Michigan Law Review

Volume 88 | Issue 3

1989

A Revisionist Theory of Abstention

Barry Friedman
Vanderbilt University

A REVISIONIST THEORY OF ABSTENTION†

*Barry Friedman**

There is a widespread perception that the forum of litigation may be as outcome-determinative as the underlying merits.[1] This perception accounts for the importance of the abstention doctrines.[2] In ab-

* Associate Professor of Law, Vanderbilt University. A.B. 1978, University of Chicago; J.D. 1982, Georgetown University. — Ed. I would like to thank Bob Belton, Jim Blumstein, Jon Charney, Michael Collins, Tom McCoy, Marty Redish, Gerry Spann, Michael Wells, Larry Yackle, and Nick Zeppos for their thoughtful review of an earlier draft of this article. I am indebted to Burns Newsome, Jon Pittman, and Amy Stutz for untiring research assistance.

1. *See, e.g.*, Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 112 (1984) [hereinafter Redish, *Separation of Powers*] ("The Supreme Court has recognized the important interrelations between congressional jurisdictional allocations and substantive congressional programs . . . ."); Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 325 (1988) [hereinafter Wells, *Disparity*] (discussing rules allocating cases between federal and state courts, and asserting, "[t]he Realists taught, and virtually everyone now acknowledges, that the rules of procedure . . . have a major impact on how the substantive principles of law operate in practice") (citation omitted); Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665, 666 (1987) [hereinafter Zeigler, *Rights Require Remedies*] ("the Court has not diluted the content or substance of rights directly; instead it has created procedural barriers," *e.g.*, requiring vindication of federal rights in state court); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 521 (1974) ("[s]tatutes that foreclose only lower federal court jurisdiction have more subtle but no less serious substantive effects") (footnote omitted); P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 480 (3d ed. 1988) [hereinafter HART & WESCHLER] (courts will consider possible state hostility to federal goal in determining whether jurisdiction should be exclusively in federal court).

2. Commentary on the abstention doctrines is extensive. *See, e.g.*, Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of* Pennzoil v. Texaco, 63 N.Y.U. L. REV. 1051 (1988); Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107 (1974); Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Proceedings*, 66 N.C. L. REV. 49 (1987); Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1978); Davies, Pullman *and* Burford *Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1 (1986); Fallon, *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988); Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974) [hereinafter Field, Pullman *Abstention*]; Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977) [hereinafter Field, *Abstention Today*]; Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683 (1981) [hereinafter Field, *Federal Jurisdiction*]; Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960); Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Redish, *Separation of Powers, supra* note 1; Redish, *The Doctrine of* Younger v. Harris: *Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978) [hereinafter Redish, Younger *Doctrine*]; Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Wells, *Disparity, supra* note 1; Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985) [hereinafter Wells, *Abstention*]; Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59 (1981) [hereinafter Wells, *Comity*]; Yackle, *Explaining Habeas*

stention cases, a federal court declines to exercise jurisdiction it unquestionably possesses in favor of the exercise of jurisdiction by a state court. Thus, the plaintiff who has chosen to litigate in a federal forum is forced into state court.

There also is a widespread perception that state courts are less receptive than federal courts to federal claims of right.[3] This perception accounts for the controversial nature of the abstention doctrines. Commentators almost uniformly condemn the Supreme Court's abstention doctrines on the ground that federal cases consistently are relegated to state courts despite the virtually "unflagging obligation"[4] of federal courts to exercise the jurisdiction bestowed upon them by Congress, and plaintiffs' repeated choice of federal fora in which to vindicate federal rights.[5]

Abstention might be less controversial if the Supreme Court offered a clear and plausible justification for requiring lower federal courts to refuse to exercise jurisdiction, but so far such a justification has eluded the Court. The abstention doctrines generally are explained in terms of "comity" and "federalism,"[6] but why these considerations often require a refusal to exercise congressionally granted jurisdiction, or how they indicate the outcome in a given case, is almost anyone's guess. Even the few commentators who have supported some form of judicial abstention have failed to develop a rationale that provides guidance to litigants or courts as to when abstention is appropriate.[7]

The importance, controversial nature, and disarray of the abstention doctrines were evident in the recent litigation between Pennzoil and Texaco.[8] Pennzoil sued Texaco in Texas state court over the

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Corpus, 60 N.Y.U. L. REV. 991 (1985); Ziegler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction,* 1983 DUKE L.J. 987; Ziegler, *Rights Require Remedies, supra* note 1.

3. *See infra* notes 35-37 and accompanying text.

4. *See infra* note 19 and accompanying text.

5. *See infra* notes 30-33 and accompanying text.

6. *See infra* notes 24-29 and accompanying text.

7. For example, Professors Shapiro and Wells have argued in support of the principle of abstention, but their theories are so indefinite as to provide little or no guidance for deciding individual cases. *See* Shapiro, *supra* note 2, at 583-85 (defending discretion to abstain and setting out only extremely broad factors to guide that discretion); Wells, *Comity, supra* note 2, at 74-75 (defending comity rationale as an acceptable tool with which the Court may justify "arbitrary" decisions in federalism cases); Wells, *Abstention, supra* note 2, at 1128-32.

8. Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987). For an excellent discussion of the *Pennzoil* decision, see Althouse, *supra* note 2. Professor Althouse argues that *Pennzoil* was an appropriate case for abstention because the federal interest in protecting rights was not great, and urges a return in abstention cases to examining the federal interest in interfering with state proceedings, rather than the state interest in being free from such interference.

purchase of Getty Oil, alleging tortious interference with contract. The jury returned a verdict against Texaco for more than $10 billion.[9] Rather than pursuing post-judgment remedies in state court, Texaco filed suit in federal court in New York, seeking to enjoin Pennzoil from enforcing the judgment. Texaco claimed that the Texas proceedings violated Texaco's rights under the U.S. Constitution and federal statutes. At bottom, Texaco claimed that Texas state court processes were inadequate to protect federal rights.[10]

The jurisdictional statutes under which Texaco filed suit in federal court were enacted by Congress to provide a federal forum for litigants challenging state action as unconstitutional, on the premise that state courts were inadequate to protect federal rights.[11] Pennzoil sought dismissal of the federal action, however, under the abstention doctrines.[12] One of the underlying premises of abstention is that state courts are adequate to protect federal rights.[13] Of course, these two broad premises cannot logically exist side-by-side, and yet they continue to co-exist in abstention cases, with no serious attempt by the courts to reconcile them.

The Supreme Court's decision in *Pennzoil Co. v. Texaco Inc.* makes clear that abstention is an ailing doctrine. Although the Court ordered the district court to abstain in favor of state court jurisdiction,[14] it took six Justices writing separately, offering varying conceptions of three rather different abstention doctrines, to explain the Court's decision.[15] To say that the Court was fragmented, or that abstention law is unclear, would be a vast understatement.

In cases such as *Pennzoil,* involving large corporations, allowing federal rights to be determined by arguably less-than-sympathetic state

9. 481 U.S. at 4.

10. 481 U.S. at 6.

11. Suit was filed under, *inter alia,* 42 U.S.C. §§ 1343 and 1983 (1982). As to Congress' intent in enacting those statutes, see *infra* notes 42-46 and accompanying text.

12. *See* 481 U.S. at 6-7.

13. *See infra* notes 38-39 and accompanying text.

14. 481 U.S. at 17.

15. Justice Powell, writing for the Court, concluded that *Younger* abstention was appropriate in the case. He indicated that *Pullman* abstention might also be appropriate, but declined to apply the *Pullman* doctrine, noting simply that "considerations similar to those that mandate *Pullman* abstention are relevant to a court's decision whether to abstain under *Younger.*" 481 U.S. at 11 n.9. Justice Brennan concluded that *Younger* abstention was inappropriate because, in his view, *Younger* is inapplicable to civil proceedings. 481 U.S. at 19 (Brennan, J., concurring). Justice Marshall decided that there was no need to reach the *Younger* issue because he believed that the federal district court did not have jurisdiction. 481 U.S. at 23 (Marshall, J., concurring). Justice Blackmun argued that application of the *Younger* abstention doctrine was inappropriate, but would have abstained under the *Pullman* doctrine. 481 U.S. at 27-29 (Blackmun, J., concurring). Finally, Justice Stevens believed that *Younger* abstention was inappropriate in the case. 481 U.S. at 30 (Stevens, J., concurring).

courts may not seem to undermine the protection against government infringement of individual rights that federal jurisdiction was designed to provide. The same can hardly be said, however, for cases such as *Moore v. Sims,* where a state court deprived parents of the custody of their child, utilizing procedures that arguably failed to comport with federal constitutional guarantees.[16] If state courts are indeed unsympathetic to claims of federal rights, then denying a federal forum strikes squarely at interests federal jurisdiction was intended to protect. In cases such as *Moore v. Sims,* the abstention principle cries out for justification.

Acknowledging that in some form the principle of abstention probably is here to stay, this article offers a revisionist theory of abstention. The key to this revisionist theory is recognizing that the Supreme Court's decisions expanding the scope of federal jurisdiction and its decisions requiring abstention from the exercise of federal jurisdiction employ very different premises regarding the adequacy of state courts to protect federal rights, and that these premises must be reconciled if abstention ever is to make any sense. The competing premises can be reconciled because in some cases falling within federal jurisdiction an initial federal trial forum is unnecessary to vindicate federal rights; in such cases, state court proceedings followed by Supreme Court review will protect federal rights. Where federal rights are protected in this way, state interests in state-court adjudication justify abstention. The revisionist theory rests on the notion that federal review may be necessary to protect federal interests, but accommodates the abstention doctrine on the ground that such review need not always occur in a federal *trial* forum.

This article offers a straightforward model for identifying cases in which abstention threatens federal rights — and so is inappropriate — and cases in which federal rights are not so threatened and state interests require abstention. Part I provides some background on the abstention doctrines, clarifying the competing premises that must be reconciled in order to develop a coherent, unified abstention doctrine. Part II then sets out the basis for the revisionist theory and the manner in which it would operate, arguing that a federal trial forum only need be — and only should be — available where necessary to protect federal rights. For example, if fact-finding is not critical to a federal plaintiff's case, initial litigation in state court followed by U.S. Supreme Court review should satisfy federal concerns. Part III ex-

16. 442 U.S. 415 (1979). The federal district court found the state procedures unconstitutional in important respects, but the Supreme Court vacated, holding the district court should have abstained.

plains at some length how application of the revisionist theory would be consistent with most of the Supreme Court's abstention precedents, while providing a more satisfactory explanation for those precedents which would give meaningful guidance to lower courts and litigants as to when abstention is appropriate. Finally, the concluding section answers some of the potential questions raised by the revisionist theory, including whether the revisionist theory requires too much ad hoc decisionmaking in abstention cases, and whether direct U.S. Supreme Court review is adequate in any given case to protect federal rights.

I. THE TRADITIONAL APPROACH

As a general rule, a court possessing jurisdiction must exercise it to resolve a properly presented dispute.[17] Courts differ from legislative and executive bodies of government in this respect: while the latter two set their own agendas, courts generally are held open to all comers.[18] In federal courts, this principle takes on particular strength, for it often is said that federal courts have a "virtually unflagging obligation" to exercise the jurisdiction they possess.[19]

One exception to the general rule that arouses considerable controversy is found in Supreme Court decisions that require a lower federal court possessing jurisdiction to decline to exercise that jurisdiction in favor of the jurisdiction of a state court. Although the circumstances in which a federal court is called upon to stay its hand vary widely, the practice of declining jurisdiction in favor of state courts is called abstention.[20]

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17. *See* Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 496-97 (1971) ("[I]t is a time-honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it.") (citation omitted); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We [courts] have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given. The one or the other would be treason to the constitution."); HART & WESCHLER, *supra* note 1, at 747.

As Professor Shapiro argued, however, the general rule is not without its exceptions. *See* Shapiro, *supra* note 2. Indeed, the exceptions are sufficiently numerous, and their application sufficiently frequent, that the "general" nature of the rule might properly be questioned. For example, equity courts stay their hand under a variety of discretionary standards, and courts with jurisdiction send litigants to other courts with jurisdiction under the doctrine of *forum non conveniens*. *See generally id.* at 555-57. But none of these exceptions has aroused controversy to the extent that the abstention doctrine has.

18. *See* FERC v. Mississippi, 456 U.S. 742, 785 n.14 (1982) (O'Connor, J., concurring in part and dissenting in part) ("[L]egislative bodies possess at least one attribute, . . . the power to set an agenda, that trial courts lack."); 456 U.S. at 784 ("[T]rial courts of general jurisdiction do not choose the cases that they hear . . . .").

19. Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)); *see also* McClellan v. Carland, 217 U.S. 268, 282 (1910).

20. It is commonplace to divide the cases that rely upon the principle of abstention into a number of smaller doctrinal groups. The *Pullman* abstention doctrine, for example, found its

Abstention is controversial because it hampers a plaintiff's access to a lower federal court, even though the federal court has jurisdiction over the case and the parties. On some occasions, abstention means only a delay in federal resolution: an issue is presented initially to a state court, but litigants may return to federal court for final resolution of federal questions.[21] More commonly, however, abstention is tantamount to abdication of jurisdiction by the lower federal courts. Under governing Supreme Court precedent, *res judicata* generally bars federal reconsideration of questions resolved in state proceedings.[22] Thus, in many abstention cases, the lower federal court loses its chance to decide the federal issue altogether.[23]

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genesis in Railroad Commn. v. Pullman Co., 312 U.S. 496 (1941), in which the Court held that a lower federal court should, as a rule, stay its hand to permit state courts to resolve unsettled state law questions that might obviate the need to reach the federal question presented in a case. Similarly, the *Younger* abstention doctrine is traced back to Younger v. Harris, 401 U.S. 37 (1971), in which the Court held that absent specified circumstances a federal court should not enjoin an ongoing state criminal proceeding.

It is useful to acknowledge at the outset that the division of the abstention cases into discrete doctrines may be more imaginary than real. The abstention doctrines defy strict categorization, so it is not surprising that courts and commentators define the categories in different terms, and that the categories change over time. *Compare* Burford v. Sun Oil Co., 319 U.S. 315, 333 n.29 (1943) *with* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-17 (1976) (offering different descriptions of the abstention doctrines). *See also* Trainor v. Hernandez, 431 U.S. 434, 460 (1977) (Stevens, J., dissenting) (abstention is a doctrine that "has bewildered other federal courts for years"); C. WRIGHT, THE LAW OF FEDERAL COURTS 303 (4th ed. 1983); Field, Pullman *Abstention, supra* note 2, at 1147-48 (noting that the various categories of the doctrine are less than clear); Zeigler, *Rights Require Remedies, supra* note 1, at 683 ("[l]ittle consensus has been achieved on how [the doctrines] should be grouped or even on how many different doctrines exist"). Indeed, the Supreme Court recently acknowledged the difficulty with placing the abstention cases in categories, noting: "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." Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 11 n.9 (1987).

21. This is the case with so-called *Pullman* abstention. *See* Railroad Commn. v. Pullman Co., 312 U.S. 496 (1941). In *Pullman,* a group of black railway employees sued in federal district court, claiming that an order by the Texas Railway Commission requiring a certain number of white conductors on each train violated their rights under the fourteenth amendment. 312 U.S. at 497-98. The Supreme Court ordered federal abstention so that the Texas state courts could determine whether, under Texas law, the Commission had the authority to issue the order. 312 U.S. at 501. A decision by the Texas courts that the Commission had no such authority would have mooted the constitutional issue. 312 U.S. at 501. If the state court upheld the Commission's authority under Texas law, the case could always then return to federal court for resolution of the federal issue. See *infra* notes 204-14 and accompanying text for a discussion of *Pullman* abstention. *But see* Field, *Abstention Today, supra* note 2, at 591 (delay and expense caused by *Pullman* abstention may deter claimants even from seeking a federal forum in the first place).

22. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980); *see also* 28 U.S.C. § 1738 (1982) ("The . . . judicial proceedings of any . . . state . . . shall have the same full faith and credit in every court within the United States . . . as they shall have by law or usage in the courts of such State . . . from which they are taken."). Habeas corpus is the noteworthy exception to this principle. *See infra* notes 145-48 and accompanying text.

23. *See, e.g., Allen,* 449 U.S. 90 (federal civil rights action based on unlawful search and seizure by state officers barred by prior state adjudication of claim in suppression hearing);

The Supreme Court justifies application of the abstention doctrines — and the concomitant denial of a federal forum — by relying primarily upon a concern for comity and federalism interests.[24] Comity refers to the relations between coordinate state and federal judicial systems.[25] The concern is that when federal courts decide issues that could be resolved by state courts, the federal courts implicitly may call into question the ability or willingness of state courts to apply federal law faithfully.[26] Federalism, in turn, refers to the relations between state and federal sovereigns.[27] The concern here is the federal courts' potential to usurp the role of state courts in addressing matters of state policy.[28] Finally, there is a concern for sound judicial administration: state courts, and the litigants before them, should not be subject to the "disruptive" effect of parallel or preemptive federal proceedings.[29]

Critics attack the abstention decisions on a number of grounds. Professor Martin Redish argues that the Court violates separation-of-

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Yackle, *supra* note 2, at 1043 (in civil context, where habeas corpus is unavailable, Supreme Court provides the only federal review of a federal claim).

24. *Younger* abstention originally was justified not only by comity concerns, but also by traditional principles of equity jurisdiction. *See* Younger v. Harris, 401 U.S. 37, 43-44 (1971). Equity courts would not issue injunctions if there was an adequate remedy at law: because state criminal proceedings presented an adequate opportunity to raise federal claims, the federal court would stay its hand. 401 U.S. at 43-44. In the latest cases applying *Younger*, however, the equity rationale has disappeared completely, leaving comity and federalism as the controlling factors. *See infra* note 118.

25. *See Younger*, 401 U.S. at 44 ("[Comity 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 . . . 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."). For the origins of the comity principle, see *Younger*, 401 U.S. at 61-64; Wells, *Comity*, *supra* note 2, at 61 n.5.

26. *See* Trainor v. Hernandez, 431 U.S. 434, 446 (1977) (observing "the negative reflection on the State's ability to adjudicate federal claims . . . whenever a federal court enjoins [a] pending state proceeding"); Steffel v. Thompson, 415 U.S. 452, 462 (1974) (federal intervention in state criminal proceedings might "[reflect] negatively upon the state court's ability to enforce constitutional principles"); *see also* Bator, *supra* note 2, at 625 (arguing that the exercise of federal jurisdiction in some cases may be sending the message to the state courts that "they can't and won't speak for the Constitution").

27. *See Younger*, 401 U.S. at 44 (federalism is a "system in which there is sensitivity to the legitimate interests of both State and National Governments . . . in which the National Government . . . always endeavors to [protect federal rights and interests] in ways that will not unduly interfere with the legitimate activities of the States").

28. *See, e.g.*, Moore v. Sims, 442 U.S. 415, 430 (1979) (federal intervention may "prevent the informed evolution of state policy by state tribunals"); Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975) (federal intervention prevents states from hearing constitutional objections to state policies); Burford v. Sun Oil, 319 U.S. 315 (1943) (federal intervention hinders state implementation of important regulatory policies). Professor Martin Redish has done a careful study of the arguments concerning federal court usurpation of state policy, and has concluded that many of *Younger*'s comity and federalism rationales actually conflict with one another. *See* Redish, Younger *Doctrine*, *supra* note 2.

29. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976); *see also Younger*, 401 U.S. at 44; *Burford*, 319 U.S. at 326-28; Railroad Commn. v. Pullman Co., 312 U.S. 496, 500 (1941).

powers principles when it instructs lower federal courts not to exercise the jurisdiction granted them by Congress.[30] Because Congress, and not the Court, controls the jurisdiction of the lower federal courts, judicial abstention flouts the will of Congress.[31] Other critics argue that abstention is contrary to the general rule that a plaintiff's choice of forum is entitled to respect. Often more than one court has subject-matter and personal jurisdiction over a dispute and its parties; the choice among fora traditionally belongs to the plaintiff.[32] The critics point out that the entire concept of abstention is, at bottom, simply antithetical to the obligation of federal courts to exercise the jurisdiction granted them.[33]

Missing from this summary of the debate, of course, is any explanation of why abstention's critics believe it matters if a plaintiff is denied a federal forum.[34] Implicit in every criticism of abstention is the assumption that, absent a federal forum, federal rights will not be vindicated.[35] Abstention's critics are of the view that state courts are not as sensitive to claims of federal rights as are federal courts.[36] Thus, denial of a federal forum runs the risk of effectively denying the plain-

30. Redish, *Separation of Powers, supra* note 1, at 76-79: Professor Redish argues that Congress, under section 5 of the fourteenth amendment, has established "a network of federally-protected substantive rights and simultaneously vested the federal courts with jurisdiction to enforce those laws, and the Supreme Court lacks the authority to ignore or invalidate those statutes . . . ." *Id.* at 77 (footnote omitted); *see also* Kurland, *supra* note 2, at 489 ("Congress has created the right to utilize the federal courts in specified circumstances and . . . the Court has no right to limit that right of access, since the jurisdiction of the federal courts are, by Constitutional command, to be fixed by the legislature.").

31. Redish, *Separation of Powers, supra* note 1, at 78 (abstention "effectively . . . repeal[s] [jurisdictional] legislation" and "renders pointless the entire legislative process").

32. Field, *Federal Jurisdiction, supra* note 2, at 722 & n.168; Shapiro, *supra* note 2, at 575 & n.194; Yackle, *supra* note 2, at 1024 & n.150; *see also* Piper Aircraft v. Reyno, 454 U.S. 235, 255 (1981) (there is "a strong presumption in favor of the plaintiff's choice of forum"); Zwickler v. Koota, 389 U.S. 241, 248 (1967) ("Congress imposed the duty upon all levels of the federal judiciary to respect a suitor's choice of a federal forum . . . .").

33. *See supra* note 17 and accompanying text.

34. The failure to set out the underlying reasons for disagreeing with the decision to abstain is endemic in the *Younger* decisions. *See* Wells, *Disparity, supra* note 1, at 298 ("The dissenting opinions [in *Younger* cases] leave quite unclear why any of these reasons should matter to litigants or judges, for, as far as the opinions are concerned, the only issue appears to be the address of the courthouse.").

35. *See, e.g.*, Davies, *supra* note 2, at 2-3 ("Those who believe that federal courts are particularly qualified to protect constitutional claims view abstention as threatening that protection."); Wells, *Disparity, supra* note 1, at 284-85 & n.4.

