

THE MISGUIDED SEARCH FOR STATE INTEREST IN ABSTENTION CASES: OBSERVATIONS ON THE OCCASION OF *PENNZOIL v. TEXACO*

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In this Article, Professor Althouse examines the abstention doctrine, under which federal courts decline to interfere with certain proceedings already begun in state court. Traditionally, courts have applied the abstention doctrine when they believed a case involved particularly strong state interests. Professor Althouse argues, however, that courts have generally erred in their abstention analyses. In focusing on state interests, courts may harm the effective enforcement of federal law, the interest the doctrine was originally intended to protect. Professor Althouse believes that federal interests should be determinative when courts consider whether to abstain. Support for her theory comes from the recent Supreme Court decision in Pennzoil v. Texaco, where the Court found that a state Court's interest in remaining free from federal judicial intrusion was a state interest strong enough to require abstention. Though she considers this state interest weak under traditional abstention analysis, Professor Althouse contends that the case nonetheless presented the ideal circumstances for abstention. In a case like Pennzoil, where a state court has already begun to process a case raising federal issues, a move to federal court can result in serious delay and inefficiency. In addition, federal intervention in such cases may actually diminish the capacity of state courts to enforce federal law, not only through the mere expression of mistrust, but also by depriving them of the opportunity to gain experience in the application and enforcement of federal law.

INTRODUCTION

In *Younger v. Harris*,¹ an opinion brimming with purported insight into the “ideals and dreams of ‘Our Federalism,’”² Justice Black proclaimed that federal courts must refrain from interfering with state criminal proceedings despite the state court criminal defendant’s ability to frame a federal question alleging that the prosecution violates the United States Constitution.³ Federal courts, though designed to vindicate federal rights, must in this instance defer to the state courts, which are **1052* equally obligated to enforce federal law. Justice Black, renouncing any belief in “States’ rights,” traced this deference to the belief that the “national government will fare best if the states are left to perform their separate functions in their separate ways.”⁴

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¹ 401 U.S. 37 (1971).

² *Id.* at 44.

³ *Id.* *Younger* does cite prior cases to show that the doctrine it announces is in fact a longstanding one. Commentators, however, generally regard *Younger* as a distinctively new doctrine. See L. Tribe, *AMERICAN CONSTITUTIONAL LAW* 202 n.2 (2d ed. 1988); Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 875 (1974).

⁴ *Younger*, 401 U.S. at 44.

Although “*Younger* abstention” has firmly embedded itself in the Supreme Court’s collection of federalism-based doctrines constraining federal jurisdiction, *Younger*’s reference to the welfare of the national government – the federal interest in the separate functioning of the states – has never taken hold. *Younger* itself also gave weight to the state’s very strong interest in its own criminal proceedings,⁵ and subsequent decisions considering which state proceedings merit abstention⁶ have made the state’s interest the centerpiece of their analysis. Indeed, the analysis in these cases consists of little more than an announcement that the state has a strong interest in the particular proceeding.⁷

Recently, the Supreme Court extended the *Younger* abstention doctrine to a case between two purely private parties. This decision, which strains the fundamental assumptions that have underlain *Younger* throughout its brief existence, brought the usually obscure notions of judicial federalism to prominent public attention, for it came in a well-publicized struggle between two large oil companies, Texaco and Pennzoil, involving a verdict that awarded Pennzoil over ten billion dollars in damages. Even though the state of Texas specifically denied its **1053* interest in the matter,⁸ the Court found a state interest – essentially nothing more than the interest of state courts in remaining free from federal judicial intrusion – that led it to require abstention.

Despite the weakness of the state interest analysis in *Pennzoil Co. v. Texaco, Inc.*,⁹ the case may in fact present a far more appropriate occasion for abstention than did *Younger* itself. As this Article will argue, federal courts should use abstention to defer to states when doing so will enhance the quality of federal law enforcement. State courts do not deserve deference simply because they are state courts or because they have jurisdiction over a case in which the state has a strong interest. They earn deference because of their ability to apply federal law in cases that appear before them.¹⁰ One may well argue that state courts are not as good as federal courts at interpreting and enforcing federal law.¹¹ But in the typical *Younger* abstention setting, when states are already engaged in processing a case that raises federal issues, a shift to federal court would

⁵ *Id.*; see Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 465 (1978). In searching for a rationale for *Younger* abstention, Professor Redish detects only four possibilities suggested by the opinion, all of which reflect concern for state interests. They are:

(1) the desire to avoid slighting state courts by questioning their competence or willingness to enforce federal constitutional rights; (2) the need to prevent interference with the orderly functioning of state judicial processes; (3) the need to avoid federal interference with substantive state legislative policies and goals; and (4) the desire to preserve the discretion of state executive officers in general and state prosecutors in particular.

Id. at 465-66. He does, however, mention and dismiss in a footnote one possible federal interest: reducing the federal docket. *Id.* at 466 n.14.

⁶ This is the most perplexing question that has arisen under *Younger*. The Supreme Court has determined that federal courts must abstain in deference to attorney disciplinary proceedings, *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423 (1982); proceedings to terminate parental rights, *Moore v. Sims*, 442 U.S. 415 (1979); proceedings to collect fraudulently obtained welfare payments, *Trainor v. Hernandez*, 431 U.S. 434 (1977); civil contempt proceedings, *Juidice v. Vail*, 430 U.S. 327 (1977); and proceedings brought pursuant to a state nuisance statute, *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

Federal courts, however, will not abstain if the state case was not pending when the federal complaint was filed, *Steffel v. Thompson*, 415 U.S. 452 (1974), unless the state proceedings begin “before any proceedings of substance on the merits have taken place in the federal court,” *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).

⁷ See notes 137-98 and accompanying text *infra*.

⁸ See *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1530 (1987) (Brennan, J., concurring in the judgment). Texas intervened in the state case at the invitation of the district court. See *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1136 n.1 (2d Cir. 1986), *rev’d*, 107 S. Ct. 1519 (1987).

⁹ 107 S. Ct. 1519 (1987).

¹⁰ For further discussion of the effect of federalism considerations on doctrines of federal court jurisdiction, see Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987).

¹¹ See, e.g., Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal courts are a superior forum to state courts for enforcing constitutional rights).

necessarily entail some loss in the quality of federal law enforcement. Not only will serious delay and inefficiency result, but the institutionalized message to the states that they cannot be trusted to apply federal law and the loss of experience in handling federal law may actually erode what ability the state courts do have. However, if we restructure abstention analysis to make federal interests central, *Pennzoil* should not draw criticism on the ground that it has expanded the already overgrown *Younger* abstention doctrine.¹² Instead, it may provide a new basis for criticizing the applications of *Younger* that have preceded it, including *Younger* itself.

This Article begins by describing the *Pennzoil* case in some detail, paying particular attention to the state interest analysis the Court embraces *1054 and dilutes to the point where it seems to impose no limitation on abstention at all. The Article then traces the development of this state interest analysis in cases preceding *Pennzoil* and proposes that abstention analysis be reframed in terms of the federal interests identified in *Younger*.

I. PENNZOIL V. TEXACO

A. The Convoluted Procedural History

The dispute between Pennzoil and Texaco began as a lawsuit brought in state court which ultimately led to federal proceedings. The state court case arose from the dealings of two oil companies directed at the acquisition of the Getty Oil Company. Pennzoil, seeking oil reserves, negotiated with Getty¹³ and reached what Getty and Pennzoil referred to as an “agreement in principle” for Pennzoil to purchase 3/7 of Getty’s shares at \$110 a piece.¹⁴ Thereafter, Getty entered into a different transaction with Texaco, in which Texaco purchased the shares at \$128 a share.¹⁵

Pennzoil brought suit in the Delaware Court of Chancery against Getty for breach of contract and against Texaco for tortious interference with a contract.¹⁶ Apparently reconsidering its forum choice, Pennzoil sought a voluntary dismissal of the claim against Texaco and refiled that claim in the Harris County District Court.¹⁷ Despite its Pennsylvanian-sounding name, Pennzoil chose a state court in the city of its corporate headquarters, Houston, Texas.¹⁸ Despite its Texan-sounding name, Texaco was a New

¹² The *Younger* doctrine has received an immense amount of criticism since its announcement in 1971. See, e.g., Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (*Younger* doctrine violates separation of powers); Wechsler, *supra* note 3, at 875 (*Younger* misconceived history and precedent); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1195-96 (1977) (“[o]verriding national policy,” which requires continued access to federal remedial power, is thwarted in civil rights area by *Younger* and its progeny); Ziegler, *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).

¹³ *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1523-24 (1987). The negotiations with Getty were accompanied by negotiations with its major stockholders, the Getty Museum and the Getty Trust, in order to obtain the cooperation of a sufficient percentage of owners to effect a going-private transaction. These parties were included in the initial case brought in Delaware Chancery Court. See Adler, *How to Lose the Bet-Your-Company Case*, AM. LAW., Jan./Feb., 1986, at 27, 107.

¹⁴ This purchase would have ultimately led to Pennzoil’s total ownership of Getty through a series of transactions explained in the district court opinion. See *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 255 n.4 (S.D.N.Y.), *aff’d in part and rev’d in part*, 784 F.2d 1133 (2d Cir. 1986), *rev’d*, 107 S. Ct. 1519 (1987).

¹⁵ *Pennzoil*, 107 S. Ct. at 1522.

¹⁶ Adler, *supra* note 13, at 107.

¹⁷ See *id.*

¹⁸ *Pennzoil*, 107 S. Ct. at 1522.

York-based corporation which found itself burdened with the disadvantages of litigating as an out-of-state corporation.¹⁹ *1055

Once Pennzoil won the verdict – \$7.53 billion in actual damages and \$3 billion in punitive damages²⁰ – it had only to wait a few days, until the Texas state court entered the judgment,²¹ before it could execute that judgment under Texas law.²²

At this point, Texaco needed to prevent execution of the judgment pending its appeal, an appeal which seemed at the time to promise a chance of overturning the verdict.²³ Texas law provides for the suspension *1056 of the execution of judgment upon the filing of a bond in “at least the amount of the judgment, interest, and costs.”²⁴ Given the impossibility of filing a bond in the amount of \$10.53 billion,²⁵ Texaco faced the prospect that execution of the huge judgment would precede the appeal. As a result, “the price of its stock dropped markedly; it had difficulty obtaining credit; the rating of its bonds was lowered; and its trade creditors refused to sell it crude oil on customary terms.”²⁶

Texaco responded to its predicament by turning away from the Texas state court system – indeed fleeing Texas altogether – and filing suit in federal district court for the Southern District of New York, in White Plains, the place of Texaco’s corporate

¹⁹ Under 28 U.S.C. § 1332(c) (1982), a corporation is deemed a citizen of the state that is its principal place of business as well as of all of the states where it is incorporated. Since both Pennzoil and Texaco had incorporated in Delaware, see *Pennzoil*, 107 S. Ct. at 1532 (Marshall, J., concurring in the judgment), Texaco lacked the requisite diversity of citizenship to remove the case to federal court. See 28 U.S.C. § 1441 (1982). Undoubtedly, the companies chose to incorporate in Delaware in order to find some future advantage in the applicability of Delaware law to matters concerning their internal affairs. See A. Conard, *CORPORATIONS IN PERSPECTIVE* 15 (1976). Ironically, this commonly made choice greatly increases the likelihood that a corporation sued by another corporation in the plaintiff corporation’s home state court will be unable to remove the case to federal court upon diversity grounds. The existence of diversity jurisdiction and its lack of comprehensiveness reveals the tension seen elsewhere in the law of federal courts, see M. Redish, *TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* (1980), between recognizing a need for federal courts and trusting state courts.

²⁰ *Pennzoil*, 107 S. Ct. at 1522. Interest on the judgment accumulated at the rate of about \$3 million a day. *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1138 (2d Cir. 1986), rev’d, 107 S. Ct. 1519 (1987). The Texas Court of Appeals subsequently reduced the punitive damages to \$1 billion. *Pennzoil*, 107 S. Ct. at 1523 n.5. The tremendous size of the verdict stems in part from Texaco’s strategic decision not to present evidence on the issue of damages, on the theory that to do so would influence the jury to believe that Texaco was in fact liable. See Adler, *supra* note 13, at 109-10. Unfortunately for Texaco, once the jury found Texaco liable, it then felt it had no choice but to accept Pennzoil’s theory of damages. *Id.* at 110. Pennzoil had presented experts who testified that damages should be calculated by subtracting the cost of acquiring Getty from the cost of discovering the oil it sought. *Id.* at 109. Texaco declined the opportunity to argue that Pennzoil’s damages were the difference between the stock price it bargained for (\$110) and the market price (i.e., the price Texaco paid, \$128 per share) or the difference between the cost of buying Getty and the cost of buying another company that possessed oil reserves. *Id.* Eventually the judgment led Texaco to file for bankruptcy and Pennzoil’s claim was settled for \$3 billion. See *Texaco Files to End Bankruptcy*, N.Y. TIMES, Dec. 22, 1987, at D3.

²¹ The jury announced the verdict on November 19, 1985, and the Texas court entered judgment on December 10, 1985, the very day that Texaco filed the federal lawsuit described in the text. *Pennzoil*, 107 S. Ct. at 1523 & n.5; see notes 27-33 and accompanying text *infra*.

²² *Pennzoil*, 107 S. Ct. at 1522. Under Texas law, Pennzoil could use the judgment to secure a lien on Texaco’s Texas property and then execute on that property “after the expiration of thirty days from the time a final judgment is signed.” *Id.* (quoting *Tex. R. Civ. P.* 627). A motion for a new trial would prevent execution under the same rule until the motion is either denied or overruled “by operation of law” (i.e., the passage of 75 days without a decision). *Tex. R. Civ. P.* 627. In fact, a new trial motion was filed and, given the difficulty of the case, the trial judge with the parties’ consent prohibited Pennzoil from attempting to enforce the judgment for as long as it took to decide the motion. This effectively negated the “operation of law” provision of the rule. *Texaco*, 784 F.2d at 1137-38 & 1137 n.3.

