Private Concurrent Litigation in Light of Younger, Pennzoil, and Colorado River

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ARTICLES

PRIVATE CONCURRENT LITIGATION IN LIGHT OF YOUNGER, PENNZOIL, AND COLORADO RIVER

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I. INTRODUCTION

In the United States, two parties engaged in litigation over a single dispute may find themselves proceeding in more than a single court system. It is not uncommon for two parties to litigate a dispute in federal and state courts at the same time. The procedures for handling this concurrent litigation are important for both the student of government and the practicing attorney. The former must be concerned with the effects such procedures have on the relative authority of the federal and state governments, the latter with their effects on his ability to select the most advantageous forum for his client and the ability of his opponent to maneuver him out of his court of choice. Students of government—scholars and politi-

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cal leaders—understand that the rules for concurrent litigation will influence the power of the federal judiciary to protect minority groups, and the expense and complexity of litigation in general. The practitioner's interest is more immediate, for these rules will influence a number of litigation decisions: when should he terminate settlement negotiations and file the complaint, in what court should he file that complaint, what causes of action should he plead, what matters should he include in answers and counterclaims, and where should he file those counterclaims? The rules also affect the cost of litigation for his client, which in turn may influence his substantive decisions.

Unfortunately, the Constitution itself is of little assistance in this matter. The Framers of the Constitution, many of whom were both students of government and practicing attorneys, were unable to decide whether lower federal courts should even exist, much less what their relationship with the

1. See Palmore v. United States, 411 U.S. 389, 412 (1973) (Douglas, J., dissenting); Mitchum v. Foster, 407 U.S. 225, 238-42 (1972); Brennan, The Bill of Rights and the States, 36 N.Y.U. L. Rev. 761, 778 (1961); Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977). Many state court judges are elected officials who must run for office in a regular partisan election or who run for reelection against only themselves under what is known as the Missouri Plan. Federal judges, however, are appointed for life by the President with the advice and consent of the Senate, and their salaries cannot be diminished while they hold office. U.S. Const. art. III, § 2. Because of this, federal judges traditionally have been considered less susceptible to public pressure and more willing to protect litigants who belong to minority or unpopular groups. A rule that required that all concurrent litigation be consolidated in the state court would make it far more difficult for a member of such a group to gain access to federal court.

2. A rule which allowed concurrent lawsuits in federal and state court to continue independently might force the parties to incur duplicative costs. On the other hand, a rule that would stay the proceeding in federal court until the completion of the state court proceeding would raise complicated issues regarding res judicata and collateral estoppel. See, e.g., England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964); Wicker v. Board of Educ., 826 F.2d 442 (6th Cir. 1987).

3. Of the fifty-five delegates to the Constitutional Convention, at least twenty had legal training. Several, including James Wilson and Jared Ingersoll, were among the nation's best lawyers; six had served as state court judges; and one, George Wythe, was professor of law at William and Mary College. For a description of each delegate, see M. Farrand, The Framing of the Constitution of the United States 14-38 (1916). James Madison, the primary architect of the Constitution, had studied law but was not a practicing attorney. 18 Encyclopedia Americana 99 (1973).

4. Many Anti-Federalists believed that the creation of federal trial courts would encroach on the power of existing state courts. Federalists believed that lower federal
state courts should be. Instead, the drafters left it to Congress to decide whether inferior federal courts should be established. However, no one considered what should be done when litigation involving a single dispute was filed in a federal court and a state court at about the same time. Should the two cases be consolidated before a single court, or should they be allowed to proceed independently?

In the past fifty years, the Supreme Court has produced four doctrines which address the relationship between federal and state courts. The first three were established in *Railroad Commission of Texas v. Pullman Co.*, *Burford v. Sun Oil Co.*, and *Younger v. Harris*. Collectively, they are known as the abstention doctrines, and they were intended to resolve the conflicting interests of the federal and state governments, interests reflected in the twin notions of federalism and comity. The fourth doctrine, created in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976); 1A J. Moore, B. Ringle & J. Wicker, Moore's Federal Practice, § 0.203[1] & [2] [hereinafter Moore's Federal Practice]. Some courts and commentators, however, add *Colorado River* to the list of abstention doctrines. See Ash v. Richard J. Lynch & Co., 644 F. Supp. 315, 317 (E.D.N.Y. 1986); Committee on Federal Courts of the New York State Bar Association, *Report on the Abstention Doctrine: The Consequences of Federal Court deference to State Court Proceedings*, 122 F.R.D. 89, 93 (1988). See also infra text accompanying notes 389-91.

The Supreme Court, in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), suggested that a federal court should abstain in cases involving eminent domain proceedings, and some commentators consider this another type of abstention. See 17 Wright & Miller, Federal Practice and Procedure, § 4241 at 28-29, § 4246 at 107-08 [hereinafter Wright & Miller]. The same commentators have observed that the Supreme Court itself has been uncertain as to how many types of abstention exist. Id. § 4241 at 26-27.

The distinctions between abstention categories are not always clear, and the Supreme Court recently has warned that 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).

Conservancy District v. United States,11 is based on different principles, and so is not an abstention doctrine at all.12 Pullman and Burford have only incidental effects on concurrent litigation and pose little problem for the practitioner. Pullman abstention is relatively straightforward and well-defined, with clearly established perimeters.13 According to Pullman, if a case filed in federal court involves a federal constitutional issue and a state law question whose resolution may obviate the need to decide the federal question, the federal court should abstain until the plaintiff has allowed a state court to resolve the state issue.14 In a sense, Pullman requires a federal court to create concurrent litigation. The second type of abstention, named after Burford v. Sun Oil Co.,15 requires a federal court to dismiss a case when any other decision would interfere with a complex state regulatory scheme concerning an area in which a state court or agency has special expertise, and in which the state itself has an important state interest.16 Although the scope is not as well-defined as Pullman’s,17 its use is rare enough that it does not trouble most attorneys.

The third and fourth doctrines are a different matter, and this article will focus on them. Younger abstention was established when the Supreme Court held that a federal court

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12. Id. at 817. But see supra note 9.
14. 312 U.S. at 500-01.
17. 1A Moore’s Federal Practice, supra note 9, at ¶ 0.203[2]; 17A Wright, Miller & Cooper, supra note 13, § 4241, at 10-11, § 4244, at 84-94.
lacked the power to enjoin a state criminal prosecution. The Colorado River doctrine was born in a case involving the allocation of water rights in light of a federal statute which waived the federal government's sovereign immunity and mandated consolidation of several cases in a specialized state water court. The facts which provoked Younger and Colorado River would seem to have nothing in common with the run-of-the-mill litigation in which two private parties find themselves simultaneously litigating a civil dispute over the same subject in a federal court and a state court.

That is not the case. Younger and Colorado River have spawned case law which has greatly expanded their initial respective scopes; they now are routinely invoked—sometimes with surprising success—in normal concurrent federal/state court proceedings between private parties. A plaintiff's attorney who files a diversity action in federal court and then files a backup case in state court (to protect her client against the possibility that the federal court will dismiss the case for lack of diversity jurisdiction after the statute of limitations has run) may find that the client has just been committed to a trial in state court. Even worse, a wily federal defendant may be able to defeat federal jurisdiction merely by filing a countersuit in state court, months or even years after the plaintiff filed the federal case. Additionally, a party facing a suit involving a matter of exclusive federal jurisdiction may be able, by hurriedly filing a claim in state court, to confine the entire action to state court.

The problem is that Younger and Colorado River have been applied to situations where the principles behind them are irrelevant. The Younger decision was based on concerns of equity, federalism, and comity; concerns about the relative interests of the federal and state government in particular types of litigation. Younger has been applied to concurrent litigation between private parties only because courts have per-

20. See infra text accompanying notes 79-80, 272-82.
21. See infra text accompanying notes 272-78, 283-95.
22. See infra text accompanying notes 270-71.
ceived that such litigation involves important state interests. 23 Those interests, however, are mere illusion, for they are based on the well-pleaded complaint rule, an artificial, archaic rule spawned by a judicially active court which was motivated largely by self-interest. 24 Colorado River, on the other hand, was based on the need for federal courts to protect themselves from involvement in certain highly complex, extraordinary cases. The use of Colorado River in ordinary private concurrent litigation reflects a basic misunderstanding of the doctrine's scope and purpose, a misunderstanding which protects self-interested courts at the expense of innocent litigants.

This article will first examine those types of cases in which parallel proceedings are filed in federal and state court, as well as the reasons behind these dual filings. Next, the article will examine the extent to which the federal courts improperly have extended the original, narrow holdings of Younger and Colorado River to the point where these doctrines have been applied routinely to dual private litigation. The article then will discuss the pitfalls and dangers which these developments have created for litigants and their attorneys.

Finally, the article will suggest several ways to resolve these problems. First, it will suggest that the Supreme Court amend the well-pleaded complaint rule, which has been the source of much difficulty concerning Younger abstention and private concurrent litigation. Second, it will argue that the Court should make clear its disapproval of the tendency of the lower federal courts to read Colorado River expansively. Third, it will suggest that in ordinary private concurrent litigation, the interests of the federal government, state governments, and the federal judiciary are too minimal (or illegitimate) to be used for considering whether the concurrent actions should proceed independently or should be consolidated before a single court. The article will contend that this decision should be based upon an analysis of the reasons why the parties created the concurrent litigation. If there was a le-

24. See infra text accompanying notes 57-73.
Concurrent Litigation

A legitimate reason for the filing of the second case in a different court, both actions should be allowed to proceed independently. Otherwise, they should be consolidated in a single court. This should protect innocent litigants who have proceeded in good faith, only to discover that their good-faith litigation decisions have been sacrificed in favor of minimal—and sometimes questionable—interests of state governments and federal courts.

II. THE PROBLEM OF CONCURRENT LITIGATION

A. Introduction

Concurrent litigation has three primary forms. The first form is public concurrent litigation, which occurs when a government entity initiates a judicial or administrative proceeding against a private party, and that private party reacts by filing suit in a different court. This reactive lawsuit challenges either the statute under which the government entity is proceeding or the manner in which it is proceeding. The second form is private repetitive litigation. This occurs when a plaintiff in an existing case files a second, repetitive action in a different court. The third form is private reactive litigation. In this version, a party which is sued in one court reacts by filing a counteraction in a different court. Obviously, public concurrent litigation involves a mixture of governmental and private interests, while the two types of private concurrent litigation, by and large, affect only private interests, some of which are legitimate while others are not.

B. Public Concurrent Litigation

1. Varieties

There are several varieties of public concurrent litigation. When the government brings a criminal or quasi-criminal action against a private party, that private party may file suit in a different court in an effort to challenge the legality of such an action.25 This rarely, if ever, occurs when the federal gov-

25. See, e.g., Allen v. McCurry, 449 U.S. 90 (1980). (When a state court refused to suppress evidence seized allegedly in violation of the fourth and fourteenth amendments, the state criminal defendant filed a federal action for damages against police
government has begun the criminal or quasi-criminal proceedings, because the defendant has no incentive to file a separate lawsuit against the federal government. If she sues in state court, the suit will be removed to federal court;26 if she files in a different federal court, the second action will be transferred to the first federal court.27 On the other hand, if the state brings criminal proceedings against her, mounting a challenge in federal court will enable her to try to present her federal statutory or constitutional arguments to a federal judge who (usually) is more sympathetic to such arguments. In this type of concurrent litigation, the state has an interest in enforcing its laws by obtaining a conviction, the federal government has an interest in making sure the state does not violate federal rights, and the private party has an interest in avoiding conviction. Public concurrent litigation can also occur when a government agency commences regulatory action against a private citizen. Again, this rarely involves the federal government, for the reasons described above and because of several doctrines requiring a private party to exhaust her federal administrative remedies before filing a federal action.28 Again, the state, the federal government, and the private party all have important interests.

Another type of public concurrent litigation involves disputes between a private litigant and a judge. A private litigant in state court who finds himself facing a contempt citation or who considers himself victimized by state court procedural rules may try to protect himself by contesting those matters in federal court.29 In such cases, the state is not a named party to the state court lawsuit. Nevertheless, the state has an important interest in the action because the authority of one

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26. 28 U.S.C. § 1442 (1982) provides that any civil action or criminal prosecution against an officer of the United States may be removed to a United States district court.


of its judges or its rules of procedure is in question. Similarly, the federal government has an interest because the state judge or rule may have violated the federal Constitution. Of course, the private litigant has his own interests as well.

It also may be said that public concurrent litigation occurs when private parties decide to litigate, in two separate courts, issues requiring application or interpretation of constitutions or statutes. This may involve weighty matters touching crucial government interests (such as a union’s dispute with management over the interpretation of certain federal labor laws,30 a subject in which the federal government has taken a special interest)31 or more mundane matters, such as a suit between a decedent’s heirs over the proper application of a state’s intestate statute. Although the state is not a party to such actions, it does have an interest, which may or may not be outweighed by the interests of the private parties in the litigation.

2. Doctrines Affecting Public Concurrent Litigation

In addition to the exhaustion requirements and special removal rules referred to above, the three major abstention doctrines directly affect public concurrent litigation. Each of these doctrines places primary emphasis on protecting the relevant state interests, secondary emphasis on the relevant federal interests, and scant attention to the private interests involved. Although the relative concern which they give to each interest is subject to question, there is no doubt that the rules are intended to protect the most important interests involved in each type of litigation.

*Pullman* abstention,32 for example, balances the interests of the federal government and state courts, and then tries to accommodate the interests of the private citizens involved. *Pullman* requires a federal court to stay its decision when it has jurisdiction over a case involving a federal constitutional

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30. See, e.g., Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, 542 F.2d 652, 653 (6th Cir. 1976); American Radio Ass’n v. Mobile Steamship Ass’n, 483 F.2d 1, 2-4 (5th Cir. 1973).


question and a question of unclear state law, if resolution of the state law question will resolve the case and obviate the need to answer the federal constitutional question.\textsuperscript{33} This doctrine protects the federal government's interest in avoiding interpretation of the Constitution whenever possible,\textsuperscript{34} and it protects the state's interest in having a state court resolve unclear issues of state law.\textsuperscript{35} Of course, the additional delay and expense caused by the need to start a second proceeding in state court injures the interests of the private parties involved, but the Supreme Court has tried to minimize this damage.\textsuperscript{36} In addition, a state court which wishes to deprive a federal plaintiff of the opportunity to have her federal claims heard by a federal court may decide those issues itself or may determine the facts in such a way as to foreordain the federal court's decision. The Supreme Court has protected federal plaintiffs against the first danger,\textsuperscript{37} it has been less able to protect them against the second danger.\textsuperscript{38} In general, however, \textit{Pullman} abstention is designed to protect, as much as possible, the interests of the three major entities involved.