36. *See, e.g.*, Neuborne, *supra* note 2, at 1105 (challenging what he calls the "myth . . . that state courts will vindicate federally secured constitutional rights as forcefully as would the lower federal courts"); Redish, *Separation of Powers, supra* note 1, at 91-92 ("If it is thought that state judges . . . will be more sympathetic to state concerns, then it is difficult to see how state judges can also be equally enthusiastic enforcers of federal rights against state action."); Redish, Younger *Doctrine, supra* note 2, at 483 ("Harsh reality may justify doubts about the competence of state courts in enforcing federal rights.").

tiff a federal right.[37]

In light of the dispute over the relative sensitivity of state and federal courts to claims of federal rights, Supreme Court abstention decisions must go beyond explaining why deference to state proceedings is important and explain why denial of a federal forum will not affect the vitality of federal rights. The Court's explanation is straightforward: state courts are as sensitive as federal courts to claims of federal rights.[38] In fact, an important part of the justification for abstention is to avoid creating the impression that state courts are less competent to address, and less attentive to, federal rights than are federal courts.[39]

The difficulty with the Court's justification for abstention is that on this core issue of state court sensitivity to federal rights the Court's own opinions support abstention's critics. The Court's abstention opinions suffer from a kind of selective amnesia, forgetting how the cases from which it now orders the lower courts to abstain originally came to fall within federal jurisdiction. More often than not, the federal plaintiff asserting federal jurisdiction is relying upon Supreme Court decisions that broadened the reach of federal jurisdiction *precisely because* state courts could not be trusted to protect federal rights.[40]

Thus, there is a fundamental inconsistency in the Court's jurisprudence concerning the exercise of federal jurisdiction. In cases constru-

37. The Supreme Court has made precisely this assumption. In commenting on the legislative history of 42 U.S.C. § 1983 (which provides a civil cause of action against state officers who violate constitutional rights), the Court noted: "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because [the citizen's rights] guaranteed by the Fourteenth Amendment might be denied by the state agencies." Monroe v. Pape, 365 U.S. 167, 180 (1961). *See also* Neuborne, *supra* note 2, at 1115 ("choice between federal and state courts as constitutional enforcement forums continues to exert an effect on the nature of the resulting federal right"); Redish, *Separation of Powers, supra* note 1, at 111 (the "legislative intent [of § 1983] was to interpose the *federal* judiciary between the individual and the state, largely because of the failure of the state courts adequately to protect the individual").

38. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 105 (1980) (rejecting "a general distrust of the capacity of the state courts to render correct decisions on constitutional issues"); Moore v. Sims, 442 U.S. 415, 430 (1979) (rejecting notion that "state courts were not competent to adjudicate federal constitutional claims"); Huffman v. Pursue, Ltd., 420 U.S. 592, 610-11 (1975) (because state judges are bound by oath to uphold the Constitution, the Court ought not to assume that they will not do so); *see also* Neuborne, *supra* note 2, at 1117 (the Court now assumes that state courts are as competent as federal courts); Wells, *Disparity, supra* note 1, at 297 (the Court dismisses arguments that the state courts are insensitive to federal rights "with a sentence or two expressing confidence in the state courts").

39. *See supra* note 38.

40. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 180 (1961) (expanding the cause of action available under 42 U.S.C. § 1983 to allow civil suits against state officers whose action violated state law); Mitchum v. Foster, 407 U.S. 225, 242 (1972) (expanding the definition of authorized exceptions to the Anti-Injunction Act, 28 U.S.C. § 2283, to allow a plaintiff to seek federal injunctive relief under § 1983 because "the very purpose of § 1983 was to interpose the federal courts between the States and the people. . . . [T]his Court long ago recognized that federal injunctive relief . . . can . . . be essential to prevent . . . loss of a person's constitutional rights.").

ing congressional statutes to confer jurisdiction, the Court expressed a concern about state court protection of federal rights. But in cases ordering abstention from the exercise of federal jurisdiction, the Court denied any such concern, vigorously asserting state sensitivity to claims of federal rights.[41]

This inconsistency is most apparent in federal civil rights cases, particularly those brought under sections 1983 and 1343.[42] In *Monroe v. Pape,*[43] decided almost eighty years after enactment of those civil rights statutes, the Supreme Court for the first time opened wide the doors to federal civil rights actions by holding that the "under color of state law" language in those statutes applied to the actions of state employees even when those actions were unauthorized by state law.[44] What is significant about the Court's decision in *Monroe v. Pape,* and related cases, is that this dramatic expansion in the availability of federal jurisdiction in civil rights cases rested upon a fundamental distrust of state courts to protect federal rights.[45] Thus, section 1983 provided a "federal remedy . . . supplementary to the state remedy," because the "state remedy, though adequate in theory, was not available in practice."

> That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States.[46]

Therefore, it is at best ironic, and at worst completely disingenu-

41. *Compare Monroe,* 365 U.S. at 180 (federal rights need to be enforced in federal courts because state courts might not enforce those rights) *with Huffman,* 420 U.S. at 610-11 (because state and federal courts are equally bound to uphold constitutional rights, the Court refuses to assume that state courts will fail to do so). *See also* Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary,* 36 UCLA L. REV. 233, 242 (1988) (Supreme Court relies on statements of federal court superiority to expand fuller jurisdiction and on statements of parity to restrict it); Currie, *supra* note 2, at 317, 321 n.30 ("I find *Younger's* conclusion that a state court defense is adequate in a case under 42 U.S.C. § 1983 (1970) particularly difficult to reconcile with the holding in *Mitchum,* [which relied upon] the premise that state courts would not adequately protect federal rights."); Wells, *Disparity, supra* note 1, at 331 ("I know of no principled justification for the coexistence of *Monroe* and the expansive judicial federalism decisions.").

42. 42 U.S.C. § 1983 (1982) authorizes civil suit to redress the deprivation under color of state law of any rights secured by the Constitution. It thus creates a cause of action. 28 U.S.C. § 1343(a)(3) (1982) provides: "The district courts shall have original jurisdiction of any civil action . . . [to] redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States . . . ." This statute provides federal jurisdiction to hear § 1983 claims.

43. 365 U.S. 167 (1961).

44. 365 U.S. at 172-87.

45. 365 U.S. at 180; 365 U.S. at 193-94 (Harlan, J., concurring).

46. 365 U.S. at 176 (quoting from the Senate debates during the consideration of the Civil

ous, that many of the abstention decisions arise in the context of section 1983 cases. Beginning with its decision in *Younger v. Harris,*[47] the Court appears gradually to have abdicated much federal civil rights jurisdiction in favor of state court jurisdiction over these cases.[48] *Younger* held that a federal court hearing a civil rights case could not enjoin pending state criminal proceedings involving the same subject matter as the federal action.[49] Subsequent decisions have extended *Younger*'s prohibition to the injunction of state court civil actions, to the issuance of federal declaratory relief if a related state case is pending, and even to the injunction of an action commenced in state court *after* the federal action was begun.[50] Thus, in the very same class of cases for which jurisdiction is permitted in *Monroe,* abstention is now largely required under *Younger.*

A key ingredient in the *Younger* cases is the Court's presumption that state courts are sufficient to protect federal civil rights. *Younger* abstention allegedly "avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted."[51] Because "state courts have the solemn responsibility equally with the federal courts' to safeguard constitutional rights,"[52] federal action would "'reflec[t] negatively upon the state court's ability' to do so."[53] Never mind that precisely the opposite presumption justified *Monroe*'s expansion of federal jurisdiction in civil rights cases in the first place.

Abstention in diversity cases suffers from the same inconsistency. Federal diversity jurisdiction has been criticized widely by judges and commentators.[54] In the face of this criticism, however, Congress has

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Rights Act of 1871 (the predecessor to § 1983)); *see also* Mitchum v. Foster, 407 U.S. 225, 242 (1972).

47. 401 U.S. 37 (1971).

48. *See* Wells, *Comity, supra* note 2, at 59.

49. 401 U.S. at 43-54.

50. *See infra* notes 115-35 and accompanying text (discussing expansion of *Younger*).

51. 401 U.S. at 44.

52. Trainor v. Hernandez, 431 U.S. 434, 443 (1977) (quoting Steffel v. Thompson, 415 U.S. 452, 460-61 (1974)).

53. 431 U.S. at 443 (quoting *Steffel,* 415 U.S. at 462).

54. *See* Burford v. Sun Oil Co., 319 U.S. 315, 337 (1943) (Frankfurter, J., dissenting) ("I speak as one who has long favored the entire abolition of diversity jurisdiction."); Bratton, *Diversity Jurisdiction — An Idea Whose Time Has Passed,* 51 IND. L.J. 347, 349 (1976) ("there are compelling reasons to advocate the elimination of diversity jurisdiction — given the nature of the federal system and the dramatic increase in the workload of federal courts"); Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms,* 92 HARV. L. REV. 963 (1979); *see also* Westen & Lehman, *Is There Life for* Erie *After the Death of Diversity?,* 78 MICH. L. REV. 311, 311 nn.1-2 (1980).

declined to eliminate or modify substantially diversity jurisdiction.[55] The premise of diversity jurisdiction is that out-of-state litigants might be subject to bias in state courts, and that a federal trial forum therefore is needed. Supreme Court diversity decisions recognize and rely upon this concern about state court bias.[56]

Despite the fear of state court bias, the Court has ordered federal abstention in a number of diversity cases. As in the civil rights context, abstention has been justified on grounds of federalism and comity. For example, in *Alabama Public Service Commission v. Southern Railway Co.*,[57] the Court ordered abstention in favor of state court review of a state administrative order prohibiting discontinuance of a certain rail passenger service, stating that "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies."[58] Thus, the "usual rule of comity" required abstention, despite the fact that the federal plaintiff was an out-of-state citizen, and even one who sought to raise a federal question.[59]

What about the bias of state courts that diversity was designed to avoid? Here, too, the Court simply took the opposite position. The *Southern Railway* Court flatly stated, *"[a]s adequate state court review* of an administrative order based upon predominantly local factors is available to appellee, *intervention of a federal court is not necessary for the protection of federal rights."*[60] If this generally were true, however, it would be difficult to see the need for diversity jurisdiction in the first place.

The inconsistency between cases approving the exercise of federal jurisdiction and those ordering abstention is not limited to civil rights or diversity jurisdiction cases. *Southern Railway*, for example, was a federal question case as well as a diversity case.[61] Federal question

55. *See* Redish, *Separation of Powers*, *supra* note 1, at 104 ("Congress has consistently refused to abolish or even limit the scope of the diversity grant.").

56. *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945) ("[d]iversity jurisdiction is founded on assurance to nonresident litigants of courts free from susceptibility to potential local bias"); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816) ("The constitution has presumed . . . that state [prejudices] might sometimes obstruct, or control . . . the regular administration of justice."); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) ("[The Constitution] entertains apprehensions [about possible bias against out-of-state litigants and therefore] has established national tribunals for the decision of controversies between . . . citizens of different states."). *See generally* Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492-93 (1928).

57. 341 U.S. 341 (1951).

58. 341 U.S. at 350 (quoting Railroad Commn. v. Pullman Co., 312 U.S. 496, 500 (1941)).

59. 341 U.S. at 350.

60. 341 U.S. at 349 (emphasis added; footnote omitted).

61. The plaintiffs in *Southern Railway* argued that the state, by preventing them from discon-

jurisdiction exists, in part, to permit resolution of federal claims in federal courts, avoiding presumably less sympathetic state courts.[62] Yet, abstention in federal question cases relies upon exactly the opposite presumption. Moreover, the same inconsistency pervades more specialized grants of federal jurisdiction. For example, in several Indian water rights cases brought by the United States and by the Indian tribes under federal jurisdiction granted by Congress to permit federal interests to be protected in federal court,[63] the Supreme Court nonetheless required abstention to permit orderly resolution of the claims in state court.[64] As for the denial of a federal forum in which to protect federal rights, the Court said only that "state courts, as much as federal courts, have a solemn obligation to follow federal law."[65]

Once one focuses on this inconsistency, the abstention doctrines seem particularly perverse as applied. Because the Court justifies abstention on comity and federalism grounds, the greater the state interest in a given dispute, the greater the propriety of abstention under the Court's approach. In diversity cases, for example, the Court has held that abstention is most appropriate when important state policies are at stake.[66] *Younger* abstention likewise has been held to be most appropriate in criminal cases and in civil cases where the state has a particularly strong interest in the outcome.[67] In these cases, the claim of a federal right generally is juxtaposed against the state's interests asserted to justify abstention.[68] Where the state's interest in the out-

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tinuing nonprofitable rail service, was confiscating their property in violation of the due process clause of the fourteenth amendment. 341 U.S. at 343.

62. *See* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) ("[One] reason Congress conferred original federal question jurisdiction on the [federal] courts was its belief that state courts are hostile to assertions of federal rights."); THE FEDERALIST NO. 80, at 591 (A. Hamilton) (J. Hamilton ed. 1864) ("The reasonableness of the agency of the national courts, in cases in which the state tribunals cannot be supposed to be impartial, speaks for itself."); Currie, *supra* note 2, at 328 (federal question jurisdiction rests upon "fear of state court hostility to or misunderstanding of federal rights").

63. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

64. 424 U.S. at 817-20.

65. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983).

66. *See, e.g.,* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 29 (1959) (state's interest in having its own courts construe an ambiguous state statute concerning condemnation justifies federal abstention); Alabama Pub. Serv. Commn. v. Southern Ry. Co., 341 U.S. 341, 349-50 (1951) (state's interest in regulating local utilities warrants abstention); Burford v. Sun Oil Co., 319 U.S. 315, 331-33 (1943) (state's interest in establishing a coherent policy with respect to regulation of oil fields, a matter of public concern, justifies abstention).

67. *See, e.g.,* Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 11 (1987) ("application of *Younger* abstention [is warranted] if the state's interests in the proceeding are . . . important"); *see also* Younger v. Harris, 401 U.S. 37, 43 (1971) (Congress, in enacting the Anti-Injunction Act, has recognized that states have a great interest in "[trying] state cases free from interference by federal courts").

68. In *Younger,* for example, the plaintiff's first amendment claim was juxtaposed against the state's interest in trying criminal cases free from federal interference. 401 U.S. at 49-54; *see also*

come of the dispute is very high, however, so is the potential for state court bias against the federal claimant, because a finding of merit in the federal claimant's constitutional claim often will defeat the state prosecution or enforcement effort. Thus, while the very rationale for federal jurisdiction is a concern about bias, the Court requires abstention in those cases where bias against federal claims is most likely.[69]

A plaintiff who has been inspired by the *Monroe* rhetoric concerning the insensitivity of state courts to federal rights and who has been led by it to file suit in federal court may be justifiably perplexed to find herself bounced into state court by application of the abstention doctrines. Perplexity turns to true wonder upon reading the abstention rhetoric that state courts are as sensitive as federal courts to federal rights.[70] Perhaps most irritating of all, however, is that the Court seemingly has not recognized, let alone made an attempt to reconcile, these two contradictory lines of authority.

Reconciliation could be attained by observing that the Court simply has changed its mind on the initial question of whether state courts can be trusted to vindicate federal rights. There are a number of ways in which this change could be understood. One explanation may be that some Justices believe that although federal courts once were necessary to protect federal rights, state courts now are as sensitive as federal courts to federal rights.[71] Alternatively, there may have been a shift in perceived values: the desire to expand the reach of federal rights may have given way to a belief that the Court has identified

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Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982) (plaintiff's first amendment claim balanced against state's interest in a state bar disciplinary action); Juidice v. Vail, 430 U.S. 327 (1977) (plaintiff's § 1983 claim weighed against state's interest in enforcing a civil contempt order against the plaintiff); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (plaintiff's first amendment rights juxtaposed against state's interest in a "quasi-criminal" nuisance action).

69. *See* Althouse, *supra* note 2, at 1083 ("ironically," the Court requires abstention in the very cases where fear of bias resulting from state's interest "propels" state court defendants into federal court; arguing that *Pennzoil* was an appropriate case for abstention because such state bias was not present).

70. *See supra* note 38 (concerning Supreme Court statements that state courts are as sensitive as federal courts to federal rights). *But see* Redish, *Separation of Powers, supra* note 1, at 86 ("[B]ecause the drafters of section 1983 were especially concerned with the good faith of the state courts, it is unlikely that they assumed that the ability to raise a federal defense in state court constituted an adequate remedy.").

71. Justice Powell, writing for the Court in Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976), noted that while there might have been an "unsympathetic attitude to federal constitutional claims [on the part] of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the [state courts]." *See also* Davies, *supra* note 2, at 31 ("state courts' hostility to federal rights has greatly diminished [since the 1960s]"); Wells, *Disparity, supra* note 1, at 312 ("[T]he divisive events and issues of the sixties are largely behind us .... State courts are habituated to the new rights, and they are staffed with judges who learned about the new rules in law school and do not consider them such an offensive intrusion on state prerogatives as their fathers did.").

basic federal rights which now are respected. Increasingly, according to these Justices, civil rights litigation is about "less important" or "less fundamental" rights than were at stake in prior cases.[72] Once it is assumed that the federal rights at stake are "less important," the federalism and comity interests take on greater relative importance, and the balance shifts in favor of litigation in state courts out of deference to these principles.[73]

Another possibility is that some segment of the Court believes that although state courts are not now quite as sensitive as federal courts, the state courts would develop such sensitivity if trusted more often with federal cases.[74] Thus, some short-term loss in protection of federal rights would in the long run benefit the federal system.

Finally, the explanation may be simply that the membership of the Court has shifted, with a concomitant shift in emphasis.[75] The civil rights cases, for example, were decided at the height of the Warren Court. Few of the members of that Court remain.[76] A clear majority of today's Rehnquist Court were appointed by presidents who avowedly sought more conservative Justices with greater tendencies to defer to state prerogatives, particularly vis-à-vis federal rights.[77] Arguably, this change in the Court's composition has led to a shift in the resolution of competing values where federal jurisdiction is concerned.[78]

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72. See, for example, Parratt v. Taylor, 451 U.S. 527 (1981), in which the plaintiff, a state prisoner, brought a civil rights action under § 1983 against prison officials for destroying a hobby kit worth $23.50. Justice Rehnquist, writing for the majority, held that § 1983 did not apply lest all state torts become cognizable as constitutional violations.

73. *See* Davies, *supra* note 2, at 25 (the Warren Court "allowed enormous federal intervention in state activity" but the abstention doctrines have been "revitalized [out of deference] to state court adjudication of cases in which states have a strong interest"); Soifer & Macgill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEXAS L. REV. 1141, 1142 (1977) (*Younger* abstention is a result of the Court's new "policy of limiting federal judicial power to the advantage of the states"); *id.* at 1215 (*Younger* may be "a doctrine merely of accommodation of a variety of agendas"); Wells, *Disparity, supra* note 1, at 327 (by relying on "comity," the Court can "enforce changes in their perception of the proper balance to be drawn between the values underlying competing state and individual claims").

74. *See* Bator, *supra* note 2, at 627 (state courts should be given the opportunity to hear constitutional claims, for in the long run this will make the state courts more effective vindicators of federal rights); Neuborne, *supra* note 2, at 1129 ("[I]f significant constitutional cases were forced into state courts more frequently, state judges would acquire greater . . . sensitivity [to] constitutional rights . . . . [O]ver time the competence gap [between federal and state courts as vindicators of federal constitutional rights] might diminish . . . .").

75. *See* Wells, *Disparity, supra* note 1, at 335 ("Whether the process of restricting federal judicial power continues may depend on such fortuities as which Justices leave the Court first and who wins the next presidential election.").

76. Of the nine Justices on the Court at the time *Monroe v. Pape* was decided in 1961, only two — Justices Brennan and White — remain.

77. *See* Davies, *supra* note 2, at 25 (Warren era marked by belief that role of federal courts is to protect rights, while Burger Court believed in deferring to state courts).

78. Professor Chemerinsky takes this argument a step further, suggesting "that all of the discussion about parity really might be a subterfuge; conservatives who believe that state courts

Although some combination of these speculative explanations may reflect the "real reason" for the differing assumptions underlying the jurisdiction and abstention cases, there are a number of reasons why this type of answer is not completely satisfying. First, although this answer seems obvious in the context of the civil rights cases, it is a bit less so in other areas of federal jurisdiction. For example, the frustration on the part of the Court with diversity jurisdiction has been fairly persistent.[79] Moreover, the decisions requiring abstention in diversity cases tend to predate the cases requiring abstention in the civil rights area. This suggests that the abstention decisions cannot be fully explained by changes in the Court's sentiment or membership.[80]

Second, even if as a factual matter state courts are now more sensitive to federal rights than they were previously, this explanation for the abstention doctrines does not address Professor Redish's argument that it is for Congress rather than the Court to determine the extent of federal court jurisdiction.[81] In the cases expanding federal jurisdiction, such as *Monroe,* the Court relied specifically on *Congress'* intent to provide a federal forum in order to avoid state courts that might be insensitive or hostile to federal claims.[82] Under a traditional separation-of-powers analysis, it would be for Congress, and not the Court, to observe the change in state sensitivity and to respond through appropriate legislation.[83]

Third, the Court has not gone so far as to overrule any of its jurisdictional decisions, creating frustrating uncertainty and constant litigation about the right of access to a federal forum. For example, current doctrine holds that *Monroe,* which expanded the reach of fed-

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are more likely to favor the government over the individual may simply be using the parity argument as a tool to achieve their ideological agenda." Chemerinsky, *supra* note 41, at 253.

79. *See, e.g.,* Burford v. Sun Oil Co., 319 U.S. 315, 337 (1943) (Frankfurter, J. dissenting) ("I [have] long favored the entire abolition of diversity jurisdiction"); Redish, *Separation of Powers, supra* note 1, at 104 (the Supreme Court, due to its dissatisfaction with diversity jurisdiction, has "developed principles of questionable logic that function only to serve the thinly-veiled goal of curbing the scope of the diversity grant"); *see also supra* note 54.

80. *Burford,* for example, was decided in 1943, long before the civil rights movement gained any real steam. Moreover, mixed in among the restrictive *Younger* decisions of recent years are cases broadening federal relief, such as those expanding municipal liability to plaintiffs injured by unconstitutional conduct. *See generally* Wells, *Comity, supra* note 2, at 73.

81. *See supra* notes 30-31 and accompanying text.

82. *See supra* note 46 and accompanying text.

83. *See* Redish, *Separation of Powers, supra* note 1, at 111-12. Justice Brennan has also expressed this view. *See, e.g.,* Juidice v. Vail, 430 U.S. 327, 343 (1977) (Brennan, J., dissenting) ("The crystal clarity of the congressional decision and purpose in adopting § 1983 . . . expose[s] [today's abstention] decision as [a] deliberate and conscious flouting[ ] of a decision Congress was constitutionally empowered to make."); Huffman v. Pursue, Ltd., 420 U.S. 592, 616 (1975) (Brennan, J., dissenting) ("[Section 1983] serves a particular congressional objective long recognized and enforced by the Court. Today's [decision] will defeat that objective.").

eral jurisdiction, remains good law; the *Younger* cases curtail *Monroe's* reach, but do not overrule it. If the premises of cases like *Younger* are correct, however, the logical underpinnings of cases like *Monroe* are destroyed, suggesting that these cases could, and perhaps should, be overruled.[84] By failing to overrule them, the Court leaves the law going in two directions at once.[85]

Finally, although there is a temptation to attribute the conflicting lines of authority to changed circumstances, and consider the job done, this does nothing to address the doctrinal confusion facing courts and litigants in abstention cases. Whatever the scholarly inclination to explain judicial decisions with regard to shifting political beliefs, judges and lawyers continue to express themselves in doctrinal, precedential terms. Scholars fight over what "really" accounts for a given decision while judges continue to sit at their desks and write opinions that, even if only purportedly, apply principles established in prior cases.[86] The scholarly resolution of the conflict, therefore, does little for the rest of the legal world, which continues to take precedent at face value.

It is now almost thirty years since *Monroe* and twenty years since *Younger.* The question is whether it is now possible, with a bird's eye view of changing conceptions of federal jurisdiction, to merge the competing lines of authority. The next section of this article establishes the basis for a revisionist theory of the abstention doctrines and explains how the theory would operate. The succeeding section then shows how prior precedent can be interpreted consistent with this new theory.