²³ The district judge in the federal suit described at text accompanying notes 27-33 *infra*, opined on the merits of Texaco’s state court appeal as part of his finding that Texaco was entitled to a preliminary injunction against enforcing the judgment. He concluded that it “presented generally fair grounds for litigation.” See *Pennzoil*, 107 S. Ct. at 1524 (quoting *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 254 (S.D.N.Y. 1986)). Texaco pursued its state court appeal during the pendency of the federal suit. *Id.* at 1523 n.5. The Texas Court of Appeals affirmed the judgment shortly before the Supreme Court issued its opinion. *Id.* The appeal raised ninety points of error, claiming misapplications of New York law and an “unfair” charge to the jury. See *Texaco Appeal*, N.Y. TIMES, Apr. 24, 1986, at D3.

²⁴ *Pennzoil*, 107 S. Ct. at 1522-23 (quoting *Tex. R. Civ. P.* 364(a)).

²⁵ According to the Second Circuit, the worldwide surety bond capacity is estimated at \$1 billion to \$1.5 billion “under the best possible circumstances.” *Texaco*, 784 F.2d at 1138.

²⁶ *Pennzoil*, 107 S. Ct. at 1523 (citing App. to Juris. Statement A90-A98 (District Court’s Supplemental Findings of Fact 49-70)).

headquarters.²⁷ In seeking an injunction barring Pennzoil from attempting to enforce the judgment, Texaco argued that the bond requirement violated the due process and equal protection clauses of the fourteenth amendment.²⁸ Pennzoil countered with an argument that the *Younger* doctrine required the district court to abstain from exercising its jurisdiction.²⁹ *1057

Texaco had found the sympathetic forum it sought. According to the district judge, “[t]he concept of posting a bond of more than \$12 billion is just so absurd, so impractical and so expensive that it hardly bears discussion.”³⁰ The judge viewed the alternative of staying the judgment by filing for bankruptcy as the “irreparable harm” that entitled *1058 Texaco to an injunction.³¹ Moreover, the district judge did not think that the

²⁷ Id. In his concurring opinion in the Supreme Court, Justice Marshall wrote that there was a “clear absence of venue ... [which] further strengthens the odor of impermissible forum-shopping which pervades this case.” Id. at 1533 (Marshall, J., concurring in the judgment). But Pennzoil did not object to venue, apparently because it does business in the Southern District of New York. See *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 252 (S.D.N.Y.), aff’d in part and rev’d in part, 784 F.2d 1133 (2d Cir. 1986), rev’d, 107 S. Ct. 1519 (1987). Under 28 U.S.C. § 1391 (1982), when a lawsuit is based on a federal question, venue is proper in the forum of residence of the defendant, and a corporation is resident wherever it does business. However, even if Justice Marshall were correct about improper venue, there is nothing wrong with filing a case in an improper venue. The defendant can waive the venue requirement, and the federal courts can transfer the case if a waiver is not forthcoming. See 28 U.S.C. § 1406 (1982). Accordingly, if a federal court suit is permissible, a plaintiff can certainly file a case in its own most convenient forum. Cf. *Keeton v. Hustler*, 465 U.S. 770 (1984) (finding no real harm in “the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations” and rejecting a due process challenge to plaintiff’s choice of a forum tenuously connected to dispute but offering unusually long statute of limitations).

²⁸ *Pennzoil*, 107 S. Ct. at 1523 n.6. Directly attacking the merits of the state case, Texaco also argued that the judgment violated the full faith and credit clause, the commerce clause, the Williams Act, and the Securities Exchange Act of 1934. Id.

²⁹ Id. at 1523. Pennzoil asserted two other grounds purportedly barring the court from hearing the case. The first was the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), which provides that “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” Id.; see *Pennzoil*, 107 S. Ct. at 1523. Since the Supreme Court held in *Mitchum v. Foster*, 407 U.S. 225 (1972), that suits brought under 42 U.S.C. § 1983 are expressly authorized exceptions to the Anti-Injunction Act, Texaco’s case presented the difficult question of whether it sought relief from an action taken under “color of state law,” as a case must to fall within the language of § 1983. The Second Circuit dealt with this issue in detail and found that Pennzoil’s need “to act jointly with state agents by calling on state officials to attach and seize Texaco’s assets” supplied the necessary “color of state law element.” *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1145-46 (2d Cir. 1986), rev’d, 107 S. Ct. 1519 (1987); see also notes 200-12 and accompanying text *infra* (discussing § 1983’s application to abstention doctrine).

The second ground was the so-called *Rooker-Feldman* doctrine, which essentially bars federal court actions that are in reality misdirected appeals from state courts. See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The district court found that “it was not ‘attempting to sit as a final or intermediate appellate state court as to the merits of the Texas action. ... Our only intention is to assure Texaco its constitutional right to raise claims that we view as having a good chance of success.’” *Pennzoil*, 107 S. Ct. at 1524 (quoting *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 254 (S.D.N.Y. 1986) (citation and footnote omitted)). The Second Circuit rejected the district court’s reliance on an assessment of the merits of Texaco’s appeal, but nevertheless found that *Rooker-Feldman* did not bar the due process and equal protection claims raised in the federal case because they were not “inextricably intertwined” with the state court action. Id. at 1524 (citing *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1137 (2d Cir. 1986)). For some reason, the Supreme Court’s opinion, written by Justice Powell, did not even address the *Rooker-Feldman* question, forcing Justice Scalia to dash off a short paragraph stating his agreement with the Second Circuit that the *Rooker-Feldman* doctrine did not deprive the federal court of jurisdiction. Id. at 1529-30 (Scalia, J., concurring). Justice Brennan, in his concurring opinion, also agreed that the *Rooker-Feldman* doctrine was inapplicable. Id. at 1530-32 (Brennan, J., concurring in the judgment). Only Justice Marshall found the doctrine applicable. See id. at 1532-34 (Marshall, J., concurring in the judgment). He maintained that analyzing the federal Court’s power to grant the injunction necessarily involved an assessment of the merit of the grounds for the appeal. Accordingly, he believed that the federal and state cases were “inextricably intertwined.” Id. at 1534. Justice Marshall noted, however, that the federal court would not actually decide the merits, it merely would determine whether the appeal was “non-frivolous.” Id. Nevertheless, he saw this federal involvement in the merits of the state case as enough to make the federal action too much like an appeal from the state judgment and thus beyond the federal Court’s jurisdiction. See id. For commentary on the use of the *Rooker-Feldman* doctrine in the *Pennzoil* case, see Note, *Texaco, Inc. v. Pennzoil Co.: Beyond a Crude Analysis of the Rooker-Feldman Doctrine’s Preclusion of Federal Jurisdiction*, 41 U. MIAMI L. REV. 627 (1987); Comment, *Texaco, Inc. v. Pennzoil Co.: Some Thoughts on the Limits of Federal Court Power Over State Court Proceedings*, 54 FORDHAM L. REV. 767 (1986).

³⁰ *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 257 (S.D.N.Y.), aff’d in part and rev’d in part, 784 F.2d 1133 (2d Cir. 1986), rev’d, 107 S. Ct. 1519 (1987). In retrospect, Texaco’s choice seems unwise, even if it had won the stay in federal court. Moving to federal court implied a mistrust of the state court, and Texaco would still have to face the Texas court for its appeal on the merits. Declaring bankruptcy in order to halt enforcement of the judgment and permit the appeal, though a drastic step, might at least have generated sympathy for Texaco’s plight in the Texas state court. In most *Younger* cases, a successful move to federal court would abort the state proceeding, thus making the move worth the risk of offending the state court. But here, success in federal court would only pave the way for an appeal, which necessarily would take in state court.

³¹ Id. at 253. The same judge who considered bankruptcy “irreparable harm” when considering Texaco’s interests also called it “a rather pleasant and profitable harbor of refuge ... where [litigants] may gain time and other special considerations” when considering

requested injunction would interfere at all with state interests: “[f]ar from impairing the operation of the state judicial system,” the injunction would improve it by sparing Texaco the “dismemberment caused by the bond provision, which would otherwise attenuate both the appellant and the force of the appeal.”³² Accordingly, the district court declined to abstain and granted a preliminary injunction ordering Pennzoil to refrain from acting to enforce the judgment.³³

The Court of Appeals for the Second Circuit affirmed.³⁴ It held that *Younger* was inapplicable because the state’s interest in enforcing judgments was no greater than its interest in seeing any citizen’s legal right enforced in any state proceeding.³⁵ Unlike the types of cases to which the Supreme Court had applied *Younger* analysis,³⁶ Pennzoil lacked a state as a party that had undertaken the state proceeding “for the purpose of vindicating a particular state policy or remedying an infraction of *1059 state law.”³⁷ Even if the *Younger* doctrine did apply to such private suits, the court wrote, this case would fall within one of the doctrine’s exceptions: federal courts will not relegate the parties to state court to air their federal claims if the state proceeding does not offer an adequate opportunity to present the claim.³⁸ The court then determined that the Texas state court lacked “adequate procedures for adjudication of Texaco’s federal claims” because it did not “assure[]” Texaco of a speedy decision on the federal constitutional issue.³⁹

Pennzoil then filed for review in the Supreme Court, which noted probable jurisdiction.⁴⁰ The Court voted unanimously to reverse, though the Justices’ various opinions, relying on differing grounds, revealed the deep and fundamental divisions that

Pennzoil’s countervailing interests. *Id.* The minority of the Supreme Court that ultimately rejected abstention and reached the merits found no violation of due process because of the possibility of filing for bankruptcy. See *Pennzoil*, 107 S. Ct. at 1530-32 (Brennan, J., concurring in the judgment); *id.* at 1532-34 (Marshall, J., concurring in the judgment); *id.* at 1535-38 (Stevens, J., concurring in the judgment).

³² *Texaco*, 626 F. Supp. at 260. The district court held that Texaco must provide security in the amount of \$1 billion, based on its calculation of Pennzoil’s appropriate damages, the difference between the market price (the price paid by Texaco) and Pennzoil’s bargained for price. *Id.* at 261-62.

³³ *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1524 & n.7 (1987). According to the district Court’s multiple findings, Texaco had satisfied the requirements for a preliminary injunction because the issues for the state appellate court presented “generally fair grounds for litigation”; the Texas lien and bond requirements violated due process by denying Texaco its right to appeal; the risk of erroneous deprivation of due process would be “quite severe”; and the administrative burden on the state would be “slight.” *Id.* at 1524 (quoting *Texaco*, 626 F. Supp. at 254-57).

³⁴ *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), rev’d, 107 S. Ct. 1519 (1987). For an article approving of the Second Circuit’s handling of the abstention issue, see Comment, *supra* note 29.

³⁵ *Texaco*, 784 F.2d at 1149. If this state interest invoked *Younger*, the court wrote, *Younger* would apply to “almost every § 1983 case and thus undermine the Supreme Court’s holding in ... [Mitchum v. Foster, 407 U.S. 225 (1972)] that federal courts are empowered by § 1983 to enjoin ongoing state proceedings.” *Texaco*, 784 F.2d at 1149. For a discussion of the significance of *Mitchum* despite a broad reading of *Younger*, see notes 200-12 and accompanying text *infra*.

³⁶ The court of appeals referred to six types of cases: attorney disciplinary proceedings, e.g., *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423 (1982); state proceedings intervening in the parent-child relationship, e.g., *Moore v. Sims*, 442 U.S. 415 (1979); state proceedings to recover welfare payments wrongfully received, e.g., *Trainor v. Hernandez*, 431 U.S. 434 (1977); contempt proceedings, e.g., *Juidice v. Vail*, 430 U.S. 327 (1977); nuisance proceedings initiated by the state, e.g., *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); and state criminal prosecutions, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).

³⁷ *Texaco*, 784 F.2d at 1149. This characterization of a case where *Younger* applies is most difficult with respect to *Juidice v. Vail*, 430 U.S. 327 (1977), upon which the Supreme Court relied heavily. For a discussion of *Juidice*, including the Second Circuit’s attempt to address this difficulty, see text accompanying notes 172-91 *infra*. The Second Circuit also found that abstention was inappropriate under the doctrine of *Railroad Comm’n v. Pullman Co.*, 312 U.S. 456 (1941). *Texaco*, 784 F.2d at 1148. The *Pullman* doctrine states that federal courts should abstain from cases involving unresolved questions of state law. *Id.* This issue is discussed in detail at notes 99-129 and accompanying text *infra*.

³⁸ See *Texaco*, 784 F.2d at 1150-52.

³⁹ *Id.* at 1150. The state decision on the federal issues would be futile, according to the court, unless it preceded the time when Pennzoil could begin to enforce the judgment. *Id.*

⁴⁰ *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1525 (1987). Under 28 U.S.C. § 1254(2) (1982), the case, having struck down an application of a state statute as unconstitutional, qualified for nondiscretionary review.

have marked the Court in recent years. A majority of five, in an opinion written by Justice Powell, and joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia,⁴¹ held that the district court should have abstained under the *Younger* doctrine.⁴² Justice Blackmun thought *Younger* abstention incorrect but would have abstained under *Pullman*.⁴³ Justices Brennan, Marshall, and Stevens, thought abstention inappropriate but rejected Texaco's claim on the merits.⁴⁴

The Texas Court of Appeals, meanwhile, affirmed the trial Court's judgment,⁴⁵ and the Supreme Court of Texas refused to hear Texaco's appeal.⁴⁶ To avoid execution of the judgment after the United States Supreme Court's judgment, Texaco filed for bankruptcy under Chapter *1060 11 of the Bankruptcy Code,⁴⁷ thereby obtaining its stay by means of federal law. Pending the United States Supreme Court's decision on whether to grant certiorari on the substantive federal issues raised in the state court proceedings, the parties reached a settlement in bankruptcy, giving Pennzoil \$3 billion.⁴⁸

B. Treatment of the *Younger Doctrine* by the Majority

1. Principles Underlying *Younger* Abstention

The majority of the Supreme Court identified three reasons for abstention. The first, taken from *Younger v. Harris*,⁴⁹ reflects principles of equity: "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law."⁵⁰ It is traditional to begin any discussion of the reasons for *Younger* abstention with a discussion of equity, the way *Younger* itself does, but then to move swiftly on to the question of federalism.⁵¹ *Pennzoil* was certainly no exception to this pattern. The Court did nothing more than set out the quote from *Younger*, with its glaring reference to criminal proceedings, and then moved on to federalism, which it clearly saw as the stronger support for the abstention doctrine, and indeed, perhaps the only support for abstention outside of the criminal area.⁵² *1061

⁴¹ Justice Scalia wrote a concurring opinion in which Justice O'Connor joined. See *Pennzoil*, 107 S. Ct. at 1529-30 (Scalia, J., concurring).