\textit{Burford} abstention is also based on the Supreme Court's analysis of the interests involved and their relevant impor-

\begin{itemize}
  \item \textsuperscript{33} \textit{Id. at} 499-502.
  \item \textsuperscript{34} \textit{Id. at} 498, 500.
  \item \textsuperscript{35} \textit{Id. at} 500-01.
  \item \textsuperscript{37} \textit{See England v. Louisiana State Bd. of Medical Examiners}, 375 U.S. 411 (1964) (describing procedure by which federal plaintiff sent to state court by \textit{Pullman} abstention may reserve her federal claims from state court consideration); \textit{Kovats v. Rutgers}, 749 F.2d 1041 (3d Cir. 1984) (if state court decides federal issues reserved under \textit{England}, federal court may resolve both the federal and state law claims).
\end{itemize}
tance. *Burford* requires a federal court to dismiss a case over which it has jurisdiction when any decision on the merits of the case would interfere with a complex state regulatory scheme in which the state has an important interest and in which the relevant state agency has special expertise.\(^{39}\) *Burford* itself, for example, involved a federal action to determine the proper well spacing in a unitized oil pool regulated by the Texas Railroad Commission. Any federal decision would have adversely affected all of the other private parties whose interests in the pool had already been decided by the special state agency.\(^{40}\) The Supreme Court decided that the federal government’s interest in the litigation was minor compared to the state’s, and so it protected the state interest. It did not discuss the interest of the private litigant, the federal plaintiff, who was denied access to a federal court.\(^{41}\) Of course, the interest of that plaintiff was outweighed by the interest of all the other private parties whose interests in the pool would have been injured by a federal court decision. In *Burford*-type cases, the private interests are contradictory at best, and usually support the Court’s decision to have the lower federal court abstain.

The third type of abstention, *Younger* abstention, is also based on an assessment of the relative importance of the interests involved. The doctrine says that when a state files a criminal, quasi-criminal, or regulatory action in state court against a private defendant, that defendant may not ask a federal court to enjoin the state court proceeding.\(^{42}\) *Younger* is designed to protect the state’s interest in enforcing its own criminal laws and civil regulations.\(^{43}\) The federal government’s interest in preventing the state from violating federal constitutional rights and the private defendant’s interest in having a federal court decide the constitutionality of the state’s actions are protected indirectly. A private defendant convicted in state criminal court can obtain federal court review by

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40. *Id.* at 319-24.
41. When *Burford* abstention is proper, the federal court must dismiss the federal case. *Id.* at 334.
43. *Id.* at 43-44.
means of habeas corpus; a private party who loses a state administrative proceeding can, after the proceeding is complete, challenge the results by means of an action in federal court. Again, the Supreme Court's rule is based upon the relative importance of the interests involved, and all three major interests are protected to the extent possible.

C. Private Concurrent Litigation

Although public concurrent litigation affects strong interests held by the federal and state governments, private concurrent litigation affects interests which are private in nature. Neither the federal nor the state government is even a party to the dispute. With public concurrent litigation, the legitimacy of the second lawsuit turns largely on one's views of federalism and comity: those who favor the federal government will believe that the Court should give primary weight to the interests of the federal government, and those who favor state interests will seek the opposite result. In private concurrent litigation, the legitimacy of the second suit (which may be either in federal or state court) turns on matters quite independent of federalism and comity.

1. Private Reactive Litigation

The first type of private concurrent litigation is reactive in nature. It occurs when one party sues another in one court, and the second party reacts by filing a second action in another court. Frequently, there is no legitimate reason for the second, reactive suit. The reacting party often is trying to vex or harass the original plaintiff, and sometimes reactive

45. See, e.g., Tongol v. Usey, 601 F.2d 1091 (9th Cir. 1979) (challenge under 42 U.S.C. § 1983 to decision of administrative agency).
46. The term was first used in Vestal, Reactive Litigation, 47 Iowa L. Rev. 11 (1961).
47. See, e.g., Allen v. Louisiana State Bd. of Dentistry, 835 F.2d 100, 105 (5th Cir. 1988); Cate v. Oldham, 707 F.2d 1176, 1179 (11th Cir. 1983); Miller v. Granados, 529 F.2d 393, 394-95 (5th Cir. 1976) (last-minute antitrust case filed to block state court foreclosure actions); Ganoe v. Luminis, 662 F. Supp. 718, 720 (S.D.N.Y. 1987), aff'd, 841 F.2d 1116 (2d Cir.), cert. denied, 108 S. Ct. 2848 (1988) (reactive litigation contesting the probate of the Howard Hughes estate; the court described the plaintiffs in the second suit as "the self-proclaimed 'close relatives'" of Hughes).
litigation produces astounding, though unconscionable, results, delaying a final judicial decision for years. Reactive litigation may also be an attempt to evade a setback in the original case. A state court defendant who loses a discovery issue may file a new case in federal court to take advantage of the more liberal federal rules of discovery. Similarly, a defendant who is unhappy with the location of the state court or with a state court's evidentiary decisions may also seek a second chance in federal court. Likewise, a state court defendant who has failed to follow the rules for removing a case may try to avoid them by simply filing a federal suit. A federal court defendant who prefers state court, but realizes that removal only moves cases from state court to federal court, and not vice versa, may file a state court action. This is also true


49. See, e.g., Carras v. Williams, 807 F.2d 1286, 1287 (6th Cir. 1986) (state court defendant filed federal lawsuit alleging state court suit was conspiracy by private citizens and state judges); Duke v. Texas, 477 F.2d 244 (5th Cir. 1973), cert. denied, 415 U.S. 978 (1974) (federal plaintiff filed suit after state court issued injunction against her).


51. A defendant in an otherwise removable state court case loses her right to remove by failing to file the necessary papers within 30 days after she is served with the complaint or with a later document from which the federal nature of the action first is ascertainable. 28 U.S.C. § 1446(b) (1982).

In addition, 28 U.S.C. § 1441(b) prevents removal based on diversity of any action in which one of the defendants is a citizen of the state in which the action is brought, and removal cannot be accomplished unless all of the defendants who have been served join in the petition, see In re Federal Sav. & Loan Ins. Corp., 837 F.2d 432, 434 n.2 (11th Cir. 1988); Pettit v. Arkansas La. Gas Co., 377 F. Supp. 108, 109-10 (E.D. Okla. 1974) (citing Chicago, R.I. & P. Ry. v. Martin, 178 U.S. 245 (1900)); Friedrich v. Whittaker Corp., 467 F. Supp. 1012, 1013 (S.D. Tex. 1979). A defendant whose efforts to remove are blocked by either rule may try to file a counterclaim disguised as a new action in federal court. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169, 1174 (11th Cir. 1982) (condemning evasion of removal statutes in this manner).

52. Murray v. Commercial Union Ins. Co., 782 F.2d 432, 433 (3d Cir. 1986) (state court plaintiff whose action was removed to federal court on diversity grounds nevertheless asked the federal court to abstain).
when a state court plaintiff whose case has been removed to federal court loses his motion to remand. Reactive litigation generated by these illegitimate motives serves no useful purpose and often creates significant problems. The second, reactive suit wastes badly-needed judicial resources. Invariably, one suit is completed before the other, creating questions of res judicata and collateral estoppel. The duplicative litigation also plays havoc with the mundane world of scheduling, requiring lawyers and judges to coordinate hearings, depositions, and trial dates. Additionally, litigation costs increase as the lawyers must do many things twice, and it may waste the time of witnesses and litigants called to testify at duplicative hearings. Finally, it creates tension between the state and federal courts as judges become concerned about protecting their own domain and authority.

On the other hand, reactive litigation sometimes is legitimate. When both the initiating party and the reacting party have related causes of action against the other, but different preferences as to which court should hear those disputes, the reacting party is merely the party who lost the race to the courthouse. There is no clear reason why speed in filing should dictate the choice of forum. Moreover, these races sometimes are won by devious means. One party may negotiate for a settlement so as to prevent the other side from filing suit, thereby enabling the plotter to file first. Other cases have involved a party who learned of an opponent’s intent to file a federal question action in federal court, and who then preempted that by swiftly filing a doubtful state counterclaim.


54. The best known example is Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 6-7 (1983).
in state court.\textsuperscript{55} Further, there are cases where the initiating party has quite properly filed its state law case in state court, but the reacting party has a counterclaim over which a federal court has exclusive jurisdiction or which may preempt the operation of state law.\textsuperscript{56}

The problem for legitimate reactive litigation is the well-pleaded complaint rule. This rule provides that a federal court lacks federal question jurisdiction over any case if the complaint in that case does not require the pleading of a federal cause of action.\textsuperscript{57} A counterclaim or an affirmative defense which raises an issue of federal law will not suffice.\textsuperscript{58} Nor is it enough if the plaintiff cannot plead a federal question in the complaint, but instead will rely upon federal law in rebutting a defense which the defendant is sure to raise.\textsuperscript{59}

This rule was the curious and unfortunate outgrowth of two cases. In the first, Osborn v. Bank of the United States,\textsuperscript{60} Chief Justice Marshall developed the “ingredient rule” to handle a matter of grim political necessity. In spite of the


\textsuperscript{56} See, e.g., Texas Employers’, 862 F.2d at 493-94; General Motors Corp. v. Buha, 623 F.2d 455 (6th Cir. 1980) (state court garnishment action against employee pension fund; bank responsible for fund filed federal court counteraction because of exclusive federal jurisdiction for ERISA actions); Marshall v. Chase Manhattan Bank, N.A., 558 F.2d 680 (2d Cir. 1977) (state court action against employee pension plan, whose administrator responded with ERISA action in federal court); American Radio Ass’n, 483 F.2d at 4-5.


\textsuperscript{58} Merrell Dow, 478 U.S. at 808.

\textsuperscript{59} Mottley, 211 U.S. at 150-51, 154.

\textsuperscript{60} 22 U.S. (9 Wheat.) 738 (1824).
landmark holding of *McCulloch v. Maryland*,\(^{61}\) which had used the federal government’s sovereign immunity to protect national banks from state taxation, the state of Ohio seized a large sum from a national bank in payment of back taxes, and an Ohio state court upheld the seizure.\(^{62}\) The bank fled to federal court for protection, and the state contested the court’s jurisdiction.\(^{63}\) The only real issue in the case was whether the bank enjoyed federal immunity, which was a question of federal law. At the time, however, the lower federal courts lacked general federal question jurisdiction.\(^{64}\) Congress, however, had given the bank a corporate charter which authorized it to sue and be sued.\(^{65}\) This ability to engage in litigation was not in dispute between Ohio and the bank, but it had to be pled. To enable the lower court to take jurisdiction, and to prevent state nullification of *McCulloch*, Marshall ignored the fact that the lawsuit did not involve a dispute over the charter; he said it was enough that this federal charter was an *ingredient* of the lawsuit.\(^{66}\) The emphasis was on form, rather than substance.

This stress on form had unfortunate effects in *Joy v. St. Louis*.\(^{67}\) The plaintiff brought an action for ejectment to regain possession of land which he claimed to own; his complaint said that his title deraigned from a land patent granted by the United States pursuant to an act of Congress.\(^{68}\) Under *Osborn’s ingredient test*, federal jurisdiction existed. The problem was that a federal patent was the ultimate source of title for almost every acre of land west of the Mississippi River, so use of the ingredient test could require federal courts to hear every land dispute arising in the western United States.

The easy answer would have been to replace the ingredient test with a test that asked whether a federal law was the real subject of dispute in the litigation (by this time, the lower

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63. *Id.* at 739-40.
64. *See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.*
66. *Id.* at 823.
67. 201 U.S. 332 (1906).
68. *Id.* at 332-33.
federal courts had general federal question jurisdiction so that Marshall’s successors could find jurisdiction in Osborn-type cases without the use of the “ingredient rule”). Instead, the Court toughened the ingredient rule—a federal law now had to be not only an ingredient of a federal action, but also an ingredient which was part of a well-pleaded complaint. As it so happened, the source of one’s title need not be pled in a complaint for ejection, so the Court was able to refuse to hear the case. Obviously, such a rule blocked federal courts from hearing cases in which the entire dispute depended on an interpretation of federal law that was raised in the answer, the counterclaim, or a plaintiff’s response to an answer or counterclaim. The Joy Court had found a way to prevent federal courts from hearing a case whose central issue was one of federal law. Despite the ridiculous effects which the rule produces, the Supreme Court continues to adhere to it, thereby rejecting the federal government’s interest in having a federal court interpret federal law, as well as the interest of a private party in gaining access to a federal court.

The well-pleaded complaint rule is particularly vicious (and wasteful) in private concurrent litigation, for it encourages parties to create concurrent litigation and prevents federal courts from reducing the amount of private concurrent litigation. As mentioned earlier, if a plaintiff files a state law claim in state court, the defendant cannot file an answer based on federal law—even preemptive federal law or federal law with exclusive federal jurisdiction—and then remove the entire action to federal court.