II. THE REVISIONIST THEORY

A. *The Theoretical Underpinnings of the Revisionist Theory*

The revisionist theory envisions an abstention doctrine that explicitly does a more sensitive job than does the traditional theory of reconciling the competing demands for the exercise of federal or state

84. True, *Monroe's* grounding in congressional intent would make such an overruling awkward. But, after all, *Monroe* came almost 100 years after §§ 1983 and 1343 were enacted. The Court could decide that *Monroe* simply was wrong. *See* Wells, *Disparity, supra* note 1, at 331-34 (asking why the Court has not overruled *Monroe* in light of subsequent cases like *Younger*).

85. Wells, *Disparity, supra* note 1, at 331 ("I know of no principled justification for the coexistence of *Monroe* and the expansive judicial federalism decisions [based on *Younger*]").

86. *Compare* Monaghan, *Taking Supreme Court Opinions Seriously,* 37 MD. L. REV. 2, 5 (1979) ("Professors have, for many years, astonished students with their perceptive re-rationalizations of the cases.") *with* Stevens, *The Life Span of a Judge-Made Rule,* 58 N.Y.U. L. REV. 1, 4 (1983) ("In [Supreme Court] conference deliberation precedents regularly provide the basis for analysis and discussion."). *See also* Zeppos, *Judicial Candor and Statutory Interpretation,* 78 GEO. L.J. (forthcoming 1990).

jurisdiction. The revisionist theory begins with the premise, central to abstention's critics, that it is the role of the Supreme Court to ensure a federal forum to vindicate federal rights. Recognizing, however, that not every case requires a federal *trial* forum to protect federal rights, the revisionist theory permits consideration of other factors that mitigate in favor of deference to state proceedings when federal interests are not threatened or can be protected by direct review of state court decisions by the Supreme Court. The revisionist theory seeks to cut with a scalpel where the Court has, at least on the face of its decisions, cut with a cleaver.

The problem with the arguments raised against abstention is that, even admitting that federal review is necessary to vindicate federal rights, for the most part these arguments prove too much. Abstention's critics maintain it is wholly inappropriate to deny a federal trial forum once such a forum has been granted by Congress to protect federal rights and interests.[87] But not every case falling within congressionally granted jurisdiction presents the concerns that motivated Congress to grant or expand federal jurisdiction. In some cases, although lower federal court jurisdiction exists, federal interests can be vindicated through other channels without exercising that jurisdiction.

First, assuming that a federal forum is necessary to protect a federal right, the lower federal courts are not the only federal fora available for this purpose. The Supreme Court can, of course, also serve this function by direct review of state-court adjudication of federal claims.[88] Some commentators have persuasively argued that the Supreme Court cannot provide sufficient federal review in all cases raising federal claims, calling into question Congress' power to eliminate the lower federal courts.[89] As convincing as aspects of this argument are, however, the argument does not establish the converse: that

87. *See, e.g.*, Redish, *Separation of Powers*, *supra* note 1, at 110 ("[t]he courts may not ignore . . . congressional policy decisions"); Soifer and Macgill, *supra* note 73, at 1142 ("the Court has elected a policy apparently inconsistent with legislative command"); *see also supra* notes 30-31 and accompanying text.

88. For a critical look at this question, see *infra* notes 300-17 and accompanying text (discussing the adequacy of direct review by the Supreme Court).

89. *See, e.g.*, Eisenberg, *supra* note 1, at 510-13 (footnotes omitted):

> The Supreme Court is clearly no longer capable [as a result of its increasing caseload] of providing a federal forum to hear the merits of every case involving a federal question . . . . [Consequently] the lower courts have become the primary vindicators of federal rights . . . . It can now be asserted that their existence is in some form constitutionally required.

Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 68 (1981) (arguing that manipulating lower federal court jurisdiction is an unconstitutional attempt to undo the Supreme Court's constitutional doctrine). *See generally* Wells, *Abstention*, *supra* note 2, at 1129 ("To assign Congress exclusive control over federal remedies for constitutional violations . . . is to give a majoritarian branch of government absolute control over the assertion of anti-majoritarian rights.").

the Supreme Court is an inadequate initial federal forum in every case. In fact, arguments that Congress could not now abolish the lower federal courts stem not from a concern for affording a federal *trial* forum, but from a concern for adequate federal review. In some cases, the Supreme Court may provide such review.[90]

Second, a federal forum is neither necessary nor appropriate in every case in which federal jurisdiction currently lies. Just as some cases may be moved from state to federal court to protect federal interests, state interests may suggest that certain cases should be "removed" to state court. Although the presence of state interests alone ought not to justify federal abstention, if abstention is possible without doing any damage to federal interests, then deference to state proceedings is entirely appropriate.[91]

Third, unless there is nothing to the federalism and comity arguments advanced by the Court in favor of abstention, sweeping all cases falling under the head of federal jurisdiction into federal court may threaten interests essential to the smooth operation of a government organized around dual sovereigns with coordinate court systems.

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90. *See infra* notes 300-17 and accompanying text. This point is made quite well in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), in which the United States sued in federal district court for a declaration of water rights. The United States, which had previously asserted its water rights in state court, brought this suit in federal district court against some 1000 water users. 424 U.S. at 800. The Court, in an opinion by Justice Brennan, held that the federal district court should dismiss the suit in favor of the ongoing state court proceeding. Justice Stevens argued forcefully in dissent that the Court inappropriately was depriving the United States of a right to litigate in its own courts: "[T]he Federal Government surely has no lesser right of access to the federal forum than does a private litigant, such as an Indian asserting his own claim." 424 U.S. at 827 (Stevens, J., dissenting). But it is hardly accurate to say that the United States was deprived of a federal forum. Should the eventual result in state court turn out to be unacceptable to the United States, it could always seek review in the U.S. Supreme Court. As Justice Stewart, also dissenting, admitted, "federal judicial review of the state courts' resolution of issues of federal law will be possible . . . by this Court in the exercise of its certiorari jurisdiction." 424 U.S. at 826 (Stewart, J., dissenting). And, as anyone familiar with Supreme Court litigation knows, if the United States were to request plenary review in that instance, it almost certainly would be granted. *See* 424 U.S. at 812-13 (commenting on the adequacy of federal review).

It is true that on its facts *Colorado River* is a somewhat novel case. Not every litigant has the same claim upon Supreme Court resources as does the United States. The point, however, is that if cases exist where the possibility of direct review by the Supreme Court could adequately protect federal interests, and if those cases can be identified and categorized, then in those cases at least a federal trial forum is less important to obtaining federal review.

91. In Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959), for example, the defendant power company removed the case to federal court under diversity jurisdiction to challenge a municipality's authority under state law to condemn property. The federal district court stayed its hand to permit the state supreme court to rule on what was an important, unresolved question of state law, and the Supreme Court approved abstention. That decision was appropriate, for *Thibodaux* involved a state-law issue of great importance to the state that could be decided in state court without threatening federal interests. The grant of diversity jurisdiction was intended to avoid the bias of state courts, but such bias was unlikely to affect the decision in *Thibodaux* because it involved a pure question of law that would have widespread applicability to state citizens and noncitizens alike. *See infra* notes 229-31 and accompanying text.

There is bound to be serious friction in a dual court system where the federal courts — while mouthing platitudes about coequal responsibility — nonetheless consistently trump efforts of the state courts.[92] Friction resulting from a genuine need to protect federal interests and rights can be understood as a necessary part of our federal system.[93] Friction that results from the exercise of unnecessarily broad federal jurisdiction, however, cannot be so justified.

Moreover, unnecessary friction ultimately takes its toll on the ability of federal courts to protect federal rights. Restraint enhances power.[94] Although in other contexts the propriety of the exercise of the "passive virtues" has been contested hotly,[95] these concerns seem to carry weight in the area of federal abstention.[96] The increased federalization of claims threatens to cheapen the special nature of federal court jurisdiction by making every state court matter a "federal case."[97] Again, this concern should not drive the Court to refuse jurisdiction in cases where it is necessary to protect federal interests, but if such cases can be separated from others where federal jurisdiction does not play such a role, the federal courts could avoid the lessened status that might follow from over-involvement in mill-run litigation.[98]

The revisionist theory of abstention advanced here proceeds from the notion that although congressional jurisdictional grants, and Supreme Court interpretation of those grants, sweep quite broadly, the Court uses the abstention doctrines to effect a sensitive allocation of cases between the federal and state courts, ensuring the exercise of

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92. *See* Moore v. Sims, 442 U.S. 415, 427 (1979) (quoting Railroad Commn. v. Pullman Co., 312 U.S. 496, 500 (1941)) (abstention is a way of avoiding "the friction [between federal and state courts caused by] a premature constitutional adjudication").

93. *See* Wells, *Comity, supra* note 2, at 77 (argument that federal decision unnecessarily disrupts state program must rest on assumption that federal decision is wrong; otherwise, disruption is warranted).

94. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962) (on the "passive virtues").

95. *See, e.g.*, Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

96. *See* Shapiro, *supra* note 2, at 578 (arguing that Bickel's concerns carry special weight with regard to lower federal court jurisdiction). *But see* Field, *Abstention Today, supra* note 2, at 603 (arguing exactly the opposite).

97. *Cf.* Neuborne, *supra* note 2, at 1125 ("Distance from the pressures and emotions generated by the application of constitutional doctrine is conducive to a generous reading and vigorous enforcement of constitutional rights."); Yackle, *supra* note 2, at 1031-32 ("The overriding responsibility of the state courts to carry out state law thus deprives them of the neutrality and dispassion demanded for contemporaneous enforcement of the fourteenth amendment.").

98. *See* Eisenberg, *supra* note 1, at 515 ("An overabundance of federal forums with unrestricted jurisdiction to hear all federal cases could . . . undermine the judiciary.").

federal jurisdiction only where necessary to vindicate federal rights.[99] Despite persistent assertions that the abstention doctrines wrongfully have deprived federal plaintiffs of federal fora, the results in abstention decisions can be read to support the conclusion that the Court has been using those doctrines to achieve just such a sensitive allocation. The abstention doctrines permit the exercise of federal jurisdiction where a federal trial forum is necessary to protect federal interests and rights. When legitimate state interests are present, however, and the case can be resolved in state court without threatening federal interests — either because no important federal interest is at stake or because direct review by the Supreme Court is adequate to the task — abstention is required to permit the state courts to resolve the issues.

B. *How the Revisionist Theory Should Operate*

The premise of any model of abstention is that a plaintiff has chosen to file suit in federal court in a matter over which the lower federal court has been granted jurisdiction by Congress. The question is whether the case should proceed in federal court, or whether some other sufficiently strong consideration mitigates in favor of overriding the plaintiff's choice. The revisionist theory presupposes that the decision whether to honor a plaintiff's choice to proceed in state or federal court is based on a concern that federal jurisdiction lie when necessary to vindicate federal rights, but that abstention is appropriate when significant state interests exist and the federal interest is *de minimis,* or could be protected by Supreme Court review.

Under the revisionist theory, three basic forum decisions are necessary. Each of these decisions is made on the basis of several rather sensible considerations. The three questions are (1) whether the nature of the case is such that judicious use of federal resources and concern for legitimate state interests nonetheless mandate resolution of the case as an initial matter in a lower federal court in order to protect federal rights; (2) whether, if the case instead is resolved as an initial matter in state court, the state judicial system provides an adequate means of raising and preserving for Supreme Court review any federal question in the case; and (3) whether direct review by the Supreme Court of federal questions resolved by the state courts is likely to be

99. Professor Yackle also has suggested that these concerns should drive application of the abstention doctrines. *See* Yackle, *supra* note 2, at 1042 ("The forum-allocation question should turn . . . on a reasoned determination of whether and when the federal courts should be open to resolve litigants' disputes . . . ."); *see also* Bezanson, *supra* note 2, at 1116 ("[Abstention is] an allocative device designed to promote the sharing of responsibility in federal litigation with state courts . . . .").

adequate to protect federal interests. Each of these questions is addressed in turn.

1. *Necessity of an Initial Federal Forum*

The first consideration is whether a federal trial forum is necessary to protect a federal right. Often this will depend upon whether protection of the federal right turns upon questions of fact.[100] If fact-finding is not important, as in the case of a facial challenge to a state statute, direct Supreme Court review of the state decision may be adequate. On the other hand, if proof of the denial of a federal right turns on factual issues, such as in the case of an allegedly coerced confession, presentation of the question to a federal trial forum may be necessary. There are two reasons for this. First, state bias on the merits of the issue may color fact-finding by the state court with regard to the federal right.[101] Second, compounding the first danger, it is particularly difficult for the Supreme Court to provide meaningful review of lower-court fact-finding.[102]

Related to this first consideration is the nature of the federal right asserted. Some federal claims of right — *e.g.*, property and economic liberty — pose less of a constraint on state regulation than do other federal rights, which require strict scrutiny of the state basis for regulation.[103] Thus, the Court would want, if such a fine division were

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100. Field, Pullman *Abstention, supra* note 2, at 1083 ("the judge who finds the facts can alter the ultimate result in a case"); Neuborne, *supra* note 2, at 1119 ("[I]n many constitutional cases, the fact finding process plays a critical role in the resolution of the controversy.").

101. *See* Field, Pullman *Abstention, supra* note 2, at 1083 ("Bias against federal claims may not be widespread among state court judges, but the ease with which the judge who finds the facts can alter the ultimate result in such a case makes such a bias particularly difficult to guard against without original federal jurisdiction.").

102. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416-17 (1964):

> [Supreme Court] review . . . is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts . . . . [T]his is especially true as to issues of fact . . . . The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.

Collins, *The Unhappy History of Federal Question Removal,* 71 IOWA L. REV. 717, 759 (1986) ("the need for a federal fact finder [is not easily met] by the prospect of Supreme Court review alone"); Davies, *supra* note 2, at 29 ("The Supreme Court cannot perform this review function for decisions coming up from state courts due to its narrow capacity for factual review . . . ."); Field, Pullman *Abstention, supra* note 2, at 1083-84 ("[T]he possibility of Supreme Court review as the sole federal input [in state cases will not] adequately protect the federal interests . . . . [W]hen the Court does grant a full hearing, it typically will not review the factual determinations that state courts have made."); Yackle, *supra* note 2, at 1023 ("Appellate review does not substitute for the trial level resolution of factual disputes.").

103. *See* G. GUNTHER, CONSTITUTIONAL LAW 472 (11th ed. 1985) (noting the "Court's stance of extreme deference to economic regulation [by the states]"). *Compare* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (granting the State of Oklahoma great leeway in regulating local businesses) *with* Roe v. Wade, 410 U.S. 113 (1973) (holding that states may not pass laws that interfere with a woman's right to have an abortion during the first trimester of pregnancy);

possible, to retain federal jurisdiction in cases where federal rights call for strong federal protection, while leaving to state courts those cases in which the federal claim of right generally provides the state greater leeway for regulation.

The Court would also want to consider the basis for the state's asserted interest in resolving a given case in state court. There are cases in which federal adjudication presents very real difficulties for the state. For example, if the primary question in a case is one that involves an unsettled question of state law with broad application, abstention might be appropriate to avoid federal resolution of the state law question different from the decision the highest state court would render if given the chance.[104] This particularly would be the case if federal interests are not threatened by state court resolution of the case or issue.[105]

Another consideration is the extent to which exercising federal jurisdiction might involve the federal courts in deciding numerous cases commonly viewed as mill-run state court litigation. The lower federal courts should not be flooded with cases that do not really require the prestige or resources of the federal bench.[106]

Finally, in a related vein, the Court would want to use abstention to avoid requiring the district courts to make premature decisions on the merits of unsettled federal questions, particularly constitutional questions. This tactic is nothing but an application of the familiar *Ashwander* doctrine.[107] If a certain class of cases may be channeled to the lower state courts for a decision on state law grounds, thus removing the need for a decision by the federal court on federal constitutional grounds, abstention in favor of state court jurisdiction might be

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see also Wells, *Comity, supra* note 2, at 77 (arguing that business regulation cases require lesser federal review, and justifying the *Burford* line of cases on this ground).

104. *See, e.g.,* Moore v. Sims, 442 U.S. 415, 427-30 (1979) (it is important to allow state courts the opportunity to decide state law issues); *England,* 375 U.S. at 415 ("[S]tate courts [are] the final expositors of state law."); *see also* Field, Pullman *Abstention, supra* note 2, at 1084-85 (it is appropriate to allow state courts to resolve state law issues in certain cases); Redish, *Separation of Powers, supra* note 1, at 95 ("Ideally, the state courts should be given the first opportunity to provide a definitive construction of an ambiguous state statute.").

105. *See* Wells, *Disparity, supra* note 1, at 308-10 (when the plaintiff seeking a federal forum has a weak federal interest, like protection of economic rights, and the state has a high countervailing interest in regulation, state court is the most appropriate forum).

106. *See, e.g.,* Wisconsin v. Constantineau, 400 U.S. 433, 443 (1971) (Black, J., dissenting) ("This Court has an abundance of important work to do, which, if it is to be done well, should not be subject to the added pressures of non-urgent state cases which the federal courts have never been called on to resolve."); Eisenberg, *supra* note 1, at 515 ("An overabundance of federal forums with unrestricted jurisdiction to hear all federal cases could in fact undermine the judiciary.").

107. Ashwander v. TVA, 297 U.S. 288 (1936).

appropriate in these cases as well.[108]

2. *Adequacy of the State Court Forum*

Having tentatively determined to remove a case from a federal trial forum, the next inquiry is whether the alternative path of initial state court adjudication, followed, if necessary, by direct Supreme Court review, is adequate to protect any federal interest in the case. Perhaps the most obvious forum decision, therefore, is assessing whether the state provides a vehicle for raising federal claims in state court.[109] If not, abstention is inappropriate.

3. *Adequacy of Direct Review*

Finally, it is necessary to assess whether the Supreme Court adequately can review the work of the state courts in order to protect federal interests. Even if the state provides a forum in which to raise the federal claim, the case probably should be resolved in federal district court if the Supreme Court cannot effectively review state determinations with regard to the claimed federal right.

In large part this issue could be resolved by considering the extent to which resolution of the federal issue turns on questions of fact. If the federal issue essentially involves a question of law, it would be more easily addressed by the Court on direct review than would an issue that turns heavily upon factual determinations.[110] For example, facial challenges to a statute present easier candidates for adequate direct review than challenges to statutes as applied. Therefore, if the

108. Several cases advocate this justification for abstention. *See, e.g.,* Railroad Commn. v. Pullman Co., 312 U.S. 496, 498 (1941) ("Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."); City of Meridian v. Southern Bell Tel. & Tel. Co., 358 U.S. 639, 641 (1959) ("In such a case, when the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily.").

109. The Supreme Court has made just this point in a number of cases, although not explicitly in the context of the revisionist theory. Under the traditional approach, abstention would be inappropriate if the state provided no forum, on the theory that the litigant is entitled to some forum in which to raise the federal claim. *See, e.g.,* Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975) (holding that *Younger* abstention is inappropriate where the plaintiffs sought to challenge the constitutionality of their pre-trial detention and where the plaintiffs did not have an opportunity to raise their federal claim in the state courts); *see also* Collins, *supra* note 2, at 68 ("when the state system forbids raising the federal issue that requires a prompt decision in an ongoing state court lawsuit, [abstention is inappropriate]").

The same rule would obtain under the revisionist theory, but for a different reason. Abstention is inappropriate under the revisionist theory if the state provides no forum because then the Supreme Court would never have an opportunity to review the issue; access to a federal forum to resolve the federal claim would be completely cut off. In those cases, immediate access to a lower federal court would be necessary.

110. *See supra* notes 100-02 and accompanying text.

two types of cases could be distinguished, abstention would be less appropriate in the case of the "as applied" challenge, and more appropriate in the case of a facial challenge.

Moreover, the Court needs to take into account the volume of cases that arise presenting a certain issue. If an issue arises only periodically, the Court might be more able to handle it on direct review. Often this consideration will coincide with the fact/law consideration: facial challenges to a statute will arise far less frequently than "as applied" challenges. This allocation also makes sense to the extent that facial challenges will probably have a broader impact than "as applied" challenges, making them excellent candidates for Supreme Court exposition.[111]

This last factor illustrates an important point about the operation of the entire scheme. The forum decisions cannot be made independently of one another: often several factors will compete or overlap. If an issue will arise frequently, either the lower federal courts or the Supreme Court ultimately must bear the burden of review. Given that reality, a decision must be made between the two based on some other factor such as the extent to which fact-finding is important. In short, taking pressure off of one part of the system necessarily means placing it somewhere else.

Therefore, the revisionist theory recognizes that the question is, to some extent, one of resource allocation. Although it is possible to envision a system that allocates every case presenting a federal issue to an initial federal trial forum, such a system would present serious difficulties not only for federalism and comity concerns, but also for those concerned with the practical realities of federal caseloads and the prestige of the federal courts.[112] The aim, therefore, is to develop an allocation of cases between the state and federal courts that minimizes the difficulties presented by such review. The revisionist theory has a special appeal because, unlike the traditional approach, it allows for this allocation in fairly explicit terms.

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111. Professor Yackle points out that a major factor in the Supreme Court's decision to hear a case is the national significance of the issue. Yackle, *supra* note 2, at 1022 n.137. Because the impact of a facial challenge is broader than an "as-applied" challenge, they tend to have greater statewide or national significance; facial challenges are therefore more appropriate for Supreme Court review.

112. *See* Neuborne, supra *note* 2, at 1128-29 ("[B]y urging a broad option to invoke federal jurisdiction, . . . lawyers exacerbate an already difficult caseload burden in the federal courts . . . . [A] failure to remedy the overburdening of the federal trial courts threatens precisely [their] capacity for excellence."); *see also infra* notes 315-18 and accompanying text.

III. THE THEORY APPLIED TO CASES

This Part seeks to demonstrate that the revisionist theory provides a more thorough, and in many ways more satisfactory, explanation for the Supreme Court's abstention holdings than the traditional approach. This demonstration is complicated somewhat by the fact that the variety of abstention holdings under the traditional approach defies orderly characterization, making it difficult to group them for purposes of analysis under one revisionist theory.[113] Nonetheless, using *Younger* abstention to provide a framework, progress can be made toward a coherent comparison of the two theories. *Younger* abstention is the appropriate vehicle for providing such a framework because it is the abstention doctrine most frequently applied by the Court. As this Part demonstrates, the other abstention doctrines merely fill in gaps left by *Younger.*

The underlying premise of *Younger* abstention is that a federal court should not interfere in the ongoing proceedings of a state court.[114] The doctrine had its inception in *Younger v. Harris,*[115] which held that a federal court could not enjoin an ongoing state criminal proceeding.[116] *Younger* spoke only to cases involving injunctive relief. It did not address relief other than injunctions, noncriminal cases, or cases that were not pending at the time federal jurisdiction was invoked.[117] Since the time of *Younger,* however, the Court has arrived at a tentative resolution as to whether *Younger* abstention ought to apply to these other types of cases.

Perhaps the simplest issue for the Court was whether *Younger* abstention required a federal court to refrain from awarding relief other

113. *See* Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 11 n.9 (1987) ("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."); *see also* C. WRIGHT, *supra* note 20, at 303 ("These various doctrines overlap at times, and the courts have not always distinguished them clearly."); Field, Pullman *Abstention, supra* note 2, at 1147 ("Partly because of the confusion of terminology, and partly because the limits of the other categories of abstention are largely incoherent, the relationships between the various categories are less than clear.").