⁴² *Pennzoil*, 107 S. Ct. at 1525.

⁴³ *Id.* at 1534-35 (Blackmun, J., concurring in the judgment). For a discussion of the *Pullman* abstention doctrine, see notes 99-129 and accompanying text *infra*.

⁴⁴ See *Pennzoil*, 107 S. Ct. at 1530-32 (Brennan, J., concurring in the judgment); *id.* at 1532-34 (Marshall, J., concurring in the judgment); *id.* at 1535-38 (Stevens, J., concurring in the judgment).

⁴⁵ *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987).

⁴⁶ See *Texaco, Inc. v. Texaco Co.*, 748 S.W.2d 631, 631 (Tex. Ct. App. 1988).

⁴⁷ 11 U.S.C. § 301 (1982).

⁴⁸ See *Texaco Files to End Bankruptcy*, N.Y. TIMES, Dec. 22, 1987, at D3; see also *Texaco, Inc. v. Pennzoil Co.*, 108 S. Ct. 1305 (1988) (petition for certiorari dismissed).

⁴⁹ 401 U.S. 37 (1971).

⁵⁰ *Pennzoil*, 107 S. Ct. at 1525 (quoting *Younger*, 401 U.S. at 43).

⁵¹ See, e.g., *Ohio Civil Rights Comm. v. Dayton Christian Schools, Inc.*, 447 U.S. 619, 626 (1986); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 600-01 (1975); see also *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431-32 (1982) (discussing only federalism/comity basis for abstaining). For a detailed analysis of these equity considerations, see Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591 (1975).

⁵² See *Pennzoil*, 107 S. Ct. at 1526 ("This [federalism] concern mandates application of *Younger* abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending..."). Although the *Pennzoil* Court did not attempt to exploit this argument for abstention, one could look for support for abstention beyond the criminal context, on equitable grounds, in the concept of "adequate remedy at law." In fact, the justification of "adequate remedy at law" is inaccurate. Forcing a state court defendant to abandon his suit for relief in federal court and turn his federal claim into a defense in his criminal trial does not provide him with an adequate remedy at law. It is one thing to deny injunctive relief in a case where damages – the remedy "at

In its discussion of federalism, the second reason for abstention, the Supreme Court invoked the key *Younger v. Harris* quote:

“[Equitable restraint] is reinforced by ... the notion of ‘comity,’ that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.... [This represents] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states.”⁵³

According to the *Pennzoil* majority, these federalism concerns justify abstention whenever the state’s interests in the proceedings “are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government.”⁵⁴

The Court then added a third justification for abstention: the potential for avoiding “unwarranted determinations of federal constitutional questions.”⁵⁵ The Court expressed worries about proceeding with a federal constitutional question that would necessarily entail interpreting state law, possibly in a way that the state courts would later “discredit[.]”⁵⁶

After setting out these three reasons for abstention, the majority concentrated on the second one – the federalism question of whether the state proceeding was the kind that demanded deference. The answer to this question depended on an analysis of the state interests at stake.

Texaco had relied primarily on the argument that there was no significant state interest at stake at all,⁵⁷ the same position the Second Circuit had endorsed.⁵⁸ The majority, however, dismissed this position as a ***1062** “misreading” of Supreme Court precedent. Citing cases that emphasized the strength of the state’s interest in various

law” – will suffice. But here, the federal plaintiff would not be seeking damages. Rather, the criminal defendant seeks to end the prosecution, and the only question presented to the federal court is *which* court ought to do it: the state court presented with the federal defense or the federal court presented with the affirmative suit. Yet *Younger* makes the unsavory assertion that having to undergo a single criminal prosecution does not amount to the irreparable injury needed to qualify for injunctive relief. *Younger*, 401 U.S. at 46. Thus, abstention occurs not because another remedy is adequate, but because the federal plaintiff is entitled to no remedy because he has no redressable injury. That is, if the federal plaintiff can “eliminate” the threat to his federal rights through his defense in the state criminal proceeding, he cannot claim entitlement to injunctive relief. *Id.* It would seem that this argument focusing on a lack of irreparable injury could be moved from the criminal to the civil context.

⁵³ *Pennzoil*, 107 S. Ct. at 1525 (quoting *Younger*, 401 U.S. at 44).

⁵⁴ *Id.* at 1526. The majority overstates the import of the language it quotes. *Younger* does not say that federal courts may never interfere with the states or even that they must limit their interference to the illegitimate activities of the states. It says only that when interfering with the legitimate activities of the states, federal courts, out of comity, must take care not to do so unduly. See *Younger*, 401 U.S. at 44.

⁵⁵ *Pennzoil*, 107 S. Ct. at 1526.

⁵⁶ *Id.* (citing *Moore v. Sims*, 442 U.S. 415, 428 (1979)). The “discrediting” would occur if the state in a later case faced the same issue and decided the question of state law differently.

⁵⁷ See *id.* at 1527.

⁵⁸ See *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1149-50 (2d Cir. 1986), rev’d, 107 S. Ct. 1519 (1987).

proceedings, it wrote simply and blandly that “this Court repeatedly has recognized that the States have important interests in administering certain aspects of their judicial systems.”⁵⁹ It then asserted that the case of *Juidice v. Vail*,⁶⁰ which had found a strong enough state interest in a civil contempt proceeding, “control[led]” *Pennzoil*, since both involved state coercion of compliance with their judgments.⁶¹ Significantly, the Court failed to mention the Second Circuit’s effort to distinguish the importance of a state judiciary’s ability to wield the contempt power without federal interference from the state’s interest in the ability of private litigants to collect on their judgments.⁶² Nor did it mention that the state of Texas had intervened in the lower court case, *explicitly disclaiming any interest* in the judgment enforcement procedure, and would have accepted federal intervention.⁶³

It is a strange kind of analysis of state interest – one undertaken with protestations of deep respect for the state – that ignores the state’s own opinion of its interest in the matter. One suspects that the state’s interest is not truly the issue. In its conclusion, the Court itself anticipates an alternate justification when it writes, “proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand.”⁶⁴ This language suggests the position taken in this Article: the “respect” federalism entails is not solicitude for the feelings of the states and their courts, but the sense that the states offer a means of furthering federal interests through the enforcement of federal law in their own courts. Federal courts have an interest in locating a question like the constitutionality of the Texas bond requirement in state court, not out of respect for the state, but to take advantage of an institution that has handled the case since it arose and is capable of deciding the issue efficiently, with adequate expertise and subject to Supreme Court review. *1063

2. An Exception to the *Younger* Doctrine: Inadequacy of State Procedures

Once the *Younger* doctrine is held to apply, it is still possible to avoid abstention if the state courts do not offer an “adequate remedy at law.”⁶⁵ To put the question in a way that more accurately reflects the reality of the requirement the Court imposed on Texaco, was there a Texas court that “could have heard Texaco’s constitutional claims within the limited time available?”⁶⁶ The easy answer is simply that Texaco had the burden of proving “that state procedural law barred presentation of its claims.”⁶⁷ Texaco was in a

⁵⁹ *Pennzoil*, 107 S. Ct. at 1527 (citing *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977); *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1982)).

⁶⁰ 430 U.S. 327 (1977). For a full discussion of *Juidice*, see text accompanying notes 172-91 *infra*.

⁶¹ *Pennzoil*, 107 S. Ct. at 1527.

⁶² See text accompanying notes 34-39 *supra*.

⁶³ See *Pennzoil*, 107 S. Ct. at 1530 (Brennan, J., concurring in the judgment) (citing *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1150 (2d Cir. 1986)). The state of Texas had intervened at the request of the district judge. See *Texaco*, 784 F.2d at 1136.

⁶⁴ *Pennzoil*, 107 S. Ct. at 1527.

⁶⁵ See text accompanying note 38 *supra*.

⁶⁶ *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1528 (1987).

⁶⁷ *Id.* (quoting *Moore v. Sims*, 442 U.S. 415, 428 (1979)). The Court also quoted *Younger v. Harris*, 401 U.S. 37, 45 (1970): “‘The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.’” *Pennzoil*, 107 S. Ct. at 1528 (quoting *Younger*, 407 U.S. at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926))).

particularly bad position to make this showing since it had made no attempt at all to seek relief in state court.⁶⁸

The Supreme Court displayed its traditional unwillingness to start out with an assumption that the state courts will not fulfill their obligation under the supremacy clause to enforce federal law.⁶⁹ There is a certain salutary functionality in this unwillingness: if federal courts intervene because they assume the state judges cannot be trusted, it will never be determined whether the state judges indeed are competent and, in fact, their lack of responsibility for the interpretation and enforcement of federal law may, over time, tend to erode what competence they do have.

The Court made a further logical leap: not only was Texaco in a bad position to argue the inadequacy of the Texas courts, and not only did it have the burden of proof of inadequacy, but according to the Supreme Court, federal courts “should assume that state procedures will afford an adequate remedy, in the absence of *unambiguous authority* to the contrary.”⁷⁰ Texaco could meet this burden only if it could cite a statute or a case clearly indicating that Texas courts lacked power to consider constitutional challenges to the state rules regarding the enforcement *1064 of judgments.⁷¹ The Court doubted Texaco could make this showing because the Texas Supreme Court had shown a “longstanding commitment” to access to state courts in interpreting the state constitution’s “open court” provision.⁷² But the Court relegated Texaco to a lower Texas court,⁷³ with no real showing of that Court’s willingness to entertain constitutional challenges to its rules. No affirmative showing of adequacy by the Court was needed, however: Texaco’s failure to overcome the burden of showing inadequacy kept it from using the “inadequacy escape” from the application of *Younger* abstention.⁷⁴

If one were to respond more sympathetically to Texaco’s claim of state court inadequacy, one could say, recognizing Texaco’s need for urgent relief, that the only adequate forum would be a sophisticated court independent enough to overcome an explicit, seemingly mandatory state rule of procedure with a bold interpretation of a vague principle like due process or open courts. Without such a court, Texaco’s argument would be a futile exercise.⁷⁵ But the Supreme Court simply is unwilling to indulge in such prejudices about the conditions in state courts.⁷⁶ Thus, litigants who fail to prove

⁶⁸ 107 S. Ct. at 1523. The Second Circuit had not indulged in the usual presumption. It declined to abstain unless it could be assured that the state court would give Texaco an opportunity to present its claim. See *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1150 (2d Cir. 1986), rev’d, 107 S. Ct. 1519 (1987).

⁶⁹ *Pennzoil*, 107 S. Ct. at 1523. For another example of this unwillingness, see *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610-11 (1975) (rejecting argument that state court appeal would have been “futile”).

⁷⁰ *Pennzoil*, 107 S. Ct. at 1528 (emphasis added).

⁷¹ *Id.*

⁷² See *id.* The Texas Constitution provides that: “All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST. Art. I, § 13. The United States Supreme Court also noted that the open courts provision had been held to deprive the state legislature of the “power to make a remedy by due course of law contingent on an impossible condition.” *Pennzoil*, 107 S. Ct. at 1528 (citing *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984)).

⁷³ The Second Circuit considered and rejected the possibility that the Texas Supreme Court might, through a writ of mandamus, involve itself in the case quickly enough to constitute the adequate remedy. *Texaco*, 784 F.2d at 1151.

⁷⁴ This situation parallels the federal plaintiff’s inability to show “irreparable injury” if the abstention issue were viewed purely as a question of entitlement to equitable relief.

⁷⁵ Cf. *Texaco*, 784 F.2d at 1150-51 (presentation of federal challenge to such a clear state procedural rule in state trial court would indeed be futile). Taking the time to go through that exercise – which the Supreme Court ended up essentially requiring as the only feasible way to overcome the burden of proof – would expose Texaco to the very harm it sought to avoid by suing in federal court. See *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (*Younger* abstention “presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues” raised in federal suit).

⁷⁶ Federal courts will, however, receive proof of bias in the state proceeding. See *Gibson*, 411 U.S. at 570-71.

these conditions face the presumption, unrealistic though it sometimes appears, that a state court is no “less inclined than a federal court to address and decide ... federal constitutional claims.”⁷⁷

It is important to remember that presumptions in the law operate in complex and subtle ways. They do not simply reflect an assessment of what is probably true. Presumptions often express a belief in what **1065* should be true or what it seems most appropriate to believe is true.⁷⁸ Here, the Court lacks the reliable empirical information it would need to determine whether, as a general rule, state courts are as capable as federal courts when applying federal constitutional law. Undoubtedly, factors other than “likelihood” have led the Court to its presumption of state court adequacy. These factors may include the existence of the state Court’s duty under the supremacy clause to enforce federal law; the idea of comity, which directs federal courts to show at least some amount of respect for state courts; and, in line with the theory of this Article, the potential salutary effects of trusting the state courts. Given these factors, it is not surprising that the Supreme Court has declined to indulge in the opposite presumption, founded on the acceptance of popular prejudices about state courts. The Court may, however, have taken its presumptions too far. Requiring “unambiguous authority to the contrary”⁷⁹ to overcome the presumption, may be so strict a standard that the federal plaintiff will never meet it without actually first seeking relief in state court and confronting inadequacy. If so, the “inadequacy escape” to the *Younger* doctrine is nothing more than a requirement that state remedies be exhausted.⁸⁰

3. Avoiding “Unwarranted” Questions of Constitutional Law

Abstention, according to the majority in *Pennzoil*, offers the added **1066* benefit of giving the state court a chance to construe the challenged state rules in a way that would avoid the constitutional question.⁸¹ Although the state procedural rule requiring that

⁷⁷ *Pennzoil*, 107 S. Ct. at 1529.

⁷⁸ See E. Cleary, MCCORMICK ON EVIDENCE 969 (3d ed. 1984) (“Usually ... a presumption is based not only upon the judicial estimate of the probabilities but also upon the difficulties inherent in proving that the more probable event in fact occurred.”); see also Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 729 (1981) (finding presumption of procedural parity “beguiling” because it permits us to engage in “wishful thinking,” but preferring to keep both forums open and allowing parties to choose which one they prefer, thus stimulating state courts to in fact achieve parity).