71. Id. at 342-43.
72. See, e.g., Oklahoma Tax Comm’n, 109 S. Ct. 1519 (1989) (well-pleaded complaint rule prevented removal of case where state tax commission ignored Chickasaw Nation’s tribal immunity and sued the tribe in state court in action whose resolution turned on federal question regarding scope of tribe’s immunity).
73. There are several exceptions to this rule. A federal officer who is sued in his official capacity may remove the suit to federal court, 28 U.S.C. § 1442 (1982) as may members of the armed forces, 28 U.S.C. § 1442a, or anyone who is sued in state court and can demonstrate that the state court will deny or will not protect his or her civil rights, 28 U.S.C. § 1443 (1982). The Federal Deposit Insurance Corporation also has the right to remove cases filed against it under 12 U.S.C. § 1819(4) (1982).
If, however, the federal law which supplies a defense also supplies the state defendant with a cause of action, the state defendant will be tempted to file a federal counterclaim in federal court. This creates concurrent litigation. Similarly, if a plaintiff files a federal action in federal court, and the defendant has a counterclaim based on state law, that defendant will be tempted to file that counterclaim in state court, secure in the knowledge that the well-pleaded complaint rule will prevent the original plaintiff from removing it.\textsuperscript{74} Without the well-pleaded complaint rule, some concurrent litigation never would occur, and much reactive litigation filed in state courts could be removed and consolidated in the federal courts.

2. Private Repetitive Litigation

Repetitive litigation occurs when a single party, already a plaintiff in one court, files a similar action in another court.\textsuperscript{75} Usually, there is no good reason for a second action. Many such lawsuits are filed because the plaintiff’s attorney is either inept or confused.\textsuperscript{76} Other repetitive lawsuits are generated by

Recently, the Supreme Court held that the Employment Retirement Income Security Act (ERISA), 88 Stat. 829, 29 U.S.C. Section 1001-1461 (1982 & Supp. 1987), preempts state common law claims to such an extent that it allows a defendant to remove such claims to state court, even though the defendant would plead ERISA as a defense. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). The Court warned, however, that it was not creating a general exception for all federal statutes which in some way preempted state law. It said that “even an ‘obvious’ pre-emption defense does not, in most cases, create removal jurisdiction.” \textit{Id.} at 66. The Court added that removal was proper under ERISA only because Congress clearly had manifested its intent that ERISA should have that effect. \textit{Id.} For a more complete discussion of the problem, see Twitchell, Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts, 54 GEW. WASH. L. REV. 812 (1986).

74. See, e.g., Kennecott Corp. v. Smith, 637 F.2d 181, 182-84 (3d Cir. 1980) (Kennecott filed action in federal court to declare state anti-takeover law unconstitutional; takeover target responded with state action against takeover); Corpus Christi Peoples’ Baptist Church v. Texas Dep’t of Human Resources, 481 F. Supp. 1101, 1105 (S.D. Tex. 1979), aff’d, 621 F.2d 438 (5th Cir. 1980) (plaintiffs filed federal action; defendants filed counteraction in state court six days later).

75. For a general discussion of repetitive litigation, see Vestal, Repetitive Litigation, 45 IOWA L. REV. 525 (1960) [hereinafter Repetitive Litigation].

76. See, e.g., Champion Int’l Corp. v. Brown, 731 F.2d 1406, 1407 (9th Cir. 1984) (corporation sued state agency in federal and state court); Atchley v. Qonaar Corp., 704 F.2d 355, 360 (7th Cir. 1983) (no discernible reason for second filing); Lamb Enter. v. Kiroff, 549 F.2d 1052, 1054 (6th Cir.), cert. denied, 431 U.S. 968
a desire to inundate one's opponents with a multitude of lawsuits.\textsuperscript{77} Of course, a plaintiff who has lost a ruling in one court may file a second action in another court with different rules, hoping for a better result.\textsuperscript{78} These types of repetitive lawsuits create the same problems of waste, duplication, and delay as do illegitimately motivated reactive lawsuits.

Some repetitive lawsuits, however, are legitimate. A federal court plaintiff whose claim is based on diversity will be well-advised to file a backup claim in state court.\textsuperscript{79} Otherwise, if the federal court determines that diversity does not exist and fails to issue that ruling until after the statute of limitations has run, the federal plaintiff will be out of luck.\textsuperscript{80} In addition, a plaintiff may decide to bifurcate its claims, filing the federal claims in federal court and the state claims in state court.\textsuperscript{81} This procedure has been suggested in another context

\footnotesize{(1977) (plaintiff let state action lay dormant and, after statute of limitations had run, filed same action in federal court—and won $400,000 verdict); Marshak v. Sheppard, 659 F. Supp. 907, 908-09 (S.D.N.Y. 1987) (plaintiff filed two state actions, let them lay dormant for ten and thirteen years, respectively, and then launched federal suit); Caplinger v. Carter, 541 F. Supp. 716, 717 (D. Kan. 1982) (plaintiff filed identical police brutality actions in federal and state court and then sought to dismiss latter without prejudice).

77. See, e.g., Eitel v. Holland, 787 F.2d 995, 996 (5th Cir. 1986) (state court plaintiff filed federal action attacking state court judge and attorneys). See also Repetitive Litigation, supra note 75, at 526, 532.


80. The need for such "backup" litigation is eliminated in states, such as Oklahoma, in which a plaintiff who has lost an action for reasons other than the merits gets a year to file a new action, even if the statute of limitations otherwise would have run. See Okla. Stat. tit. 12, § 100 (1981).

by the Supreme Court, and its use demonstrates a respect for the interests of the federal and state governments. Finally, plaintiffs with causes of action over which the federal courts have exclusive jurisdiction may find themselves having to file repetitive litigation.

D. Handling Private Concurrent Litigation

The traditional rule has been that the presence of a similar proceeding in a different court is, of itself, not a sufficient reason for staying the original action. While this rule protects private concurrent litigation created for legitimate reasons, it also protects private concurrent litigation generated by illegitimate motivations. Perhaps recognizing the latter of the two results, federal judges have used or considered using Younger abstention and the Colorado River doctrine to impose some controls on ordinary private concurrent litigation and to eliminate such litigation wherever possible. Their desire to eliminate illegitimate private concurrent litigation is understandable, but the tests which they have adopted also burden legitimate private concurrent actions.

The next two sections will examine Younger and Colorado River and their progeny. It will be shown that Younger was intended to balance federal and state interests in public concurrent litigation, and that Colorado River was intended to protect the federal judiciary in certain types of unusual, complex litigation. The sections will also show how these doctrines

82. The doctrine of Pullman abstention requires the lower federal courts to bifurcate cases in a similar manner. See Railroad Comm'n v. Pullman, 312 U.S. 496, 501-02 (1941); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 413-22 (1964).

83. See Pullman, 312 U.S. at 501. The Ninth Circuit has noted, however, that bifurcation also wastes judicial resources. Selma-Kingsburg-Fowler, 604 F.2d at 644.


86. See text accompanying notes 137-56, 185-86 and 362-84.
have been expanded to apply to ordinary private concurrent litigation without adequate attention to the disastrous impact they may have on the interests of the private parties involved. Finally, each section will describe the specific difficulties which the expansion of *Younger* and *Colorado River* has imposed on private litigants who find themselves in legitimate concurrent litigation.

### III. *Younger* Abstention and Concurrent Private Litigation

#### A. Introduction

Almost from *Younger*’s publication, courts and commentators were uncertain about its exact boundaries. After a period of dramatic expansion during the 1970s, *Younger*’s borders appeared to stabilize in *Middlesex County Ethics Committee v. Garden State Bar Association* and *Ohio Civil Rights Commission v. Dayton Christian Schools*. The Court’s 1987 decision in *Pennzoil Co. v. Texaco, Inc.*, however, raised new concerns by suggesting that *Younger* might apply when a federal court was asked by a private party to enjoin a purely private dispute in state court. A close reading of the Supreme Court’s pronouncements, the decisions of the lower federal courts, the purposes behind *Younger*, and the negative effects which *Younger* would have on concurrent private litigation, demonstrate that the Supreme Court will not and should not erode *Younger*’s boundaries to cover this area.

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89. 477 U.S. 619 (1986).

B. Younger and Its Progeny Before Pennzoil

1. Younger

The facts in Younger v. Harris gave little indication of the eventual breadth of the Court’s holding. Younger, a district attorney in California, had prosecuted Harris and several others for allegedly violating the state’s criminal syndicalism laws.\(^{91}\) The defendants reacted by filing suit under 42 U.S.C. § 1983 in federal district court.\(^{92}\) They contended that the statute itself was unconstitutional, and they asked the federal court to enjoin any further activities in state court.\(^{93}\) The United States Supreme Court held that the federal court should have dismissed Harris’ request for an injunction without considering the merits of the issue, allowing the state prosecution to proceed.\(^{94}\)

Justice Black’s majority opinion was based on a longstanding congressional policy to “permit state courts to try state cases free from interference by federal courts.”\(^{95}\) The Court said this policy was based on two major concerns. First, the request for an injunction had invoked the federal court’s equity power, and the Court said that a basic rule of equity was that “courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.”\(^{96}\) According to the majority, Harris was free to raise his constitutional arguments in the state criminal prosecution, so denying his request for an injunction would neither deprive him of an adequate remedy at law nor subject him to irreparable injury.\(^{97}\) The Court’s second concern was that a federal injunction in this situation would violate principles of federalism and comity. Justice Black insisted that the federal judiciary must

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92. Id.
93. Id.
94. Id. The text of the statute used to prosecute Harris was almost identical to an Ohio statute which had been struck down in Brandenburg v. Ohio, 395 U.S. 444 (1969).
95. Younger, 401 U.S. at 43.
96. Id. at 43-44.
97. Id.
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maintain a proper respect for state courts and state functions, all the while remembering that the federal system of government is based on "sensitivity to the legitimate interests of both State and National Governments." 98

Although the majority opinion in Younger frequently had referred to criminal prosecutions and had cited only cases involving state criminal litigation, there were signs that it might have broader applications. Justice Black had not expressly limited his doctrine to criminal litigation. Instead, he said that his concerns about the scope of equity jurisdiction "particularly" applied when criminal prosecutions were involved. 99 This language suggested that his equity concerns also might apply to injunctions against state civil actions, and that concerned Justice Stewart.

Justice Stewart's concurrence tried to limit Younger to federal injunctions against state criminal cases and warned against applying Younger when a federal injunction was sought against state civil proceedings. 100 Several lower federal courts, however, ignored Justice Stewart's arguments and applied Younger in cases where a federal injunction was sought against a state quasi-criminal proceeding, 101 a state regulatory action, 102 or even ordinary litigation between private parties. 103

99. Younger, 401 U.S. at 43.
100. Id. at 55-56 (Stewart, J., concurring).
103. Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, Ltd., 542 F.2d 652, 654 (6th Cir. 1976); American Radio Ass'n v. Mobile Steamship Ass'n, 483 F.2d 1, 7 (5th Cir. 1973) (labor dispute between unions and management); Cousins v. Wigoda, 463 F.2d 603, 606-07 (7th Cir.), aff'd, 409 U.S. 1201 (1972) (Rehnquist, J., in chambers) (dispute over credentials between delegates to Democratic National Convention).
2. Huffman to Dayton: The Gradual Expansion

Four years after Younger, the Supreme Court confirmed Justice Stewart's suspicions and began to expand Younger's scope. In Huffman v. Pursue, Ltd.,104 the Court ordered a federal district court to abstain from enjoining a state civil enforcement proceeding. An Ohio prosecutor had declined to file criminal charges against a theater for allegedly showing pornographic movies; instead, he had filed a civil complaint, asking that the theater be closed as a public nuisance.105 The state court granted the request and closed the theater, whereupon the theater's owner asked a federal district court to declare the Ohio pornography statute unconstitutional and to enjoin the state court's injunction.106 Although Younger had involved a state criminal action, the Huffman Court said that a state nuisance action was sufficiently analogous to a criminal proceeding, and it used Younger to bar the injunction.107

Younger's boundaries were blurred even further in the mid-1970s by four additional decisions. Hicks v. Miranda108 expanded Younger chronologically, holding that Younger applied when the state criminal proceedings sought to be enjoined were filed after the federal lawsuit had begun, but before any proceedings of substance on the merits had occurred in federal court.109 Rizzo v. Goode110 used Younger to overturn a federal court injunction against the Philadelphia police department, even though there were no ongoing state judicial proceedings of any type involved.111 In Trainor v. Hernandez,112 the Court broadened Younger to protect a state civil proceeding filed by a state agency to recover allegedly ex-

105. Id. at 595-98.
106. Id. at 598-99.
107. Id. at 604-07.
109. Id. at 349.
111. Id. at 379. The Court did not use Younger itself, but it did cite one of Younger's progeny, Doran v. Salem Inn, 422 U.S. 922 (1975). See also City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983). (Younger barred an injunction against a police department's use of "bar and arm" chokeholds, even though there were no ongoing state judicial proceedings.).
cessive welfare payments made to a welfare recipient.\textsuperscript{113} \textit{Judice v. Vail}\textsuperscript{114} ordered Younger-type abstention when a litigant, who was facing civil contempt charges because of his conduct in a state court suit, asked a federal court to enjoin the contempt proceedings. The Supreme Court said that such an injunction would interfere with the process by which the state vindicated the regular operation of its judicial system.\textsuperscript{115} \textit{Judice} was the first Supreme Court case to apply Younger when the state was not a named party in the state litigation, although it should be noted that the real combatants in the civil contempt proceedings were the state judge and the private litigant.\textsuperscript{116}

The next major expansion of Younger occurred in \textit{Middlesex County Ethics Committee v. Garden State Bar Association},\textsuperscript{117} in which the Court ordered a lower federal court to abstain from hearing a request to enjoin a county ethics committee's disciplinary actions against an attorney. Middlesex was important in two respects. First, the ongoing proceedings were not conducted by a state court; they were run by a county disciplinary committee which had received its authority from the state supreme court.\textsuperscript{118} Younger, of course, had been concerned with the ability of a court of equity to enjoin a state court, and each of Younger's progeny had involved a state proceeding conducted by a judge.\textsuperscript{119} The Court, however, was not disturbed by this, for it found the proceedings sufficiently judicial to invoke Younger's concerns.\textsuperscript{120} Second, the Court did not limit this expansion of Younger's scope to disciplinary proceedings; it said that Younger applied whenever a federal injunction against a state court would interfere with