114. Younger v. Harris, 401 U.S. 37, 43 (1971) ("Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try cases free from interference by federal courts.").

115. 401 U.S. 37 (1971).

116. 401 U.S. at 41. The doctrine has its exceptions: abstention is unwarranted if the state action is brought in bad faith or to harass the claimant; if the statute is unconstitutional on its face; or if there is the threat of immediate and irreparable injury. *See* 401 U.S. at 53-54. It is rare that a case actually falls within a *Younger* exception, however. *See, e.g.,* Collins, *supra* note 2, at 60 (Court has never found a "bad-faith proceeding"); Soifer & Macgill, *supra* note 73, at 1210 (*Trainor* erased the thought that exceptions ever would be found and applied).

117. *See* 401 U.S. at 41.

than injunctive relief.[118] Even if a federal court may not interfere with an ongoing state court proceeding by enjoining it, the award of declaratory relief to a federal plaintiff need not be seen as posing the same interference because the state court would remain free to proceed to its own judgment.[119] Nonetheless, in a companion case to *Younger,* the Court made clear that at least in the case of pending state proceedings, declaratory relief is as forbidden as injunctive relief.[120] Thus, the general rule is that the federal court simply may not proceed in a case if

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118. Under one of the primary rationales for *Younger* abstention, the equity rationale, there was reason to believe that nonequitable relief would be treated differently from equitable relief. *See* 401 U.S. at 43-44 (justifying doctrine on equity principles); *see also* Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 10 (1987) ("The first ground for the *Younger* decision was 'the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not get to restrain a criminal prosecution, when the moving party has an adequate remedy at law.' ") (quoting Younger v. Harris, 401 U.S. 37, 43 (1971)). If the requested relief were not equitable in nature, then limitations on the grant of equity — *e.g.,* that equity will not intervene where there is an adequate remedy at law — arguably would have no place in barring relief. This equity rationale for abstention can be seen as early as *Ex Parte Young,* 209 U.S. 123 (1908). The Court there stated:

> [A]n injunction against a state court would be a violation of the whole scheme of our government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.
>
> The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists because of a power to do the former.

209 U.S. at 163.

In Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), then-Justice Rehnquist, writing for the majority, divorced the equity rationale from the *Younger* abstention doctrine, insisting that the Supreme Court has "consistently required" federal courts to "abide by standards of restraint that go well beyond those of private equity jurisprudence." 420 U.S. at 603. In Hicks v. Miranda, 422 U.S. 332 (1975), Justice White, writing for the majority, upheld the *Younger* abstention doctrine without referring to the equity rationale at all. *See also* Middlesex County Ethics Commn. v. Garden State Bar Assn., 457 U.S. 423 (1982) (applying *Younger* abstention principle without any mention of the equity rationale); Wells, *Abstention, supra* note 2, at 1108 ("As the rules have evolved, the Court has relied less and less on equity and instead has stressed values of federalism as the basis of these doctrines. Accordingly, the abstention doctrines cannot be justified in terms of the inherent powers and limitations of a court of equity.").

119. Indeed, Chief Justice Rehnquist has suggested that a federal declaratory judgment would not bind the state court in a subsequent proceeding. Steffel v. Thompson, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., concurring). Thus, according to the Chief Justice, if a federal plaintiff obtains a federal declaratory judgment that a state statute was unconstitutional prior to violating the statute, and then the state subsequently prosecutes the federal plaintiff in state court, the state court then would be free to reach a different conclusion than the federal court with regard to the statute's constitutionality. 415 U.S. at 481-83 (Rehnquist, J., concurring). The federal declaration of rights, however, would be "highly persuasive." 415 U.S. at 482 n.3 (Rehnquist, J., concurring).

120. *See* Samuels v. Mackell, 401 U.S. 66 (1971) (holding that the same principles that govern the propriety of federal injunctions of state criminal proceedings govern the issuance of federal declaratory judgments in connection with such proceedings); *see also* Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) (holding similarly for state tax proceedings).

The Court has declined to rule whether *Younger* abstention will apply to claims for money damages. The Court had the opportunity to decide this issue in Deakins v. Monaghan, 484 U.S. 193 (1988), but expressly avoided it. 484 U.S. at 202. There is a split of authority among the circuits of the United States Courts of Appeals as to whether *Younger* applies to a claim for damages. The First, Ninth, and Tenth Circuits have held that *Younger* applies to such a case,

the state criminal court has jurisdiction of the matter and is proceeding.

Only slightly more complicated was the issue of whether *Younger* applies to noncriminal proceedings. In a series of cases, the Court applied the federalism and comity rationales of *Younger* to cases outside the jurisdiction of the criminal courts, but only where the state had a serious interest.[121] The most prominent of these decisions involved civil enforcement actions: federal courts will defer not only to pending state criminal proceedings, but also to state civil cases in which the state (or its representative) is a party plaintiff seeking to exercise coercive authority over a private defendant. Thus, in *Huffman v. Pursue, Ltd.*,[122] the *Younger* doctrine was applied to require federal abstention in the face of a state nuisance action brought to enjoin operation of a pornographic theater.[123] In *Trainor v. Hernandez*,[124] the Court applied *Younger* in a case involving a challenge brought in federal court to an attachment procedure invoked by the state in a state court proceeding to recover allegedly fraudulently obtained welfare benefits.[125] A related question that remained after cases such as *Huffman* and *Trainor* was whether *Younger* would be invoked in a civil proceeding between two purely private litigants.[126] The Court answered the question affirmatively in *Pennzoil Co. v. Texaco Inc.*,[127] holding that a federal court could not entertain a challenge to a state appeal-bond statute if the same challenge could be raised in state court in a then-pending private civil action.[128] Although the precise contours of *Pennzoil*'s extension of *Younger* are unclear, the general rule (subject to the specific limitations described below) appears to be that federal

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while the Fifth and Sixth Circuits have held that it does not. *See* 484 U.S. at 208 n.3 (White, J., concurring) (reviewing circuit court decisions).

121. *See, e.g.*, Moore v. Sims, 442 U.S. 415, 423-35 (1979) (ordering lower federal court not to interfere with a pending state court proceeding in which the State of Texas had taken custody of the federal plaintiff's children to protect them from alleged child abuse).

122. 420 U.S. 592 (1975).

123. 420 U.S. at 607.

124. 431 U.S. 434 (1977).

125. 431 U.S. at 444. The Court interpreted *Huffman* to have argued that

> while the traditional maxim that equity will not enjoin a criminal prosecution strictly speaking did not apply to [a civil enforcement action], the 'more vital consideration' of comity counseled restraint as strongly in the context of a pending state civil enforcement action as in the context of a pending criminal proceeding.

431 U.S. at 443 (citations omitted).

126. *See Huffman*, 420 U.S. at 607; *Trainor*, 431 U.S. at 444 n.8.

127. 481 U.S. 1 (1987).

128. 481 U.S. at 17. Citing *Trainor* and *Huffman*, the Court relied on the nature of the state's interest and not the identity of the parties in applying the *Younger* doctrine. 481 U.S. at 14 n.12 ("[T]he State of Texas has an interest in this proceeding 'that goes beyond its interest as adjudicator of wholly private disputes.' ").

courts may not proceed in civil or criminal cases in which a state court has jurisdiction and is proceeding.[129]

The final *Younger* issue was whether a federal court should defer only to a proceeding that was pending at the time the federal action was filed. The answer seems to be that abstention is appropriate even beyond that mark. In *Hicks v. Miranda,*[130] the state filed a criminal action against the federal plaintiff after the federal plaintiff brought a federal action challenging a state obscenity statute. The Court held that so long as the state initiated its state court action before "proceedings of substance on the merits" had begun in federal court, the federal court should abstain.[131] Thus, rather than relying upon a pending/nonpending distinction (which is the traditional interpretation of the *Younger* cases), a federal court generally will not exercise jurisdiction over a case, criminal or civil, in which the federal defendant has begun a state proceeding, or begins one shortly after the federal court proceeding is initiated.[132]

This statement of *Younger*'s applicability undoubtedly seems so broad that a few preliminary observations are in order. First, there *are* exceptions.[133] Second, *Younger* cannot apply to certain cases. The touchstone of *Younger* is the possible existence of a state proceeding. Such proceedings will not exist in cases where federal removal jurisdiction applies. Thus, for example, federal courts generally will not abstain under *Younger* in diversity cases or cases in which the state plaintiff's case presents a federal question or otherwise falls under federal jurisdiction, because in such cases any state action could be re-

129. *But see* Deakins v. Monaghan, 484 U.S. 193, 202 (1988) (even if *Younger* applies, "the District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding"). *Deakins* is consistent with the revisionist theory because in that case the state failed to provide adequate means of addressing the federal concern.

130. 422 U.S. 332 (1975).

131. 422 U.S. at 349; *see also* Doran v. Salem Inn, Inc., 422 U.S. 922, 929 (1975) (holding that because federal litigation was in an "embryonic stage and no contested matter had been decided," the plaintiff's request for an injunction was "squarely governed by *Younger*"); *cf.* Steffel v. Thompson, 415 U.S. 452, 462-63 (1974) (holding that where state enforcement of a statute has been threatened, but no prosecution is pending, *Younger* does not require the district court to abstain from hearing a constitutional attack on the statute).

132. *See* Bator, *supra* note 2, at 617 n.35:

> It is a disadvantage of the overstated distinction between pending and threatened state proceedings that it obscures a distinction which is truly fundamental: the distinction between cases in which the plaintiff seeks an anticipatory ruling that future conduct is constitutionally immune from state punishment (or other regulation), and cases in which the plaintiff is claiming that past conduct is so immune. In the former case the state enforcement proceeding is by hypothesis not truly "ripe" (although the federal action may be); the violation has not yet occurred, and the whole point of the federal action is to obtain an adjudication of the federal claim without risking punishment (or regulation) even if the claim is rejected.

133. *See supra* note 116. Moreover, *Younger* will not apply if the state provides no opportunity to raise the federal claim in the state proceeding. *See infra* notes 169-71 and accompanying text.

moved to federal court, and thus there would be no state proceeding to which the federal court must defer.[134] But, as this section will explain, subject to these caveats, *Younger is* extremely broad.[135]

Thus, the universe of abstention possibilities may be divided into two categories: one in which *Younger* abstention is appropriate and one in which it is not. *Younger* abstention generally is appropriate in any case in which the federal defendant already has begun a state proceeding at the time the federal action is commenced, or begins such a proceeding shortly after the federal action is filed. *Younger* abstention is inappropriate in any case in which the federal defendant either chooses not to file such a state proceeding or cannot do so successfully, in that any action so filed will in turn be removed by the federal plaintiff back to federal court.

With this understanding, it is possible to begin to draw a matrix with the following vertical division:

FIGURE 1

Younger abstention appropriate (state proceeding)	*Younger* abstention inappropriate (no state proceeding)

Next, it is necessary to divide this universe horizontally, placing in one category cases within the criminal jurisdiction of the state courts, and in the other category cases outside that jurisdiction. This division is important because cases within the state's criminal jurisdiction are subject to federal habeas corpus review, while those within the civil jurisdiction generally are not.[136] The revisionist theory seeks to ensure

134. *See, e.g.*, 28 U.S.C. § 1441(b) (1982) (permitting removal of civil actions involving jurisdiction founded on diversity "if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought"); 28 U.S.C. § 1442 (1982) (permitting removal of actions against federal officials acting under color of law). For a fuller explanation of the relationship between removal and abstention, see *infra* notes 163-64, 193-96, and accompanying text.

135. *See* Wells, *Disparity, supra* note 1, at 294-95; Redish, Younger *Doctrine, supra* note 2, at 481 (taking *Younger*'s rationale of avoiding offense to state judges and judicial systems to its logical conclusion would extend the doctrine to all civil cases and any exceptions would disappear); Soifer & Macgill, *supra* note 73, at 1164, 1213 (*Younger* rationales of preventing erosion of the role of juries and avoiding duplicate proceedings, taken to their logical conclusions, would extend to civil as well as criminal cases).

136. Though federal habeas corpus is not limited to criminal defendants, the statute limits habeas review to those in "custody" in violation of federal law. 28 U.S.C. § 2241(c) (1982).

that federal review is available, despite the abstention doctrines, where necessary to vindicate federal rights. The significance of habeas review is that even if abstention *initially* is required under *Younger* in certain cases, notably state criminal cases, habeas review might afford an adequate federal forum subsequent to adjudication in the state court.[137] Thus, we now have a simple four-square matrix:

FIGURE 2

	Younger abstention appropriate (state proceeding)	*Younger* abstention inappropriate (no state proceeding)
cases within criminal jurisdiction	1	2
cases not within criminal jurisdiction	3	4

Analyzing the Court's decisions within the framework of this matrix, one sees that the revisionist theory yields results consistent with the traditional approach, but provides a more satisfactory explanation for the abstention doctrines. Each of the four matrix squares are analyzed below. Squares one, two, and three cover the various *Younger* cases. Square four involves cases not covered by the *Younger* doctrine. It is within this last square that all the remaining abstention doctrines come into play, fine-tuning the results obtained by application of *Younger.*

A. *Square One: Actions Within the State's Criminal Jurisdiction Where the State Initiates Criminal Proceedings*

Many federal constitutional issues arise in the course of a state criminal proceeding. Some are substantive challenges to the applicable state criminal law — for example, a claim that the Constitution prohibits criminalizing certain conduct.[138] More commonly, the

Under this definition, most, but not all, criminal defendants could obtain federal habeas corpus review, and few, if any, civil litigants could do so. *See also infra* notes 145-48.

137. *See infra* notes 145-48 (discussing relationship between habeas and abstention).

138. *See, e.g.,* Hicks v. Miranda, 422 U.S. 332 (1975) (challenging a California criminal obscenity statute on the grounds the statute violated the petitioner's first and fourteenth amendment rights); Steffel v. Thompson, 415 U.S. 452 (1974) (challenging a Georgia criminal trespass law on the grounds that the statute violated the petitioner's first amendment rights); Younger v.

claims are procedural — *i.e.,* a claim that the state has in the course of the criminal proceeding violated a defendant's constitutional due process rights.[139] Square one involves attempts by state criminal defendants to obtain federal review of such federal constitutional claims.

State criminal defendants may file a federal action seeking review of these constitutional issues at any of several possible points. The federal action could, of course, be filed after the state criminal proceeding is initiated, seeking a declaratory judgment or injunctive relief. For example, the defendant could seek to have the state proceeding stayed on the ground that the grand jury that indicted him was composed in a racially discriminatory fashion.[140] Or, the federal action could be filed after the defendant engages in conduct prohibited by state criminal law, but before the state has initiated any proceedings, in an effort to prevent the state from filing criminal charges. For example, a federal plaintiff who has been threatened with prosecution for engaging in allegedly subversive advocacy could file an action in federal court seeking to enjoin such state proceedings on the ground that the allegedly criminal conduct is protected by the first amendment.[141]

Under the revisionist theory, these claims are appropriate for review in a federal trial court. The claims raise serious constitutional issues entitled to careful scrutiny, and resolution of the claims generally will involve fact-finding for which a federal trial court is necessary. Moreover, the volume of cases raising these issues is too high for any pretense of adequate review by the Supreme Court.[142] Thus, the first forum decision mitigates clearly in favor of federal review.

Under the traditional approach, however, the Supreme Court has held that abstention is appropriate in these cases.[143] Indeed, these cases are at the very core of the *Younger* doctrine: they request a fed-

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Harris, 401 U.S. 37 (1971) (challenging the California Criminal Syndicalism Act on the grounds that the statute violated the petitioners' first and fourteenth amendment rights).

139. *See, e.g.,* Illinois v. Krull, 480 U.S. 340 (1987) (challenge to statute authorizing warrantless administrative searches); Donovan v. Dewey, 452 U.S. 594 (1981) (challenge to warrantless search of a mine).

140. In Rogers v. Alabama, 192 U.S. 226 (1904), the defendant moved to quash a murder indictment on the ground that blacks had been excluded on the basis of race from the grand jury. A further option for a criminal defendant might be removal of the entire action to the federal district court under 28 U.S.C. § 1443 (1982).

141. *See* Younger v. Harris, 401 U.S. 37 (1971) (first and fourteenth amendment challenges to the California Criminal Syndicalism Act); Dombrowski v. Pfister, 380 U.S. 479 (1965) (first and fourteenth amendment challenges to Louisiana's Subversive Activities and Communist Control Law).

142. *See* Friedman, *A Tale of Two Habeas,* 73 MINN. L. REV. 247, 274 (1988) (discussing inability of Supreme Court to handle by direct review all constitutional challenges to state criminal convictions).

143. *See Younger,* 401 U.S. at 43-44.

eral court to stay a state criminal proceeding. Thus, there appears to be some conflict between the result demanded by the revisionist theory and the result that obtains under the traditional approach. Moreover, in this instance there appears to be some conflict between different considerations of the revisionist theory, for although these cases seem to require a federal trial forum, there are important state interests that may justify initial litigation in state court. First, criminal law generally is regarded as the quintessential state function, and federal courts rightly are reluctant to interrupt state criminal proceedings. Second, given the nature of the constitutional claims — most are procedural, arising in an ad hoc fashion throughout the course of state criminal proceedings — permitting federal review of each such claim as it arose would pose an intolerable disruption of state criminal proceedings.[144]

Any apparent conflict between the revisionist and traditional models is resolved in square one, however, by the availability of federal habeas corpus review. The general rule is that in these square-one cases a convicted prisoner may bring his federal claim to federal court *subsequent* to the exhaustion of his state remedies. The federal court is not bound by *res judicata* with regard to the state court's legal determination of the constitutional claim,[145] and there even is a mechanism for relitigation of facts if the facts were not determined accurately in state court.[146]

In this way, habeas works an accommodation between the federal and state interests arising in the square-one criminal cases. Litigation proceeds initially in state court, but a federal forum generally is available for relitigation of constitutional claims if the need arises.[147]

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144. *See* Eisenberg, *supra* note 1, at 518:

> Sometimes a federal question does not become apparent until the defense has coalesced and even then it may be difficult to determine whether the "federal" matter will determine the outcome . . . . To require original federal jurisdiction here would be extremely wasteful. The state courts here perform a useful sifting function by narrowing the class of cases that require federal review to those that in fact turn upon federal issues.

See also Yackle, *supra* note 2, at 1032-33 ("The federal claims available to criminal defendants are typically procedural, their effect on outcome characteristically obscure . . . . The merit of claims of that kind, and certainly their effect on the proceedings, can be ascertained only later, after the state courts have responded to litigants' federal objections.").

145. *See* Brown v. Allen, 344 U.S. 443, 458 (1953) ("[T]he state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata.*"); *see generally* Friedman, *supra* note 142, at 303-09 (discussing role of *res judicata* in modern habeas corpus jurisprudence).

146. *See* 28 U.S.C. § 2254(d) (1982) (governing the standard of review of state fact-finding for federal courts entertaining petitions for writs of habeas corpus).

147. *Cf.* Althouse, *supra* note 2, at 1088. The one significant exception to this principle involves fourth amendment claims. In Stone v. Powell, 428 U.S. 465 (1975), the Supreme Court held that habeas review was unavailable with regard to a claim that the state court failed to exclude unlawfully seized evidence, so long as the state court provided a full and fair hearing of the fourth amendment claim. I have argued elsewhere that *Stone v. Powell* was decided incor-

Therefore, despite the fact that *Younger* requires abstention in these cases, the revisionist theory is consistent with the traditional approach in affording the possibility of ultimate federal review for square-one cases.[148]

B. *Square Two: Actions Within the State's Criminal Jurisdiction Where the State Cannot or Does Not Initiate Criminal Proceedings*

Except for one difference, square-two cases are the same as cases arising under square one. The difference is that in square-two cases the state either cannot institute criminal proceedings or chooses not to do so. If the state has initiated criminal proceedings, or does so shortly after the federal action is filed, *Younger* requires the federal court to abstain.[149] In the absence of pending state proceedings, however, the Supreme Court has made it clear that abstention is not warranted.[150]

In order to test the revisionist theory against the result obtaining under the traditional approach, it is useful to get a sense of how and why square-two cases arise. There are basically two possibilities. First, the state simply may determine not to file criminal charges even

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rectly, and is inconsistent with the entire theory of habeas review. *See* Friedman, *supra* note 142, at 287. The decision in *Stone v. Powell* has had a ripple effect in the abstention area. The Supreme Court has held that generally (with the notable exception of habeas) the decision of a state court on a constitutional claim is *res judicata* in a subsequent federal proceeding. *See supra* notes 22-23 and accompanying text. In civil proceedings, this often creates little difficulty for the federal plaintiff, who is free to choose whether to proceed initially in federal or state court. Thus, the *res judicata* impact of a state decision can be avoided by proceeding initially in federal court. This generally provides no difficulty for a state criminal defendant either because the decision on constitutional issues in criminal cases does not have *res judicata* effect in the subsequent habeas case. In Allen v. McCurry, 449 U.S. 90 (1980), the Supreme Court held that a state court decision in a criminal proceeding on a fourth amendment issue would have a preclusive effect in a subsequent civil rights action by the state criminal defendant. Thus, although these fourth amendment claims would be entitled to federal review under the revisionist theory, habeas is unavailable to provide such federal review, and the decision of the state criminal court on the fourth amendment issue cannot be challenged in a subsequent federal civil proceeding. The revisionist theory of abstention thus serves to emphasize further that the holding in *Stone v. Powell* is incorrect and inconsistent with the fabric of the law of federal jurisdiction.

148. It is true that there are exceptions to the availability of habeas corpus that jeopardize the neatness of this solution. For example, in *Stone,* 428 U.S. 465, the Court held that fourth amendment claims generally are not reviewable on habeas. Moreover, in a series of decisions the Court has manipulated the definition of "custody" — the threshold for habeas review — in a manner that yields results inconsistent with this solution. *See generally* Yackle, *supra* note 2, at 998-1010 (discussing "custody" cases). There also are habeas decisions on procedural default, successive petitions, abuse of the writ, exhaustion, and fact-finding that pose some difficulty. *See generally* Friedman, *supra* note 142. Rather than viewing these decisions as inconsistent with, and thus undermining, the revisionist theory, one may view the revisionist theory as a useful tool for critiquing the habeas doctrine. I have done this elsewhere. *Id.*

149. Hicks v. Miranda, 422 U.S. 332, 349 (1975).

150. Steffel v. Thompson, 415 U.S. 452, 461-63 (1974).

though a criminal statute has been violated. If this is true, the state itself shows so little interest in state court litigation that abstention is unwarranted. Second, and more common, the federal plaintiff may file an "anticipatory action"[151] in federal court seeking a declaration that the conduct in which the federal plaintiff wishes to engage, but has not yet engaged, is constitutionally protected, despite the fact that it is proscribed by the state's criminal law.[152]

Under the traditional approach, abstention in these cases is inappropriate: the Court relies on the absence of pending state proceedings to justify use of a federal trial forum.[153] According to the Court, if the federal action cannot go forward, the plaintiff is left either to engage in the conduct, thereby violating state law and risking criminal prosecution, or to refrain from engaging in the arguably protected conduct.[154] In the Court's view, declaratory relief in the federal courts exists precisely to avoid this dilemma, and thus abstention under *Younger* is inappropriate.