⁷⁹ *Pennzoil*, 107 S. Ct. at 1528.

⁸⁰ See Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977). The federal plaintiff might be able to show that the state Court’s own jurisdictional limitations forbid it from considering the federal issue. See Trainor v. Hernandez, 431 U.S. 434, 467 (1977) (Stevens, J., dissenting) (state procedure “effectively foreclose[s] any challenge to its constitutionality”). In *Pennzoil*, both the district court and the Second Circuit conceded that the Texas state courts did not lack the power to hear constitutional challenges and Texaco “cited no statute or case clearly indicating that Texas courts lack such power.” *Pennzoil*, 107 S. Ct. at 1528.

A twist in the *Pennzoil* case deserves some mention: to what state court was the Supreme Court deferring? The trial court no longer had jurisdiction over the case. According to the Supreme Court, either Texaco was precluded from raising this problem because its own delay had resulted in the failure of the trial court to handle the federal challenge while it still had jurisdiction, *id.* at 1529 n.16 (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 607-09 (1975)), or Texaco could seek relief from the Texas Court of Appeals or the Texas Supreme Court on the theory that they “arguably have the authority to suspend the supersedeas requirement to protect their appellate jurisdiction.” *Id.* (citing *Pace v. McEwen*, 604 S.W.2d 231, 233 (Tex. Civ. App. 1980)). Thus, Texaco failed to convince the Court that there was no state court available to hear the federal challenge to the bond.

⁸¹ *Pennzoil*, 107 S. Ct. at 1526. A standard precept of constitutional interpretation dictates deciding a question about the meaning of a statute – or as here, a rule – before reaching the constitutional issue. The theory is that the court may find a clearly constitutional meaning of the statute or rule and thus avoid the constitutional question altogether. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This sequence of decision making rests on separation of powers considerations. Out of concern for “the ‘great gravity and delicacy’ of its function in passing upon the validity of an act of Congress,” the Supreme Court has evolved numerous techniques to enable it to “shrink from exercising” this power. *Id.* at 345 (citation omitted). When the statute challenged is state legislation, the focus shifts from separation of powers to concerns of federalism. See *Pennzoil*, 107 S. Ct. at 1526 n.9 (citing *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941)).

Texaco post the bond to stave off Pennzoil's execution of the judgment did not provide any exceptions, the Court thought it was "impossible to be certain" that the Texas courts would not find some way around the seemingly mandatory requirement.⁸² Yet the only Texas law that the Court could point to as offering some hope for a state law solution was the "open Courts" provision in the state constitution.⁸³ The Texas Court, under the threat of a federal constitutional decision forcing it to modify its strict bond requirement, might expansively pursue the "open Courts" provision at the expense of its clear procedural rules.

The Court did not concern itself with whether giving the state an opportunity to find a state law avoidance to the constitutional question would improve the quality of constitutional adjudication or of state/federal relations.⁸⁴ It merely stated that there was a possibility of avoiding *1067 the question through the use of state law, taking it for granted this avoidance is a goal worthy in itself.

C. Positions of the Concurring Justices

1. Rejecting *Younger*

Although the *Pennzoil* Court voted unanimously to reverse, the Court split in a now-common five-to-four fashion when it came to the question of whether the *Younger* doctrine applied. Writing separate concurring opinions were Justices Brennan,⁸⁵ Marshall,⁸⁶ Blackmun,⁸⁷ and Stevens.⁸⁸

⁸² *Pennzoil*, 107 S. Ct. at 1526. This deference based on a mere possibility of a state law solution to the constitutional problem with the bond requirement contrasts with the greater degree of ambiguity needed to warrant *Pullman* abstention. See notes 99-129 and accompanying text *infra*.

⁸³ See note 72 *supra* (text of "open court" provision). There is also some question as to when a potential state constitutional solution can force a *Pullman* abstention. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Court refused to abstain when the state provision tracked the federal constitutional provision at issue, while in *Reetz v. Bozanich*, 397 U.S. 82 (1970), a very specific state constitutional provision dealing with fishing rights did warrant abstention. The "open Courts" provision seems to fall somewhere in between these two cases. Although it does not track the federal constitutional provision at issue, it does raise issues very similar to due process. Since what must ultimately be done in any event is a basic assessment of the fairness of the bond requirement, rather than asking whether the Texas regulation requires the bond, I would suggest that the case is much closer to *Constantineau*. But perhaps one ought to question the wisdom of *Constantineau* in federalism terms or at least limit it to mirror-image state constitutional law. There are benefits to be gained from the development of state constitutional law, see Sager, Foreword: *State Courts and the Strategic Space Between Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 973-74 (1985), and abstention creates a larger arena in which that law can develop. When a mirror-image provision is presented, however, abstention smacks more of the empty "states' rights" form of deference, oriented primarily toward saving a state's dignity by allowing it to strike down its own law.

⁸⁴ See note 105 *infra* (examining whether this kind of deference and resulting pressure on the state in fact serve the interests of federalism).

⁸⁵ *Pennzoil*, 107 S. Ct. at 1530 (Brennan, J., concurring in the judgment). Justice Brennan, finding no ground for abstention and also rejecting application of the *Rooker-Feldman* doctrine, see note 29 *supra*, went on to consider the substantive merits of Texaco's claim. Because Texas created an appeal as of right, Texaco possessed a due process right that protected it from having its appeal foreclosed. *Id.* at 1531 (Brennan, J., concurring in the judgment). Although Texaco had argued that it was impossible for it to post a bond in the amount required, Justice Brennan located a solution in federal bankruptcy law. *Id.* (Brennan, J., concurring in the judgment) (citing 11 U.S.C. § 362 (1982 & Supp. II 1984)). Since filing for reorganization in bankruptcy would automatically stay the claims of all judgment creditors, Texaco's due process right would remain unoffended. Justice Brennan took care to limit this conclusion to the particular facts of the *Pennzoil* case, noting that in a different situation, particularly in a case involving fundamental constitutional rights, declaring bankruptcy might undermine the litigant's ability to advance its interests on appeal. *Id.* at 1532 (Brennan, J., concurring in the judgment) (citing *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 299-300 (5th Cir. 1979) (solicitude for special problems encountered by NAACP in first amendment litigation), cert. denied, 444 U.S. 1074 (1980)).

⁸⁶ *Id.* at 1532 (Marshall, J., concurring in the judgment). While indicating that if he were to reach the merits he would agree with Justices Brennan and Stevens that Texaco's claim lacked merit, Justice Marshall wrote that the federal courts lacked jurisdiction over the suit. *Id.* He stood alone among the Justices in finding that the *Rooker-Feldman* doctrine, see note 29 *supra*, applied. *Id.* at 1533-34.

⁸⁷ *Id.* at 1534 (Blackmun, J., concurring in the judgment).

⁸⁸ *Id.* at 1535 (Stevens, J., concurring in the judgment).

Justice Brennan restated his long-held belief that *Younger* should not apply to civil proceedings, particularly when they are brought under section 1983.⁸⁹ According to Justice Brennan, expansion of *Younger* would conflict with the Court's position, taken in *Mitchum v. Foster*,⁹⁰ that by enacting section 1983, Congress intended to "interpose the federal courts between the States and the people, as guardians of the people's federal rights."⁹¹ *1068

Although he would have preferred to limit *Younger* to criminal cases, Justice Brennan also went on to do his own state interest analysis. He noted that the state of Texas was not a party to the Supreme Court appeal and had stated in its brief to the Second Circuit that it had "no interest" in the underlying action, "except in its fair adjudication."⁹² Even if the state did have an interest in ensuring that its "judgments are not rendered nugatory,"⁹³ that interest did not attach in this particular case because Texaco's assets substantially exceeded the amount of the judgment.⁹⁴ Moreover, the state's deliberate decision to remain uninvolved in the instigation of any of the steps of enforcement showed that the interest in enforcing the judgment was Pennzoil's and not the state's.⁹⁵

In a separate concurrence that included a lengthy discussion of the merits,⁹⁶ Justice Stevens warned that "the Court cuts the *Younger* doctrine adrift from its original moorings" when it abandons the requirement that the state have "a *substantive* interest in the ongoing *1069 proceeding, an interest that goes beyond its interest as adjudicator of wholly private disputes."⁹⁷

Justice Blackmun, also writing separately, agreed with Justice Brennan's analysis of the *Younger* doctrine, and saw the majority's decision as an "unprecedented" expansion

⁸⁹ Id. at 1530. But see *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 438 (1982) (Brennan, J., concurring) (accepting application of *Younger* to attorney disciplinary proceedings because of "traditional and primary responsibility" of states in this area and because of "quasi-criminal" nature of proceedings).

⁹⁰ 407 U.S. 225 (1972).

⁹¹ *Pennzoil*, 107 S. Ct. at 1530 (Brennan, J., concurring in the judgment) (quoting *Mitchum*, 407 U.S. at 242). *Mitchum* held that 42 U.S.C. § 1983 (1982) is an "expressly authorized" exception to the Anti-Injunction Act. See *Mitchum*, 407 U.S. at 243. The Act bars federal injunctions of state court proceedings unless expressly authorized (or within one of two other categories not relevant here). See 28 U.S.C. § 2283 (1982). In doing so, the *Mitchum* Court cited legislative history acknowledging the congressional concern that the state courts themselves could violate federal rights. Thus, access to federal courts was needed to avoid insulating these violators of federal rights. However, it must be noted that the *Younger* case preceded *Mitchum*, so that the observations about the "guardian" role of the federal courts was never acknowledged by the Supreme Court outside of the shadow of abstention. The federal courts would not freely use their power, but would exercise "equitable restraint," unless some showing of bad faith, harassment, or inadequate procedure could be shown. Thus, *Mitchum* made it possible for federal courts to intervene when state courts fail to present the "ability ... to resolve federal questions presented in state court litigation," *Pennzoil*, 107 S. Ct. at 1527, but it did not undercut *Younger*'s approach of giving predominance to state courts engaged in a proceeding capable of handling the federal issues presented. Indeed, *Younger* rather sloppily evaded the issue of whether § 1983 was an expressly authorized exception to the Anti-Injunction Act. See *Younger*, 401 U.S. 37, 55 (Stewart, J., concurring) (maintaining that majority's decision was based on principles of equity and not on § 1983). It appears that the *Mitchum* decision, one year later, was acceptable to a majority of the Court only because the *Younger* doctrine was in place to confine its effects. For a more detailed discussion of § 1983 and abstention, see notes 200-19 and accompanying text *infra*.

⁹² *Pennzoil*, 107 S. Ct. at 1530 (Brennan, J., concurring in the judgment) (quoting *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1150 (2d Cir. 1986)).

⁹³ Id. (Brennan, J., concurring in the judgment) (quoting majority opinion, 107 S. Ct. at 1527 (citing *Judice v. Vail*, 430 U.S. 327, 336 n.12 (1977))).

⁹⁴ Id. at 1530-31 (Brennan, J., concurring in the judgment). According to the district Court's findings of fact, Pennzoil had "publicly admitted" the sufficiency of Texaco's assets. Id. at 1530 (Brennan, J., concurring in the judgment).

⁹⁵ Id. at 1531 (Brennan, J., concurring in the judgment). State officers would, however, respond to the private party's instigation of these steps. This involvement was crucial to Justice Brennan's conclusion that the enforcement was an action under color of state law, a conclusion needed for the action in federal court to fall within § 1983. Id. at 1530-31.

⁹⁶ Id. at 1535 (Stevens, J., concurring in the judgment). Justice Stevens found no constitutional requirement that Texas stay the execution of the judgment, noting the state's justified concern for the interests of the judgment creditor. Id. at 1537 (Stevens, J., concurring in the judgment) (citing *Louisville & Nashville R.R. Co. v. Stewart*, 241 U.S. 261 (1916)).

⁹⁷ Id. at 1536 n.2 (Stevens, J., concurring in the judgment).

that would lead to the use of abstention “no matter how attenuated the State’s interests are in that proceeding and no matter what abuses the federal plaintiff might be sustaining.”⁹⁸

2. The Potential for *Pullman* Abstention

Justice Blackmun also thought the case qualified for abstention, but he would have invoked the *Pullman* doctrine because he believed the interaction of the “various Texas statutes and constitutional provisions at issue” produced enough ambiguity to deserve authoritative state court resolution before reaching the due process challenge.⁹⁹ It is worth pausing here to consider the possibility of using *Pullman* in *Pennzoil*.

Although federal courts are certainly capable of interpreting state law and frequently do so in diversity cases,¹⁰⁰ as well as in federal question cases that also raise state law claims,¹⁰¹ according to *Pullman*, federal courts cannot actually “determin[e]” state law.¹⁰² They merely “forecast” what the state courts might say state law is.¹⁰³ Noting the serious threat to the “reign of law” if the federal courts resorted to such “tentative” guesses about state law, perhaps striking down as unconstitutional a state statute that did not mean what the federal court thought it did,¹⁰⁴ *Pullman* required the federal court to abstain.¹⁰⁵ *1070

⁹⁸ Id. at 1534 (Blackmun, J., concurring in the judgment).

⁹⁹ Id. at 1535 (Blackmun, J., concurring in the judgment) (citing *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941)). *Pullman* was an attack on the constitutionality of a Texas regulation requiring that there be a white “conductor” (in addition to a black “porter”) on a railroad sleeping car in the state. *Pullman*, 312 U.S. at 497-98. Justice Frankfurter wrote that this was “undoubtedly ... a substantial constitutional issue,” but it “touche[d] a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.” Id. at 498. He also adverted to the need to show a “scrupulous regard for the rightful independence of the state governments.” Id. at 501 (quoting *DiGiovanna v. Camden Fire Ins. Ass’n*, 296 U.S. 64, 73 (1935)). If one were to do a more extensive federal interest analysis of the type advocated in this Article, the circumstances of *Pullman* would certainly raise suspicions that the Court had employed an inappropriate “state’s rights” formulation of federalism. See text accompanying notes 1-4 supra.

¹⁰⁰ See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁰¹ See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (explaining pendent jurisdiction). Pendent jurisdiction may also give way to federalism-motivated forms of deference to states. See *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

¹⁰² *Pullman*, 312 U.S. at 499.