\textsuperscript{113} Id.
\textsuperscript{114} 430 U.S. 327 (1977).
\textsuperscript{115} Id. at 335.
\textsuperscript{116} Rizzo v. Goode, 423 U.S. 362 (1976), and City of Los Angeles v. Lyons, 461 U.S. 95 (1983), also lacked a state as a named party to a state court proceeding, but this was because the lower federal courts had been asked to enjoin state executive action, rather than an ongoing state judicial proceeding.
\textsuperscript{117} 457 U.S. 424 (1982).
\textsuperscript{118} Id. at 425-28, 433-34.
\textsuperscript{119} The two exceptions, Rizzo, 423 U.S. 362, and City of Los Angeles, 461 U.S. 95, are best regarded as aberrations because they did not involve any state judicial proceedings.
\textsuperscript{120} Middlesex, 457 U.S. at 433-34.
an important state interest.\textsuperscript{121} The Court said that New Jersey’s interest in the ethics committee’s proceedings was sufficiently important because of the state’s interest in regulating the professional conduct of lawyers \textit{and} because a state agency (the county ethics committee) had started the state proceedings and was a named defendant in the federal action.\textsuperscript{122}

\textit{Middlesex} appeared to open the way for the use of \textit{Younger} to protect state regulatory proceedings conducted by any state administrative agency. This was confirmed in \textit{Ohio Civil Rights Commission v. Dayton Christian Schools},\textsuperscript{123} in which the Court used \textit{Younger} to dismiss a federal plaintiff’s claim that a state agency’s investigation into alleged gender discrimination violated the first amendment.\textsuperscript{124}

In short, over a fifteen year period \textit{Younger} had been stretched from a prohibition of federal injunctions against ongoing state criminal proceedings conducted by a judge to a prohibition on federal injunctions against state regulatory proceedings, conducted by a state administrative agency, which implicated important state interests. The Court, however, had not abandoned all limitations on \textit{Younger}, for it had not yet applied the doctrine to a case in which the only real combatants—named or not—were private parties, or to a case in which involved only the private rights of private litigants. Instead, the Court had been careful to expressly reserve an opinion on this question in several cases.\textsuperscript{126} These repeated disclaimers seemed to lack credibility since they appeared in opinions in which the Court busily expanded \textit{Younger}’s outer boundaries closer and closer to the purely private civil case. It seemed inevitable that the Court soon would confront the is-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 434, 433 n.12, 435.
\item Id. at 434-35.
\item 477 U.S. 619 (1986).
\item Id. at 625-29.
\item Juidine v. Vail, 430 U.S. 327, 334, 336 n.13 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 607 (1975); Gibson v. Berryhill, 411 U.S. 564, 575 (1973); Mitchum v. Foster, 407 U.S. 223, 244 (1972) (Burger, C.J., concurring). When the Court noted probable jurisdiction in Sosna v. Iowa, 415 U.S. 911 (1974), the Court directed the parties to discuss whether \textit{Younger} applied to a civil attack on a divorce statute, but the parties urged the Court to consider only the merits, a request which the Court granted. \textit{Sosna}, 419 U.S. 393, 396-97 n.3.
\end{enumerate}
\end{footnotesize}
sue and, despite its earlier reservations, expand Younger to protect all state litigation, criminal or civil. Indeed, Justice Brennan described the Court's disclaimer in Judice v. Vail as a "tongue-in-cheek . . . signal that merely the formal announcement is being postponed," and the majority opinions in Middlesex and Dayton did not bother to repeat the Court's earlier express disclaimers.

3. The Lower Federal Courts Before Pennzoil

Even as the Supreme Court expanded Younger in fits and starts, the lower federal courts tried to make sense of the doctrine's ill-defined, ever-changing boundaries. The first question they faced was whether the Supreme Court would expand Younger to quasi-criminal state proceedings. Without exception, the lower courts answered affirmatively, and their answer was confirmed by the Court in Huffman v. Pursue, Ltd. The next issue proved more difficult. Hard on the heels of Huffman, Judice prohibited federal injunctions against state contempt of court proceedings. The Judice Court did not explain, however, whether its decision covered only attacks on state court contempt proceedings or whether it would cover other challenges to a state court or state court procedures, such as an attack on a state rule barring appointment of counsel to certain indigent defendants. The lower federal courts split almost evenly on the issue.

126. Judice, 430 U.S. at 345 n.*.
Huffman’s use of Younger abstention in quasi-criminal cases also raised the possibility that the doctrine might protect state disciplinary actions against licensed professionals, such as attorneys and doctors. The lower federal courts had no trouble with this question. Without exception, they applied Younger, anticipating the Supreme Court’s decision in Middlesex, which reached the same conclusion.

At the same time, however, the lower courts had considerable difficulty deciding whether Younger’s protection was limited to state judicial proceedings or whether it also covered state administrative actions. During the 1970s and early 1980s, they split bitterly on the subject. Middlesex, which

requested in injunction against allegedly unconstitutional state rule regarding state court orders; no important state interest present); General Motors Corp. v. Buha, 623 F.2d 455 (6th Cir. 1980) (no abstention regarding requested injunction against state court writ of attachment since integrity of state judicial process was not involved); Briere v. Agway, Inc., 425 F. Supp. 654 (D. Vt. 1977) (no abstention regarding request for declaratory judgment that state court rules regarding attachment are unconstitutional).


133. At least four courts used Younger. See Blue Cross & Blue Shield v. Baerwalt, 726 F.2d 296 (6th Cir. 1984) (state agency regulation of insurance rates); Women’s Community Health Center, Inc. v. Texas Health Facilities Comm’n, 685 F.2d 974 (5th Cir. 1982) (health department licensing of hospital); Williams v. Red Bank Bd. of Educ., 502 F. Supp. 1366 (D.N.J. 1980) (board of education termination of employee), vacated, 682 F.2d 1008 (3d Cir. 1981); Mathias v. Lennon, 474 F. Supp. 949 (S.D.N.Y. 1979) (state insurance department’s regulation of insolvent insurance company). Another four rejected Younger’s use. See United Services Auto Ass’n v. Muir, 792 F.2d 356, 365 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987) (Younger rejected because state administrative remedies were inadequate); W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 489-90 (7th Cir. 1984) (Younger rejected because state administrative proceedings provided insufficient remedy and because state’s decision to begin administrative proceedings instead of criminal charges showed state interest was not sufficient to invoke Younger); Tovar v. Billmeyer, 609 F.2d 1291 (9th Cir. 1979) (court refused to use Younger to protect city council denial of permit because Younger applied only to criminal and contempt proceedings); Buckner v. Maher, 424 F. Supp. 336, 374 (D. Conn. 1976), aff’d, 434 U.S. 898 (1977) (Younger applies only to criminal cases). Five other courts, confronted with claims that a federal law preempted state laws on which state administrative proceedings were based, also refused to use Younger, arguing that the state lacked an important state interest when the federal law preempted state statutes. See Kentucky W. Va. Gas Co. v. Pennsylvania
had protected a quasi-judicial state agency proceeding from an injunction, suggested that Younger might cover other agencies which regulated areas of important state interest, and Dayton confirmed this. Nevertheless, at least one federal court continued to refuse to use Younger to protect state administrative proceedings, on the grounds that the proceedings did not involve an important state interest.

The conflict between circuits was also sharp in regard to Younger's application to purely private civil litigation. Soon after Younger, the Fifth, Sixth and Seventh Circuits applied it to private civil litigation. As the Supreme Court continued to avoid the issue, the trend changed. After 1975, only five reported cases applied Younger to private civil concurrent litigation, while twenty-three decisions (involving nine different circuits) refused to approve such an extension.

Many courts declined to apply Younger unless the state itself had begun the state litigation, pointing out that the state had been the initiator of the state litigation in almost


134. Middlesex, 457 U.S. at 432.
135. 477 U.S. at 627-29.
136. See Ford Motor Co. v. Insurance Comm'r, 672 F. Supp. 841, 849 (E.D. Pa. 1987) (preemptive federal law meant there was no important state interest in the state agency proceeding).

137. Lamb Enter. v. Kiroff, 549 F.2d 1052 (6th Cir.), cert. denied, 431 U.S. 968 (1977) (Younger barred federal injunction against state court which allegedly refused to accord full faith and credit to early federal court judgment on same issue); Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, 542 F.2d 652 (6th Cir. 1976) (Younger barred federal injunction against anti-labor injunction issued by state court in possible violation of federal labor law); American Radio Ass'n v. Mobile Steamship Ass'n, 483 F.2d 1 (5th Cir. 1973) (same); Cousins v. Wigoda, 463 F.2d 603 (7th Cir.), aff'd, 409 U.S. 1201 (1972) (Rehnquist, J., in chambers) (Younger barred federal court interference with state case involving credential dispute between delegates at Democratic National Convention).

138. See supra text accompanying note 125.
139. See infra text accompanying notes 153, 156.
140. See infra text accompanying notes 141-45, 148-52.
every Supreme Court decision involving Younger.\textsuperscript{141} In effect, these courts excluded Younger from all private concurrent litigation. Other courts drew upon Younger, Huffman, and Middlesex to hold that Younger was limited to criminal or quasi-criminal actions and to administrative proceedings which involved an important state interest.\textsuperscript{142} Some noted that an extension of Younger to cover private litigation would prevent the federal courts from exercising their responsibility to protect federal rights from the actions of state officials,\textsuperscript{143} and a few said that private litigation simply did not involve an important state interest.\textsuperscript{144} The Third and Ninth Circuits\textsuperscript{145} ar-

\textsuperscript{141} See Carras v. Williams, 807 F.2d 1286, 1291 (6th Cir. 1986) (breach of contract dispute; Younger applies only when state is party or circumstances are extraordinary); Lynk v. LaPorte Superior Court No. 2, 789 F.2d 554, 558 (7th Cir. 1986) (divorce action; Younger based on noninterference with proceeding brought by state itself); Eitel v. Holland, 787 F.2d 995, 999 (5th Cir. 1986) (state must initiate state case to vindicate important state policy); Harris v. Pernsley, 755 F.2d 338, 344 (3d Cir.), cert. denied, 474 U.S. 965 (1985) (fact that state litigation was begun by inmates shows state interest is not sufficiently important); O'Hair v. White, 675 F.2d 680, 695 (5th Cir. 1982); Johnson v. Kelly, 583 F.2d 1242, 1248 (3d Cir. 1978) (Younger does not apply when state case initiated by private party); Marshall v. Chase Manhattan Bank, N.A., 558 F.2d 680, 684 (2d Cir. 1977); Miller v. Granados, 529 F.2d 393, 395 (5th Cir. 1976) (state breach of contract action does not involve important state interest); Shipley v. First Fed. Sav. & Loan Ass'n, 619 F. Supp. 421, 434 (D. Del. 1985); Agency Rent-A-Car v. Connolly, 542 F. Supp. 231, 234 (D. Mass.), vacated, 666 F.2d 1029 (1st Cir. 1982) (take-over dispute).

\textsuperscript{142} Traughber v. Beauchaine, 760 F.2d 673, 680 (6th Cir. 1985) (tort dispute; state not a party and no issues essential to the operation of state government); Playtime Theatres v. City of Renton, 748 F.2d 527, 533 (9th Cir. 1984), rev'd on other grounds, 475 U.S. 41 (1986) (state brought state declaratory judgment action to defend constitutionality of pornography statute); Cate v. Oldham, 707 F.2d 1176, 1183 (11th Cir. 1983) (state case involving claim of malicious prosecution by district attorney did not involve vital state interest); Miofsky v. Superior Court, 703 F.2d 332, 338 (9th Cir. 1983) (state tort action; Younger limited to criminal or quasi-criminal cases and those involving important state interests); Strode Publishers v. Holtz, 665 F.2d 333, 335 (11th Cir. 1982) (tort dispute; Younger protects only state officials trying to perform their duties); Dawn v. Mecom, 520 F. Supp. 1194, 1195 (D. Colo. 1981) (arbitration dispute; Younger limited to state enforcement actions); Chang v. Northwestern Memorial Hosp., 506 F. Supp. 975, 980 (N.D. Ill. 1980) (medical malpractice action; Younger limited to criminal or quasi-criminal cases); Ash v. Richard J. Lynch & Co., 644 F. Supp. 315, 317 (E.D.N.Y. 1986) (breach of contract action).

\textsuperscript{143} Miofsky, 703 F.2d at 338 (extension of Younger to civil litigation would violate federal court duty to hear cases and make abstention the rule, not the exception); Johnson v. Kelly, 583 F.2d 1242, 1250 (3d Cir. 1978); Agency Rent-A-Car, 542 F. Supp. at 234.

\textsuperscript{144} First Nat'l Bank & Trust v. Lawing, 731 F.2d 680, 683 (10th Cir. 1984) (estate dispute did not involve important state interest); O'Hair, 675 F.2d at 695 (un-
gued that using Younger in civil cases would overrule the principle that 42 U.S.C. § 1983 is an exception to the Anti-Injunction Act.\textsuperscript{148} Additionally, the Third Circuit contended that Younger, when combined with Hicks v. Miranda,\textsuperscript{147} would require a would-be federal plaintiff with a civil claim to exhaust all remedies in state court.\textsuperscript{148} One court gave no rationale for its decision;\textsuperscript{149} another said that the normal restraints on equity would still have to be considered even though Younger itself did not apply;\textsuperscript{150} one court observed that procedural rules prevented a state district court from providing an adequate remedy;\textsuperscript{151} and one court, despite Juidice, Huffman, and Middlesex, forlornly insisted that Younger applied only to injunctions against state criminal actions.\textsuperscript{152}

The few courts that continued to use Younger to bar federal injunctions against state civil proceedings did so with relatively little analysis. Their primary argument was that Younger's concerns of federalism and comity applied as much to civil cases as they did to criminal actions.\textsuperscript{153} This ignored described state action was wholly private and so did not implicate important state interest).


147. Hicks v. Miranda, 422 U.S. 332 (1975). Hicks held that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed, but before any proceedings of substance on the merits have taken place in the federal court, the principles of Younger v. Harris should apply in full force." Id. at 349.