The Court's response to this situation under the traditional approach is not entirely satisfactory. It is true that under either the traditional approach or the revisionist theory the absence of a state forum in which to raise a federal claim would preclude federal abstention. In this fashion the two models are consistent. It is not completely accurate, however, to assert that the federal plaintiff in square-two cases is without a state forum. Although there is no pending criminal proceeding in which to raise the federal issue, there is no obvious reason why the federal plaintiff could not file the same declara-

151. *See* Bator, *supra* note 2, at 617 n.35 (arguing that there is support for allowing "true anticipatory actions" not based on the relative competence of state and federal courts); Field, *Federal Jurisdiction, supra* note 2, at 707 (principal way to avoid being forced into state court is to file anticipatory action).

152. *See, e.g., Steffel,* 415 U.S. at 459. In *Steffel,* the plaintiff sought declaratory relief under the first amendment to protect against his potential arrest under Georgia's criminal trespass law. The Court held that a petitioner need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *See also* Perez v. Ledesma, 401 U.S. 82 (1971) (peremptory first amendment challenge to Louisiana obscenity statute); Epperson v. Arkansas, 393 U.S. 97 (1968) (seeking declaratory judgment that Arkansas criminal "anti-evolution" statute was unconstitutional under the first amendment).

153. *Steffel,* 415 U.S. at 462 ("relevant principles of equity, comity and federalism 'have little force in the absence of a pending state proceeding' ") (quoting Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 509 (1972)).

154. [W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

Steffel, 415 U.S. at 462.

tory judgment action in state court rather than federal court.[155] Assuming that a state declaratory action would lie, the Court's justification for failing to apply *Younger* to square-two cases is unpersuasive.

The revisionist theory reaches the same result as under the traditional approach, but the explanation it provides for that result is fuller and more satisfactory. Assuming that the state does provide a vehicle for obtaining a declaratory judgment, abstention is still inappropriate under the revisionist theory for at least two reasons. First, the claims raised in the federal declaratory proceeding are essentially the same as would be raised in a state criminal proceeding: the rights at stake are substantial and may depend upon factual determinations,[156] and thus, litigation of the federal claims in a federal forum is necessary. Because subsequent habeas relief would be unavailable in these cases, it is sensible to proceed in the first instance in the federal trial forum.

Second, by focusing on the state interest it is possible to see an internal logic in treating the "anticipatory action" differently from the criminal action. In filing the anticipatory action, the plaintiff, rather than violating state law and then seeking to raise a federal claim, defers the arguably protected conduct pending a determination of the constitutionality of the criminal law. In this fashion the plaintiff shows respect for state interests.[157] More important, the state interest in *enforcing* its criminal law — an interest inherent in the criminal proceeding — is absent in the anticipatory action because no breach has yet occurred.[158] The revisionist theory explicitly recognizes this, as the traditional approach does not, and "rewards" the federal plain-

155. State declaratory judgment actions may be nonexistent or state practice may differ sufficiently from broad federal declaratory judgment practice so as, in effect, to deprive the plaintiff of an adequate forum. For example, a state may not permit criminal statutes to be challenged in declaratory judgment actions. *See* City of Houston v. Hill, 482 U.S. 451, 477, *cert. denied, appeal dismissed,* 483 U.S. 1001 (1987) (Powell, J., concurring) (noting that Texas does not permit declaratory relief against criminal statutes). In addition, states may have different ripeness thresholds that would bar declaratory relief even though the same action would not be barred in a federal court. Absent any showing to this effect in a specific case, however, the Court's response is too facile.

156. *See supra* notes 100-03 and accompanying text.

157. *See* Wells, *Disparity, supra* note 1, at 34 (the doctrine governing anticipatory actions makes sense based on institutional costs of interference with state proceedings); *cf.* Bator, *supra* note 2, at 617 n.35:

> The important point to note is that there are substantial and interesting arguments in favor of permitting this sort of "true" anticipatory action which are not at all based on claims of superior federal-court competence[,] . . . for instance, the argument that anticipatory relief is necessary to avoid the chilling effect of an over-broad statute regulating speech . . . .

158. It is true that the state law is still evaluated by a federal court, but that is the case any time a federal court reviews a state statute. The key point here is that there is not interference with state criminal law *enforcement. See* Steffel v. Thompson, 415 U.S. 452, 462 (1974) ("When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system . . . .").

tiff for seeking a determination prior to violating state law.[159]

Thus, the traditional decision not to abstain in these anticipatory actions is consistent with the revisionist theory. But the revisionist theory provides a more satisfying explanation than that provided by the traditional approach. Square-two cases are heard by a federal court not because the state forum is inadequate (although that would be a sufficient reason if it were true) but because they involve claims similar to those raised in criminal actions, but under circumstances in which habeas will not be available to provide a federal trial forum. Additionally, if there is no state criminal action pending, the state's interest is lessened. Therefore, the plaintiff's choice of forum in these cases should be respected.

C. *Square Three: Actions Outside the State's Criminal Jurisdiction Where the Federal Defendant (State or Private Party) Initiates a State Court Proceeding*

Square-three cases are called "civil *Younger*" cases. In these cases, the plaintiff files a federal action alleging some violation of her constitutional or other federal rights. The defendant in federal court, either a private party or the state, then urges the federal court to abstain in favor of either a state civil action that was already pending at the time the federal action was filed or a state civil action that was filed shortly after federal proceedings were begun. For example, a federal plaintiff may seek a federal determination of the constitutionality of conduct that is the subject of a state civil enforcement action.[160] Or, a federal plaintiff may come to court for relief from application of a procedural

159. This description of the decision not to abstain is supported by judicial resolution of the ripeness concerns that inevitably arise in the context of such anticipatory suits. When a plaintiff files suit seeking a declaration that conduct criminal under a state statute is protected by the Constitution it is a fair response that such an action may not be ripe. It is difficult to answer accurately the constitutional question without some specific context, *i.e.*, without knowing exactly what conduct is in question. *See* Field, *Federal Jurisdiction, supra* note 2, at 707. In a number of cases, however, federal courts have expressly loosened the ripeness standard in order to render judgment in these cases. *Id.* at 709 n.126 ("[c]hallenges to an enactment brought before any violation are sometimes justiciable"); *see also* D. LAYLOCK, MODERN AMERICAN REMEDIES 1211 (1985) (The Supreme Court routinely "entertain[s] suits to declare statutes unconstitutional, invoking the ripeness requirement only occasionally."); Ohio Civil Rights Commn. v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) (filing of administrative complaint against religious school for dismissal of pregnant teacher); Adler v. Board of Educ., 342 U.S. 485 (1952) (permitting a group of teachers, parents, and administrators to challenge a New York civil service law providing for dismissal of teachers who advocated violence against the government, despite the fact that none of the plaintiffs was even remotely threatened with dismissal; only Justice Frankfurter, in dissent, commented on the apparent jurisdictional concerns).

160. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (first amendment challenge to an Ohio public nuisance statute which provides that a place exhibiting obscene films is a nuisance and allows up to a year's closure of any such place); Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1972) (42 U.S.C. § 1983 action seeking relief from Georgia obscenity statute); General Corp. v. Sweeton, 365 F. Supp. 1182 (N.D. Ala. 1973) (42 U.S.C. § 1983 action seeking injunctive and

rule employed in state civil litigation, perhaps a rule requiring posting of bond for costs or permitting garnishment.[161]

It may be useful at the outset to specify what cases are *not* square-three cases. Often a federal plaintiff will file an action alleging that a state official or the state itself has violated the plaintiff's rights; the plaintiff seeks damages in federal court.[162] Theoretically, the state official or the state could file an independent action in state court for a declaration that the state's or official's past conduct was not violative of the plaintiff's federal rights, and then ask the federal court to abstain in favor of that state proceeding. For the following reason, however, this scenario does not constitute a square-three case and abstention is not warranted.

Removal jurisdiction distinguishes those civil actions in which the federal court will abstain under *Younger* (square three) from those in which it will not (square four). In the scenario just suggested, any such action filed by the defendant in state court could be removed to federal court by the federal plaintiff.[163] Because the essence of *Younger* abstention is to favor a pending state proceeding,[164] and because there can be no pending state proceeding here (because any proceeding so begun would be removed), this scenario is not a square-three case, but belongs rather in square four where *Younger* abstention does not apply.

It is also useful for definitional purposes to compare square-three cases with square-one cases. In both types of cases, the federal court stays its hand in favor of a pending state proceeding. The difference is that square-one cases involve state criminal proceedings, while square-three cases involve state civil proceedings. In civil cases, there is no explicit remedy of federal habeas corpus providing federal review subsequent to state proceedings.[165] Thus, the only access to a federal forum in square-three cases ordinarily will be direct review by the

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declaratory relief from Alabama state court orders enjoining the operation of several theaters and book stores).

161. Trainor v. Hernandez, 431 U.S. 434 (1977) (challenge to attachment procedure in Illinois civil action seeking a return of welfare payments alleged to have been wrongfully received); Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987) (federal action to declare unconstitutional a Texas statute allowing a judgment creditor to secure and execute a lien on a judgment debtor's property).

162. *See* Monroe v. Pape, 365 U.S. 167 (1961) (federal action alleging that municipal police officers violated plaintiff's fourteenth amendment rights while conducting a warrantless search and seizure).

163. 28 U.S.C. § 1441(a) (1982).

164. *See* Samuels v. Mackell, 401 U.S. 66 (1971) (*Younger* abstention required because state criminal action was still pending).

165. *See supra* notes 136, 145-48.

Supreme Court. In these civil cases, therefore, the adequacy of the revisionist theory rests either on the ability of a federal plaintiff to avoid falling into square three, or on the adequacy of direct review by the Supreme Court of the state action.

In order to test the adequacy of direct review, it is necessary to divide square-three cases into two types. First, there are cases in which the challenge of the federal plaintiff is procedural: the plaintiff alleges that some aspect of the procedures employed in the state proceeding violates constitutional or other federal proscriptions, typically the due process clause. Second, there are substantive challenges: the federal plaintiff alleges that the conduct for which he is to be held liable in state court is immune from sanction by virtue of a federal law or constitutional guarantee. Moreover, it is important to keep in mind that in square three the federal defendant may be either the state or a private party.

1. *Federal Court Challenge to State Procedures*

Taking the procedural cases first, it makes little difference whether the federal defendant is a private party or the state. These are cases such as *Trainor v. Hernandez*[166] or *Pennzoil Co. v. Texaco Inc.*,[167] in which the defendant, dissatisfied with the procedural fairness of some aspect of the state proceeding, seeks a declaration in federal court that the procedure is invalid and perhaps an injunction against use of the procedure. In both the private and state defendant cases, the Supreme Court has made fairly clear that the federal court should abstain and not interfere with the pending state proceeding.

Just as it would under the revisionist theory, the Supreme Court has indicated that abstention under the traditional approach is inappropriate where the state makes no provision for challenging the procedural fairness of its own proceeding. In *Trainor,* for example, the federal plaintiffs sought federal review of a state attachment procedure that was being used against them in a state action to recover funds allegedly fraudulently obtained from the state.[168] The Supreme Court held that the federal court should have applied the principles of *Younger* and *Huffman,* but the Court refused to decide in the first instance whether the state proceeding afforded an adequate opportunity to raise the federal constitutional challenge, and remanded.[169] On remand, the district court found that no such adequate opportunity

166. 431 U.S. 434 (1977).

167. 481 U.S. 1 (1987).

168. 431 U.S. at 437-38.

169. 431 U.S. at 447-48.

existed in state court, and reinstated its judgment against the defendants.[170] This outcome is perfectly consistent with the revisionist theory, for, absent a means of raising the claim in state court, there probably will be no opportunity to raise the claim in the only federal forum available, the Supreme Court.[171]

Assuming that the state court does provide an opportunity for review of the procedural challenge on the merits, the propriety of abstention under the revisionist theory rests upon whether direct review by the Supreme Court is adequate to protect the federal rights involved, or whether there is a need for a federal trial forum. The reason abstention under the revisionist theory generally is appropriate is that in the vast majority of these cases the procedural challenge to state proceedings can be resolved without the need for federal trial court fact-finding, and typically the challenges are of a broad nature frequently resolved by the Supreme Court on direct review.

The common characteristic of these procedural challenges is that almost invariably the challenge is to some state action taken pursuant to the state's statutory or regulatory law. For example, in an action to recover state benefits, the challenge may be to an attachment or lien procedure.[172] In a child custody case involving allegations of parental abuse, a parent may claim he was given no opportunity to be heard before being deprived of custody.[173] It is not coincidental that these cases raise challenges to state action taken pursuant to state statutes and regulations. After all, if state actors were not involved, there would be no federal question supporting jurisdiction in the federal forum.[174] And in civil proceedings, as opposed to criminal proceedings, most of the governing procedure is spelled out in statutes or rules.[175]

Given the nature of these cases, direct Supreme Court review gen-

170. Hernandez v. Finley, 471 F. Supp. 516, 522 (N.D. Ill. 1978).

171. *See* Yackle, *supra* note 2, at 1043 (if federal courts abstain under *Younger* in civil cases, no federal review may be possible except by the Supreme Court); Althouse, *supra* note 2, at 1063-65 (discussing application of this principle in *Pennzoil* and arguing that the Court's test for determining when state procedures provide an adequate opportunity is too strict).

172. *See* Trainor v. Hernandez, 431 U.S. 434 (1977) (attachment), discussed *supra* at notes 168-69 and accompanying text.

173. *See* Moore v. Sims, 442 U.S. 415 (1979) (federal challenge to Texas statute allowing state temporarily to deny custody of children to parents suspected of abuse).

174. *See* Lugar v. Edmonson Oil Co., 457 U.S. 922, 924 (1982) ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.' ").

175. *See generally* Leubsdorf, *Constitutional Civil Procedure,* 63 TEXAS L. REV. 579, 579 (1984) ("Since the 1960s, the Supreme Court has been the dominant force in shaping criminal procedure.... Yet civil procedure... has remained relatively untouched...."); *id.* at 612 ("In the past, reformers changed civil procedure through legislation and rulemaking rather than constitutional adjudication.").

erally will be adequate to protect federal interests. First, federal fact-finding usually will not be essential in a challenge to a state procedural statute or rule. Typically, the challenge attacks the statute "on its face" as opposed to "as applied." For example, a constitutional challenge may allege that the due process clause requires notice prior to garnishment, and that the statute at issue has no notice provision.[176] Even when facts are relevant to the determination, the facts that must be found are not particularly susceptible to biased interpretation. It usually is clear from the record whether a litigant or lawyer received notice. There may be a dispute over whether a certain form of notice was legally sufficient, but, unlike the complicated and highly interpretive determination of, for example, whether a confession was obtained without coercion,[177] these facts are to a much greater degree a matter of historical record. Because most square-three procedural cases pose facial challenges to state statutes, or challenges to the application of statutes where state fact-finding is unlikely to be suspect, Supreme Court review is adequate in these cases, and abstention therefore is inappropriate under the revisionist theory.

Moreover, in contrast to the wealth of federal procedural issues arising in every criminal case, the volume of constitutional procedural challenges in civil litigation is relatively slight, enhancing the sufficiency of direct review. This conclusion, as noted earlier, is consistent with the fact that most civil procedural challenges are of a broad facial nature. Moreover, given the broad statutory nature of the challenges, the impact of the decision will go far beyond the facts of each case. All these factors support the ability of a worthy federal suitor to obtain adequate protection of federal rights by way of review in the Supreme Court should the state courts fail to enforce those rights.[178]

176. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434 (1977) (civil action seeking return of allegedly fraudulently obtained welfare payments); Fuentes v. Shevin, 407 U.S. 67 (1972) (due process challenge to replevin provisions of Florida law authorizing a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin); Lynch v. Household Fin. Corp., 405 U.S. 538 (1972) (due process challenge to Connecticut law authorizing summary pre-judicial garnishment).

177. *See* Miranda v. Arizona, 384 U.S. 436, 449-56, 491-99 (1966) (inquiring in detail into interrogation techniques generally advocated and into the particular techniques used in the cases on review); *see also* Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47, 84 (1964) ("Secret police interrogation of suspects raises [some] very serious problems . . . . [One] is the difficult problem of proof.").

178. If this observation is valid, it is worth noting that the recent, widely acclaimed elimination of the last vestiges of the Supreme Court's mandatory jurisdiction might have been a poor decision. Until this year, although most of the Supreme Court's jurisdiction was discretionary, when the constitutionality of a state statute was challenged, either facially or as applied, review by the Supreme Court was guaranteed as of right within the Court's appellate jurisdiction.

On its face, the distinction between appeal and certiorari would explain abstention in the square-three cases to the extent that Supreme Court appellate review, given its mandatory nature, would be adequate, particularly when square-three cases are compared to cases receiving

Finally, in the rare circumstance in which fact-finding is important and the state court simply distorts the facts, the Supreme Court's traditional jurisprudence may afford sufficient opportunity for relief to satisfy the revisionist theory. First, there is precedent in civil rights cases for the Supreme Court on direct review to disregard state fact-finding and reach its own factual conclusions.[179] Of course, given that

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only discretionary review. The difficulty with this argument, of course, is that it was hotly debated, first, whether the appellate jurisdiction differed that much from certiorari as a practical matter, and, second, whether the nature of the square-three cases and the Court's workload permitted adequate review in any event. *See, e.g.*, Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1291-99 (1979); *see also* Wells, *Abstention*, *supra* note 2, at 1128-29.

Despite the fact that the matter was hotly contested, a majority of the Court at one time paid lip service to the notion that appellate review was more adequate and meaningful than certiorari review. Hicks v. Miranda, 442 U.S. 332 (1975), provides a good example. In *Hicks*, the State of California brought an action to have declared obscene a film then being shown in the federal plaintiffs' theater. The state also brought misdemeanor charges against theater employees. The theater-owner defendants lost in state court and, rather than appealing, filed a declaratory judgment action in federal court. The three-judge federal panel declared the obscenity statute unconstitutional, specifically declining to follow the contrary implication of the Supreme Court's summary dismissal in Miller v. California, 418 U.S. 915 (1974) *(Miller II)*, a case decided within the Court's appellate jurisdiction. *Hicks*, 422 U.S. at 341. On appeal, the Supreme Court held that, under *Younger*, the lower federal courts should have abstained, and that the federal plaintiffs must first pursue their state appellate remedies. 422 U.S. at 349. In that same opinion, the Court held that the three-judge district court was incorrect on the merits. Justice White, speaking for the Court, stated:

> [In *Miller II*,] a federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement.

422 U.S. at 344.

The Court was correct, of course, in maintaining that, given that the case arose within the Court's appellate jurisdiction, it had no discretion to avoid the merits; it is also true, however, that just as the Court was free to deny plenary consideration, the Court was also free to deny summary decisions any precedential effect. It chose not to do so, perhaps not coincidentally in a square-three case where *Younger* abstention was held to be appropriate. The Supreme Court's holding that these summary resolutions of appeals receive greater precedential effect than certiorari denials suggests that the Court believed that appeals receive greater consideration.

Given the recent elimination of the Court's mandatory appellate jurisdiction, the point is now moot. The revisionist theory suggests, however, that the remaining appellate jurisdiction was no mere vestige, and that perhaps Supreme Court direct review of challenges to state statutes should be mandatory once again.

179. If the Supreme Court suspects that state court fact-finding is potentially biased in a given case, it may remand or dismiss the case to resolve ambiguity in the trial court's record. *See, e.g.*, Simmons v. West Havens Housing Auth., 399 U.S. 510, 511 (1970) (appeal from an eviction judgment) ("Because of an ambiguity in the record concerning the underlying reason these . . . appellants were denied an opportunity to appeal the trial court's judgement ordering that they be evicted, we now conclude that the appeal be dismissed."). Moreover, the Court has on occasion done its own fact-finding in constitutional cases. *See, e.g.*, Fiske v. Kansas, 274 U.S. 380, 385-86 (1927):

> [T]his Court will review the finding of facts by a State court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

See also M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 41 (1981) ("[T]he

it is difficult for an appellate court to determine factual issues, appellate fact-finding is not a desirable or reliable safeguard.[180] More important, although there is no formal vehicle for subsequent federal review of civil cases analogous to habeas corpus, when a case proceeds through state court and then on to direct federal review, and a need for federal fact-finding later develops, access to an initial federal forum might — and perhaps should — be available. Indeed, in *Huffman v. Pursue, Ltd.*,[181] the first civil case to apply *Younger*, then-Justice Rehnquist, writing for the Court, stated explicitly that the question of where an action should proceed initially is different from whether access to a federal trial forum might be obtained at a later date.[182] All that *Huffman* decided was that state appellate remedies must be exhausted before federal remedies are sought.

Although the Court avoided decision on a procedure analogous to habeas in the civil context, subsequent federal review of state civil cases need not be barred by *res judicata* any more than it is in criminal cases. *Res judicata* traditionally will not apply if the prior adjudication did not present a "full and fair opportunity" for adjudication on the merits.[183] In habeas, this principle is embodied in the idea that *res judicata* does not apply to legal judgments, although deference to state fact determinations nonetheless is statutorily mandated unless the habeas petitioner can show some fault with state fact-finding.[184] If state fact-finding is biased in a civil court, then, under traditional prin-

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Supreme Court has long held that it will make its own findings of 'constitutional fact.' But constitutional facts are often the same routine facts that the trial court has already decided."). *See generally* HART & WESCHLER, *supra* note 1, at 661 ("Article III explicitly legitimates this power by specifying that the Supreme Court shall have appellate jurisdiction 'both as to Law and Fact' ").

180. *See supra* note 102.

181. 420 U.S. 592 (1975).

182. Even assuming, *arguendo*, that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state court proceedings. We do not understand why the federal forum must be available prior to completion of the state proceedings in which the federal issue arises, and the considerations canvassed in *Younger* militate against such a result.

420 U.S. at 606.

183. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 (1982):

Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of [28 U.S.C.] § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.

184. *See* 28 U.S.C. § 2254(d) (1982) (setting forth a general presumption in favor of state courts' factual findings); *see also* Sumner v. Mata, 449 U.S. 539, 547 (1981) (noting that federalism interests embodied in § 2254(d) require that federal courts generally defer to state court fact-finding); Friedman, *supra* note 142, at 311 ("[A]lthough state court determinations on questions of law are not *res judicata*, federal habeas courts accord state court determinations of fact a

ciples, *res judicata* ought not bar subsequent federal relitigation. This conclusion explains the Court's reservation in *Huffman* of whether an initial federal forum might be available in the civil *Younger* cases if a civil petitioner were prepared to make a showing similar to that in the habeas statute.[185] This conclusion would also explain the Court's insistence upon deference to state proceedings that have afforded an opportunity to raise a federal claim.[186] Of course, a situation requiring subsequent federal review would arise only rarely. But, under both the traditional and revisionist theories, in the rare case where a federal plaintiff can show no full and fair opportunity to obtain adjudication in state court, federal review in a trial court would be appropriate.[187]

Thus, in the context of procedural challenges to state actions, the revisionist theory is consistent with the traditional approach. Hearing such procedural challenges in federal court on an ad hoc basis would undoubtedly disrupt state court proceedings. Such disruption would be the price of federalism if there were no alternative means for raising these challenges and obtaining federal review. However, because these cases largely are not dependent on federal fact determinations, but pose broad questions with far-reaching consequences, adequate review — if Supreme Court review ever is — is most likely in cases such as these.[188]

2. *Federal Court Challenges to the Substantive Propriety of a State Proceeding*

Unlike procedural challenges, challenges to the substantive propriety of a state proceeding run a somewhat greater likelihood of requiring federal fact-finding. To the extent that federal fact-finding is not required — as, for example, in the large volume of cases posing facial or overbreadth challenges to state statutes — everything said above regarding procedural challenges would apply to substantive challenges. But, to the extent that federal fact-finding *is* required, these substantive challenges require further analysis.[189]

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presumption of correctness — indeed, the federal habeas statute requires that federal courts give some respect to state court factual determinations.").

