. 246 When a defense of immunity is

243. One might argue that, especially with respect to Colorado River abstention, the courts put the burden on the proponent of abstention, citing language in the cases to the effect that abstention should be ordered only under exceptional circumstances. See supra note 90 and accompanying text. In Younger cases, however, there can be no doubt that the courts put the burden on the federal plaintiff to show some exception to the Younger doctrine. See Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 14 (1987) (burden of proving inadequacy of state proceeding rests on plaintiff).
244. This includes a federal question, a diversity matter or some other type of federal jurisdiction.
245. See Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). In Northern Pipeline, the Supreme Court ruled that absent a waiver, a party involved in a federal court proceeding had a right to a hearing before an Article III judge. See id. at 58-59. Accordingly, the Court ruled that the Bankruptcy Act of 1978, 28 U.S.C. §§ 151-160 (1982), was unconstitutional because it allowed bankruptcy judges, who did not have the Article III lifetime tenure and salary protection, to decide matters that otherwise would be heard by an Article III judge. See Northern Pipeline, 458 U.S. at 80-84. The Court did not say that a state court judge would not be competent to decide a matter of state law that would arise in the context of a bankruptcy proceeding. In fact, it assumed state court competence. The point of Northern Pipeline, however, is not the competence of the adjudicator. Rather, the point is that when federal jurisdiction is properly invoked, the litigants in the action have a right to Article III determination. The Supreme Court should not use a judicially created doctrine when it interferes with a constitutional right. Cf: Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (eleventh amendment overrides judicially created doctrine of pendent jurisdiction).
246. The question whether to abstain is discretionary. Thus, the issue differs from that in Pennhurst, where the result was dictated by the constitutional requirements of the eleventh amendment. See supra note 9. Accepting the majority's rationale in Pennhurst,
raised, the Supreme Court has placed the burden of pleading\textsuperscript{247} and proof\textsuperscript{248} on the proponent of the immunity. The same approach should be adopted in abstention cases: the party who requests that the federal court abstain should be required to plead and prove the elements necessary to invoke abstention. It is proper to put the burden on the opponent of federal jurisdiction because of the presumption that the plaintiff's choice of forum, indeed his right to the federal forum, should be honored.

Federalism is not the business of the federal courts. Rather, the Supreme Court, in \textit{Garcia v. San Antonio Metropolitan Transit Authority},\textsuperscript{249} made clear that Congress should address federalism concerns.\textsuperscript{250} Accordingly, the federal courts should not abstain in the name of federalism unless there is some indication that Congress intended the courts to show restraint. Therefore, the rebuttable presumption should be that the courts are to exercise jurisdiction. In some cases, an analysis of the federal jurisdictional statute invoked, federal cause of action pleaded, or some other federal text may provide the basis for an inference that Congress would prefer that the court abstain. For example, even in the typical \textit{Younger} case, notwithstanding \textit{Mitchum v. Foster},\textsuperscript{251} the federal court could cite Congress' intent that federal courts not enjoin pending state court proceedings. Congress intended the scope of the Anti-Injunction Act to be broad and the Court generally has construed its exceptions narrowly.\textsuperscript{252} Just as the Court has sanctioned the use of federal common law when there is some indicia of congressional intent,\textsuperscript{253} the Court should refuse to intervene when it concludes that Congress would disapprove.

This presumption against intervention in state proceedings must be weighed against the contrary presumption that arises when Congress expresses a desire to provide a litigant with a federal right and a federal forum for enforcing that right. For example, Congress has designed sec-
tion 1983 to be an extremely intrusive remedy. Congress' well-documented intent to provide federal plaintiffs with a hospitable federal forum, especially in cases involving state institutions or agencies, indicates that the federal court should retain jurisdiction and provide a plaintiff with the full range of statutory remedies, including injunctions against state administrative processes in institutional cases. To argue that it is more important to protect the sensibilities of state court judges misses the mark. What interest do state court judges have in preventing a federal litigant from selecting the forum of its choice? Should a New York state court judge be offended if a litigant chooses a New Jersey state court?

Similarly, the adequacy of an alternative forum test, which places the burden of persuasion on the party opposing abstention, is misplaced. Moreover, even if the state forum is adequate, adequacy should be a necessary, but not sufficient condition for abstention. Indeed, state court judges should be more offended by the mere inquiry into whether a state court can adequately protect the federal plaintiff's interests. The plaintiff's right to choose the forum is certainly a less-charged consideration in determining the adequacy of the forum. The question the Court has been unable to answer is why the existence of an adequate but alternative forum should be used to disrupt the plaintiff's choice.