149. Atchley v. Qonaar Corp., 704 F.2d 355, 360 (7th Cir. 1983) (securities dispute).

150. Puerto Rico Int'l Airlines v. Silva Recio, 520 F.2d 1343, 1345-46 (1st Cir. 1975) (holding that although Younger does not apply to private action, normal equitable concerns still must be considered).

151. Miller, 529 F.2d at 395.


153. Lamb Enter. v. Kiroff, 549 F.2d 1052, 1056-57 (6th Cir. 1977), cert. denied, 431 U.S. 968 (1977); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 875 F.2d 1169, 1173 (11th Cir. 1982); Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, 542 F.2d 652, 654 (6th Cir. 1976); American Radio Ass'n v. Mobile Steamship Ass'n, 483 F.2d 1, 6-7 (5th Cir. 1973). It also should be
the fact that Younger also was based on equity's traditional reluctance to enjoin criminal proceedings, a concern that was not present when private civil litigation was involved. This also failed to consider the fact that comity was a concern in Younger because an important state interest—enforcement of the state's criminal statutes—was involved. Again, this was not true in purely private, civil litigation. Indeed, the three circuits which used the federalism/equity argument to justify the invocation of Younger in private civil litigation eventually reversed themselves. The other courts gave no reasons for their decisions.

C. Pennzoil and its Effects

The Court's most recent decision involving Younger abstention came in 1987, with unclear ramifications for private concurrent litigation. Pennzoil Co. v. Texaco, Inc. expressly declined to decide whether Younger generally prevented any federal injunction against an in personam civil action in state court between private litigants, but the opinion also contained the Court's strongest suggestions that such an expansion of Younger was possible.

The litigation began when Pennzoil filed a tortious interference with contract action against Texaco in a Texas state court. Eventually the jury issued a $10.53 billion verdict

noted that two of these cases supported their conclusions with citations to a number of decisions applying Younger to public concurrent litigation without noting that difference. Lamb, 549 F.2d at 1057; Louisville, 542 F.2d at 654.

154. Younger v. Harris, 401 U.S. 37, 43-44 (1971). Only Lamb noted Younger's equity prong, but that case failed to explain the relevance of that prong to civil litigation. Lamb, 549 F.2d at 1056.

155. Compare cases cited supra note 153 with Carras v. Williams, 807 F.2d 1286, 1291-92 (6th Cir. 1986) (state initiate rule); Eitel v. Holland, 787 F.2d 995, 999 (5th Cir. 1986) (same); Traughber v. Beauchane, 760 F.2d 673, 680-81 (6th Cir. 1985) (same); Cate, 707 F.2d 1176, 1183 (11th Cir. 1983) (same); O'Hair v. White, 675 F.2d 660, 695 (5th Cir. 1982) (same); Strode Publishers v. Holtz, 665 F.2d 333 (11th Cir. 1982).


158. Id. at 14 n.12.

159. Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 784-85 (Tex. App. 1987). For a more complete discussion of the facts, see Comment, Texaco, Inc. v. Pennzoil Co.: Some Thoughts on the Limits of Federal Court Power Over State Court Proceedings,
against Texaco. Under Texas law, the entry of the verdict as a final judgment by the trial judge would enable Pennzoil to obtain liens on Texaco’s real property in the state; thirty days after the judgment was entered, Pennzoil would be able to obtain a writ of execution and begin collecting. An appeal by Texaco would prevent the execution of a final judgment, but only if Texaco also posted a bond in the amount of the judgment, interest, and costs, a sum estimated at $13 billion.

Texaco took a different tack. It appealed in the Texas state courts without providing a bond and, at the same time, it sued Pennzoil in the Southern District of New York, claiming that the Texas bond requirement violated its constitutional rights. The federal district court enjoined Pennzoil from filing any lien against Texaco or attempting to collect the judgment. Pennzoil had filed a “stipulation” which said it would not object if the Texas courts used federal bond standards instead of the state bond requirements, but the federal judge said that this document had no value. Pennzoil appealed the injunction to the Second Circuit, which heard oral arguments the day before the Texas Court of Appeals affirmed the jury’s verdict. When the Second Circuit upheld the district court’s injunction, Pennzoil appealed. By a five-to-four vote, the Supreme Court held that the case was subject to Younger abstention, that none of the exceptions to Younger existed in the case, and that therefore the action had to be dismissed.

Justice Powell’s majority opinion can be divided into two major sections: a discussion of the policies behind Younger

160. Texaco, 729 S.W.2d at 784.
161. Pennzoil, 481 U.S. at 4-5.
162. Id. at 5-6.
163. Id. at 6 n.5.
165. Id.
166. Id. at 257-58.
167. Compare Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1133 (2d Cir. 1986) with Texaco, 729 S.W.2d at 768.
168. Texaco, 784 F.2d at 1157.
and an analysis of the importance of Texas’ interest in the litigation. In the initial section, Justice Powell recounted the equity and comity foundations of Younger, but he devoted more attention to a third base. First, he said that the federal court’s injunction ignored the reluctance of equity to act when the party seeking the injunction had an adequate remedy at law. Second, he wrote that an injunction in the Southern District of New York against a state court in Harris County, Texas, failed to properly respect the notions of comity and federalism. But that was not all. Justice Powell wrote that “another important reason for abstention [was] to avoid unwarranted determination of federal constitutional questions.” This was the language of Pullman abstention, even though Pennzoil deliberately had not argued Pullman to the Court, as the Court admitted. Furthermore, Justice Blackmun’s concurring opinion had said that the case should be decided for Pennzoil on the basis of Pullman. Yet no other justice joined that concurrence, and Justice Powell said that the Court was declining to address Justice Blackmun’s position. In any case, Justice Powell spent as much time discussing Pullman’s rationale as he did discussing the rationale associated with Younger.

In the second part of the majority opinion, Justice Powell determined that the interest of the state of Texas was important enough to trigger Younger’s application. In prior cases which had used Younger, the state’s interest was strong enough that it had been not just a named party in the state litigation, but the plaintiff, the party which considered the dispute important enough to take it to court in the first

170. Id. at 11.
171. Id. at 11 n.9.
173. Pennzoil, 481 U.S. at 29 (Blackmun, J., concurring).
174. Id. at 11 n.9.
175. In Middlesex County Ethics Comm. v. Garden State Bar Ass’n, 457 U.S. 426 (1982), the Court had barred a federal judge from enjoining a county disciplinary proceeding against an attorney even though the proceedings were not criminal or quasi-criminal. The Court said the injunction need only interfere with an important state interest. Id. at 432, 434-35.
place.\textsuperscript{176} That was not true in \textit{Pennzoil}, where the state action had been brought by a private party. Justice Powell overcame this problem by analogizing the dispute to \textit{Juidice v. Vail},\textsuperscript{177} where the Court had barred a federal injunction against state civil contempt proceedings which had been brought in the context of a dispute between two private parties. \textit{Juidice} had said that an injunction would interfere with the state's important interest in administering its judicial system, especially "the vindication of the regular operation" of that system.\textsuperscript{178} Justice Powell wrote that a federal injunction in \textit{Pennzoil} similarly would interfere with the state judicial system by destroying the bond requirements which that system used to enforce its judgments.\textsuperscript{179}

This was the heart of Powell's opinion, and it was vigorously attacked by Justices Brennan, Blackmun, and Stevens. Justice Brennan labeled the state's interest in the litigation "negligible";\textsuperscript{180} Justice Blackmun considered it "attenuated";\textsuperscript{181} and Justice Stevens said it differed in kind and degree from the state's interest in \textit{Juidice}. Justice Stevens argued:

\begin{quote}
We have invariably required that the State have a substantive interest in the ongoing proceeding, an interest that goes beyond its interest as adjudicator of wholly private disputes. By abandoning this critical limitation, the Court cuts the \textit{Younger} doctrine adrift from its original doctrinal moorings which dealt with States' interest in enforcing their criminal laws.\textsuperscript{182}
\end{quote}

\textsuperscript{176} See Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619, 623 (1986) (state proceedings begun by state equal employment opportunity commission); \textit{Middlesex}, 457 U.S. at 427-28 (state proceeding begun by county committee under authorization by state supreme court); \textit{Trainor}, 431 U.S. at 435-37 (state case filed by state agency); Huffman v. Pursue, Ltd., 420 U.S. 592, 595, 598 (1975) (state case filed by state prosecutor); \textit{Younger}, 401 U.S. at 747-48 (state case filed by state prosecutor).

\textsuperscript{177} 430 U.S. 327 (1977).

\textsuperscript{178} Id. at 335.

\textsuperscript{179} \textit{Pennzoil}, 481 U.S. at 13-14.

\textsuperscript{180} Id. at 19 (Brennan, J., concurring).

\textsuperscript{181} Id. at 27 (Blackmun, J., concurring).

\textsuperscript{182} Id. at 30 n.2 (Stevens, J., concurring).
The state of Texas expressly had said that its only interest in this case was the fair adjudication of the dispute,183 and if a federal injunction would interfere with that interest, then Younger would apply any time a federal court was asked to enjoin any proceeding in state court, even if that state court proceeding was a civil suit between two private parties.

Since the publication of Pennzoil, several federal judges have echoed Justice Stevens' concerns. Before Pennzoil, the Third Circuit repeatedly said that Younger applied only when the state litigation had been initiated by the state,184 but Pennzoil's release prompted an admission that this rule was now subject to question.185 A dissenting judge in the Fifth Circuit argued that Pennzoil barred a federal trial court from enjoining a state case involving a state claim which federal law clearly preempted.186 Judge Edwards of the Sixth Circuit warned that Pennzoil contained the "mischievous suggestion" that "ill-defined notions of equity, comity and federalism required dismissal of any federal court suit which might interfere with any state government activity."187

183. Id. at 19 (Brennan, J., concurring) (citing Texaco, 784 F.2d at 1155).
186. See Judge Jones' dissent in Texas Employers' Ins. Ass'n v. Jackson, 820 F.2d 1406 (5th Cir. 1987), modified, 862 F.2d 491 (5th Cir. 1988) (en banc).

Two miscellaneous attacks on the opinion must be countered here. First, the fact that the federal court injunction was against Pennzoil itself, rather than the Texas state courts, did not prevent the use of Younger, which had barred federal injunctions against state courts. Pennzoil, 481 U.S. at 8 n.7. Such a simple method of evading Younger would destroy its power, and the Court has held that a state court injunction to bar a litigant from proceeding in federal court is the same as an injunction against that court. Donovan v. City of Dallas, 377 U.S. 408, 410, 413 (1964).

A second possible attack on Pennzoil is that the Court could have avoided Younger by instead using the Rooker-Feldman doctrine. This doctrine provides that a judgment of a state court can be reviewed only by the United States Supreme Court
The validity of these concerns is subject to some question. The Court expressly reserved decision on the issue. In 1976, Justice Brennan had labeled a similar disclaimer as a "tongue-in-cheek . . . signal that merely the formal announcement is being postponed." Eleven years later, the Court still was not ready to make the announcement. Eleven years is a long time to keep one's tongue planted in one's cheek, especially when almost every federal circuit has ruled in a manner inconsistent with the proclamation Justice Brennan expected the Court to make. Furthermore, the concern that Pennzoil expands Younger to all civil cases is based on a failure to appreciate the Pennzoil Court's use of Juidice by analogy.

In Juidice, a federal court was asked to enjoin a state court's efforts to hold a litigant in contempt of court. Traditionally, courts have distinguished between criminal contempt, which is initiated by the court and which is intended solely to protect the court's authority, and civil contempt, which is initiated by a private litigant, intended to help the

on direct appeal or by writ of certiorari; federal district and circuit courts cannot hear such appeals. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923). See also Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281, 296 (1970). Even if the attack in federal court is not directly on the substance of the state court judgment, review by the lower federal courts is not permissible if the constitutional claims presented to it are "inextricably intertwined" with the merits of the state court judgment. Feldman, 460 U.S. at 483-84 n.16. Indeed, Justice Marshall argued that the federal court injunction in Pennzoil was barred by Rooker-Feldman. Pennzoil, 481 U.S. at 26 (Marshall, J., concurring). The majority opinion did not discuss this issue, but Justices Scalia, O'Connor, and Brennan rejected Justice Marshall's idea, arguing that the federal action was not inextricably intertwined with the Texas jury's decision. See id. at 18 (Scalia, J., concurring), 20 (Brennan, J., concurring).

Scalia and Brennan were correct: the validity of Texas bond requirements could be considered by the federal court without any reference to the jury's verdict that Texaco impermissibly had interfered with the Pennzoil-Getty contract. Furthermore, Texaco had filed its action in federal court before the jury's verdict was entered as a final judgment. Pennzoil, 481 U.S. at 6 n.5. The Court may have wished to avoid the issue as to when a verdict or trial court decision becomes a final judgment for Rooker-Feldman purposes.

188. Pennzoil, 481 U.S. at 14 n.12.
190. See supra notes 141-45, 148-52.
191. 430 U.S. at 329-30.
court protect the interest of that litigant, and punished by a fine which benefits the private litigant. Juidice involved civil contempt: the proceeding in New York labeled the contempt civil, a private party (Vail’s creditors) had commenced the proceedings, and the resulting fine was to be paid to that same private party. These factors led the federal trial court to hold that Younger did not apply, since the case was not a traditional criminal state prosecution. The Supreme Court's order that the trial court must abstain could be interpreted to mean that Younger protected a state civil case initiated by a private litigant.