¹⁰³ Id.

¹⁰⁴ Id. at 500. The *Pennzoil* Court considered that any subsequent revelation that the federal court had misinterpreted state law would render the federal decision “effectively advisory.” *Pennzoil Co. v. Texasco, Inc.*, 107 S. Ct. 1519, 1526 n.9 (1987).

¹⁰⁵ *Pullman*, 312 U.S. at 501. It should be noted that *Pullman* identified the federal interest as avoiding unnecessary constitutional questions but saw the state interest as giving the state control over its own law. Id. But state interpretation of state law here may also further the dominance of federal law. Purporting to give states “control” of their law in fact constitutes subtle pressure on them to void or modify state laws that challenge federal norms. To use the *Pennzoil* facts for an example, *Pullman* abstention would use the threat of a constitutional attack on the Texas bond requirement to pressure the Texas court to modify its strict bond requirement by expansively construing the “open Courts” provision at the expense of the clear procedural rule. Does it, in fact, minimize the friction between the federal and state judicial systems for the state to undertake this modification on its own? If the mandatory bond requirement, chosen by the state for the valid purpose of protecting judgment creditors, does not offend due process, perhaps federalism is better served by giving the state this information at the outset instead of pushing it toward abandoning its rule. A state court that is overly solicitous of federal due process might unnecessarily cut back on valid and worthwhile state programs. For example, if the federal court had abstained in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the state court might have tried to modify the comprehensive state program for the redistribution of privately held land that the Supreme Court found consistent with federal due process. Id. at 239-44; cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Pressure of this sort results in a state decision resting on state law, albeit influenced by federal law, and hence not reviewable by the Supreme Court and not subject to correction if in fact the state court has misapprehended federal law. The Supreme Court may have sensed this problem since it has limited *Pullman* abstention to the rare case of a seriously ambiguous statute, thereby avoiding its use in the *Pennzoil* case. See text accompanying notes 109-14 infra.

Unlike *Younger* abstention, *Pullman* abstention does not depend on the existence of a pending case in state court.¹⁰⁶ *Younger* abstention rests on the belief that it is better to allow the state court to function separately and trust it to handle an issue of federal law adequately than to intervene to insure a correct decision. In contrast, *Pullman* abstention reflects the federal Court's mistrust of its own capacity to determine state law correctly and is invoked to obtain a state court determination of state law.¹⁰⁷ When a federal court abstains under the *Pullman* doctrine, it is seeking the state Court's expertise in interpreting the state's law, not, as under *Younger*, declining to provide the litigants with the benefit of its own expertise in determining federal law.¹⁰⁸

The Supreme Court has restricted the use of *Pullman* abstention. *1071 Recent cases have emphasized the importance of finding serious ambiguity in the state statutory language.¹⁰⁹ To justify abstention, which is repeatedly called "the exception, not the rule,"¹¹⁰ the federal court must find the challenged state statute "fairly subject to an interpretation which will render the constitutional question unnecessary."¹¹¹ It is not enough that the state court might somehow strain to find a way out of the statute's constitutional infirmities.¹¹² In the words of Justice O'Connor in *Hawaii Housing Authority v. Midkiff*¹¹³:

In the abstract, of course, such possibilities always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that the state courts might render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction."¹¹⁴

The majority of the Court in *Pennzoil* recognized the value of avoiding an unwarranted question of constitutional law when it enumerated its reasons for abstaining under the *Younger* doctrine.¹¹⁵ But the majority would not directly consider the applicability of the *Pullman* argument that *Pennzoil* had raised in the lower federal courts

¹⁰⁶ *Pullman*, 312 U.S. at 501-02. The federal court can refer the case to a state court through a certification process if one is available. See *Virginia v. American Booksellers Assoc.*, 108 S. Ct. 636 (1988).

¹⁰⁷ See *Pullman*, 312 U.S. at 501-02. *Pullman* is needed to remedy the institutional dysfunction presented by the state supreme Courts' inability to review federal court decisions of state law. When the *Younger* doctrine forces a litigant to take a federal question to state court, the United States Supreme Court can ultimately review the state Court's decision of federal law. Thus, *Younger* and *Pullman* represent a consistent policy of presenting a question of law, at some point in the proceedings, to the court that can interpret it authoritatively.

¹⁰⁸ Since *Pullman* requires bringing a new proceeding in state court, it exemplifies not the ideal of separate judicial functioning, but rather the competing ideal favoring locating issues in the forum most equipped to resolve them. See L. Tribe, *supra* note 3, at 195-201 (describing "twin policies" that underlie judicial federalism).

¹⁰⁹ See *Houston v. Hill*, 107 S. Ct. 2502, 2514 (1987); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236-37 (1984).

¹¹⁰ *Midkiff*, 467 U.S. at 236 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)).

¹¹¹ *Id.*; accord *Hill*, 107 S. Ct. at 2512-15.

¹¹² See *Hill*, 107 S. Ct. at 2515 ("A federal court may not properly ask a state court if it would care in effect to rewrite a statute.").

¹¹³ 467 U.S. 229 (1984).

¹¹⁴ *Id.* at 237 (quoting *Zwickler v. Koota*, 389 U.S. 241, 251 & n.14 (1967)). On the question of Justice O'Connor's commitment to a high standard for finding ambiguity, see *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (O'Connor, J., concurring) (ambiguity of the word "lust").

¹¹⁵ *Pennzoil*, 107 S. Ct. at 1525-28; see text accompanying notes 81- 84 *supra*. The same blending of *Younger* and *Pullman* had taken place earlier in *Moore v. Sims*, 442 U.S. 415 (1979). There, in applying *Younger*, the Court wrote:

State courts are the principal expositors of state law. Almost every constitutional challenge ... offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals.

Id. at 429-30.

because *Pennzoil* had, by the time it reached the Supreme Court, abandoned what appeared to be a losing argument.¹¹⁶ In writing about the value of *Younger* *1072 abstention, a majority of the Supreme Court did write that “it is impossible to be certain” that the rule requiring the bond raised constitutional problems,¹¹⁷ and it saw some potential for a state law resolution through the Texas Constitution’s “open Courts” provision.¹¹⁸ But it would be a serious misapprehension of the case law to infer from this mere possibility of a strained interpretation of state law capable of avoiding the constitutional question that the majority would have relied on *Pullman* if *Pennzoil* had only made the argument. According to *Midkiff*, “such possibilities always exist.”¹¹⁹ Nothing in the majority opinion in *Pennzoil* approaches the needed finding that the state law is “obviously susceptible of a limiting construction.”¹²⁰

Justice Blackmun, however, did find *Pullman* applicable. “[O]n the unique facts of *this* case, ‘unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.’”¹²¹ In contrast to Justice O’Connor’s jaded view in *Midkiff* of lawyers’ ability to tease ambiguity out of anything,¹²² Justice Blackmun pointed to the parties’ “extensive briefing” on the meaning of the Texas law as evidence that it must be unclear.¹²³

In blending *Pullman* considerations with its *Younger* analysis, the majority added an intriguing comment: “The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.”¹²⁴ This comment may engender some speculation about whether the majority intended to blur the existing boundaries between the discrete abstention doctrines,¹²⁵ but it is unlikely that the majority *1073 meant to usher in an era of doctrine-shattering with this offhanded comment. In the first place, if the Court no longer viewed the doctrines as distinctly separate, it would not have required that *Pennzoil* separately argue *Pullman* to preserve that ground for relief. Furthermore, there are good reasons to limit the Court’s

¹¹⁶ *Pennzoil*, 107 S. Ct. at 1526 n.9. The lower federal courts had not found the requisite ambiguity in the state law. The district judge pronounced the state law “clear.” *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 260-61 (S.D.N.Y.) (observing that state court had already manifested its inability to find way around bond requirement because it had sought consent from *Pennzoil* to impose stay of requirement), *aff’d in part and rev’d in part*, 784 F.2d 1133 (2d Cir. 1986), *rev’d*, 107 S. Ct. 1519 (1987). The court of appeals found it “crystal clear.” *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1148 (2d Cir. 1986), *rev’d*, 107 S. Ct. 1519 (1987).

¹¹⁷ *Pennzoil*, 107 S. Ct. at 1526.

¹¹⁸ *Id.* For the text of this provision, see note 72 *supra*.

¹¹⁹ *Midkiff*, 467 U.S. at 237.

¹²⁰ *Id.*

¹²¹ *Pennzoil*, 107 S. Ct. at 1535 (Blackmun, J., concurring in the judgment) (quoting *Midkiff*, 467 U.S. at 236).

¹²² See *Midkiff*, 467 U.S. at 237; text accompanying notes 109-14 *supra*.

¹²³ See *Pennzoil*, 107 S. Ct. at 1535 (Blackmun, J., concurring in the judgment). It seems Justice Marshall’s general comment on the *Pennzoil* case is à propos here: “Because a wealthy business corporation has been ordered to pay damages in an amount hitherto unprecedented, and finds its continued survival in doubt, we and the courts below have been presented with arguments of great sophistication and complexity, ... ‘mak[ing] what previously was clear seem doubtful....’” *Id.* at 1534 (Marshall, J., concurring in the judgment) (quoting *Northern Sec. Co. v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting)).

¹²⁴ *Pennzoil*, 107 S. Ct. at 1526 n.9.

¹²⁵ The Court has developed several distinct doctrines – *Pullman*, *Younger*, *Burford*, *Thibodaux*, *Colorado River* – each named after a Supreme Court case that struggled with a particular fact pattern and a nagging feeling that the state was entitled to its separate judicial functioning under the circumstances. See *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496 (1941) (federal courts should abstain from reviewing constitutionality of state commission ruling until state courts construe statute); *Younger v. Harris*, 401 U.S. 37 (1971) (federal court will not enjoin state criminal prosecution except under extraordinary circumstances); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (abstention in deference to complex system of state regulation and need for exclusive state control to achieve coherent policy); *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959) (abstention in diversity case because area of law “intimately involved with sovereign prerogative” of eminent domain); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (abstention because of parallel state procedure and federal statutory policy of avoiding piecemeal litigation).

observation to its context of articulating the *Younger* doctrine. The abstention doctrines are, for the most part, narrowly tailored to suit the needs of the federal system. Only two of the various abstention doctrines, *Younger* and *Pullman*, get much use.¹²⁶ And well-known, clear, and strict limitations that accurately reflect federal interests already constrict *Pullman*.¹²⁷ *Younger* is the abstention doctrine with truly broad application,¹²⁸ the one in need of further explanation. And it is *Younger*, of all the doctrines, that has the capacity to attract an array of federalism considerations. The ability to avoid constitutional questions referred to by the *Pennzoil* majority¹²⁹ ought therefore to be seen as one more attempt to justify the broad-ranging *Younger* abstention doctrine. Since the Court's language should not be interpreted as an attempt to consolidate or blur the various abstention doctrines, let us turn exclusively to the *Younger* doctrine, looking at it through the lens of the *Pennzoil* case. *1074

II. THE SIGNIFICANCE OF *PENNZOIL* IN THE SUPREME COURT'S DEVELOPMENT OF THE STATE INTEREST ANALYSIS OF THE YOUNGER DOCTRINE

A. A "Great Money Case"?

An air of uniqueness surrounds the *Pennzoil* case because of its high stakes and the boldness of the litigation strategies it produced. The notoriety of the case threatens to obscure its doctrinal significance. Was it a one-of-a-kind "great case" – or in Justice Marshall's words, a "great money case" – stigmatized from the outset as "bad law"?¹³⁰

Justice Powell wrote a minimal opinion for the abstention-favoring majority that ignored the unusual circumstances.¹³¹ He went about designing abstention doctrine reasoning in a workmanlike fashion from *Huffman v. Pursue, Ltd.*¹³² and *Juidice v. Vail*.¹³³ That *Huffman* involved only a blow to a tiny business¹³⁴ and *Juidice* an

¹²⁶ See L. Tribe, *supra* note 3, at 196-99.

¹²⁷ See text accompanying notes 102-11 *supra*.

¹²⁸ See L. Tribe, *supra* note 3, at 197. The exceptions to *Younger* are the bad faith or harassment exception and the patently violative exception. See text accompanying notes 225-28 *infra*. Even as early as 1978, Professor Redish was able to write, "[e]xcept for the comparatively narrow exceptions mentioned in *Younger* itself, deference under the doctrine is total in scope." Redish, *supra* note 5, at 477 (citing Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498 (1977)).

¹²⁹ *Pennzoil*, 107 S. Ct. at 1526.

¹³⁰ *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1534 (1987) (Marshall, J., concurring in the judgment) (quoting *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904) (Holmes, J., dissenting)). Justice Holmes wrote: "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." *Northern Securities*, 193 U.S. at 400 (Holmes, J., dissenting). Justice Marshall gave his own twist to Holmes's dictum: "[G]reat sums of money ... make bad law." *Pennzoil*, 107 S. Ct. at 1534 (Marshall, J., concurring in the judgment). It is a good phrase, but it only serves as a criticism of the courts below. None of the Supreme Court Justices seems to have yielded to what Justice Holmes called the "hydraulic pressure" of the "great case" and bent "settled principles of law." *Id.* (quoting *Northern Securities*, 193 U.S. at 401).

¹³¹ See *Pennzoil*, 107 S. Ct. at 1525-29. The minority of Justices who rejected abstention and reached the merits expressed their indignation that a large corporation should claim special procedural rights. See *id.* at 1534 (Marshall, J., concurring in the judgment) ("The principles which would have governed with \$10,000 at stake should also govern when thousands have become billions. That is the essence of equal justice under law."); *id.* at 1538 (Stevens, J., concurring in the judgment) ("The price of even-handed administration of justice is especially high in some cases, but our duty to deal equally with the rich and the poor does not admit of a special exemption for multibillion-dollar corporations or transactions.")

¹³² 420 U.S. 592 (1975) (abstention applied to proceedings brought pursuant to state nuisance statute); see text accompanying notes 140-57 *infra*.

¹³³ 430 U.S. 327 (1977) (abstention applied to civil contempt proceedings); see text accompanying notes 172-91 *infra*.