The Court's decision in *N.O.P.S.L v. Council of New Orleans* provides some comfort in cases involving state institutions. Nonetheless, lower courts have abstained in institutional cases and the melding of *Younger* and *Pullman* abstention holds the prospect of further erosion, despite Justice Scalia's pronouncement. Indeed, Chief Justice Rehnquist and Justice Blackmun's concurring opinion seem to leave the door ajar for further expansion of abstention in the civil context.

3. The Choice of Law

It is interesting that the Supreme Court and commentators seem more

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256. See supra notes 31-34 and accompanying text.
258. See id. at 2516-20.
259. See supra notes 159-186 and accompanying text.
260. Indeed, perhaps the result in *N.O.P.S.L* was foreordained. The issue was federal preemption in an area involving nuclear power. The Court has been determined to reach the merits in comparable cases. In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), the Court found standing on a rather attenuated causation theory, see id. at 72-81, then upheld the constitutionality of the Price-Anderson Act, 42 U.S.C. § 2210 (1982), which provided nuclear suppliers with limited liability. See *Duke Power*, 438 U.S. at 82.
261. See *N.O.P.S.L*, 109 S. Ct. at 2521.
willing to defer to state interests in cases involving federal rights and claims than in ordinary diversity cases. Somehow "federalism" justifies abdication of federal jurisdiction in federal question cases, but not in diversity cases under *Colorado River*. Arguably, the Supreme Court has it backwards by making it easier to abstain in cases involving federal rights than in cases involving only state law issues. A rational analysis would be tipped in the other direction. In *Moses H. Cone*, the Court suggests that abstention turn on the law to be applied; this notion should be applied in all cases.

As a general rule, if federal law applies, the federal court should retain jurisdiction over the case. If state law applies and there is a pending state proceeding raising the same claims, abstention should be ordered. Even if abstention is a forum allocation device, state interests should not be the catalyst for abstention. Rather, the federal interest in complete, speedy vindication of federal rights should motivate courts to retain jurisdiction.\(^{262}\)

4. The Presence of a Pending State Action

When there is a pending state action, there is less need for federal intervention. In the *Colorado River* scenario, unless the choice of law factor mitigates in favor of retaining federal jurisdiction, the federal court should generally defer to the pending state proceeding. This vindicates the principles of parity and saves judicial resources. Moreover, unless there are federal claims or defenses in issue, the only interest is the plaintiff's desire to litigate in the federal forum. This interest is suspect in cases in which the federal plaintiff is also the state plaintiff. Even when the federal plaintiff is the state court civil defendant, recognizing federal jurisdiction may simply create races to the courthouse.

In the typical *Younger* scenario, as has been demonstrated, the state interest in prosecuting the pending state criminal action outweighs the federal interest. Moreover, as the Committee Report demonstrates, the risk of prejudice in those cases is minimized.\(^{263}\)

If there is no pending state proceeding, the federal court should not abstain. In some *Pullman* cases, the court may use state certification procedures. In other cases, the federal court should not require duplicative state litigation in the hope that the federal constitutional or statutory issue will disappear. The federal court could just as easily decide the case on the state issue;\(^{264}\) federal courts apply state law routinely in diversity cases. There is no prejudice to state interests because the federal rule of law announced on the question of state law is not binding on the state courts.

\(^{262}\) See Althouse, *supra* note 15, at 1084-86.

\(^{263}\) See *supra* notes 187-193 and accompanying text.

5. The Merits of the Federal Issue

In addition, the merits of the case should be weighed in the decision whether to keep a case in federal court.\(^{265}\) Thus, rather than invoke principles of comity or federalism in deciding whether to abstain, courts should consider the relative importance of the federal and state interests raised.\(^{266}\) One way of measuring the importance of the federal interest is the strength of the plaintiff's case. Accordingly, the likelihood of success of the federal claims should tip the balance in favor of retaining jurisdiction.