Such an interpretation would ignore both the language of Juidice and the special nature of contempt proceedings. Instead of distinguishing between criminal and civil contempts, as might be expected, the Juidice Court spoke only of “contempt of court” and said that it was immaterial whether the Juidice proceeding was “labelled civil, quasi-criminal, or criminal in nature.” While the lower court had argued that the proceedings were to benefit a private party (so that the state had no interest in them, whereas the state had an interest in all criminal cases), the Supreme Court said that the purpose of a contempt proceeding is “by no means spent upon purely private concerns. It stands in aid of the authority of the judicial system.” The Court’s language recognized that civil contempt proceedings protect both the private interests of a litigant and the public interest of the court in preserving its authority. The twin interests protected by the contempt power have led most courts to see contempt proceedings as sui generis, neither criminal nor civil in nature, and some

jurisdictions, recognizing the court's interest in preserving its authority through civil contempt, allow courts to initiate civil contempt proceedings on their own motions.\textsuperscript{200}

Since \textit{Pennzoil} did not involve a contempt action to uphold the authority of a state court, one could conclude that the state had no interest in the case. The Second Circuit,\textsuperscript{201} along with Justices Brennan, Marshall, and Stevens, said that the state’s only interest in \textit{Pennzoil} was in fairly adjudicating the dispute.\textsuperscript{202} If the \textit{Pennzoil} Court still had required dismissal of the federal lawsuit, then the state would have a \textit{Younger}-triggering interest in every pending state civil case, and \textit{Younger} would be applied universally.\textsuperscript{203}

But the Court defined the state's interest in a subtly, yet significantly, different way. It described the state's interest as that of “enforcing the orders and judgments of [its] courts . . . in forcing persons to transfer property in response to a court’s judgment.”\textsuperscript{204} Furthermore, the Court said that the state's interest in enforcement “goes beyond its interest as adjudicator of wholly private disputes.”\textsuperscript{205} It will be remembered that Texaco had sought federal intervention after an adverse jury verdict was returned, but before that verdict was formally entered as a final judgment.\textsuperscript{206} Moreover, Texaco had fled to its home corner in the Southern District of New York for relief from this adverse verdict. A jury verdict should be entitled to some protection; the time allotted for requesting a new trial should not be used to seek a federal injunction against the verdict in a federal courtroom half a continent away.\textsuperscript{207} Since the timing and nature of the request for injunctive relief seemed to fall outside the doctrine traditionally used to protect state court judgments from lower federal court

\begin{itemize}
\item \textsuperscript{201} Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1150 (2d Cir. 1986).
\item \textsuperscript{202} Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 18 (1987) (Brennan, J., concurring), 30 n.2 (Stevens, J., concurring).
\item \textsuperscript{203} Id. at 30 n.2 (Stevens, J., concurring).
\item \textsuperscript{204} Id. at 14.
\item \textsuperscript{205} Id. at 14 n.12.
\item \textsuperscript{206} See supra text accompanying notes 160-65.
\item \textsuperscript{207} See \textit{Pennzoil}, 481 U.S. 23 (Marshall, J., dissenting).
\end{itemize}
review, the Court used *Younger* instead. The important state interest was not Texas' interest in providing a fair adjudication for the parties; it was Texas' interest in seeing that the verdicts of its juries were enforced. Indeed, the state interest in *Pennzoil* may have been stronger than the state interest in *Younger* itself. In *Pennzoil*, federal court intervention had been sought only after a state court decision had been reached, while in *Younger*, federal help was sought long before the state case had gone to a jury. In short, *Pennzoil* was simply a specialized version of *Juidice*; it was not an expansion of *Younger*.

208. In *Pennzoil*, the time for requesting a new trial in state court had not yet expired, and no final judgment had been entered in the case despite the jury's verdict. See *Pennzoil*, 481 U.S. 6, 6 n.5. The *Rooker-Feldman* doctrine says that a final judgment of a state court cannot be reviewed by a federal district or circuit court. District of Columbia Ct. of App. v. Feldman, 460 U.S. 462, 476, 482 (1983); see *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) (barring federal review of a state trial court decision affirmed by the state supreme court).

209. This defense of *Pennzoil* clashes with the thoughts of two other commentators. Judge Edwards of the Sixth Circuit has argued that the Second Circuit's injunction in *Pennzoil* respected and furthered the state's interest in the case because it allowed the Texas appellate courts to hear Texaco's appeal on the constitutionality of the bond requirement and the merits of the case. Edwards, *Commentary: The Changing Notion of 'Our Federalism,'* 33 WAYNE L. REV. 1015, 1026 (1987). There are two weaknesses in this analysis. First, it assumes that the state's interest was in ensuring the fair adjudication of the cases in its courts, an interest which would be furthered by allowing an appeal. As explained earlier, the real state interest was in ensuring the enforcement of the decisions of its courts, and the Second Circuit's injunction clearly injured that interest. Second, the effect of the injunction was to require the Texas court to hear an appeal which it otherwise would not have to hear, and states have been less than thrilled when the federal government has ordered their courts to hear certain cases. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947) (unsuccessful effort by state to challenge federal statute giving state courts jurisdiction over actions to enforce Emergency Price Control Act; Supreme Court held that state's reluctance to accept jurisdiction was irrelevant); *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1 (1912) (same re Federal Employers Liability Act).

In contrast to Judge Edwards, Professor Althouse has argued that the state's interest in *Pennzoil* was very weak. 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, 1053, 1082 (1988). However, Althouse argues that the weakness of Texas' interest in the case is precisely why *Younger* was used. She contends that the paradox of *Younger* is that while fear of California's interest in enforcing its criminal code (including an unconstitutional provision) had driven the state defendants there to seek federal help, the federal court refused to help precisely because of the presence of an important state interest. *Id.* at 1083. She argues that while many of *Younger*'s progeny have succumbed to "blind deference" to state's rights, *id.* at 1084, *Pennzoil* is not so afflicted, because there is no significant state interest to protect. *Id.*
What really should give analysts cause for concern is Justice Powell's statement that "[a]nother important reason for abstention is to avoid unwarranted determination of federal constitutional questions." Justice Powell recognized that this language sounded very much like Pullman-type abstention, which neither party had argued before the Court. He warned, however, that 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."

Justice Powell's comments are startling because they were so unnecessary. As he admitted, the parties did not present Pullman arguments to the Court, and the Court's decision did not rely on Pullman. Nor did the Court need to discuss Pullman. The crucial part of its opinion was the determination that an important state interest was present. Once that was done, Younger clearly applied, and Pullman was mere surplusage.

Justice Powell's comments were even more startling because the use of Pullman instead of Younger in Pennzoil would have produced a new interpretation of Pullman and a decision in favor of Texaco. Pullman, of course, held that when a plaintiff presents a federal court with a question of federal law, and the need to answer that question may be obviated by resolution of an unclear state law, the federal court should stay its hand to allow the plaintiff to present the un-

at 1087. Indeed, she contends that the less interest a state has in a case, the more appropriate abstention is, since the state has less incentive to skew the litigation. Id. at 1088.

Although Althouse's argument does eliminate one paradox, it creates another. If abstention is appropriate in Pennzoil because of the weakness of the state's interest, how can that interest be strong enough to satisfy the comity prong of Younger, which reflects the Court's belief in the need to protect state interests? In addition, if Pennzoil correctly mandated abstention where the state interest was very weak, should not Pennzoil abstention be applied in all civil litigation? In other words, Althouse's view of abstention seems to have even vaguer boundaries and far broader scope than did Younger.

211. Id. at 11 n.9. For a discussion of Pullman, see supra text accompanying notes 13-14, 32-38.
212. Pennzoil, 481 U.S. at 11 n.9.
clear state law issue to a state court for resolution. Pullman fact patterns are of two types: a federal plaintiff may present related federal and state claims, or the federal plaintiff may contend that a state law violates the federal constitution. In the former case, a victory for the plaintiff on the state claim would eliminate the need to decide the federal claim; in the latter, a narrow construction of the state law might eliminate federal constitutional concerns.

Pennzoil, however, fit neither fact pattern. It is not an example of the first category, because Texaco raised only federal constitutional claims; there was no state claim for a state court to decide. Nor is it clear that Pennzoil fit in the second category. That category is comprised of cases in which a plaintiff asks the federal court to enjoin state enforcement of a statute which allegedly is unconstitutionally vague or which might punish constitutionally protected conduct. In either case, the state is a party and can argue that a narrow construction of the state statute by a state court would eliminate the problem. In Pennzoil, the state did not appear as amicus curiae, let alone argue that a construction of state law could eliminate the federal constitutional concerns. Indeed, neither litigant made such an argument, and the Court could only say that it was “impossible to be certain” that the Texas statutes would be construed in such a way as to require a federal decision on their constitutionality. If the mere possibility that a state court might construe a challenged statute narrowly is enough to trigger Pullman, then virtually all challenges to allegedly vague or over-broad statutes are subject to Pullman.

Even if the parties had raised Pullman arguments, the use of four traditional rules would have produced a far different result than Justice Powell reached. First, the emergency

215. Pennzoil, 481 U.S. at 11. The state of Texas intervened in the case while it was before the Second Circuit Court of Appeals. See Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1136 (2d Cir. 1986). But it did not file any brief or pleading with the United States Supreme Court, nor was it a party in the appeal to the Supreme Court. See Pennzoil, 481 U.S. 1.
nature of Texaco’s request should have made the Court reluctant to use Pullman, for the doctrine is not to be used when it would cause serious delays which would severely injure the party seeking federal court assistance. 216 In Pike v. Bruce Church, Inc., 217 the Court had declined to use Pullman because of the danger that $700,000 worth of cantaloupe would spoil. 218 In Pennzoil, a Pullman delay could have destroyed or bankrupted the nation’s fifth-largest company, causing serious effects on the economies of several states. 219 Even Justice Powell recognized that the potential for enforcement of the Pennzoil judgment already had seriously affected Texaco’s ability to do business. 220

Second, if Pullman had been applied, the court would only have stayed the lower federal court’s consideration of the federal claims until after the Texas state courts had construed the Texas bond requirements. Third, Texaco would have been entitled to prevent the Texas courts from considering its federal constitutional claims, and Texaco might have been able to persuade the lower federal court merely to certify the state law question to the Texas Supreme Court. Fourth, though not least importantly from Texaco’s perspective, the lower federal court would have had the authority to grant an injunction to preserve the status quo while the state court was deciding the state law issues. 221

In light of this, Justice Powell’s references to Pullman and its rationale are puzzling. When he discussed Pullman without mentioning the four traditional rules described above, did he mean to suggest that those rules had been abandoned? If so, Pennzoil has eliminated the few protections which fed-

218. Id. at 140 n.3.
220. Pennzoil, 481 U.S. at 5.
eral plaintiffs had against the negative side effects which Pullman's use can produce. Furthermore, his other comments about Pullman's relevance to Pennzoil suggest a desire to broaden drastically the scope of the older doctrine. If Pullman concerns are present in Pennzoil, are they not present in almost every federal case? In Pennzoil, after all, the federal plaintiff presented no state law claim which might obviate the need to consider his federal claim. Justice Powell implied that a court, by noting the potential presence of a state claim, could force the plaintiff to raise it. In Pennzoil, there was no finding that a state law was unclear and was subject to a narrowing construction that would obviate the need to consider the federal claim. Can the Court justify Pullman's use merely because "it is impossible to be certain" to the contrary? Can a court invoke Pullman's justification (although not its name) sua sponte? If the possibility that the Texas courts might use the Texas Constitution and statutes to create an exception to that state's bond requirements is enough to invoke Pullman, why was not Pullman invoked in Younger itself? Even though neither party in Younger had raised the California Constitution's free speech provision, a California court might have invoked it to construe the California antisyndicalism statute in a sufficiently narrow way to avoid the need to consider the statute's first amendment arguments. The danger of this is obvious: it "would convert [Pullman] abstention from an exception into a general rule.""223

Justice Powell's language regarding Pullman had several other disturbing implications. His statement that the types of abstention are "not rigid pigeonholes into which federal courts must try to fit cases" raises interesting questions, since the efforts of the lower courts to set limits on Younger fit into precisely that category. For example, courts have tried to limit Younger to criminal cases or quasi-criminal cases, or to cases in which the state was the plaintiff or at least a named party. Justice Powell's language suggests that these efforts

222. Pennzoil, 481 U.S. at 11.
224. Pennzoil, 481 U.S. at 11 n.9.
225. See supra note 142.
226. See supra text accompanying notes 141, 155.
are misguided, and this in turn questions the efficacy of any effort to limit Younger's application to particular types of cases. Justice Powell's comment also suggests that there might be no hard and fast limits to any other type of abstention; he described them as "a complex of considerations," rather than as individual types. This statement hints that instead of applying a particular form of abstention when the specific requirements of that type were satisfied, the courts could be less exacting and precise, abstaining in any case which seemed to fall somewhere within the general area indicated by Pullman, Burford, and Younger. This is the most dangerous possible interpretation of Pennzoil, and it is too early to judge its accuracy.

In summary, Pennzoil should be read as an analogous case to Juidice, in that it is intended to protect the state's important interests in enforcing the judgments of its courts. It should not be read to mean that Younger applies to all private concurrent litigation. On the other hand, Pennzoil suggests that abstention may be a doctrine which has no formal rules or limitations, a suggestion which is so extreme that the lower courts should ignore it until it is made more explicit.

D. The Danger of Applying Younger to Private Litigation

Although the Supreme Court has resisted applying Younger to private concurrent litigation, it is important to examine what would happen if it did. At least two groups would benefit. The federal courts would see their workloads slightly reduced, and state court plaintiffs who were victims of

228. Although consideration of the subject is beyond the scope of this article, the extension of Younger to all civil actions would mean that Younger would apply to a lawsuit in which the United States or its instrumentalities was a party. Several courts already have confronted the problem. See United States v. Composite State Bd. of Medical Examiners, 656 F.2d 131, 134 (5th Cir. Unit B 1981) (Younger inappropriate when United States asserts federal interests); Baltimore Bank for Coops. v. Farmers Cheese Coop., 583 F.2d 104, 112 (3d Cir. 1978) (overturning federal district court decision to abstain); Marshall v. Chase Manhattan Bank, 558 F.2d 680, 681, 684 (2d Cir. 1977) (no abstention in action filed by Department of Labor, since state was not a party); United States v. California, 639 F. Supp. 199, 206-08 (E.D. Cal. 1986) (abstention proper even when United States is a party); United States v. Interlake, Inc., 432 F. Supp. 985, 986 (N.D. Ill. 1977) (abstention proper even when United States is a party).
vexatious or otherwise illegitimate reactive lawsuits in federal courts would be allowed to proceed unmolested in state court. The manner in which the states would benefit is less clear. As discussed earlier, the only real state interests are the protection of state court plaintiffs from vexatious or unnecessary duplicative litigation (a goal which could be achieved by considering the motives behind the concurrent litigation) as well as the artificial state interest created by the well-pleaded complaint rule's refusal to allow removal based on federal defenses or counterclaims.229 Indeed, the use of Younger in private concurrent litigation may actually injure the state by increasing the burden on already overloaded state courts. Furthermore, Younger's use will impose significant injuries on the interrelated interests of the federal government and private litigants.