¹³⁴ *Huffman*, 420 U.S. at 595.

individual's default on a small personal loan¹³⁵ had no apparent impact on the Court's analysis. The brevity of the *Pennzoil* decision might raise questions, but the result reached puts these questions to rest. If the momentous sum of money involved had affected the majority, it would have leaned toward avoiding abstention and reaching the merits, as did three of the concurring *1075 Justices. Nor can one dismiss the case as a procedural decision disguising a view of the merits. If Justices Powell, Rehnquist, White, O'Connor, and Scalia had secretly aimed to deny or cut back due process rights, they could have done so directly and easily by joining the opinion written by Justice Brennan.¹³⁶ To the extent that the majority changed the *Younger* doctrine, federalism, not the amount of money at stake, provided the motivation. It therefore seems fair to conclude that the Supreme Court has handed us a serious exposition of the abstention doctrine. Taking *Pennzoil* seriously, then, this Article considers how much the case has expanded *Younger* and what light this expansion can shed on the state interest analysis that has developed under *Younger*.

B. The Development of the State Interest Analysis

The *Younger* case required the federal courts to abstain from interfering in a criminal proceeding.¹³⁷ In that case, a state criminal defendant sought to convert what would ordinarily be a defense in the criminal case – the argument that the statute underlying his prosecution violated the federal Constitution – into an affirmative claim for relief in federal court.¹³⁸ The state was pursuing its manifestly strong interest in prosecuting a criminal defendant in a single unified proceeding in state court, and the defendant sought to escape from the state system and to move the dispute into federal court on his own terms. One can easily understand the defendant's strategic choice: the move to federal court would isolate the federal issue and thereby draw intense attention to it, enable the defendant to raise the claim in a court known for its understanding and vigorous enforcement of federal rights, and throw the state into a defensive position. One can just as easily see why the move would cause consternation to a Supreme Court concerned about the relationship of comity between state and federal courts.¹³⁹

Over the years the Court gradually expanded the reach of its new doctrine. The first noncriminal abstention case was *Huffman v. Pursue, Ltd.*,¹⁴⁰ a public nuisance action initiated by the sheriff and prosecuting attorney of Allen County, Ohio against the operator of a movie theater.¹⁴¹ The case was based on a state statute that provided for the closing of a place found to be exhibiting obscene films.¹⁴² In state court, the *1076 state officials won a judgment imposing this remedy.¹⁴³ Instead of appealing within the state system, the theater operator, Pursue, Ltd.,¹⁴⁴ filed suit in federal district court and

¹³⁵ *Juidice*, 430 U.S. at 328.

¹³⁶ See note 85 supra.

¹³⁷ *Younger v. Harris*, 401 U.S. 37, 54 (1971).

¹³⁸ *Id.*

¹³⁹ See *id.* at 43-54.

¹⁴⁰ 420 U.S. 592 (1975).

¹⁴¹ *Id.* at 595.

¹⁴² *Id.* at 595-96 (citing Ohio Rev. Code Ann. § 3767.01-99 (1971)).

¹⁴³ *Id.* at 598.

¹⁴⁴ The case was initially brought against Pursue's predecessor, but Pursue succeeded to his interest before the entry of the judgment. *Id.* There was no argument that Pursue's access to the state proceeding was limited in any way because of this change in defendants. *Id.* at 598 n.10.

attacked the constitutionality of the Ohio statute.¹⁴⁵ The district judge, without mentioning the federalism problem entailed in moving from state to federal court, concluded that the closing of the theatre was a prior restraint in violation of the first amendment and therefore enjoined it.¹⁴⁶

On appeal, the Supreme Court¹⁴⁷ distinguished this proceeding, initiated by the state in its “efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws,”¹⁴⁸ from civil litigation between private parties.¹⁴⁹ The nuisance action, with the state as a party and affecting state anti-obscenity interests also enforceable criminally, was “in important respects ... more akin to a criminal prosecution than are most civil cases.”¹⁵⁰

Although the equitable principle against interference in a criminal proceeding on which the *Younger* Court relied¹⁵¹ could not avail the *Huffman* Court, the considerations of federalism that animated *Younger* again presented themselves.¹⁵² As in *Younger*,¹⁵³ the Court used language indicating that its deference to the state court was neither an empty display of respectfulness,¹⁵⁴ nor merely an attempt to let the state carry out its state policies to further its own interests. Rather, it was an ***1077** act undertaken to maximize the state’s effectiveness as an institution capable of serving federal interests.¹⁵⁵ The Court wrote, “interference with a state judicial proceeding prevents the state ... from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections” to state policies.¹⁵⁶ Thus, federal as well as state interests supported the idea of abstention in *Huffman*.¹⁵⁷

Later cases drifted away from *Huffman*’s careful attempt to align a particular civil proceeding with criminal cases. Two 1977 cases, *Juidice v. Vail*¹⁵⁸ and *Trainor v. Hernandez*,¹⁵⁹ made passing references to criminal cases. In *Juidice*, the Court required abstention in deference to a state contempt process because the state’s interest in it was “surely ... important,” though “[p]erhaps ... not quite as important as is the State’s interest

¹⁴⁵ Id. at 598.

¹⁴⁶ Id. at 599.

¹⁴⁷ There was no court of appeals decision since the case was heard on the district court level by a three-judge panel, id., from which appeal was directly to the Supreme Court.

¹⁴⁸ Id. at 605.

¹⁴⁹ Id. at 604-05.

¹⁵⁰ Id. at 604. For a contemporaneous article noting this possible narrow reading of *Huffman*, but expressing concerns about its potential implications, see Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that “Interfere” with State Civil Proceedings*, 29 STAN. L. REV. 27, 48, 62 (1976).

¹⁵¹ See *Younger*, 401 U.S. at 43-45.

¹⁵² *Huffman*, 420 U.S. at 604.

¹⁵³ See *Younger*, 401 U.S. at 37, 44.

¹⁵⁴ *Huffman*, 420 U.S. at 604. There is language in *Huffman* that does betray an empty type of respect: federal interference “can readily be interpreted ‘as reflecting negatively upon the state Court’s ability to enforce constitutional principles.’” 420 U.S. at 604 (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)). I would argue it is not the decorous avoidance of negative reflections on the state judiciary that dictates noninterference, but the effectiveness of noninterference in actually promoting the “state Court’s ability to enforce constitutional principles.” Id.

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ The corollary to this proposition is that the Court ought to answer questions concerning the scope and limits of abstention by reference to both interests. See Althouse, *supra* note 10; text accompanying notes 200-30 *infra*.

¹⁵⁸ 430 U.S. 327 (1977); see text accompanying notes 172-91 *infra*. In *Juidice*, the Court noted that it could engage in the analysis of labeling and merely call the state’s contempt proceeding “quasi-criminal,” but chose instead simply to compare the “offense” of interfering with a contempt proceeding to the “offense” of interfering with a criminal proceeding. It found the offense “every bit as great.” *Juidice*, 430 U.S. at 335-36 (citing *Huffman*, 420 U.S. at 604).

¹⁵⁹ 431 U.S. 434 (1977).

in the enforcement of its criminal laws ... or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman*.”¹⁶⁰ *Trainor*, repeating *Juidice*’s “not quite as important” language, applied *Younger* to an action by a state to recover welfare payments allegedly obtained through fraud.¹⁶¹ Like *Huffman*, *Trainor* found it significant that the state had the alternative of pursuing its interest, this time in “safeguarding the fiscal integrity of its public assistance programs” through the use of criminal sanctions and had chosen a less drastic civil remedy.¹⁶²

In *Moore v. Sims*,¹⁶³ decided two years later, the Court, applying *Younger* to a state-initiated proceeding to terminate parental rights, broke away from comparisons to criminal proceedings entirely, simply announcing (while purporting merely to restate *Huffman*) that the “threat to our federal system posed by displacement of state courts by those of the National Government ... is also fully applicable to civil *1078 proceedings in which important state interests are involved.”¹⁶⁴

After *Sims*, the Court’s analysis degenerated into brief and successful searches for the “important state interest.” For instance, in *Middlesex County Ethics Committee v. Garden State Bar Association*,¹⁶⁵ the Court found “an extremely important interest in maintaining and assuring the professional conduct of the attorneys the state licenses”¹⁶⁶ and extended *Younger* to attorney disciplinary proceedings brought by the state.¹⁶⁷ In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,¹⁶⁸ the Court’s most recent *Younger* case before *Pennzoil*, the Court looked for “a sufficiently important state interest” before applying abstention to state administrative agency proceedings brought to enforce state prohibitions on sex discrimination.¹⁶⁹ Without elaboration, the Court expressed “no doubt” that such an interest was present.¹⁷⁰

It is interesting that as the Court has pushed *Younger*’s boundaries to what seem like further and further extremes, it has found it easier and easier to conclude that abstention is required. The next section of the Article considers the use of state interest analysis in *Pennzoil*, showing how it represents an extension of the *Younger* doctrine even beyond the *Juidice* case it purported to find “controlling.” In Part III, the Article suggests that there is a sound basis for the Court to have struggled less and less with *Younger* when forcing it into areas where the state’s interest seems much lower than in criminal cases: state interest is simply not the appropriate test for abstention.¹⁷¹

¹⁶⁰ *Juidice*, 430 U.S. at 335 (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

¹⁶¹ *Trainor*, 431 U.S. at 444.

¹⁶² *Id.* In his opinion, Justice Blackmun emphasized this alternative, writing that “[t]he propriety of abstention should not depend on the State’s choice to vindicate its interests by a less drastic, and perhaps more lenient, route.” *Id.* at 449-50 (Blackmun, J., concurring in the judgment).

¹⁶³ 442 U.S. 415 (1979).

¹⁶⁴ *Id.* at 423.

¹⁶⁵ 457 U.S. 423 (1982).

¹⁶⁶ *Id.* at 434.

¹⁶⁷ *Id.*

¹⁶⁸ 477 U.S. 619 (1986).

¹⁶⁹ *Id.* at 628.

¹⁷⁰ *Id.* The federal plaintiff, a Christian-affiliated school, had challenged the state procedure itself as a violation of the Establishment Clause. The alleged victim of the discrimination was a teacher dismissed based on the school’s “religious doctrine that mothers should stay home with their preschool age children.” The teacher had agreed to “internal resolution of disputes” as part of a religious belief that “one Christian should not take another Christian into courts of the State.” *Id.* at 622-23.

¹⁷¹ See text accompanying notes 199-219 *infra*.

C. The Application of State Interest Analysis in *Pennzoil*

In deciding to apply *Younger* abstention to *Pennzoil*, the Supreme Court declared that *Juidice v. Vail* was controlling.¹⁷² In contrast to *1079 *Pennzoil*, *Juidice* was the very opposite of the “great money” case,¹⁷³ but *Juidice*, like *Pennzoil*, and unlike all of the other Supreme Court *Younger* cases, began as a state court lawsuit between two private parties. Thus, to understand how the Court’s search for the state interest could lead to abstention in such cases, we need to examine *Juidice* more closely.

Juidice involved a debtor, Harry Vail, Jr., who had defaulted on a personal loan.¹⁷⁴ His creditor, the Public Loan Co., sued him in city court and won a default judgment for \$534.¹⁷⁵ Vail failed to pay the judgment, and the creditor’s attorney, acting as an officer of the court under a provision of state law,¹⁷⁶ served him with a subpoena ordering him to appear (at the attorney’s office) and give information about this nonpayment.¹⁷⁷ Despite the warning in the subpoena that failure to appear would be “punishable as contempt of court,” Vail did not appear.¹⁷⁸ About two months later, Justice Juidice, of the Dutchess County Court in New York, ordered Vail to appear and show cause why he should not be held in contempt and, upon this next failure to appear, held him in contempt, which meant the imposition of a \$250 fine.¹⁷⁹ Upon Vail’s failure to pay the fine, Justice Juidice signed the *ex parte* order that led to Vail’s arrest and imprisonment.¹⁸⁰ Vail then obtained his release by paying the fine.¹⁸¹ After having spent nine months ignoring the authority of the state court, Vail became a named plaintiff in a federal class action lawsuit challenging the constitutionality of New York’s collection procedures.¹⁸²

The *Juidice* Court recognized that all prior applications of the *Younger* doctrine to civil cases occurred in actions that closely resembled criminal proceedings, like the action for abatement of nuisance in *Huffman v. Pursue, Ltd.*¹⁸³ But the Court chose to avoid the analysis of *1080 labeling: it declined to discuss the contempt process in terms of whether it was quasi-criminal.¹⁸⁴ Instead, the Court supported its application of

¹⁷² See *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1527 (1987). The majority held that:
The reasoning of *Juidice* controls here. That case rests on the importance to the States of enforcing the orders and judgments of their courts. There is little difference between the State’s interests in forcing persons to transfer property in response to a Court’s judgment and in forcing persons to respond to the Court’s process on pain of contempt.

Id.

¹⁷³ See notes 131-35 and accompanying text supra.

¹⁷⁴ *Juidice v. Vail*, 430 U.S. 327, 329 (1977).

¹⁷⁵ Id.

¹⁷⁶ Id. at 329 & n.2 (citing N.Y. Civ. Prac. L. & R. §§ 5223- 5224 (McKinney 1963), N.Y. Civ. Prac. L. & R. § 2308(a) (McKinney 1974)).

¹⁷⁷ Id. at 329.

¹⁷⁸ Id. (citing N.Y. Civ. Prac. L. & R. § 5223 (McKinney 1963)).

¹⁷⁹ Id. at 329.

¹⁸⁰ Id.

¹⁸¹ Id.

¹⁸² Id. Unlike *Texaco*, Vail was not a sophisticated litigant deliberately turning his back on the state to seek relief in federal court. He was simply a private debtor, not in the habit of using the courts at all, whose creditor had subjected him to a series of state procedures that subsequently fell under attack in a federal class action that he agreed to join. See id. at 329-31. In fact, since Vail had obtained his release from prison by paying the fine, and since he alleged no threat of further or repeated proceedings, he lacked standing because he had no redressable injury. Id. at 332-33. However, because two of the named plaintiffs remained in prison, there was standing to pursue the class action. Id.

¹⁸³ See id. at 333-34 (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975)).

¹⁸⁴ See id. at 335-36.