185. *See* 420 U.S. at 605-07.

186. *E.g.*, Trainor v. Hernandez, 431 U.S. 434, 441 (1977); Juidice v. Vail, 430 U.S. 327, 337 (1977); *see also supra* note 109.

187. *See* Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (holding that state administrative agency was "incompetent by reason of bias to adjudicate the issues pending before it," and therefore, that *Younger* dismissal was inappropriate); *see also* Kugler v. Helfant, 421 U.S. 117, 125 n.4 (1975) (noting that the facts of *Gibson* presented "extraordinary circumstances").

188. For a discussion of the adequacy of Supreme Court review generally, see *infra* notes 310-18 and accompanying text.

189. Just as in the area of procedural challenges, the Supreme Court has made clear that

The key point regarding substantive challenges is that to the extent there is a denial of adequate federal review, the fault rests not with the abstention doctrines, but with the Supreme Court's decisions in *Louisville & Nashville R.R. v. Mottley*[190] and *Tennessee v. Union & Planters' Bank*.[191] In *Mottley,* the Court held that federal question jurisdiction must be based on the face of the plaintiff's complaint, and not on any defense the defendant might assert.[192] In *Planters' Bank,* the Court held that this "well-pleaded complaint" rule applied to removal cases:[193] a state defendant cannot remove a case to federal court on federal question grounds simply because he intends to rely on a federal defense.

To the extent that abstention bars federal review of substantive federal defenses, therefore, the *Mottley* and *Planters' Bank* rules are responsible.[194] If the Court did not require abstention in cases in which the state defendant filed a new action in federal court seeking declaratory or injunctive relief on the basis of the federal defense, *Mottley* and *Planters' Bank* would be completely circumvented. It would be curious indeed if, after barring removal, the Supreme Court simply allowed the state defendant with a federal defense to file a new federal action and then stay state proceedings. If the resulting denial of a federal trial forum is unacceptable, however, fault should be found elsewhere than with the abstention doctrines.

The revisionist theory does, however, indicate how — even in light of *Mottley* and *Planters' Bank* — parties with federal defenses may obtain review of their claims by federal trial courts. Just as the state criminal defendant in square-one cases has the option with regard to substantive defenses of avoiding state criminal proceedings either by abstaining from the conduct at issue or by filing an anticipatory federal

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abstention is inappropriate in cases in which the state proceeding provides no opportunity to raise the substantive federal defense. In Ohio Civil Rights Commn. v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986), for example, the State of Ohio brought an administrative action against a parochial school that fired a teacher due to the teacher's pregnancy and her consultation with an attorney about possible legal action against the school. The defendant came to federal court seeking an injunction on the ground that the first amendment's free exercise clause rendered it immune from such state administrative proceedings. The Supreme Court held that federal abstention was appropriate in the case, but rested its conclusion on the school's ability to raise the claim in state court, even though that opportunity did not exist in the administrative proceeding but only in state court review of that proceeding. 477 U.S. at 629. This reliance on opportunity to raise the claim in state court is consistent, again, with the revisionist theory.

190. 211 U.S. 149 (1908).

191. 152 U.S. 454 (1894).

192. 211 U.S. at 152.

193. 152 U.S. at 462.

194. For an excellent discussion concerning the denial of federal review occasioned by *Mottley* and *Planter's Bank,* see generally Collins, *supra* note 102, at 717.

declaratory action, the potential defendant to a state civil enforcement action has the same opportunity. For example, the bar owner who cares to employ topless dancers (alleging a first amendment right to do so) and who is threatened with a civil nuisance action in state court as a result, may file a declaratory suit in federal court before engaging in the conduct, and thus obtain a federal determination of the substantive defense.[195] For all the reasons explained in the analysis of such "anticipatory actions" in square two, this option is perfectly consistent with the revisionist theory.[196]

In sum, most square-three cases will receive adequate review of federal claims. In some cases, this will occur by filing an anticipatory action and avoiding square three and abstention altogether. In other cases, review will occur in the Supreme Court following state proceedings. Moreover, to the extent federal review is unavailable, abstention is not the villain; removal and federal question rules pose the real problem. Thus, generally, square-three cases are consistent with the revisionist theory.

D. *Square Four: Civil Actions Initiated in Federal Court Where the Federal Defendant Cannot or Has Not Initiated State Court Proceedings*

The fourth square is in many ways the most complex, and most interesting, to analyze. It too is consistent with the revisionist theory. Into this square fall all civil actions instituted by a federal plaintiff in which *Younger* abstention is inappropriate because no state proceeding has been or can be initiated to which a federal court will defer.

There are several types of cases in square four: There are actions

195. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (three bar owners brought an action seeking a determination of the constitutionality of a New York statute proscribing topless dancing; only one of the three had been prosecuted).

196. Although subject to some uncertainty, the same sort of "anticipatory action" ought to be available to the state court defendant in a private civil action. If, for example, Corporation *A* sues Corporation *B* for breach of contract, Corporation *B* may wish to defend on the ground that contract performance now would violate the new federal antitrust laws. If Corporation *B* breaches and Corporation *A* sues, *Mottley* says this is not a federal question case, and *Planters' Bank* says that if the suit is filed in state court Corporation *B* cannot remove. But Corporation *B* ought to be able, prior to breach, to sue in federal court for a declaration that it can fulfill its contract obligation consistent with federal law. Yet, the declaratory judgment cases arguably disallow this cause of action. If such an "anticipatory action" is prohibited, however, it is not because of abstention rules, but because of removal and declaratory judgment rules. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 (1983) (suggesting that the no-removal rule is not a mere judicial creation but results from the statutory scheme). Cases such as *Franchise Tax Board* seem inconsistent with cases permitting declaratory actions when the state is a defendant in federal court. *But see* Romero v. International Terminal Operating Co., 358 U.S. 354, 379 n.51 (1959) ("[T]he many limitations which have been placed on jurisdiction under [federal law] are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts.").

under section 1983 challenging the conduct of state officials.[197] There are actions challenging the constitutionality of a state statute apart from state enforcement proceedings.[198] There are actions involving federal rights that are parallel to state proceedings, such as the *Colorado River* cases.[199] And, finally, there are actions challenging the results of state administrative proceedings.[200]

The common characteristic of these actions is that the federal defendant cannot initiate a state court proceeding. There are essentially two reasons for this inability. First, the state defendant might be able to remove any state action so filed in federal court under the removal statutes, and thus no state proceeding would exist to which *Younger* would require deference.[201] Second, a federal plaintiff might bring an anticipatory action before engaging in conduct over which the federal defendant could bring suit in state court.[202] These two reasons overlap, but they are not coterminous.

A quick summary of the three forum decisions suggests some difficulty with applying the revisionist theory to these square-four cases. First, in some of these cases the federal right is insubstantial, or requires little federal fact-finding, and yet may implicate serious state interests. Second, if federal issues do arise, in most cases the state permits these issues to be raised in state court. Finally, to the extent that state review is available, and the issue is, for instance, a facial challenge to a state statute, Supreme Court review would be just as adequate as it would be for square-three cases. Thus, there are square-four cases in which the traditional approach, which relegates these cases to the federal courts under *Younger,* seems inconsistent with the allocation dictated by the revisionist theory.

It turns out upon close examination, however, that all of the remaining abstention doctrines — to the extent they can be pigeonholed — serve to limit federal review in square-four situations in which the federal plaintiff has filed a federal action in a matter not within the state's criminal jurisdiction, and under *Younger* the federal defendant

197. *See e.g.,* Monroe v. Pape, 365 U.S. 167 (1961) (action under 42 U.S.C. § 1983 against 13 Chicago police officers and the City of Chicago for a warrantless search of plaintiff's home).

198. For example, in Wisconsin v. Constantineau, 400 U.S. 433 (1971), the plaintiff sued to challenge a state statute that permitted the sheriff, without notice or hearing, to post her name in liquor stores as an alcoholic who could not buy liquor.

199. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); *see also infra* notes 255-91 and accompanying text.

200. *See, e.g.,* Alabama Pub. Serv. Commn. v. Southern Ry. Co., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943). These cases are discussed further *infra* at notes 233-54 and accompanying text.

201. *See supra* notes 163-64 and accompanying text.

202. *See supra* notes 151-59 and accompanying text.

cannot initiate a state proceeding to which the federal court will defer. In effect, therefore, the other abstention doctrines simply fine-tune *Younger,* making it consistent with the revisionist theory. Square four is by definition too broad to provide a careful allocation of cases to the federal and state courts. Beginning with the premise that all square-four cases begin in federal court, however, the other abstention cases serve to reallocate a portion of the cases to state court.

In fact, this interpretation of the non-*Younger* abstention cases is of great assistance in clarifying the law with regard to the remaining abstention doctrines. As the Court itself has conceded, the abstention decisions are difficult to pigeonhole;[203] over time the rationales for abstaining have varied, and the specific contours of any one doctrine have been most unclear. The Court has been able to achieve little agreement as to the bases for abstention and when particular doctrines apply.

Application of the revisionist theory to those doctrines helps sort out the case law. The non-*Younger* doctrines turn out to be nothing more than intuitive groupings of cases where federal trial-level review potentially is unnecessary. More significant than the description of an abstention doctrine under the traditional approach is an examination of similarities and differences in cases where the doctrine did or did not apply. Examining these similarities and differences indicates that the cases divide clearly along the criteria relevant under the revisionist theory. The revisionist theory, therefore, provides a sounder understanding of abstention than does the traditional approach.

1. Pullman *Abstention*

The paradigmatic situation involving allocation of square-four cases under the revisionist theory is found in a group of abstention cases falling generally under the head of "*Pullman* abstention." In *Railroad Commission v. Pullman Co.,*[204] Pullman porters, who traditionally were black, intervened in a federal action brought by the Pullman Company and other railroads challenging a Texas Railroad Commission order requiring that all Pullman sleepers be under the supervision of Pullman conductors, who traditionally were white.[205] The Supreme Court held that abstention was appropriate to permit the

203. *See supra* note 113.

204. 312 U.S. 496 (1941).

205. The Pullman Company and the railroads attacked the commission order as unauthorized by Texas law as well as violative of the equal protection, due process, and commerce clauses of the U.S. Constitution. The porters' main objection was that the order discriminated against blacks in violation of the fourteenth amendment. 312 U.S. at 498.

state court to address the threshold question of whether the challenged order was within the Commission's authority in the first place.[206] This form of abstention does not deprive the federal plaintiff of review over the federal claim: if the federal claim is not rendered moot by state-court determination of the state law issue, the plaintiff may return to federal court to press her claim.[207]

Under the traditional approach, the justification for *Pullman* abstention is that the federal court should allow the state court to resolve the state law question in order to avoid the federal court answering the state law question differently than would a state court.[208] Because the state courts have the last word in interpreting state law, state policy could be hampered in the period between an erroneous interpretation of state law by a federal court and a subsequent "correct" interpretation by the state court.[209]

This rationale explains *Pullman* and comports with the revisionist

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206. The *Pullman* Court recognized that state law might render the federal constitutional questions moot: "If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority." 312 U.S. at 501.

207. In Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364 (1957), the Supreme Court held that if a party chooses not to submit federal questions (in this instance, the constitutionality of a state statute) for state court determination, the state court must at least be informed of the nature of the challenge:

> The bare adjudication by the Alabama Supreme Court . . . does not suffice, since that court was not asked to interpret the statute in light of the constitutional objections presented to the District Court. If appellant's freedom-of-expression and equal protection arguments had been presented to the state court, it might have construed the statute in a different manner.

353 U.S. at 366.

When a state court decides such a federal question presented to it, and the litigant decides not to seek Supreme Court review (or it is denied), however, the litigant is bound by the state determination only if he truly elected "to seek a complete and final adjudication of [his] rights in [a] state court[ ] . . . ." England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 417 (1964) (quoting NAACP v. Button, 371 U.S. 415, 427-28 (1963)). The litigant "may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor* and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." *England,* 375 U.S. at 421. *See generally* Field, Pullman *Abstention, supra* note 2, at 1078-79.

208. The Court explained in *Pullman* that federal courts are not as capable as state courts of making determinations of state law:

> But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination . . . . [T]he last word on the statutory authority of the Railroad Commission in this case[ ] belongs neither to us nor to the district court but to the Supreme Court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court.

312 U.S. at 449-500.

209. *See* 312 U.S. at 499-501. *But cf.* Field, *Abstention Today, supra* note 2, at 604:

> [A]n abstention may be rendered utterly purposeless in any given case by the state supreme court declining to review the lower court's ruling. A *lower* state court's guess as to how the state supreme court would decide the disputed state law issue may not be any more in-

theory. What the Court appears to acknowledge in the *Pullman* cases is that state and federal courts may answer the same legal questions in different ways. Thus, uncertain state law questions of broad policy importance to the state are sent to state court for resolution; federal questions, however, are reserved for federal resolution.

To be sure, *Pullman* has been criticized because state law is often not particularly uncertain, and because the state law question is often of limited applicability or import; in either case, the only thing achieved by abstention is delay in resolving a federal question and vindicating federal rights.[210] But there is another explanation for *Pullman* abstention that comports quite well with the revisionist theory. In addition to the state law justification for *Pullman,* the *Ashwander*[211] principle — that a federal court should not prematurely or unnecessarily address a novel constitutional or federal question[212] — justifies the exercise of abstention in *Pullman* cases.[213] For example, in 1941 the Court could not have been keen to resolve the equal protection challenge raised by the Pullman porters. *Pullman* abstention reflects the Court's hope that it would not have to do so, either because resolution

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formed than the federal court's would be. And the whole purpose of abstention is to obtain the state *supreme* court's pronouncement.

210. *See* Field, *Abstention Today, supra* note 2, at 600 ("[B]ecause the availability of abstention depends primarily upon the degree of unclarity of state legal issues, and because some ambiguity can be detected in almost any legal rule, the instances in which abstention should be ordered do not lend themselves to any definite codification."). Professor Field also questions whether, in some circumstances, delay is not merely a byproduct of abstention, but actually its aim. *Id.* at 602.

211. Ashwander v. TVA, 297 U.S. 288 (1936).

212. Justice Brandeis, concurring in *Ashwander,* stated:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

297 U.S. at 347 (Brandeis, J., concurring).

213. The traditional approach, locked into the language of comity and federalism, tends to focus on the first justification for *Pullman* abstention, while in fact the latter justification is probably the more typical one. This is seen by comparing two *Pullman* cases: Reetz v. Bozanich, 397 U.S. 82 (1970), in which the Court held *Pullman* abstention appropriate, and Wisconsin v. Constantineau, 400 U.S. 433 (1970), in which the Court held such abstention inappropriate. The grounds stated for the decision in each case were the extent to which relevant state law was unclear: the Court held state law unclear in *Reetz,* but clear in *Constantineau.* In both cases, however, the state *statute* was clear, and the state law issue was the extent to which the clear state statute would be invalidated by a previously unconstrued state *constitutional* provision. Thus, both cases involved equally unclear state law questions.

On state law grounds, therefore, it is difficult to reconcile *Reetz* and *Constantineau.* On federal grounds, however, the cases are as different as night and day. *Reetz* presented an issue of great difficulty under the federal equal protection and privileges and immunities clauses. *Constantineau* presented a tremendously easy issue under the federal due process clause. *See* Field, Pullman *Abstention, supra* note 2, at 1100 ("The Court apparently considered the . . . issue in *Constantineau* a clear and nonsensitive one.").

of the state law question would obviate the need to reach the federal question or because the state court would resolve the porters' claim in a favorable manner. This justification for *Pullman* abstention also comports with the revisionist theory to the extent that the federal question is preserved while state law questions are answered by the state court.

In sum, *Pullman* abstention provides an important tool for reconciling competing federal and state interests in cases that fall into federal court under *Younger,* but which present either state law questions that state courts should decide or federal questions federal courts would just as soon avoid. The case is sent to state court for resolution of the state issue and is returned to federal court if a federal question remains. The results under both models appear to be the same, but the revisionist theory gives a more candid explanation for those results, serving as a better tool for deciding future cases.[214]

2. Thibodaux *Abstention*

The revisionist theory also explains quite well the resolution of cases often grouped together under the head of "*Thibodaux* abstention." These are actions brought in the diversity jurisdiction of the federal court which claim that a state action deprives the federal plaintiff of a property interest. *Thibodaux*[215] and its companion case, *Frank Mashuda,*[216] for example, involved challenges to state condemnation proceedings. An earlier *"Thibodaux"* case, *Meredith v. City of Winter Haven,*[217] involved a challenge to a municipal decision to deny certain rights to bondholders on recall of their bonds for refunding.

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214. Two further observations are in order concerning *Pullman.* First, as *Pullman* leaves decisions of important state questions to state courts, while permitting review of federal questions in federal court, *Pullman* mirrors the manner of direct review in the Supreme Court. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626, 632 (1874) ("The State Courts are the appropriate tribunals, as this Court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise." However, rights "guaranteed to him by the Constitution and laws of the Union should not be left to the exclusive and final control of the State courts."). In affording an initial federal forum when fact-finding may be important, however, *Pullman* abstention fits within the revisionist theory nicely.

Second, *Pullman* emphasizes the relationship between square-one and square-three cases, on the one hand, and square-two and square-four cases on the other. *Pullman* was an anticipatory action; had the Pullman Company violated the Commission's order, it would have been subject to a civil enforcement action in state court. In that action, the federal claim could have been raised, subject to direct review by the Supreme Court. Thus, by refraining from violating the state rule, the Pullman Company achieved for itself the ability to seek initial review in a federal court of its federal claim.

215. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

216. County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959).

217. 320 U.S. 228 (1943). *Thibodaux* abstention is sometimes referred to alternatively as *Winter Haven* abstention.

Abstention was held appropriate in *Thibodaux,* but inappropriate in the other two cases. In *Thibodaux,* the city filed a condemnation case in state court. The defendant removed to federal court on grounds of diversity. After some preliminary proceedings, the district court stayed its hand so the litigants could take back to state court the state law question of whether the state statute at issue permitted a municipality to issue expropriation orders.[218]

The Supreme Court upheld the decision to abstain in *Thibodaux* on the ground that it was necessary for "harmonious federal-state relations in a matter close to the political interests of a State."[219] The Court relied upon the ground that eminent domain questions are particularly important to the states, and that state courts have a special competence in the state law question at issue.[220] Thus, according to the Court, federalism concerns justified the district court's stay.

The dissent in *Thibodaux* objected strenuously on the ground that abstention unduly deprived the federal litigant of a forum choice that was granted expressly by Congress when it elected to permit removal in diversity cases.[221] Not only was the dissent correct, but the majority's explanation is doctrinally unsatisfying because the premise of *Erie*[222] is that the federal courts will strive to reach the same result as the state court on issues of state law. It is particularly interesting that *Thibodaux* was authored by Justice Frankfurter, who wrote vigorously against abstention in the *Burford* cases,[223] precisely because abstention in these cases deprived litigants of a federal forum in diversity cases.[224] The very arguments available to Justice Frankfurter in his dissent in *Burford* mitigated against his decision to permit abstention in *Thibodaux.*

Thibodaux becomes particularly difficult to justify under the Court's analysis when contrasted with an almost identical case decided the same day, in which abstention was not permitted. In *County of*

218. *Thibodaux,* 360 U.S. at 26.

219. 360 U.S. at 29.

220. 360 U.S. at 29.

221. Justice Brennan, in his dissent, wrote:

> [T]he imperative duty of a District Court, imposed by Congress under 28 U.S.C. §§ 1332 and 1441, [is] to render prompt justice in cases between citizens of different States. To order these suitors out of the federal court and into a state court in the circumstances of this case passes beyond disrespect for the diversity jurisdiction to plain disregard of this imperative duty.

360 U.S. at 31-32 (Brennan, J., dissenting).

222. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938).

223. *See infra* notes 242-43 and accompanying text.

224. *See* Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943).

Allegheny v. Frank Mashuda Co.,[225] the state instituted a condemnation proceeding in state court, and effected a taking of respondent's property. Subsequently, the state leased the property to a private party, allegedly for private use. Respondent then filed a separate action in federal court under its diversity jurisdiction, seeking a declaration that under state law the state was without authority to condemn the property.[226] Justice Brennan, writing for the Court, held that the district courts were under an obligation to exercise jurisdiction granted them by Congress.[227] He distinguished a case such as *Thibodaux,* where abstention would be appropriate, on the ground that the law at issue in *Mashuda* was well-settled and required only an application of that law to the facts of the case, something the district court was competent to do.[228]

The distinction made by Justice Brennan between the cases is not of evident importance. First, if eminent domain is an area of special importance to the states, it should not matter whether it is a federal factual or legal determination that interferes with state goals in a given case: either is an interference. Second, because legal principles are established each time law is applied to novel facts, the need for state court, as opposed to federal court, determination should be the same no matter how "well-settled" the state law is. Again, the premise of *Erie* is that federal courts will strive to decide state law cases as would state courts, not that federal courts would apply state law only when it is "well-settled."

Within the context of the revisionist theory, however, the differences between *Thibodaux* and *Mashuda* become more significant. The decisions in *Thibodaux* and *Mashuda* strike the balance required under the revisionist theory by respecting both Congress' reasons for creating diversity jurisdiction and the wider concern for protecting the province of state courts. In *Thibodaux,* the question on which the district court abstained was a pure question of state law. Given the broad nature of the question, the result was applicable not only to the out-of-state litigant in that case, but to all entities, foreign and local, subject to condemnation.[229] State courts were unlikely to decide the issue in a way prejudicial to out-of-state interests, thereby jeopardizing across-

225. 360 U.S. 185 (1959).

226. 360 U.S. at 188.

227. 360 U.S. at 187.

228. 360 U.S. at 196.

229. The issue in *Thibodaux* was the general interpretation of a statute, rather than the application of that statute to the plaintiff. 360 U.S. at 26-30.

the-board application.[230] Thus, there was little concern about the kind of bias that diversity jurisdiction was established to avoid. On the other hand, given the nature of the state law question — a broad question of municipal authority under state law to effect takings of private property — it was wise to permit resolution in state court. In fact, this is precisely the kind of question that the *Pullman* Court recognized as requiring state determination so as not to frustrate state policy. Federal courts may well answer state law questions differently than would state courts, causing "needless friction" between state and federal courts.[231]

Mashuda, on the other hand, was a very different case. Although no case is "purely factual" in that legal principles turn on application of facts, *Mashuda* came about as close as possible to being such a case.[232] Thus, there was present the precise possibility for bias feared by Congress in creating diversity jurisdiction. In addition, although an application of law to facts necessarily would result in the federal district court making state "law," the broad contours of applicable law already were well-settled. Thus, the "*Pullman*-type" interference with state policy objectives was unlikely to occur.[233]

On close examination, in fact, *Thibodaux* was very much like *Pullman.* In *Thibodaux,* the district court merely stayed its hand while the state law question was resolved, leaving for ultimate resolution in federal court the fact-based question concerning the validity of the

230. *See* 360 U.S. at 31 (Stewart, J., concurring) ("[S]ince the controlling state law is clear and only factual issues need be resolved, there is no occasion in the interest of justice to refrain from prompt adjudication.").