1. Younger and Claims for Monetary Relief

A reasoned decision about Younger's application to private concurrent litigation must consider Younger's interaction with claims for monetary damages. In Younger, the state court defendants had sought only injunctive relief in federal court, i.e., they had asked that court to act only as a court of equity.230 Accordingly, Justice Black invoked the traditional rule that equity courts are reluctant to enjoin criminal proceedings.231 He did not discuss what would happen if those same state court defendants had asked the federal court for both equitable and legal relief in the form of an action for damages under 42 U.S.C. § 1983. The question is of some importance, for private concurrent litigation frequently involves a request for an award of monetary damages from a federal court.

The Supreme Court first recognized this problem in Juidice v. Vail,232 although the Court expressly declined to resolve the matter.233 Left to their own devices, the lower federal courts developed an extensive, though largely conclusory,
Concurrent Litigation

body of case law. The research for this article uncovered forty-four cases in which defendants in state courts asked federal courts for both injunctive and monetary relief. These cases can be divided into four major categories. The first group holds that Younger applies to legal remedies, so a federal lawsuit seeking both equitable and legal remedies while a state case is pending must be completely dismissed.\footnote{234} The courts in this group have said that they wanted to avoid friction between themselves and the state courts.\footnote{235} Of the three cases in this group, one involved federal plaintiffs contesting state criminal proceedings,\footnote{236} and two involved state civil enforcement proceedings.\footnote{237} None were purely private concurrent litigation.

A second group of cases concluded that a request for federal legal relief should be allowed to continue in spite of Younger.\footnote{238} Some of these courts argued that Younger applied only to equitable remedies and had no effect on requests for damages.\footnote{239} Other courts said that while a federal judgment which granted damages would have a res judicata or collateral estoppel effect on any ongoing state proceedings, this effect was far less intrusive than the injunctive relief barred by Younger.\footnote{240} Nearly all the cases in this group were civil enforcement cases.\footnote{241}

\begin{itemize}
  \item 234. Ronwin v. Dunham, 818 F.2d 675, 676 (8th Cir. 1987); Mann v. Jett, 781 F.2d 1448, 1449 (9th Cir. 1986); Shipman v. Missouri Div. of Family Servs., 588 F. Supp. 1203, 1206-07 (E.D. Mo. 1984), vacated, 782 F.2d 1048 (8th Cir. 1985).
  \item 235. Mann, 781 F.2d at 1449.
  \item 236. Id.
  \item 237. Ronwin, 818 F.2d at 678; Shipman, 588 F. Supp. at 1204-05.
  \item 239. Thomas, 807 F.2d at 457; Bishop, 736 F.2d at 295; Clark, 436 F. Supp. at 1272; Liberty, 81 F.R.D. at 597.
  \item 240. Carras, 807 F.2d at 1291; Coleman, 570 F. Supp. at 687; Clark, 436 F. Supp. at 1271.
  \item 241. Clark, 436 F. Supp. 1266, a criminal case, and Carras, 807 F.2d 1286, a purely private civil case, were the only exceptions.
\end{itemize}
The third group of cases took a middle course. These cases (a mixed bag of criminal matters, civil enforcement actions, and administrative proceedings) said or implied that, while Younger would not require them to dismiss the request for legal relief, the intrusive effect of a federal judgment,242 the Colorado River doctrine, or ordinary prudence would counsel them to stay further action on that request until the state proceedings had finished.243

A fourth group of cases took a completely different approach. They said absolutely nothing on the subject.244 It is important to note that each of these cases involved purely private concurrent litigation. In each case, the court said that Younger did not apply to private civil litigation at all; there was no need to examine Younger's applicability to the dam-


ages aspect of those cases. In contrast, those cases which said *Younger* barred all remedies, equitable and legal, primarily involved state criminal prosecutions.\textsuperscript{445} The cases which abstained from hearing the damage claims on the basis of *Colorado River* (instead of *Younger*) were predominantly civil enforcement or administrative proceedings.\textsuperscript{446} Although the courts did not identify the type of state case involved as a factor in their decisions, the correlation described above suggests that the lower courts subconsciously consider *Younger* to be based primarily on a desire to protect state criminal justice systems.

The Supreme Court finally confronted *Younger*’s relevance to legal relief in the 1988 case of *Deakins v. Monaghan*.\textsuperscript{447} The federal plaintiffs had sought injunctive and monetary relief for an allegedly unconstitutional search conducted as part of a state grand jury investigation.\textsuperscript{448} By the time their appeal reached the Supreme Court, their request for an injunction was moot, and they indicated that they would ask the federal trial court to stay any consideration of the damages issues until the state criminal proceedings had finished.\textsuperscript{449} The Supreme Court endorsed this idea. It said that there was no need to decide whether *Younger* applied to a federal action seeking only monetary relief, since it was clear that the federal plaintiffs could invoke one of *Younger*’s exceptions. Because the federal plaintiffs could not have raised their damage claims in the state criminal proceedings,\textsuperscript{450} their state remedies were inadequate, so they still would be able to proceed in federal court.\textsuperscript{451} However, the Court also said that prudence and the doctrine of *Colorado River* required the lower federal court to stay any consideration of damages until the state action had run its course.\textsuperscript{452}

Three points can be drawn from this decision. First, the Supreme Court was able to finesse its way out of a major

\textsuperscript{245} See supra note 234.
\textsuperscript{246} See supra notes 242-43.
\textsuperscript{247} 108 S. Ct. 523 (1988).
\textsuperscript{248} Id. at 526.
\textsuperscript{249} Id. at 528-29.
\textsuperscript{250} Id. at 529.
\textsuperscript{251} See *Younger* v. *Harris*, 401 U.S. 37, 46, 49 (1971).
\textsuperscript{252} *Deakins*, 108 S. Ct. at 530.
quandry, at least for the time being. The lower courts, which had applied Younger to requests for damages,\textsuperscript{253} effectually had stripped Younger of its equitable base, leaving only the twin notions of comity and federalism to support the opinion. Had the Supreme Court adopted their position, Deakins would have done what Pennzoil did not, i.e., it would have opened Younger’s application to all cases, equitable or legal, criminal or civil. At the same time, the Court could not refuse to apply Younger. If it did, adroit criminal defense lawyers quickly would learn to avoid Younger by adding a claim for legal relief to their federal court complaints. The Court’s ruling neatly sidestepped both alternatives.

Second, the Court’s use of Colorado River may have expanded the scope of that doctrine. Colorado River protected from federal court interference a complex state regulatory and administrative scheme for the adjudication of thousands of interdependent water rights in Colorado.\textsuperscript{254} Deakins seemed to treat the state criminal justice system as deserving similar protection, even though criminal justice systems lack the complexity and interdependency of water courts.

Third, the Court created the potential for a fascinating anomaly. Deakins means that the Court never will have to squarely face the application of Younger to damage requests concerning criminal, quasi-criminal, or administrative proceedings. In every such case that arises, the state defendant will be unable to present the state court or agency with his request for monetary relief. This means that the state remedies will be inadequate, so Younger is inapplicable. Colorado River, however, still will require the federal court to refrain from hearing the case. That will not be true, however, for any case in which the concurrent litigation is of a purely private, civil nature. In such a case, the state proceedings often will be able to adequately protect the state court defendant, who needs merely to file his federal claim as a counterclaim in state court. Thus, Deakins sets up the distinct possibility that a rule intended to protect state criminal courts against inter-

\textsuperscript{253} See supra note 243.
\textsuperscript{254} See infra Section IV. A.1.
ference from federal courts of equity\textsuperscript{255} will instead provide more protection to state civil courts from federal courts of law.\textsuperscript{256}

This result would be more than anomalous. It would show how little modern interpretations of \textit{Younger} have to do with that opinion's original meaning and with Justice Black's reliance on the special, limited powers of courts of equity.\textsuperscript{257} It also would show how little the Supreme Court has heeded Justice Black's warning that federalism and comity do not require “blind deference to 'States rights,'” but instead mandate sensitivity to the “legitimate interests of both State and National Governments.”\textsuperscript{258}

2. \textit{Younger} and Requests for Injunctions in Legitimate Private Reactive Litigation

\textit{Younger} also would injure legitimate private reactive litigation which requests only injunctive relief. \textit{Younger}'s use would force federal plaintiffs to move to state courts, which generally are far more crowded and burdened than federal courts.\textsuperscript{259} A 1988 study by the New York Bar Association found that the delays caused by \textit{Younger} abstention were far

\begin{footnotes}
\item[255] If the reference to a “federal court of equity” grates on the ear, one must ask how \textit{Younger} could be based in any part on a special quality of equity jurisdiction several decades after the division between law and equity was abolished in the federal courts. \textit{See} Fed. R. Civ. P. 1, 2.
\item[256] \textit{Cf.} Trainor v. Hernandez, 431 U.S. 434, 470 (1977) (Stevens, J., dissenting) (describing abstention as “Daedalian,” in reference to Daedalus, the Greek mythological hero who was imprisoned in a maze of his own design and whose son, Icarus, was killed when he and his father tried to escape).
\item[257] \textit{Younger} v. Harris, 401 U.S. 37, 43-44 (1971).
\item[258] \textit{Id.} at 44.
\item[259] A comparison of the state and federal courts in Oklahoma for the period from June 30, 1985, to June 30, 1986, proves the point. During this period, 4871 civil cases were filed in federal courts, 4751 were terminated, and 3799 were left pending. \textit{Annual Report of the Director of the Admin., Office of the United States Courts} 1986, tables 3, 3A and B, at 187, 195, 203. In contrast, during the same time period, the Oklahoma state trial courts had 74,320 civil cases filed, disposed of 66,558, and had 114,003 pending. \textit{The Judiciary: Annual Report for Fiscal Year} 1986, at 41 (1987). The state figures exclude all domestic relations, small claims, and probate court statistics. \textit{Id.}
\end{footnotes}
worse in civil than in criminal proceedings.\textsuperscript{260} As the committee noted, state criminal cases often are resolved in a relatively short time, thanks to speedy trial laws. Civil proceedings, however, can require much more time.\textsuperscript{261} The committee recommended that federal courts considering abstention should also consider the extent of any delays which abstention would cause and the injuries created by those delays.\textsuperscript{262}

A second and related problem is that \textit{Younger} will increase the workload of already overburdened state courts. There is something strange about a doctrine which, in the name of comity, orders state courts to hear cases involving federal law.\textsuperscript{263}

The third problem is that \textit{Younger} would preclude legitimate reactive litigation in federal court. Where both parties in a dispute had a cause of action against the other, widespread use of \textit{Younger} would make the race to the courthouse crucial. A party who was able to file in state court before its opponent reached federal court could prevent any real proceedings in federal court. This would overturn the traditional rule that concurrent lawsuits in state and federal court may proceed independently of each other.\textsuperscript{264} It would mean that a speedy party who reached state court first would be able to prevent its slower opponent from having the federal issues adjudicated by a federal court.\textsuperscript{265} It would also encourage a devious party


\textsuperscript{261} \textit{Id}. at 102-05.

\textsuperscript{262} \textit{Id}. at 106-07.


\textsuperscript{264} Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976), (citing McClellan v. Carland, 217 U.S. 268, 282 (1910), and Donovan v. City of Dallas, 377 U.S. 408 (1964)).

\textsuperscript{265} Removal would be prevented by the well-pleaded complaint rule. \textit{See infra} text accompanying notes 57-75. It should be noted that while \textit{Younger}'s use would give an unfair advantage to a party who was able to file in state court before her opponent filed in federal court, the reverse may not be true. \textit{Younger} protects state criminal actions which were filed after a federal civil case, Hicks v. Miranda, 422 U.S. 332, 349 (1975), and this may also cover state civil actions. \textit{See infra} text accompanying notes 272-295.
in the midst of litigation to file a sudden state court action, damaging the chances of reaching a settlement.\footnote{266}

Younger's use would also cause problems when the federal law issue involves a matter of preemption. Traditionally, the preemptive effect of a federal law has been decided by a federal court.\footnote{267} Younger's use in private litigation, however, would make such a decision toothless: a federal court which decided that federal law preempted state law would be unable to enjoin a state court from using the state law in a state action.\footnote{268} The matter would be even worse when a dispute depended on an issue over which a federal court had exclusive jurisdiction.\footnote{269} What is a state court defendant whose defense or counterclaim involves such an issue supposed to do if Younger applies to civil actions? Should he include the issue in his state court answer or counterclaim, thereby waiving his access to federal court? Or should he file in federal court, knowing that the court can do nothing to stop the state proceeding?