Younger with a brief indication that the contempt process was important to the state as a means of “vindicat[ing] the regular operation of its judicial system.”¹⁸⁵

How close was *Juidice* to *Pennzoil*? A majority of the Court believed *Juidice* close enough to control the dispute in *Pennzoil*.¹⁸⁶ Although *Juidice* arose as a private dispute between a debtor and creditor, the federal court lawsuit named the state court judge who issued the contempt order as defendant. In *Pennzoil*, the federal injunction would have run against Pennzoil, barring it from seeking to enforce the judgment.¹⁸⁷ The district court through *Younger* inapplicable because the injunction sought would not “interfere with a state official’s pursuit of a fundamental state interest.”¹⁸⁸ In *Juidice*, the state had provided private creditors with collection procedures to be followed, backed up by the coercive power of state courts if necessary. The private creditor had invoked those procedures for its own benefit and therefore the state’s interest in the creditor’s receiving its money was no greater than the state’s interest in any private litigant enforcing any right in any lawsuit. However, once the state judge, Juidice, had acted pursuant to her available contempt powers, the debtor sought relief against the judge. It is this additional fact that stands out in *Juidice*; the federal plaintiff sought to interfere with a state judge engaged in the process of exercising the contempt power, the power “at the core”¹⁸⁹ of all the Court’s powers. The *1081 contempt power is the “weapon used directly by the state courts to protect their authority.”¹⁹⁰ It is in this ability to wield the contempt power – for whatever reason – not the protection of the private creditor’s ability to collect its judgment, that the state held a strong interest.¹⁹¹

In *Pennzoil*, however, no state official was engaged in an activity invested with a state interest. A private party, Pennzoil, possessed a judgment. Its interest in enforcing the judgment was private. The fact that state law provided the means for enforcement and that the private creditor would rely upon the minor involvement of state agents does not alter the nature of the dispute.¹⁹² Another private party, Texaco, for its own private interests, sought to delay enforcement, using various theories of state and federal law. The federal suit was thus between two private parties over a matter in which the state had

¹⁸⁵ Id. at 335. Following standard *Younger* analysis, see text accompanying notes 65-80 supra, the Court provided that failure of the state system to offer the would-be federal plaintiff an opportunity to raise the federal claim in state court would preclude abstention. *Juidice*, 430 U.S. at 337. Thus, although mouthing concern for state interests, the immediate acknowledgement of an “inadequacy” escape reveals a further concern for federal interests, interests that are served some (though not all) of the time by the availability of state courts as federal law-enforcing institutions.

¹⁸⁶ See *Pennzoil*, 107 S. Ct. at 1527; text accompanying notes 60-61 supra.

¹⁸⁷ This aspect of the litigation raised some question as to whether Pennzoil’s imminent acts to enforce the judgment even fell within the terms of § 1983, which requires an action under color of law. See *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1145-47 (2d Cir. 1986), rev’d, 107 S. Ct. 1519 (1987). Note how the color of law requirement of § 1983 ultimately limits *Younger*’s extension into civil litigation. Unless a case fits within § 1983, the Anti-Injunction Act will bar the lawsuit. See notes 200-12 and accompanying text infra. Still, there are very few, if any, cases seeking to enjoin state proceedings that can be heard in federal court, because the Anti-Injunction Act takes up almost exactly where the *Younger* doctrine leaves off. Thus, the only cases attempting to enjoin state proceedings that a federal court may hear are those where there is state action but insufficient state interest. After *Pennzoil*, this is a very narrow category.

¹⁸⁸ *Pennzoil*, 107 S. Ct. at 1524 (quoting *Texaco, Inc. v. Pennzoil Co.*, 626 F. Supp. 250, 260 (S.D.N.Y. 1986)).

¹⁸⁹ *Juidice v. Vail*, 430 U.S. 327, 335 (1977).

¹⁹⁰ *Texaco*, 748 F.2d at 1151 (distinguishing *Juidice*).

¹⁹¹ The dissenting opinion in *Juidice*, written by Justice Brennan, saw the majority’s holding as a major extension of *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Brennan pointed to both the absence of a state party in the underlying state court suit and the lack of state interest in private debt collection. *Juidice*, 430 U.S. at 341 (Brennan, J., dissenting). He saw the majority’s reliance on the state interest in its contempt power as a mere “cover[] for the ultimate goal of denying § 1983 plaintiffs the federal forum in any case, civil or criminal, when a pending state proceeding may hear the plaintiff’s federal claims.” Id. at 344-45 (footnote omitted). If Justice Brennan’s understanding of *Juidice* was accurate, then *Pennzoil* is not a ground-breaking case, but merely one more step delaying “formal announcement” that *Younger* applies to all civil litigation.

¹⁹² See *Texaco*, 784 F.2d at 1145-46.

not become involved.¹⁹³ Although certain actions to enforce the judgment, if taken by Pennzoil, would have involved a minor state official, there was nothing approaching the level of state interest found in a criminal proceeding initiated by the state.¹⁹⁴ Federal court interference in *Pennzoil* would have posed no serious threat to any ongoing process initiated by the state in the pursuit of its strong interests. *1082

One might question whether the state had a strong interest in protecting Pennzoil's ability to enforce its judgment. However, one might just as well ask whether providing a means to forestall collection on that judgment pending the appeal showed an interest in protecting judgment debtors.¹⁹⁵ The state's interest seems to have been fairly neutral, as the state itself maintained before the Second Circuit.¹⁹⁶ The state provided various legal rights to private parties and held its courts open as a means of enforcement. The state's only "interest" was in permitting both parties to exercise those rights. There is no reason to think that the state had any more interest in protecting the financial security of a judgment creditor pending an appeal than in making it possible for a party who has lost at trial to exercise its right to appeal before it must pay a judgment. The state's role was limited to providing a judicial forum for the two private parties to use in resolving their dispute.

In keeping with the perfunctory state interest analysis that has characterized the Court's recent *Younger* cases, the *Pennzoil* Court did nothing more than make the bare announcement that "the States have important interests in administering certain aspects of their judicial systems."¹⁹⁷ The Court relied on a tenuous analogy to a case, *Juidice*, that itself had stretched the state interest analysis to the point where it had lost almost all meaning. In so doing, the Court made a rather dramatic new extension of *Younger*,

¹⁹³ A situation more closely analogous to *Juidice* might have been presented if Texaco had attempted to file an appeal in state court without posting the required bond and then sued the state official who refused to process the appeal without the bond. Then, at least, a state party would have been named as the federal defendant. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434-35 (1982) (state's interest demonstrated by naming state official as defendant in the federal complaint); *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977) (responding to district Court's attempt to depreciate state's interest based on state's use of procedure also available to private parties, observing "the fact remains that the State was a party"). But *Juidice* and *Pennzoil* would still differ in important ways. Not only is an injunction directed at a state judge plainly more offensive and intrusive to the state's central functions, but a state judge is in a position to hear the federal challenges that have been taken to federal court in contrast to an appellate court clerk who could hardly have adjudicated a federal constitutional claim as part of his decision whether to accept the appeal. Deference to such an official would resemble the kind of deference discussed and criticized at text accompanying notes 229-30 *infra*.

¹⁹⁴ Cf. *Steffel v. Thompson*, 415 U.S. 452, 460-62 (1974) (*Younger* inapplicable where state procedure to be enjoined had yet to commence).

¹⁹⁵ The abstention in *Pennzoil* would permit the state system to delineate the scope of this apparent interest in the debtor. It was almost as if Texaco feared having Texas, which created the right, interpret it. Perhaps Texaco believed that a state court might not interpret the right as broadly as might an independent federal judge, who was less grounded in the local interests and political feelings that gave rise to the law. Viewed in this manner, *Pennzoil* is comparable to *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), a case in which the Supreme Court tailored the law of sovereign immunity to avoid federal court interpretation of state law claims, forcing the claims to be heard by a court that could interpret them authoritatively. The persons given the rights under state law did not trust the same state, through its courts, to interpret that law, and hoped, perhaps, for a more generous interpretation and application of the law in federal court. The idea that the federal court was aiding the state in furthering the interest expressed in its statute by interpreting it was, understandably, rejected. See Althouse, *supra* note 10, at 1521-24 (discussing *Pennhurst*); Dwyer, *Pendent Jurisdiction and the Eleventh Amendment*, 75 CALIF. L. REV. 129 (1987) (finding federal interpretation of state law more troubling in cases aimed at reforming state institutions than in noninstitutional cases). Compare *Pennhurst*, 465 U.S. at 106 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.") with *id.* at 151 (Stevens, J., dissenting) ("The issuance of injunctive relief which enforces state laws and policies, if anything, enhances federal Courts' respect for the sovereign prerogatives of the states.").

¹⁹⁶ See note 8 and accompanying text *supra*.

¹⁹⁷ *Pennzoil*, 107 S. Ct. at 1527.

applying it to a case with no state official as defendant, where the state's interest was so insignificant that the state itself disclaimed it.¹⁹⁸ *1083

III. REJECTING STATE INTEREST ANALYSIS IN RECOGNITION OF THE FEDERAL INTEREST STANDARD GOVERNING *YOUNGER* ABSTENTION

A. The Inverse Relationship Between State Interest and the Concerns Underlying *Younger* Abstention

Texaco's complaint in federal court focused on its inability to post the required bond and thus to qualify for the stay the state had made available to debtors. Essentially, Texaco's complaint expressed its concern that the state was not interested enough in its problems. It did not contain the assertion that is usually made in *Younger* cases: that the state was so involved in pursuing its own policies that it might fail to give sufficient attention to federal issues. This omission raises an important point. Ordinarily, *Younger* abstention occurs when the state is quite interested in the proceeding. It is this fear of the state's self-interest that propels state court defendants into federal court, where they hope to find a more vigorous enforcement of their federal rights. And, ironically, under the Court's current method of analysis, it is that very state interest that commands the deference of abstention.

Instead of seeing *Pennzoil*, which presents by far the weakest state interest, as the very outer boundary of abstention, we should perhaps view it as the most appropriate case for abstention. After all, when federal courts abstain under *Younger*, they do so in deference to a pending proceeding conducted by state judges,¹⁹⁹ and they trust those judges to enforce federal law under the supremacy clause. When the state has initiated *1084 a particular proceeding and is using it in the pursuit of some pressing state policy, it is easy to ascertain the requisite "strong state interest." But for that very reason it is much more difficult in those cases to rely on the state courts and their willingness to uphold the policies of federal law. Trust logically ought to follow in proportion to disinterest. That it has not indicates that state interest in the underlying proceeding does not really, and should not, determine when *Younger* abstention is appropriate.

¹⁹⁸ See *id.* at 1534 (Blackmun, J., concurring in the judgment) (district court was correct not to abstain because "to rule otherwise would expand the *Younger* doctrine to an unprecedented extent and would effectively allow the invocation of *Younger* abstention whenever any state proceeding is ongoing, no matter how attenuated the State's interests are in that proceeding....").

¹⁹⁹ It should be noted that in some of the *Younger* cases, the proceeding deferred to may be less substantial than a state court case presided over by a state judge. In *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), the Court required deference to a local Ethics and Grievance Committee, which acted as an "arm of the [New Jersey Supreme Court] in performing the function of receiving and investigating complaints and holding hearings," *id.* at 433. The Court noted that the New Jersey court regarded its bar disciplinary proceedings as "judicial in nature" and thus deserving of deference. *Id.* at 433-34; see also *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (deference to pending state administrative proceedings). It should also be noted that there is a separate issue as to whether the proceedings deferred to offer an adequate opportunity to raise the federal issues. See text accompanying notes 65-80 *supra*. There are several highly problematic cases that seem to require deference to state officials who do not in any way resemble judges and can offer no opportunity at all to adjudicate federal issues. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (deference to state police department policies); *Rizzo v. Goode*, 423 U.S. 362 (1976) (same); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (deference to state attorneys and judges). These cases are discussed at notes 229-30 and accompanying text *infra*.

B. The Superiority of Federal Interest Analysis

If the central role of the federal courts is to interpose themselves between the states and the people,²⁰⁰ then they are least needed when there is no action taken by the state that threatens any person.²⁰¹ When litigants abandon state court and bring complaints against private entities in federal court, they must strain to meet the “under color of law” requirement needed to use section 1983.²⁰² If they are unable to use section 1983, the Anti-Injunction Act²⁰³ flatly bars the action to enjoin a state proceeding.²⁰⁴

Mitchum v. Foster,²⁰⁵ so often cited for the proposition that section 1983 was intended to “interpose the federal courts between the states and the people as guardians of the people’s federal rights,”²⁰⁶ holds that section 1983 is an exception to the Anti-Injunction Act. The Act expresses a general rule against federal court interference with state court proceedings, without regard to whether the proceedings exist to further any important state interests. The *Mitchum* Court carved out an exception to that general rule – in fact, it stretched to find section 1983 an “expressly authorized exception” – because it recognized that the state courts themselves are capable of participating in the violation of federal rights.²⁰⁷ It concluded that the drafters of section 1983 thought state courts could “harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federal protected rights.”²⁰⁸ Whether its drafters **1085* really did intend section 1983 to operate as an exception to the Anti-Injunction Act is subject to dispute.²⁰⁹ But it is clear that *Mitchum* exemplifies jurisdictional line drawing in response to the needs of the federal system. The judicial system malfunctions when a state court violates the federal rights of a litigant and that litigant is denied recourse to federal courts. Closing the federal forum relegates the litigants to the very state court that they allege is depriving them of their federal rights. If state courts are capable of violating civil rights, as Congress found in creating section 1983, a flat bar to injunctions is intolerable.

The abstention doctrine does not necessarily contradict the kind of federal interest-oriented interpretation seen in *Mitchum*. Although federal interests may make a flat bar to federal intervention in state court proceedings intolerable, it does not necessarily follow that unfettered intervention would serve the federal interest even better. Federal interests are served efficiently and well when state courts handle federal defenses in stride, as envisioned under the supremacy clause. To accept abstention, we need not embrace a state interest form of analysis, because federal interests also support abstention, at least in circumstances where state courts serve as reliable enforcers of federal law.

²⁰⁰ See *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

²⁰¹ For the contrary view that the state’s interest should be a major consideration in whether to keep the case in state courts, see Bartels, *supra* note 150, at 76-79.

²⁰² 28 U.S.C. § 1983 (1982).