231. *See infra* note 241 and accompanying text.

232. The Court noted that "[t]he only question for decision is the purely factual question whether the County expropriated the respondents' land for private rather than for public use." 360 U.S. at 190.

233. A case superficially contrary to this analysis is Meredith v. Winter Haven, 320 U.S. 228 (1943), which is often discussed by commentators in the context of *Thibodaux* abstention. *Winter Haven* involved a challenge in federal court to a municipality's interpretation of its authority to recall certain bonds without paying a refunding premium. The state argued in favor of abstention on the ground that state law on the question was uncertain, and that the question would therefore be better left to resolution in the state courts. The Supreme Court described the issue in the case as whether the district court rightly declined to exercise its jurisdiction on the ground that state law was uncertain. 320 U.S. at 229. Relying on the obligation theory, the court held abstention inappropriate. 320 U.S. at 237-38. What is important about *Winter Haven* is that although the question was phrased in terms of uncertainty, because that is how the litigants framed the issue, state law in fact was not at all uncertain. Indeed, the very question had been resolved by the Florida Supreme Court in a prior case involving the very same bonds. 320 U.S. at 232-33. The argument that the law was uncertain was based solely on the ground that the Florida Supreme Court had failed to address some precedents contra to its decision, and that it might therefore change its mind in the future. 320 U.S. at 233-34. If that is the definition of uncertainty, no law ever is certain. Contrary to the position of those seeking abstention in *Winter Haven,* law rarely gets more certain than when there is a recent decision resolving the issue by the highest court empowered to do so.

taking.[234] In this way, *Thibodaux* abstention may be nothing more than an application of *Pullman,* but in diversity rather than federal question cases.

Thibodaux abstention, therefore, turns on exactly those factors relevant under the revisionist theory. The revisionist theory, in fact, provides a better understanding of this type of abstention than does the traditional approach. Although the results are the same, the rationale under the traditional approach is unclear and difficult to justify. Thus, the revisionist theory again provides a better understanding of abstention in this class of non-*Younger* cases.

3. Burford *Abstention*

The revisionist theory also explains the doctrine popularly referred to as *Burford* abstention, although the revisionist theory suggests that abstention may not be appropriate in the *Burford* cases. The key examples of this type of abstention are *Burford v. Sun Oil Co.*[235] and *Alabama Public Service Commission v. Southern Railway Co.*[236]

Both *Burford* and *Southern Railway* involved federal challenges to the decision of a state administrative agency. Jurisdiction in both cases was premised jointly on diversity and the presence of a federal question. *Burford* involved a challenge to a state grant to an in-state party of oil drilling rights that arguably adversely affected the oil rights of the out-of-state plaintiff.[237] *Southern Railway* involved a challenge to an order denying the plaintiff the right to discontinue a branch of its intrastate railway service.[238]

In both cases the Court approved abstention, relying once again on the state's interest in the proceeding at hand and the interest in avoiding the "federal-state conflict" that would result from federal court interference in the proceedings.[239] One significant factor to the Court in both cases was the fact that the state had limited the review of the particular administrative decision to the courts of one judicial district, evidently striving for some uniformity of decision.[240] Thus, according to the Court, "needless friction" would result from federal court

234. The Court described the case as one in which the district judge made "a conscientious exercise . . . of his discretionary power merely to stay disposition of a retained case until he could get controlling light from the state court." 360 U.S. at 27 n.2.

235. 319 U.S. 315 (1943).

236. 341 U.S. 341 (1951).

237. 319 U.S. at 316-17.

238. 341 U.S. at 342.

239. *Burford,* 319 U.S. at 327; *Southern Ry.,* 341 U.S. at 349-50.

240. *Burford,* 319 U.S. at 326; *Southern Ry.,* 341 U.S. at 348.

interference.[241]

The contrary view expressed in each case was premised primarily on the obligation theory. Justice Frankfurter authored the dissent in *Burford* and a concurrence in *Southern Railway,* arguing in both that no matter how distasteful the exercise of diversity jurisdiction might be, because Congress had insisted upon it, federal courts could not shirk their obligation to hear diversity cases.[242] As these cases involved out-of-state plaintiffs, Justice Frankfurter thought that the precise danger of bias that prompted Congress to grant diversity jurisdiction was likely to be present in these cases. The mere fact that a federal court might be likely to reach a result different from that reached by a state court on the matter would not be enough to compel abstention, Justice Frankfurter concluded, because that was, after all, precisely Congress' aim in creating federal diversity jurisdiction.[243]

The difficulty in these cases is that the revisionist theory would seem, at first blush, not to countenance abstention. The federal "right" at stake, at least with regard to the diversity basis for federal jurisdiction, was the "right" to be free from state bias against out-of-state parties. That bias could manifest itself directly in fact-finding determinations, making a federal trial court essential for protection of the federal right. When this bias seems likely, and particularly when subsequent federal review similar to habeas corpus generally would be unavailable, the revisionist theory would require that a federal trial forum be provided.

The error of abstaining appears particularly acute when these decisions are contrasted with similar cases in which abstention would not lie under the traditional *Younger* formulation. *Southern Railway,* for example, could be seen as an "anticipatory action." Rather than failing to comply with the Commission's order and subjecting itself to state enforcement jurisdiction, the railroad in effect sought anticipatory relief in federal court following the close of administrative proceedings. Moreover, *Southern Railway* was a diversity case. Had the Commission sued the railroad for money damages, removal to federal court should have been permitted.[244] Finally, if the railroad had been suing the state, alleging denial of a federal right, it would not even be necessary to exhaust state administrative remedies, let alone state judi-

241. *Burford,* 319 U.S. at 327; *Southern Ry.,* 341 U.S. at 350.

242. *Burford,* 319 U.S. at 344-45 (Frankfurter, J., dissenting); *Southern Ry.,* 341 U.S. at 361-62 (Frankfurter, J., concurring in the judgment).

243. *Burford,* 319 U.S. at 344-45 (Frankfurter, J., dissenting); *Southern Ry.,* 341 U.S. at 361-62 (Frankfurter, J., concurring in the judgment).

244. *See* 28 U.S.C. § 1441(a) (1982).

cial remedies.[245]

The best justification for abstaining in the *Burford* cases may be seen by comparing these cases to state criminal proceedings. If a state prosecutes an out-of-state citizen under its criminal law, no statutory right to removal exists,[246] although the Constitution arguably confers diversity jurisdiction over such a case.[247] The difference in the statutory treatment of civil and criminal cases no doubt turns on the federalism concern of interfering with state enforcement proceedings.

Given the highly regulated nature of petitioners' industries in these *Burford* cases, it may be accurate to characterize the state interest at stake as analogous to a state's interest in enforcement of its criminal law. Moreover, "anticipatory actions" as such are in a sense impossible to bring in this administrative context, for the regulatory authority is ongoing. It is impossible to gain federal jurisdiction *before* the state interest attaches, because the state interest attaches as soon as the state licenses one of these highly regulated businesses. For example, in *Southern Railway* the railroad was required to come to the Commission to request abandonment — the status quo was maintaining the rail operation. Similarly, in *Burford* the Commission was not required to enjoin drilling; rather, those wishing to drill had to seek permission. As in all highly regulated schemes, state enforcement is ongoing and regulated entities must petition to change the status quo. Thus, *Burford* cases may be viewed as similar to state criminal cases when no opportunity for an anticipatory action exists.

Moreover, there are factors other than a strong state interest that justify abstention under the revisionist theory. One factor is the sheer volume of litigation in the federal courts that would be generated by the exercise of federal jurisdiction in administrative cases like *Burford.*[248] Finally, if any substantive federal right is at stake in cases like *Burford,* it is an economic due process right of a sort requiring deference to the state.[249]

Of course, this leaves the federal plaintiff without recourse to a

245. *See* Patsy v. Board of Regents, 457 U.S. 496 (1982) (plaintiff in an action under 28 U.S.C. § 1983 need not exhaust state administrative remedies before resorting to the federal courts).

246. Only two sections of title 28 permit removal in criminal proceedings: 28 U.S.C. § 1442 (1982) (removal by federal officers sued for acts done in the course of their duties) and 28 U.S.C. § 1443 (1982) (removal by defendants with certain civil rights claims).

247. "The judicial Power shall extend to all Cases . . . between a State and Citizens of another State." U.S. CONST. art. III, § 2.

248. *See* 319 U.S. at 332 ("[W]e should leave these problems of Texas law to the state court where each may be handled as 'one more item in a continuous series of adjustments.' ") (quoting Railroad Commn. v. Rowan & Nichols Co., 310 U.S. 570, 584 (1941)).

249. *See supra* notes 103-04 and accompanying text.

federal fact-finder in the face of potential state bias. In the criminal context, habeas corpus is available to ensure subsequent federal review. Although these civil administrative enforcement cases are similar in certain respects to criminal cases, there is no civil habeas analog.

While the Court's response to this problem was not ideal, neither was it insensitive. In *Southern Railway,* the Court discounted the risk of state bias in fact-finding because "it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved."[250] The Court noted in a footnote that this case stood in sharp contrast to

> such cases . . . where State judicial review procedures plus review in this Court were thought to be inadequate . . . [because] the federal right of a utility to be protected from confiscation of its property depended upon "pure matters of fact" to the extent that a *de novo* hearing of such facts in a federal court was essential to the protection of constitutional rights.[251]

Finally, there may have been another reason for the Court's skepticism regarding the necessity of diversity jurisdiction in these cases. Federal plaintiffs in *Burford* cases generally are corporate entities. Both *Burford* and *Southern Railway* were decided before 28 U.S.C. section 1332(a) was amended to include a corporation's principal place of business as a residence for diversity purposes.[252] Subsequent to that amendment, neither *Burford* nor *Southern Railway* would have been diversity cases.[253] Moreover, even if the forum state was not a principal place of business for the corporations, current literature is quite skeptical about permitting corporations to invoke diversity as a plaintiff in a suit in a jurisdiction where the corporation regularly conducts business.[254] All told, the Court simply may have been prescient in the *Burford* cases.

The rationale of *Burford* is not completely consistent with the revi-

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250. 341 U.S. at 348.

251. 341 U.S. at 349 n.11. Justice Frankfurter's concurrence took sharp issue with the Court's assertion of this rationale, not disagreeing on the merits so much as claiming it had not been established in prior precedent. *See* 341 U.S. at 356 n.3 (Frankfurter, J., concurring).

252. *See* S. REP. NO. 1830, 85th Cong., 2d Sess. 5 (1958); H.R. REP. NO. 1706, 85th Cong., 2d Sess. 4 (1958) (suggesting virtually every suit involving a corporation fell potentially under diversity jurisdiction).

253. *Southern Railway* involved only the railway's "Alabama intrastate passenger service . . . mainly within Alabama." 341 U.S. at 342-43. Therefore, the railway would today be considered a citizen of Alabama and diversity jurisdiction would be destroyed. The land tract at issue in *Burford* was squarely within Texas and both parties were operating strictly in the East Texas oil fields. 319 U.S. at 318. Thus, the parties in both cases would lack federal diversity jurisdiction today.

254. For an excellent review of the Supreme Court's inconsistency and confusion with the problem of the corporation incorporated in more than one state, see D. CURRIE, FEDERAL COURTS 338-40 (3d ed. 1982).

sionist theory. After all, even if *de novo* review is not essential, fact-based direct review might nonetheless be inadequate. But, given all of the aforementioned considerations counselling against federal review, *Burford* must be considered a close case and, in any event, not plainly inconsistent with the revisionist theory.

4. Colorado River *Abstention*

Perhaps the most intriguing puzzle for the revisionist theory arises in the context of the Supreme Court's decisions regarding so-called *Colorado River* abstention. In *Colorado River Water Conservation District v. United States,*[255] the United States brought suit in federal court[256] to adjudicate the rights of certain Indian tribes to water from the Colorado River.[257] Shortly thereafter, several of the federal defendants moved to dismiss the federal action in favor of a pending state proceeding that had been initiated after the federal suit.[258]

The Supreme Court, in an opinion by Justice Brennan,[259] who traditionally has been the most unyielding proponent of the obligation theory, held that dismissal in favor of the state court action was appropriate. The Court found that none of the previously recognized branches of the abstention doctrine applied to the case.[260] Nonetheless, "exceptional circumstances" present in this case indicated that

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255. 424 U.S. 800 (1976).

256. The government invoked federal jurisdiction under 28 U.S.C. § 1345 (1982), which provides that, "[e]xcept as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States . . . ."

257. In order to manage the allocation of water resources, Colorado enacted its Water Rights Determination and Administration Act in 1969. Under this Act, the state is divided into seven water divisions, each division having an established proceeding for adjudicating water claims. 424 U.S. at 804-05. The government, suing some 1000 water users, sought declaration of the government's rights to certain waters located in Division 7:

> [T]he Government asserted rights on its own behalf and on behalf of certain Indian tribes, as well as rights based on state law . . . . Prior to institution of this suit, the Government had pursued adjudication of non-Indian reserved rights and other water claims based on state law in Water Divisions 4, 5, and 6 . . . .

424 U.S. at 805-06.

258. "Shortly after the federal suit was commenced, one of the defendants . . . filed an application in the state court for Division 7 seeking" to make the government a party to proceedings in that Division for the purpose of adjudicating all of the government's claims, both federal and state, pursuant to the McCarran Amendment. Several defendants then filed a motion in district court to dismiss the federal action. The district court granted a motion to dismiss, but the court of appeals reversed, "holding that the suit . . . was within district-court jurisdiction under 28 U.S.C. § 1345," and that abstention was inappropriate. 424 U.S. at 806.

259. Justice Brennan was joined by Justices White, Marshall, Powell, and Rehnquist, and Chief Justice Burger.

260. The *Colorado River* Court divided the abstention cases into three general categories. 424 U.S. at 814-17. See *supra* note 113 and accompanying text regarding the Court's inability to categorize the abstention doctrines in lasting, coherent fashion.

principles of sound judicial administration warranted the federal court staying its hand to avoid duplicating the effort of the state court.

According to the *Colorado River* Court, the "exceptional circumstances" justifying abstention included (1) uncertainty as to whether the court had jurisdiction over the property at issue, (2) uncertainty as to which court took jurisdiction first, and (3) the fact that the federal court was distant from the controversy.[261] The Court believed that each of these factors warranted abstention, but a fourth factor in particular was dispositive: Congress, in enacting the McCarran Amendment,[262] which permitted water-rights suits against the United States in state court, indicated a clear intent to have the state proceeding take precedence.[263]

As indicated by the dissenting opinions, there was good reason to question the *Colorado River* holding.[264] First, most of the factors relied upon by the Court, other than the congressional-intent rationale, did not seem necessarily to favor state jurisdiction.[265] Second, it was less than clear that the McCarran Amendment was intended to require abstention.[266] But foremost, it seemed peculiar to deny the

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261. The Court explained:

> In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required. Only the clearest of justifications will warrant dismissal.

424 U.S. at 818-19 (citations omitted). The Court also noted other factors which tended to support dismissal: the absence of any substantial progress in the federal court litigation, the presence of extensive rights governed by state law, and the government's willingness in similar suits to litigate in state court. 424 U.S. at 820.

262. The McCarran Amendment, 43 U.S.C. § 666 (1982), provides that "consent is given to join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system or other source . . . ." *See* 424 U.S. at 803.

263. The Court stated:

> The clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system . . . . Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognized the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

424 U.S. at 819 (citation omitted).

264. Justice Stewart wrote a dissenting opinion in which Justices Blackmun and Stevens concurred. Justice Stevens also dissented in a separate opinion.

265. Justice Stewart maintained in dissent that the rule regarding *in rem* proceedings relied upon by the Court did not require exclusive possession of the property. 424 U.S. at 822-23 (Stewart, J., dissenting). Moreover, given the nature of the water-rights proceedings, the United States' suit in federal court would not lead to piecemeal litigation; rather, the determination of water rights (*i.e.*, the priority of one's water claim) always occurs in one suit, with the actual allocation among parties with different water rights priorities occurring in another. 424 U.S. at 823-24 (Stewart, J., dissenting).

266. 424 U.S. at 827 (Stevens, J., dissenting) ("there is no basis for concluding that Congress

United States access to its own courts, particularly in Indian matters, where state court proceedings generally are disfavored.[267]

Colorado River becomes even more perplexing when contrasted with the next major case to face the Court in this area, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[268] In *Moses Cone,* a hospital and a contractor became entangled in a dispute over a construction contract; by the terms of the contract, the matter was to be resolved by arbitration.[269] After negotiations broke down, the hospital raced into state court and obtained a temporary order enjoining arbitration.[270] The contractor then filed its own action in federal district court, but the federal court stayed the action pending resolution of the state court suit.[271]

The Supreme Court reversed and held that *Colorado River* abstention was inappropriate in *Moses Cone,* dismissing out of hand two factors that, given its holding in *Colorado River,* seemed to argue in favor of abstention: the state court proceedings were first in time, and there was some danger of piecemeal litigation.[272] Instead, employing reasoning similar to that in *Colorado River* regarding Congress' intent in enacting the McCarran Amendment, the *Moses Cone* Court focused primarily on the congressional intent underlying the Arbitration Act. First, Congress sought "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."[273] Moreover, in enacting the Arbitration Act, Congress explicitly required that federal law would provide the rule of decision on the merits of the dispute's arbitrability.[274]

The difficulty with the Court's reasoning is that Congress' clear intent in enacting the Arbitration Act was that *state* courts were to apply that federal law.[275] *Colorado River* indicated that the primary

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intended that Amendment to impair the private citizen's right to assert a federal claim in a federal court").

267. 424 U.S. at 826 (Stewart, J., dissenting); 424 U.S. at 827 (Stevens, J., dissenting).

268. 460 U.S. 1 (1983).

269. 460 U.S. at 4-6.

270. 460 U.S. at 7.

271. 460 U.S. at 7. The district court justified its decision on the grounds that the two suits involved the identical issue of the arbitrability of the contractor's claims. 460 U.S. at 7.

272. The Court acknowledged that the state court proceedings were first in time, but pointed out that, just as in *Colorado River,* no significant progress had yet been made in these proceedings. 460 U.S. at 19-20. Moreover, any piecemeal litigation resulted from the nature of the dispute between the parties and from the fact that Congress intended arbitration to occur in only a portion of that dispute — the portion over which the parties had agreed to arbitrate. 460 U.S. at 21-22.

273. 460 U.S. at 22.

274. 460 U.S. at 23-24.

275. Although the Arbitration Act "creates a body of federal substantive law . . . regulating

"exceptional circumstance" favoring abstention was Congress' intent that the suit proceed in state court.[276] Yet Congress' intent in enacting the Arbitration Act was far clearer than its intent in enacting the McCarran Amendment. Under the Arbitration Act, state courts were to resolve the claim by applying the federal arbitration law. Yet the Court approved state court proceedings in *Colorado River* but not in *Moses Cone.*

Although the Court's reliance on congressional intent under its traditional approach is unsatisfying, the revisionist theory provides a basis for explaining these cases. This is seen when the *Colorado River* cases are contrasted with all other square-four cases. In all other square-four cases *Younger* is inapplicable because there is no pending state court proceeding to which the federal court might defer. This is either because the federal action is anticipatory or because any state case is itself removable to federal court. In the *Colorado River* cases, however, there *is* a pending state proceeding, and the question is whether the federal court ought to defer to that proceeding.[277]

The answer lies in the fact that just as *Colorado River* cases are not quite typical square-four cases, neither are they mill-run *Younger* cases. What distinguishes the *Colorado River* cases from other *Younger* cases is the existence of simultaneous pending state and federal actions produced by some "special circumstances." But for the "special circumstances" in each of these cases, there would not be proceedings pending in both state and federal court, and *Younger* would be inapplicable.

[arbitration agreements] . . . it *does not* create any independent federal question jurisdiction under 28 U.S.C. § 1331 . . . ." Thus "enforcement of the Act is left in large part to the state courts. . . ." 460 U.S. at 25 n.32 (emphasis added).

276. Congressional intent played a primary role in *Colorado River* and *Moses Cone. See Colorado River,* 424 U.S. at 820 ("the policy underlying the McCarran Amendment[ ] justifies] the District Court's dismissal in this particular case"); *Moses Cone,* 460 U.S. at 22-23 (refusal of federal court to proceed was "plainly erroneous in view of Congress' clear intent" in enacting the federal Arbitration Act). In the most recent *Colorado River* case, Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983), it became clear that, of all the "exceptional circumstances," congressional intent is by far the most important: "Although giving lip service to the balancing of factors set forth in *Colorado River,* the Court essentially gives decisive weight to one factor: the policy of unified water rights adjudication purportedly embodied in the McCarran Amendment." 463 U.S. at 575 n.4 (Stevens, J., dissenting).

277. Perhaps the real question ought to be why *Colorado River* cases are not square-three *Younger* cases. Why shouldn't the federal court in each case defer to the state court proceeding, at least insofar as *Younger* might dictate? It is not an entirely implausible explanation for these cases, therefore, that *Colorado River* was simply a last-ditch invention by those Justices opposed to broad application of *Younger* in civil cases. After all, Justice Brennan, the most vocal of the *Younger* critics, is the chief architect of *Colorado River* abstention. The other way to resolve these cases would be to apply *Younger* to all civil cases, whether or not the state had a convincing interest in the litigation sufficient to justify deference. Justice Brennan, however, would surely oppose this approach.

Moses Cone provides the clearest example. The contractor's federal suit was a diversity action.[278] Absent diversity, *Moses Cone* would be a state court case. But why was the *Moses Cone* litigation in state court also? The contractor, subsequent to filing its federal action, removed the state court action to federal court.[279] Had this been the end of it, *Moses Cone* would have been a square-four case in which there was no pending state proceedings and in which, under the revisionist theory, federal resolution was perfectly appropriate, but a glitch arose. The federal court remanded the part of the state court action to state court because there also was a nondiverse party present in state court — the architect — who was not present in the federal action.[280] Absent this procedural quirk, *Moses Cone* either would have been a square-four diversity case in which abstention was inappropriate, or a state contract litigation raising no federal trial forum issue at all.[281] Because of the procedural quirk — the "special circumstance" — *Moses Cone* was both.

Colorado River is similarly anomalous. By all rights, *Colorado River* ought to be a *Younger* case. A federal action was filed, then a federal defendant sought to remove on the ground that the state issues could be better resolved in a pending state court action.[282] Two factors, however, led to duplicate proceedings and a thorny question of which court should proceed. First, the Court construed the McCarran Amendment as dictating litigation of water-rights cases in state court to avoid duplicate litigation. Then, the Court held that the McCarran Amendment did not divest the federal court of jurisdiction over actions brought by the United States. Thus, there arose two actions and the need for a policy decision about whether both could proceed.[283]

The Supreme Court has not, under the traditional approach, developed an adequate understanding of why *Colorado River* cases arise

278. 460 U.S. at 1, 4.

279. 460 U.S. at 7 n.4.

280. 460 U.S. at 7 n.4.

281. In fact, *Moses Cone* points to a bit of an anomaly posed by federal defenses arising in diversity cases. In a nondiversity case, federal defenses are litigated in state court. *See supra* notes 190-96 and accompanying text. The diverse state defendant, however, with the very same federal issues, can obtain federal review of those issues in federal court, not by virtue of federal question jurisdiction but because of diversity removal.