Some commentators have assumed that abstention is acceptable because there is a right to appeal adverse state court decisions on federal issues to the United States Supreme Court. This right, always less than absolute, is now almost gone. Supreme Court review is now entirely discretionary.\(^{267}\) As a result, it is unlikely that an erroneous state court decision on a federal issue will be reviewed. This fact alone requires the federal courts to look at the merits of the federal issue and also justifies reversing the de facto presumption in favor of abstention in cases involving federal law issues.\(^{268}\)

6. The Pennhurst Problem and Institutional Litigation

In *Pennhurst State School and Hospital v. United States*,\(^{269}\) a case involving both federal constitutional and statutory rights, as well as state law claims, the Supreme Court held that the eleventh amendment barred federal jurisdiction over pendant state claims against state officials. The Supreme Court recognized that application of the eleventh amendment to the pendant state claims may result in the federal claims being litigated in state courts, or in the bifurcation of claims with attendant preclusion problems. The Court, however, was not troubled for two reasons. First, many instances exist in which, under the abstention doctrines, an issue is split off and referred to state court.\(^{270}\) Second, "considerations of policy cannot override the constitutional limitation on the authority of the fed-

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\(^{265}\) But see N.O.P.S.I. v. Council of New Orleans, 109 S. Ct. 2506, 2516 (1989) (rejecting suggestion that Court should take a "quick look" at the merits when deciding whether to abstain).

\(^{266}\) See Althouse, supra note 15, at 1083-90.

\(^{267}\) See 28 U.S.C.A. § 1254 (West Supp. 1989). The 1988 amendment to section 1254 eliminated the non-discretionary "appeal" procedure which required the Court, in certain instances, to hear cases regardless of their national importance. See id.


Indeed, in *Michigan v. Long*, 463 U.S. 1032 (1983), Justice O'Connor rejected an approach to Supreme Court appellate jurisdiction over state court criminal convictions that would leave state courts as the final arbiters of federal constitutional law. See Althouse, supra note 217, at 1497.


\(^{270}\) See id. at 122.
eral judiciary to adjudicate suits against a State. That a litigant's choice of forum is reduced 'has long been understood to be a part of the tension inherent in our system of federalism.’ ”

In *N.O.P.S.I. v. Council of New Orleans*, Justice Scalia's opinion for the Court on the *Younger* argument shows why only a minimal state interest is sufficient to justify abstention. The Court does not look to the degree of the state’s interest in a particular case. “Rather, what we look to is the importance of the generic proceedings to the state.” It is easier for a state to demonstrate its interest in the smooth functioning of a particular institution or process, than to demonstrate its interest in a particular case. Thus, although the Court in *N.O.P.S.I.* declined to apply *Younger* abstention in what is characterized as a legislative context, the climate is ripe for further erosion into the administrative arena. It is in the *Pennhurst* scenario that this erosion would have the gravest consequences. Institutional litigation implicates the state’s interest in the smooth functioning of its institutions.

As the Committee report indicated, abstention causes the greatest loss of federal rights in cases involving institutional litigation. After *Pennhurst*, if the federal court plaintiff wants to litigate state claims, a state proceeding must be commenced. This raises the specter and the likelihood of *Colorado River* abstention. Even if the federal plaintiff declines to commence a state proceeding to protect its state claims, further expansion of the abstention doctrines may lead the federal court to require the federal plaintiffs to commence a state court action, as *Burford* or *Pullman* abstention permit. In either case, if the state court comes to judgment first, the federal plaintiff, as a practical matter, may be precluded from pursuing the federal claims.

Of course, the federal plaintiff could forfeit its right to a federal forum entirely, assuming the state court has concurrent jurisdiction over the federal claims, by bringing all claims in the state forum. Surely, that is not what the framers of the Constitution, the fourteenth amendment and various federal statutes had in mind when the federal courts were given their jurisdiction and powers. *Pennzoil*'s endorsement of *Younger* abstention in the civil context cannot be accepted without more serious regard for the potentially grave consequences and effects on federal rights.

**CONCLUSION**

Abstention has been extended too far and results in federal judicial abdication in too many cases. On the other hand, it is unrealistic to ar-

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271. Id. at 123 (quoting Employees v. Missouri Dept. of Public Health & Welfare, 411 U.S. 279, 298 (1973) (Marshall, J., concurring)).


273. Id. at 2517.

274. See supra notes 159-186 and accompanying text.

275. See supra notes 24, 53-54 and accompanying text.

276. See supra notes 110-115 and accompanying text.
gue that abstention should be abolished. Indeed, in some cases, federalism and judicial economy arguments in favor of abstention have merit. Unfortunately, the hodgepodge of doctrines has led to a blurring of their meanings as well as analytic confusion. Accordingly, abstention analysis should be unified and applied carefully on a case-by-case basis.