²⁰³ 28 U.S.C. § 2283 (1982).

²⁰⁴ *Mitchum v. Foster*, 407 U.S. 225 (1972) (finding § 1983 within “expressly authorized” exceptions to Act).

²⁰⁵ 407 U.S. 225 (1972).

²⁰⁶ *Id.* at 242.

²⁰⁷ *Id.* at 242-43.

²⁰⁸ *Id.* at 240. For an in-depth discussion of the relevant legislative history of § 1983, see Nichol, *Federalism, State Courts, and Section 1983*, 73 VA. L. REV. 959 (1987).

²⁰⁹ See Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 329 (1978); Nichol, *supra* note 208, at 1000 n.205; Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 733-39 (1977).

From this vantage point, *Mitchum* and *Younger* do not conflict.²¹⁰ Indeed, *Mitchum* placed itself in a legal context alongside abstention. Despite its broad pronouncements about the importance of the federal courts in vindicating federal rights, the *Mitchum* court explicitly approved *Younger*, renouncing any intent to “question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding.”²¹¹ And *Younger* perceived a national interest in leaving the states “to perform their separate functions in their separate ways.”²¹² *Mitchum* and *Younger* share a single vision of federalism, designed in accordance with the capacity of state courts to work for or against the federal interests.

The bulk of the *Younger* progeny, with its talk of state interests, seems to succumb to the “blind deference to ‘States’ Rights’” that Justice Black condemned in *Younger*.²¹³ The cursory declarations that *1086 “Yes, the state has a strong interest here,” with no mention of the significance of the federal rights asserted, understandably rankles.²¹⁴ An abstention doctrine articulated in terms of state interest seems to have broken loose from its moorings, to use Justice Stevens’s *Pennzoil* image.²¹⁵ It is not surprising that many commentators cringe at the Court’s invocation of the word “Federalism.”²¹⁶ The way the cases use it seems to justify turning away from the enforcement of federal rights without pausing to engage in any analysis at all.²¹⁷ Yet even those who question the current Court’s reliance on notions of federalism look favorably on the states when they function to protect and enforce individual rights.²¹⁸

There are distinct advantages to having a parallel system of courts working alongside the federal courts and furthering the interests expressed in federal law. State courts are in a better position to control violations of federal rights presented in their own proceedings, as long as they do not perpetuate violations. Moreover, they may, at least in some states and during some periods of history, surpass the federal courts in protecting individual rights, both by vigorously enforcing federal law and by developing state law alternatives.²¹⁹ *Younger* abstention can encourage and preserve the vitality of state courts in anticipation of a time when the federal courts may fall short in protecting the values embodied in the federal Constitution.

²¹⁰ But see Nichol, *supra* note 208, at 964-71 (deference toward state courts that *Younger* imposes on § 1983 litigants cannot be reconciled with language of *Mitchum*).

²¹¹ *Mitchum*, 407 U.S. at 243. For a discussion of the way *Younger* anticipated *Mitchum* and *Mitchum* then relied on *Younger*, see Whitten, *supra* note 51, at 672-75.

²¹² *Younger v. Harris*, 401 U.S. 37, 44 (1971).

²¹³ *Id.* For a criticism of basing *Younger* doctrine on this kind of avoidance of affront to state courts, see Redish, *supra* note 5, at 482-84; Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 687-89 (1987).

²¹⁴ See, e.g., Soifer & Macgill, *supra* note 80; Ziegler, *supra* note 213.

²¹⁵ *Pennzoil*, 107 S. Ct. at 1535, 1536 (1987) (Stevens, J., concurring in the judgment). For a discussion suggesting the unsoundness of state interest analysis, see Comment, *supra* note 29.

²¹⁶ See, e.g., Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1425 (1987) (“Victims of government-sponsored lawlessness have come to dread the word ‘federalism.’ Whether emblazoned on the simple banner of ‘Our Federalism’ or invoked in some grander phrase, the word is now regularly deployed to thwart full remedies for violations of constitutional rights.”).

²¹⁷ See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983); *Rizzo v. Goode*, 423 U.S. 362, 379 (1976).

²¹⁸ See, e.g., Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). One should remember that Justice Brennan concurred in the judgment in *Younger*, noting that the federal plaintiff failed to allege that the state’s charges against him were brought in bad faith and that the state court could have handled his constitutional contentions. *Younger*, 401 U.S. at 56-57 (Brennan, J., concurring in the result).

²¹⁹ See S. Fino, *THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM* (1987); Nichol, *Dialectical Federalism: A Tribute to the West Virginia Supreme Court of Appeals*, 90 W. VA. L. REV. 91 (1987); see also Hagan, *Patterns of Activism in State Supreme Courts*, 18 PUBLIUS 97 (1988) (analyzing state judicial activism vis-à-vis other state actors).

C. Applying Federal Interest Analysis to Existing *Younger* Doctrine

Federal interest analysis generates an ideal of abstention in deference to pending state court proceedings when to do so will result in speedy attention to federal defenses, increased familiarity with federal **1087* law and expertise in handling it, and greater responsiveness by state courts in vindicating federal rights. Abstention simply to avoid interference when it appears that the state cannot or will not produce these results runs counter to this ideal. The following discussion illustrates that the Supreme Court's current doctrine already reflects an intuition, though rarely any explicit acknowledgement, of this ideal. Much of the existing doctrine gains coherence when placed in the context of federal interests in the separate functioning of the states. The principle of federal interest also provides a means for criticizing or fine tuning some aspects of the *Younger* doctrine.

Federal interest analysis explains the rapid and easy extension of *Younger* into areas of slight state interest. As described above, states are most trustworthy when the requisites of federal law present no serious conflict with state policy.²²⁰ It is obviously difficult to trust a state court to give full play to, say, the federal guarantee of freedom of expression when it runs against an explicit state regulation of speech, enforceable criminally, as was the case in *Younger*. It is much easier to trust a state court to determine whether federal due process provides a reason to excuse one private litigant from posting a supersedeas bond, when the counter-interest is only another private litigant's loss of security pending an appeal, as was the case in *Pennzoil*.

Federal interest analysis will not clarify all jurisdictional lines. In a different context, while delineating the outer boundaries of general federal question jurisdiction,²²¹ Justice Stevens, writing for a majority of the Court, suggested that federal interests were determinative.²²² Justice Brennan responded in his dissent that federal interest analysis was so "infinitely malleable" that it could justify "virtually any set of results."²²³ Federal interest analysis is not suggested here as a panacea. Rather, it is offered as an accurate and satisfying description of what has motivated **1088* the Court's varying jurisdictional doctrines developed over the years. Openly employing federal interest analysis will not end all controversy, but it will tend to ensure that judges engage in the most sensible and realistic jurisdictional controversy. Judicial minds will undoubtedly differ when asked in a particular circumstance whether federal interests are better served through federal court jurisdiction or by trusting the states and encouraging them to become reliable enforcers of federal law.

²²⁰ See text accompanying note 199 supra.

²²¹ 28 U.S.C. § 1331 (1982).

²²² *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986). There has long existed an immense amount of uncertainty about which cases that present state law causes of action but involve elements of federal law fall within the federal Courts' federal question jurisdiction. *Id.* at 814-16. Justice Stevens harmonized cases like *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (jurisdiction existed over state law causes of action presenting federal issue of constitutionality of federal farm bond program) and *Moore v. Chesapeake & Ohio Ry.*, 291 U.S. 205 (1934) (jurisdiction did not exist over state law cause of action incorporating federal safety standard as element of state tort liability), by noting the difference in the federal interest in the respective cases.

²²³ *Merrell Dow Pharmaceuticals*, 478 U.S. at 822 n.1 (Brennan, J., dissenting). Justice Brennan's criticism, however, itself relies on a federal interest in avoiding ad hoc analysis of the strength of federal interests in particular cases and the uncertainty such an approach injects into the important threshold inquiry into subject matter jurisdiction. He would simply apply § 1331 to all cases presenting a federal question that is an essential element of the plaintiff's cause of action. *Id.* at 820.

The *Younger* case itself presented this difficult choice. Leaving the criminal defendant in *Younger* to state court enforcement of his alleged first amendment rights probably did place his rights at risk. Since this risk undoubtedly impaired federal interests, it is not difficult to understand why some would prefer federal court intervention. Justice Douglas expressed this preference when he dissented in *Younger*.²²⁴ Yet, the majority of the Court chose deference, a result that federal interest factors can also justify. If the state court properly enforces federal law, a great deal of time and confusion is saved. Moreover, the state gains expertise in incorporating the enforcement of federal law into its ordinary proceedings, a gain that will further federal interests in the future. If the state errs, Supreme Court review and, in criminal cases, federal habeas corpus relief are available. The crucial question is whether, when it is not yet known if the state will err, federal interests are better served by stopping the state before it has the opportunity either to fail or to succeed, or by giving the state that opportunity, subject to correction after the fact. Long-term federal interests in promoting a strong and capable parallel system of courts justify the latter choice, abstention; even though short-term concern for individual federal claimants points in the opposite direction.

The cases following *Younger* presented much easier questions in terms of federal interest, even though they presented more difficult state interest questions. As the state interest dwindled, the risk to countervailing federal rights decreased, and the advantages of having a state court handle federal law grew. As for *Pennzoil*, once we abandon the task of searching for a strong state interest to justify abstention and recognize the federal interest in the separate functioning of the state courts, the application of *Younger* to the enforcement of judgments becomes almost automatic.

The exceptions to abstention under the current case law for the most part reflect judicial intuition about what is ultimately in the federal interest. The classic instance of nonabstention occurred in *Dombrowski v. Pfister*.²²⁵ There, the federal plaintiffs alleged that state prosecutors had *1089 embarked on a plan to harass the plaintiffs with improper searches and threats of prosecution intended to discourage them from engaging in their civil rights work. Since the state could achieve its goal without fully pursuing litigation in state court, it made sense to refuse to abstain because the state court would never receive the opportunity to address the federal claims presented. Deference would immunize a state that abused federal rights and offered no potential forum to vindicate them. Federal courts will also issue injunctions if there is no state proceeding pending,²²⁶ if the pending procedure excludes the opportunity to raise the federal claims,²²⁷ or if state adjudicators are disqualified by proven bias.²²⁸ These doctrinal variations are all justified because the state court is not in a position to perform its supremacy clause duties.

²²⁴ *Younger v. Harris*, 401 U.S. 37, 58 (1971) (Douglas, J., dissenting).

²²⁵ 380 U.S. 479 (1965).

²²⁶ See *Steffel v. Thompson*, 415 U.S. 452 (1974). Indeed, *Dombrowski* itself can be explained as a “no pending state proceeding” case. See Weinberg, *supra* note 12, at 1206-07 (1977). It is more problematic if the state criminal proceeding begins prior to any “proceedings of substance on the merits” in the federal case. Under *Hicks v. Miranda*, 422 U.S. 332 (1975), the federal court should abstain in such a case. This accords with federal interest analysis if one considers that once the state Court’s jurisdiction is invoked, that court is in a position to produce results favorable to the federal interest. There is, however, some room to question that result, in that a policy of abstention upon institution of the state proceeding may encourage the state to bring criminal proceedings in state court against a federal claimant, in order to avoid federal intervention.

²²⁷ *Trainor v. Hernandez*, 431 U.S. 434 (1977).

²²⁸ See *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). In *Gibson*, the Court found abstention inappropriate, upholding the district Court’s finding of bias on the part of the Alabama Board of Optometry, the state administrative body to whose proceedings it would have deferred. The federal plaintiffs were optometrists who practiced in business corporations and they alleged that the board

The current *Younger* doctrine utterly fails to reflect an understanding of the state's functional role in promoting federal interests in a line of cases exemplified by *Rizzo v. Goode*.²²⁹ These cases have employed *Younger* abstention in deference to state institutions completely lacking in judicial character. In *Rizzo*, for example, the Court suggested that *Younger* would bar equitable relief directed at changing procedures for dealing with allegedly pervasive police brutality within a city police department. But abstention serves absolutely no federal interest in the absence of a pending state proceeding capable of considering the claims raised in federal court. In *Rizzo*, the federal courts deferred to a state institution that offered no mechanism for litigating the question of whether current police procedures violated the federal Constitution or *1090 for providing appropriate remedies. This kind of deference depends on the "states' rights" formulation of federalism that federal interest analysis will not support.²³⁰

CONCLUSION

The Supreme Court's decision in *Pennzoil* felt right; without looking at the technicalities of abstention doctrine, one would intuitively sense that Texaco's flight from the Texas state court system to a New York federal court offended federalism values. Yet, instead of falling squarely within the scope of the *Younger* doctrine as it had evolved in its decade and a half existence, *Pennzoil* appeared to stake out new territory. How could the case that seemed most wrongly transplanted to federal court have expanded the scope of abstention, when earlier cases had often seemed to be disturbing denials of access to the federal forum?

This Article has argued that the Supreme Court has simply lost track of the original purpose behind the *Younger* abstention doctrine. *Younger* itself suggests a federal interest model that subsequent cases have overlooked in favor of a state interest model. Given the supremacy of federal law and the role of the federal courts in protecting federal rights, the state interest model has long been a puzzling inversion of the intended order of preference. One must hope that *Pennzoil v. Texaco*, in which the Court abstained in virtually the complete absence of state interest, will lead to a rediscovery of the original justification for *Younger* abstention – maximizing federal law enforcement through the effective and efficient use of our parallel judicial systems.

members, all optometrists practicing privately, had the goal of revoking the licenses of all optometrists employed by business corporations. *Id.* at 578-79. The Court saw the Board members as biased because of their "substantial pecuniary interest in the legal proceedings." *Id.* at 579.

²²⁹ 423 U.S. 362 (1976). The other cases in this line are *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-13 (1983) (refusal to issue injunction preventing police department from using chokeholds) and *O'Shea v. Littleton*, 414 U.S. 488, 499-502 (1974) (denying propriety of issuing injunction proscribing future constitutional violations by state attorneys and judge).

²³⁰ For a more detailed discussion of the *Rizzo* problem, see L. Tribe, *supra* note 3, at 207-08; Althouse, *supra* note 10, at 1528-31; Redish, *supra* note 5, at 470-71; Weinberg, *supra* note 12, at 1216-27.