282. 424 U.S. at 806.

283. Another example of such quirky jurisdiction was presented in Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978). *Will* was a simple state insurance contract case. The defendant raised a federal defense based on the securities laws and filed a separate federal action raising those issues. 437 U.S. at 658. Thus, *Will* was a simple square-three case but for one problem: the key claim in federal court was one over which the federal courts have exclusive jurisdiction. Reluctant to dismiss that claim, which could not be adjudicated in state court, and equally reluctant to draw the entire litigation into federal court, the Court permitted both actions to proceed.

and how they should be treated. Under the revisionist theory, however, these anomalistic dual-proceedings cases can be resolved by application of the revisionist theory's three forum decisions. This is seen by returning to the problem of the differing results in *Moses Cone* and *Colorado River.* Under the revisionist theory, those seemingly contradictory results are explained easily.

First there is the question of whether lower federal court resources are necessary in this kind of case. In *Colorado River,* not only was the Court skeptical about the need for an initial federal forum, it was also worried that to afford a federal forum would bring a tremendous amount of state law water-rights litigation into the federal courts.[284] Second, the revisionist theory looks to the adequacy of the state forum for raising any federal claim. In *Colorado River,* and in the Court's subsequent Indian water-rights decision, *Arizona v. San Carlos Apache Tribe,*[285] the Court went to lengths to ensure that any federal issue could be raised in state court, and to hold out the possibility of federal jurisdiction should the state courts fail to provide a forum for such claims.[286] In *Moses Cone,* by contrast, the Court expressed doubt that the state court would give adequate attention to the federal claim raised there.[287] In fact, despite Congress' intent that state courts execute federal arbitration policy, the Court plainly was skeptical about whether the state courts were up to the job,[288] and so permitted the

284. Colorado's purpose in enacting its Water Rights Determination and Administration Act was to provide state procedures for determining the increasing number of water claims. *See* 424 U.S. at 804.

285. 463 U.S. 545 (1983).

286. *See Colorado River,* 424 U.S. at 820 ("We need not decide, for example, whether . . . dismissal would be warranted . . . if the state proceedings were in some respect inadequate to resolve the federal claims."); 424 U.S. at 812 ("[T]he Government's argument [against dismissal of the federal suit] rests on the incorrect assumption that consent to state jurisdiction for the purpose of determining water rights imperils those rights . . . ."); *San Carlos Apache Tribe,* 463 U.S. at 559-60 ("[I]t is also clear . . . that a dismissal or stay of the federal suits would have been improper if there was no jurisdiction in the concurrent state actions to adjudicate the claims at issue in the federal suits.").

287. Although state courts are required as much as federal courts to grant stays of litigation under § 3 of the Arbitration Act, it was less clear whether the same was true of an order to compel arbitration under § 4 of the Act. The Court noted that in many cases, a stay under § 3 is adequate to protect the right to arbitration, but in a case such as *Moses Cone,* where the party opposing arbitration is the one from whom the payment is sought, a stay of litigation alone is not enough. Thus, the state court proceeding might not provide adequate protection for the federal right. As the Court noted in *Moses Cone:*

> If the state court stayed litigation pending arbitration but declined to compel the hospital to arbitrate, [the contractor] would have no sure way to proceed with its claims except to return to federal court to obtain a § 4 order — a pointless and wasteful burden on the supposedly summary and speedy procedures proscribed by the Arbitration Act.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 27 (1983).

288. See, to this effect, the Court's discussion in *Moses Cone* of North Carolina's historical hostility to arbitration. Although mouthing platitudes about the adequacy of state court adjudication — *e.g.,* "[w]e are not to be understood to impeach the competence or procedures of the

cases to proceed in the lower federal courts.

Finally, the Court must address the adequacy of its own review. In *Colorado River* and *San Carlos Apache Tribe,* the Court explicitly reassured all parties that direct review would be adequate.[289] This surely is correct. If federal rights were inadequately respected, the petitioner would be the United States, or at least the Indian tribes, both of which traditionally have been quite successful in obtaining Supreme Court review.[290] Again, *Moses Cone* stands in sharp contrast: if the state court refused to order arbitration, that issue might not be appealable in state court, and thus direct review would be unavailable.

The *Colorado River* cases thus are anomalistic abstention cases. Application of the revisionist theory's analysis, however, consistently yields the correct result.

5. *Recapping Square Four: What's Left?*

Initially, square four seemed too broad to comport with the revisionist theory: permitting any suit initiated by a federal plaintiff to proceed in federal court in the absence of a state proceeding that compelled abstention under *Younger* would place cases in federal court that, for the reasons described at the outset of this section, would not be a wise use of lower federal court resources. As the foregoing discussion indicates, however, the non-*Younger* abstention doctrines serve to limit the scope of this right to a federal forum.

These additional abstention doctrines pull a large number of cases out of federal court. *Pullman* removes cases where *Ashwander* dictates that the federal court should avoid premature decision of the federal question. *Colorado River* seeks to avoid duplicative litigation. *Pullman, Burford,* and *Thibodaux* all seek to avoid "needless friction" with state courts on purely state law questions where state court bias is not a problem.

In all these cases, state review exists to protect state interests. Fed-

North Carolina courts," 460 U.S. at 26 — the Court plainly had grounds to suspect that the North Carolina courts would not eagerly enforce federal arbitration policy. The Court itself acknowledged that, "[a]s a historical matter, there was considerable doubt at the time of the District Court's stay that the North Carolina court would have granted even a § 3 stay of litigation." 460 U.S. at 27 n.36.

289. *See San Carlos Apache Tribe,* 463 U.S. at 571 ("[A]ny state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment."); *Colorado River,* 424 U.S. at 813 (the Supreme Court may review questions raised in state court after final judgment by that court if such questions have been preserved) (quoting United States v. District Court, 401 U.S. 520, 526 (1971)).

290. *See* 424 U.S. at 812-13. Moreover, not even the dissenters argued that the state courts could not be trusted with fact-finding in these cases.

eral review is retained where necessary to protect federal interests. Remaining in federal court from square four are all those cases — such as classic *Monroe v. Pape*-type actions challenging violations of federal rights by state officials — in which a federal trial forum is necessary to protect federal interests, or in which no state interests are implicated.[291]

E. *Summing Up*

The matrix represented in Figure 3 below permits a comparison of the results which obtain under the revisionist theory with the results in individual cases under the traditional approach. As this Part has demonstrated, the results under both theories are largely the same, but the revisionist theory provides a more satisfying rationale for these decisions.

FIGURE 3

	Younger abstention appropriate (state proceeding)	*Younger* abstention inappropriate (no state proceeding)
criminal:	*Younger* abstention; review by federal habeas court	no *Younger* abstention; lower federal court review in anticipatory action
civil:	*Younger* abstention — *procedural challenge:* direct review adequate; possibility of federal trial forum if direct review unavailable *substantive challenge:* removal rules culprit; avoid removal rules with anticipatory action; otherwise, same safeguards as with procedural challenges	no *Younger* abstention; federal jurisdiction limited by *Pullman, Thibodaux, Burford, Colorado River.*

291. Currie, *supra* note 2, at 328-29 ("[M]istrust of state courts is at its height when, as in Section 1983 cases, a state officer is charged with denying the asserted federal right.").

CONCLUDING THOUGHTS: ON THE MERITS OF THE REVISIONIST THEORY

Emerging from the shadow cast by the conflicting premises of the traditional approach, the revisionist theory provides a plausible explanation for the abstention doctrines. Rather than viewing abstention decisions as running against the current of federal jurisdiction, the revisionist theory suggests that abstention is a consistent part of the overall scheme of federal jurisdiction. This section attempts to anticipate, and address, some of the potential objections to the revisionist theory.

The first objection might be that the revisionist model requires too much ad hoc decisionmaking in order to determine whether to abstain in a given case, and thus fails in its promise to provide clear guidance to lower courts and litigants. This calls to mind a similarly posited objection raised by Professor Cohen to the thesis he advanced in his well-known article on federal question jurisdiction: "The short answer may be that the maze of analytical standards used by the courts [currently] has not, as has been shown, produced consistent and predictable results in hard cases."[292] It also calls to mind an obvious response: whatever its shortcomings, the revisionist model is, at minimum, a substantial improvement over the current state of affairs.

Although on its face the traditional approach may seem easy to apply, in reality this is not the case. The traditional approach presents the impression that one need only figure out which established category a given case falls within — *Younger, Pullman,* or what have you — and the abstention result is clear. The rub comes in understanding, as the Court recently conceded, that the established doctrines themselves are anything but clear.[293] Instead, there is interminable litigation not only about whether a case ought to be within a given doctrine, but also about what defines the doctrine itself. The confusion over the *Colorado River* doctrine or the long process of defining *Younger* abstention are but two examples that come readily to mind.[294]

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292. Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law,* 115 U. PA. L. REV. 891, 908 (1967).

293. *See supra* note 113 and accompanying text.

294. Although both doctrines seem to have been clearly set forth in the initial cases, subsequent cases indicate that both doctrines have undergone substantial change. Thus, the *Younger* doctrine relied upon to decide *Pennzoil Co. v. Texaco Inc.* bears almost no relation in rule or rationale to *Younger* itself. *Compare* Younger v. Harris, 401 U.S. 37 (1971) (relying primarily on principles of equity jurisdiction, as well as federalism concerns, to hold that federal court may not enjoin a pending state criminal proceeding) *with* Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987) (relying solely on principles of federalism to hold that federal court may not entertain a challenge to fairness of state court civil proceedings when such proceedings are ongoing); *see also* Mullenix, *supra* note 2, at 104 (absence of clear Supreme Court guidance as to application of

The revisionist model stands in sharp contrast, for although its application requires a number of multi-factored forum decisions, the theory provides a bright-line standard for the majority of cases. Once a case falls within square one or square two, the abstention result is clear.[295] The same generally is true for square-three cases, with the only inquiry going to the availability of a state forum in which to raise the constitutional issue.[296]

The only square requiring case-by-case analysis is square four. However, it is with square-four cases, ironically, that the revisionist model offers its greatest advantage over the traditional approach. In any doctrinal area there will be difficult cases. The advantage of the revisionist theory is that it explains why the difficult cases fall into square four, and, within that square, defines and offers a concrete set of considerations to resolve them.[297] Moreover, as the standards of the revisionist theory are applied to square-four cases over time, guideposts for future decision likely will evolve.[298] Rather than providing such guidance, the pigeonholing doctrines of the traditional approach obscure difficult decisions, stunting subsequent doctrinal coherence.[299]

Substantive objections to the revisionist theory probably will be more vigorous. Some might argue that although the revisionist theory explains abstention and offers guidance for future cases, it does not go so far as to answer fundamental objections to the application of any abstention doctrine. But that is not the case.

Although the objections to abstention are varied, the root concern is the same: removing a case from federal court denies the plaintiff a forum that Congress chose to make available precisely because such a

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Colorado River abstention criticized as "conclusory decisionmaking" and a "proliferation of legal gibberish").

295. Abstention is appropriate in square-one cases. *See supra* notes 146-48 and accompanying text. Abstention is inappropriate in square-two cases. *See supra* notes 157-59 and accompanying text.

296. So long as there is an adequate state forum in which to raise the federal issues, abstention is appropriate in square-three cases. *See supra* notes 166-96 and accompanying text.

297. Square four encompasses all those cases in which a federal defendant cannot initiate a state proceeding to displace the federal action under *Younger,* but where under the relevant considerations of the revisionist theory, abstention might be appropriate nonetheless. Application of the relevant factors to square-four cases offers clear guidance as to whether abstention is appropriate even though *Younger* would not mandate it.

298. To an extent, this has already occurred. Certain of the traditional approach's doctrines, such as *Pullman* and *Thibodaux,* had never been explained clearly by the Court. But *Pullman* and *Thibodaux* cases can now be resolved relatively mechanically by applying the revisionist theory's factors. See *supra* notes 204-14 and accompanying text for discussion of *Pullman* abstention, and *supra* notes 215-34 and accompanying text for discussion of *Thibodaux* abstention.

299. Thus, for example, *Frank Mashuda, Thibodaux,* and *Winter Haven* are, within the context of the traditional approach, almost impossible to reconcile, making it difficult to decide how to resolve the next *"Thibodaux"* case. Yet, such difficulty evaporates once these cases are seen within the context of the revisionist theory. *See supra* notes 229-34 and accompanying text.

forum was necessary for the vindication of federal rights; consequently, the plaintiff is forced into state court to the peril of federal interests.[300]

The entire basis of the revisionist theory, however, is that a federal trial forum should be, and is, available whenever necessary to vindicate federal interests.[301] Wherever a federal trial forum is not necessary, the theory trusts the mechanism of review by the Supreme Court to see to it that federal rights are not slighted by the states.

If federal review is adequate to protect federal interests, the concerns raised by abstention's critics should be resolved. Some critics, for example, decry the denial of a plaintiff's choice of forum, or the failure of federal courts to exercise jurisdiction despite their "unflagging obligation" to do so. But these principles are meaningless in the abstract. The question is why the choice of forum should matter. Plaintiffs presumably choose federal fora, and federal fora have an obligation to proceed, when a federal forum is necessary to protect federal interests. If such a forum is unnecessary, because federal rights are adequately protected, these objections to abstention must, at least, be minimized.[302]

For the same reason, the revisionist theory ought to satisfy Professor Redish's separation-of-powers concerns. He argues that Congress has made the decision regarding those cases in which federal jurisdiction is necessary, and that courts violate the constitutional framework of separation-of-powers by declining jurisdiction once granted.[303] But Congress presumably grants and withdraws federal jurisdiction by analyzing the same competing interests that are relevant under the revisionist theory. It is fair to assume that Congress has no capricious interest in awarding jurisdiction in a topsy-turvy fashion, but makes the federal trial courts available when there is a danger of state bias or a concern that federal courts are necessary to protect federal rights.[304] By the same token, Congress has shown a concomitant concern for

300. *See supra* notes 35-37 and accompanying text.

301. *See supra* note 99 and accompanying text.

302. If there is no practical difference between proceeding in state or federal court with regard to protection of federal rights, the only legitimate remaining concern would be symbolic. To the extent a symbolic concern sensibly exists in the absence of real concern as to results, however, the concern would hardly outweigh the legitimate grounds for abstaining. *But see* Chemerinsky, *supra* note 41, at 300-10 (arguing that plaintiff should have a choice of forum, thus allowing the "market" to determine whether parity exists between state and federal courts).

303. *See supra* notes 30-31 and accompanying text. *See generally* Redish, *Separation of Powers, supra* note 1.

304. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 415-17 (1963) (habeas remedy extended to state prisoners by Act of 1867 to address state hostility to federal rights); Monroe v. Pape, 365 U.S. 167, 173-80 (1961) (civil rights actions enacted to provide adequate federal remedy because states failed to protect federal rights).

state adjudicatory interests, and has enacted specific legislation prohibiting the federal courts from proceeding when significant state interests are at stake.[305]

The revisionist theory permits courts to fulfill the interest of Congress in enacting jurisdictional statutes. The difficulty with congressionally granted jurisdiction is that, as with much legislation, those statutory allocations necessarily are somewhat imprecise. Given the nature of Congress' task, it is difficult for Congress to draft jurisdictional statutes that do anything more than carve out rough contours as to when federal jurisdiction is necessary or inappropriate. Oftentimes, those grants are overbroad, and the Supreme Court has sought to make a more sensitive allocation.[306] But just as often the Court has taken an underinclusive statute and broadened it to ensure the availability of federal jurisdiction when necessary,[307] or at least taken a statute narrowly construed since its passage and broadened it to the same end.[308] In reality, there is no separation-of-powers problem because, as the revisionist theory makes clear, the abstention decisions comport with the intent of Congress by ensuring adequate federal review.[309]

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305. *See, e.g.*, 28 U.S.C. § 2283 (1982) (Tax Injunction Act); 28 U.S.C. § 1341 (1982) (Anti-Injunction Act); *see also* Redish, *Separation of Powers*, *supra* note 1, at 81; Shapiro, *supra* note 2, at 581-82.

306. That is, of course, the interpretation of *Younger v. Harris* under the revisionist theory. Other examples of Supreme Court decisions narrowing congressional grants include Wainwright v. Sykes, 433 U.S. 72 (1977) (denying habeas relief to certain procedurally defaulted claims); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) (limiting federal question jurisdiction to cases where a federal question appears on face of plaintiff's complaint); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) (holding that Supreme Court jurisdiction over state court judgments extends only to federal questions); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) (requiring complete diversity to invoke federal diversity jurisdiction);

Several points must be made about these limiting decisions. First, sometimes they merely limit the breadth of federal jurisdiction, although it is difficult to see any sensible allocation. For example, *Strawbridge* undeniably limits the full scope of federal jurisdiction, but it is unclear what factor beyond the caseload of courts justifies the line drawn in that case. Second, even an attempt to draw a sensible line may or may not meet with success. For example, *Mottley* may have had the effect of withdrawing from federal jurisdiction cases that required a federal forum. *See supra* notes 190-94 and accompanying text; Collins, *supra* note 102, at 766-77. Finally, it is arguable with regard to certain limiting decisions, such as *Wainwright v. Sykes*, whether the Court is furthering or frustrating the will of Congress.

307. The most famous example may well be Mitchum v. Foster, 407 U.S. 225 (1972), in which the Court perverted legislative intent and strained any reasonable interpretation of the English language to hold that the Anti-Injunction Act did not bar injunctions in civil rights actions. *See* Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 733-39 (1982); Currie, *supra* note 2, at 329 ("There was no excuse for the *Mitchum* decision.").

308. *See* Monroe v. Pape, 365 U.S. 167 (1961) (broadening § 1983's scope 90 years after its passage); Brown v. Allen, 344 U.S. 443 (1953) (broadening habeas statute 80 years after its enactment).

309. *See* Shapiro, *supra* note 2, at 574 (jurisdiction questions difficult to answer "in gross"; "measured authority to decline jurisdiction . . . protects . . . the principle of separation of powers"). Despite the logic of this position, Professor Redish nonetheless demurs. He argues that there is no evidence that Congress intended to delegate authority to the Supreme Court to narrow jurisdictional grants, or that Congress has acquiesced in judicial decisions that do so. *See*

Of course, this entire argument rests upon the notion that the abstention cases as applied *do* afford a federal forum when necessary to protect federal rights. To the extent the forum provided is a federal district court, no one is likely to dispute the claim of adequacy. Disagreement likely will surface, however, with regard to the question of whether Supreme Court review really is adequate in those cases in which the revisionist theory depends solely upon the Court to provide a federal forum. If the critics are right that such review is not adequate, the revisionist theory is in some difficulty.

Frankly, there is no perfectly satisfactory answer to this concern. It is no doubt correct that the Supreme Court's own docket is sufficiently heavy that many cases do not receive the attention they deserve from the Court.[310] It also is probably true that every party with a federal claim would at least prefer to have the choice of going into a federal trial forum, rather than depending upon the adequacy of subsequent review.

At the same time, it is obvious that it is untenable to take the position that Supreme Court review is wholly inadequate.[311] Abstention represents but one instance in which parties with federal claims are denied a federal trial forum. The denial of a federal trial forum in abstention cases pales in comparison to the denial effected by the case law regarding what constitutes a federal question,[312] what is proper diversity,[313] and when removal of a case from the federal courts is permitted.[314] Cases in which abstention is required do not, by com-

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Redish, *Separation of Powers, supra* note 1, at 80-84. I do not believe that the lack of evidence is absolute, or that, even if it were, it would compel Professor Redish's conclusion. I intend to take up this issue in a later essay.

310. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 526 (1976) (Brennan, J., dissenting) (noting that institutional constraints preclude adequate oversight by the Court of states' application of federal law). *See generally* Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study,* 59 N.Y.U. L. REV. 681 (1984) (discussing docket problems). Some commentators have called for an intermediate court of appeals to ease the Supreme Court's docket pressure. *See, e.g.*, Yackle, *supra* note 2, at 1022 n.137 (summarizing commentary on such proposals). *See generally* Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System,* 59 CORNELL L. REV. 597 (1974); Haynsworth, *A New Court to Improve the Administration of Justice,* 59 A.B.A. J. 841 (1973).

311. Even those commentators critical of abstention frequently rely on Supreme Court review to serve as a safeguard in some cases. *See, e.g.*, Yackle, *supra* note 2, at 1048-49 (relying on the Supreme Court to review federal claims of litigants who voluntarily litigate in state court); Field, Pullman *Abstention, supra,* note 2, at 1085 ("Despite its limitations, the availability of Supreme Court review does afford some protection against error or bias when state courts decide federal issues.") (footnote omitted).

312. *See generally* Cohen, *supra* note 292.

313. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

314. *See* Collins, *supra* note 102, at 752 (removal decisions "exclude from federal trial court jurisdiction an entire class of claims based on federal right or privilege, or an interpretation of federal law").

parison, present a particularly compelling argument for the necessity of a federal trial forum. Yet, the alternative to the premise of the revisionist theory concerning the adequacy of direct review is to concede that direct review is inadequate to protect federal rights in all cases and to allocate all federal claims to an initial federal forum.

Even if it were possible as a practical matter to make a federal trial forum available on such a widespread basis, it is fair to ask whether it would be a desirable option. In one sense it would be: if state courts are not as sensitive to federal claims of right, and if the Supreme Court cannot do an adequate job on direct review, then every claim would get a better hearing in a lower federal court. However, in an equally important sense this would not be desirable: widespread availability of federal fora would trivialize federal jurisdiction, removing the force and impact of federal judgments.[315] Federal judges, confronted with the volume of mill-run litigation now occurring in state courts, might lose their vantage point and become cynical about the extent or values of federal protections.[316] And widespread federal jurisdiction would draw a significant volume of litigation from the state courts, diminishing *their* utility and import.[317]

No commentator I know of argues for such a dramatic revision in the allocation of cases between federal and state courts. Of course, in arguing in favor of federal jurisdiction on any specific question, it becomes easy to overlook the cumulative effect. But few commentators, if faced with this cumulative effect, would advise tearing down all the barriers and affording universal access to a federal trial forum for federal claims.

The question that remains then is what constitutes a wise use of federal judicial resources.[318] It is obvious that direct review has its shortcomings as a mechanism for protecting federal interests. But the revisionist theory relies on direct review only in those cases where such review is most likely to be meaningful, guaranteeing a federal

315. *See supra* note 112 and accompanying text.

316. *See* Neuborne, *supra* note 2, at 1125-26 (arguing that the federal bench's distance from the application of constitutional doctrine is conducive to vigorous enforcement of constitutional rights).

317. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) ("In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."); Bator, *supra* note 2, at 621 (state courts necessarily play large role in protecting constitutional rights).

318. *See* Wells, *Disparity*, *supra* note 1, at 302 ("Problems spawned by federal jurisdiction may be so great, and the correlative advantages of a restrictive rule so plain, that even staunch supporters of federal courts acknowledge the need for limits on access."); Neuborne, *supra* note 2, at 1128-29 ("civil rights lawyers exacerbate an already difficult caseload burden in the federal courts").

trial forum where Supreme Court review is feared inadequate. In a world in which line drawing is necessary to resolve competing interests, the revisionist theory does a good job of providing a federal forum to those most in need of federal review.