It is evident that the Supreme Court and many commentators have lost sight of a few basic facts. First, the abstention doctrines largely ignore the plaintiff’s right to choose the federal court system, as well as the right to a hearing before an Article III judge that attaches once the federal system is invoked. No one has satisfactorily explained how a judge-made doctrine can legitimately oust a litigant from a constitutionally guaranteed forum. Second, although abstention is treated as a procedural device, its application has overwhelming substantive impact.

As a practical matter, the Supreme Court has come very close to merging the tests for its various abstention doctrines. Because the theoretical foundation for each of the doctrines varies from totally to nearly suspect, no purpose is served by maintaining the pretense that there are different doctrines. The Court should recognize that the similarities so outweigh the differences that one test for abstention should be adopted that insures that litigants’ federal rights will not be ignored.
APPENDIX A
ABSTENTION QUESTIONNAIRE

1. Name
2. Address
3. Telephone
4. Name of case
5. Court/venue
6. Index No.
7. Date of Filing
8. Case timetable
(Note any special circumstances affecting case timetable, e.g. interlocutory appeals, stays, etc.)
   a. “State” proceeding commenced
   b. Federal proceeding commenced
   c. Abstention sought
   d. Application submitted/argued
   e. Abstention ruled upon
   f. Appeal filed
   g. Appeal determined
   h. Termination of “state” proceeding
   i. Determination of “federal” rights
9. Nature of federal rights sought to be vindicated, if any
10. Statute(s) sued under
11. Factual circumstances
12. Relief sought
13. Nature of related “state” proceeding
14. Procedurally, how was abstention raised (affirmative defense, motion, sua sponte, etc.)
15. During what phase of proceedings (pre-answer, some discovery, summary judgment, etc.)
16. District court determination
17. Appellate court determination
18. Effect of determination on plaintiff’s federal claims
   a. Generally
   b. Were federal claims asserted in the state proceeding
   c. If yes, what was the outcome
   d. If federal claims were discontinued after abstention, what were the reasons for discontinuance
   e. Were any issues of claimed deprivation of rights determined by any court or tribunal
   f. Were federal claims dismissed or upheld on substantive grounds. If so, give details
19. How much attorney’s time was devoted to litigation of abstention issues
20. What percentage of the litigation was devoted to litigation of abstention issues
21. What was the impact on plaintiff of applications for abstention
22. Was case settled prior to final determination
23. If yes, what impact did abstention have on settlement position

24. Prospective impact of abstention

A. The potential effect of abstention as a significant factor in determining where to initiate litigation concerning federal rights:
   (a) almost always; (b) very frequently; (c) frequently; (d) rarely; (e) almost never

B. In the same context, abstention as a significant factor in determining where to assert federal rights in actions brought by an opposing litigant:
   (a) almost always; (b) very frequently; (c) frequently; (d) rarely; (e) almost never

C. In the course of federal litigation brought by your office, abstention is raised and determined:
   (a) almost always; (b) very frequently; (c) frequently; (d) rarely; (e) almost never

D. Abstention is most likely to be raised and determined:
   (a) in the pleadings; (b) upon motion to dismiss; (c) upon a motion for summary judgment; (d) at hearing stage; (e) sua sponte

E. In context of other doctrines, when abstention is raised, it becomes the primary determinant of whether the litigation continues in federal court:
   (a) almost always; (b) very frequently; (c) frequently; (d) rarely; (e) almost never

F. By the time abstention was determined in an action, discovery was usually:
   (a) almost completed; (b) approximately half finished; (c) partially completed; (d) just begun; (e) not begun at all

G. When the abstention issue has been raised, it is decided in favor of your litigant
   (a) almost always; (b) very frequently; (c) frequently; (d) rarely; (e) almost never

H. Overall, in context of other decisions, the impact of abstention is:
   (a) preeminent; (b) a major factor; (c) of about equal importance; (d) less important than others; (e) of minimal importance

I. In the same context, abstention as a deterrent to litigation in the federal courts is:
   (a) preeminent; (b) a major factor; (c) of about equal importance; (d) less important than others; (e) of minimal importance

J. In approximately how many cases undertaken by your office has abstention had more than minimal impact, either in choice of forum of the conduct or litigation

Overall comments