\footnote{266. This is particularly true given the widespread adoption of the Uniform Declaratory Judgments Act. See 6A Moore's Federal Practice, supra note 9, at ¶ 57.02[1].}

\footnote{267. A claim that state regulation is preempted by federal law presents a federal question, giving the federal courts jurisdiction. Shaw v. Delta Air Lines, 463 U.S. 85, 96 n.14 (1983), citing Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199-200 (1921). If preemption is used as a defense, the well-pled complaint rule will prevent federal question jurisdiction, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 25-27 (1983), unless Congress intended the preemption to be complete. In that case, preemption raised as a defense will override the well-pled complaint rule. Metropolitan Life Ins. Co., 481 U.S. at 63-66.}

\footnote{268. See Texas Employers' Ins. Ass'n v. Jackson, 820 F.2d 1406, 1417, 1422 (5th Cir. 1987) (court admits its finding of preemption coupled with an inability to "enforce that finding is paradoxical, to say the least" and hopes that state court will "accord full weight" to its decision), modified, 826 F.2d 491 (5th Cir. 1988) (en banc).}

3. Preemptive Strikes to Destroy Jurisdiction

Younger's use in civil litigation would encourage malevolent preemptive strikes by parties who want the case to be tried in state court. It is one thing when a legitimate race to the courthouse is won by a state court plaintiff; it is another when the state court plaintiff's claim is motivated purely by a desire to bar his opponent from access to a federal court. This may be done by filing a declaratory judgment action in state court or by filing a weak state law claim in federal court. For example, an employer accused of gender discrimination by an employee filed a claim for slander in state court before the employee was able to file suit in federal court, thereby blocking federal court consideration of the civil rights issue.270 In another case, when a worker whose injury was covered by a federal statute learned that the insurer was going to federal court to contest his claim, he immediately filed suit in state court, claiming the insurer was acting in bad faith.271

4. The Hicks Doctrine and the Future of Federal Question Jurisdiction

The most dangerous effect of Younger's use in private concurrent litigation is that it will tempt the lower federal courts to apply the rule of Hicks v. Miranda.272 In Hicks, when the owners of a movie theater challenged in federal court the constitutionality of a state obscenity statute, the state immediately brought criminal charges against them, contending that they had violated a state obscenity law.273 The Supreme Court held that even though the state action was


271. Texas Employers' Ins. Ass'n v. Jackson, 826 F.2d 491, 495 (5th Cir. 1988).


273. Id. at 334-39.
filed after the federal suit, Younger still prevented a federal injunction against the state litigation. 274

Although there has been some dissent, 275 Hicks' rule has been expanded to cover state administrative proceedings initiated after a federal lawsuit has been filed. 276 The question of Hicks' applicability to private concurrent litigation is much less settled, however, primarily because the overwhelming majority of lower federal courts have said that Younger itself should not apply to such litigation. Among the courts that have considered Hicks' use in private reactive litigation, one has employed Hicks, 277 while three others have rejected or evaded it. 278

Extending Younger and Hicks to private civil matters would have several disadvantages. First, it would penalize federal plaintiffs who filed repetitive state cases for legitimate reasons. 279 A federal plaintiff suing on diversity grounds who later filed a back-up action in state court 280 might find herself forced under Hicks to proceed in state rather than federal court. A plaintiff who intentionally bifurcated his claims into

274. Id. at 350.

275. Polykoff v. Collins, 816 F.2d 1326, 1332-33 (9th Cir. 1987) (state court proceedings for declaratory judgment do not allow application of Hicks or Younger).


278. Kennecott Corp. v. Smith, 637 F.2d 181, 185 (3d Cir. 1980) (fact that federal district court could have granted temporary injunctive relief before state proceedings began is enough to override Hicks, even if federal court declined to give that relief); Johnson v. Kelly, 583 F.2d 1242, 1250 (3d Cir. 1978) (flat rejection of Younger and Hicks in private litigation). Cf. Quinn v. Missouri, 681 F. Supp. 1422, 1427-28 (W.D. Mo. 1988) (Hicks inappropriate when later state court action seeks only declaratory relief).

279. None of the private repetitive cases discovered during research for this Article discussed Hicks. See, e.g., Champion Int'l Corp. v. Brown, 731 F.2d 1406 (9th Cir. 1984); Corporacion Insular de Seguros v. Garcia, 680 F. Supp. 476 (D.P.R. 1988); Chang v. Northwestern Memorial Hosp., 506 F. Supp. 975 (N.D. Ill. 1980). Nevertheless, there is a possibility that Hicks might be applied to such cases.

280. See supra notes 79-80.
federal and state court lawsuits\textsuperscript{281} might face a similar problem. The problem would be even worse if the bifurcation was prompted by a federal claim over which the federal courts had exclusive jurisdiction.\textsuperscript{282}

Second, such an extension of \textit{Younger} and \textit{Hicks} would tempt federal defendants who wished to use reactive litigation to destroy federal question jurisdiction. Justice Stewart worried that the majority's holding in \textit{Hicks} would tempt prosecutors to file state criminal charges against a federal plaintiff as soon as they learned of federal lawsuits,\textsuperscript{283} enabling them to try the cases in their home courts. This temptation is controlled to some degree by the fact that a state prosecutor must have probable cause before he can file state criminal charges, but there is no such requirement for private parties filing state suits.\textsuperscript{284} Similarly, a state prosecutor knows that any victory in state court will be subject to federal court habeas corpus review;\textsuperscript{285} again, there is no equivalent protection for private litigation. More importantly, the widespread adoption of state declaratory judgment action provisions\textsuperscript{286} makes it relatively easy for a federal defendant who does not have even a weak state counterclaim against a federal plaintiff to still file a state court action and invoke \textit{Hicks}. Two courts have rejected \textit{Hicks}' application in conjunction with state court declaratory judgment actions, holding that the state has no real interest in such proceedings, so that there is no comity concern.\textsuperscript{287} Nevertheless, perhaps the only thing standing between devious federal defendants and widespread use of this tactic is a lack of knowledge of \textit{Hicks} (and a lack of imagination). Even if the federal defendant's sole purpose in filing the reactive state action is to deprive the federal court of jurisdiction, \textit{Hicks} still applies.\textsuperscript{288}

\textsuperscript{281} See cases cited supra note 81.
\textsuperscript{282} See supra note 84.
\textsuperscript{283} Hicks v. Miranda, 422 U.S. 332, 357 (1975) (Stewart, J., dissenting).
\textsuperscript{284} Huffman v. Pursue, Ltd., 420 U.S. 592, 615 (1975) (Brennan, J., dissenting).
\textsuperscript{286} See 6A Moore's Federal Practice, supra note 9, at ¶ 57.02[1].
\textsuperscript{287} Polykoff, 816 F.2d at 1332-33; Quinn, 681 F.2d at 1427-28.
\textsuperscript{288} United Services Auto Ass'n v. Muir, 792 F.2d 356, 365 (3d Cir. 1986); Corpus Christi Peoples' Baptist Church v. Texas Dept. of Human Resources, 481 F. Supp. 1101, 1107 (S.D. Tex. 1979).
The danger of unsavory yet successful efforts to defeat federal jurisdiction is particularly strong in light of the Supreme Court's statement that a federal action will not override a subsequently-filed state court action until there have been "proceedings of substance" in the federal lawsuit.\textsuperscript{289} Justice Stewart was concerned in \textit{Hicks} about the Court's failure to define substantive proceedings, especially since the federal trial court in that case had denied a request for a temporary restraining order.\textsuperscript{290} Although the issuance of a preliminary injunction would satisfy the requirement, it is not clear that a temporary restraining order (or even a significant amount of discovery) would do the trick.\textsuperscript{291} Accordingly, if \textit{Younger} and \textit{Hicks} apply to civil litigation, someone served as a defendant in federal court need only file a declaratory judgment action in state court and a motion to dismiss in federal court. In this manner, she can invoke \textit{Younger} and \textit{Hicks} even before she files an answer, let alone before the plaintiff has had an opportunity to obtain some substantive decision. For years, civil procedure students have known that the removal statutes can be used only to move a state action to federal court, and not \textit{vice versa}.\textsuperscript{292} If \textit{Younger} and \textit{Hicks} apply to civil litigation, that is no longer true. The Court will have created a "reverse removal rule."

All this is \textit{Younger} with a special vengeance. It would rob a plaintiff of her choice of a forum court and of her access to federal court.\textsuperscript{293} It would destroy the role of the federal judiciary as the primary enforcer of federal law.\textsuperscript{294} Surely, a state has only a minimal interest in a reactive lawsuit filed in state court by a private party for the sole purpose of depriving a federal court of jurisdiction. Forcing a federal court in the name of federalism and comity to give up its jurisdiction in such a case would turn federalism on its head.\textsuperscript{295} \textit{Younger} allegedly involved a sensitivity to the interests of both the state

\textsuperscript{289} \textit{Hicks}, 422 U.S. at 349.
\textsuperscript{290} \textit{Id.} at 353 n.1 (Stewart, J., dissenting).
\textsuperscript{291} \textit{Id.}
\textsuperscript{293} \textit{Hicks}, 422 U.S. at 354 (Stewart, J., dissenting).
\textsuperscript{294} \textit{Id.} at 355-57.
\textsuperscript{295} \textit{Id.} at 355 (citing \textit{Steffel v. Thompson}, 415 U.S. 452, 462 (1974)).

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and national governments, but Hicks’ use would be the blind
defereence to states’ rights against which Justice Black warned.
In essence, it would destroy the heart of Congress’ landmark
1875 decision to give the lower federal courts jurisdiction over
federal questions.

IV. THE EFFECTS OF COLORADO RIVER ON PRIVATE
CONCURRENT LITIGATION

The dangers posed by Younger-Pennzoil abstention to le-
gitimate private concurrent litigation are reinforced by the
doctrine announced in Colorado River Water Conservation
District v. United States.296 Colorado River is not a form of
abstention,297 but a doctrine with a completely different justi-
fication.298 Its effect, however, is similar to that of Younger: it
allows a federal court to dismiss or stay a case over which it
has jurisdiction in favor of a parallel lawsuit in state court,
even if the state court action was filed after the federal action.
The Colorado River doctrine is far broader than Younger, for
its application does not require a request by a federal plaintiff
for an injunction against a state court; the mere pendency of
concurrent federal and state litigation will trigger considera-
tion of Colorado River. This section will examine the extent to
which the Supreme Court has delineated the scope and applica-
tion of Colorado River. It will also argue that the Court’s
commentary has been vague and unclear, and that this lack of
clarity, combined with a considerable amount of judicial self-
interest, has tempted many lower federal courts into using
Colorado River in a most inappropriate and unfortunate
manner.

A. The Supreme Court’s Doctrine

1. The Cases

The Supreme Court has discussed the Colorado River
rule in three cases: Colorado River itself, Moses H. Cone Me-

297. Id. at 813-17. See also infra text accompanying notes 386-391.
298. Colorado River, 424 U.S. at 817.
memorial Hospital v. Mercury Construction Corp., and Arizona v. San Carlos Apache Tribe of Arizona. In Colorado River, the United States had filed suit in federal court in Denver in order to establish its water rights and the rights of several Indian tribes to streams in southwestern Colorado. Soon thereafter, several private parties who claimed water rights in the same streams filed a suit in a special state court set up to handle water rights in a comprehensive fashion. Those parties then asked the federal court to dismiss its case, even though that suit had been filed before the state case in which they were the plaintiffs. The federal district court agreed, and the Supreme Court upheld the dismissal.

The facts in Moses Cone seemed to have little in common with Colorado River. A hospital and a contractor signed a building contract which provided for mandatory arbitration. A dispute arose, and lengthy negotiations were scuttled when the hospital abruptly filed a declaratory judgment action in state court. That court issued an ex parte injunction against the enforcement of the contract's arbitration clause. As soon as this injunction expired, the contractor sued in federal district court, arguing that a federal injunction against any further state proceedings was necessary in order to enforce the federal Arbitration Act. When the federal court disagreed, the contractor appealed, arguing that the federal court improperly stayed the case because of Colorado River. The Supreme Court found that the stay was improper.

The third and only other Supreme Court discussion on this subject came in San Carlos Apache Tribe, whose facts were almost identical to those of Colorado River. Several In-
dian tribes asked several federal courts to determine their water rights. Other private claimants to the water filed suits in the appropriate state water court systems, and the federal courts dismissed the federal case under Colorado River.\textsuperscript{309} The United States Supreme Court agreed,\textsuperscript{310} making the case its only other application of the Colorado River doctrine.

2. Possible Factors for a Colorado River Test

A superficial reading of these cases could identify a number of factors which might be considered by a federal court contemplating dismissal of a case over which it has jurisdiction in favor of a parallel state action. The first apparent factor would be whether a res exists. In both Colorado River and San Carlos Apache Tribe, a single res—the water subject to adjudication—was present;\textsuperscript{311} in Moses Cone, the federal defendant conceded that no res existed.\textsuperscript{312} The res factor invokes the long-established doctrine that the first court to assume jurisdiction over property may exercise control over that property and prevent other courts from doing so.\textsuperscript{313} Otherwise, the two courts might reach different judgments and award the property to two or more different claimants. In an ordinary water adjudication, the same principle applies, since any water awarded to one party by one court is not available to be awarded to any other party; all of the water rights are interdependent.\textsuperscript{314} But the existence of a res could not be the only relevant factor. If it were, the Court would not have needed to discuss any other factors, which it did,\textsuperscript{315} nor would the Court have had any reason to abandon control of the res.

The next likely factor would be the desire to avoid piece-meal litigation. Congress, in the McCarren Amendment,\textsuperscript{316} had given consent to join the United States as a defendant in

\begin{itemize}
\item \textsuperscript{309} San Carlos Apache Tribe, 463 U.S. at 553-557.
\item \textsuperscript{310} Id. at 567-70.
\item \textsuperscript{311} See Colorado River, 424 U.S. at 818-819; San Carlos Apache Tribe, 463 U.S. at 554-57.
\item \textsuperscript{312} Moses Cone, 460 U.S. at 19.
\item \textsuperscript{313} Colorado River, 424 U.S. at 818-19.
\item \textsuperscript{314} Id. at 819.
\item \textsuperscript{315} Id. at 819-20.
\end{itemize}
the adjudication of water rights in state court, thereby waiving the United States' sovereign immunity in this area. The *Colorado River* Court interpreted this to mean that Congress wanted to avoid piecemeal litigation and preferred to have the water rights on a stream allocated by a single proceeding in state court.317 In contrast, the federal statute involved in *Moses Cone* required piecemeal litigation when it was necessary to effectuate an arbitration agreement.318

A third factor discussed in the cases was the extent to which the parallel federal and state proceedings had progressed. *Colorado River* warned that it was immaterial which case had been filed first. Even if the federal case had been filed first, the lack of proceedings in federal court counseled against the federal court's retention of jurisdiction.319 The *Moses Cone* Court confronted opposite facts: the federal case had progressed much further than the state case, so the Court said dismissal was inappropriate.320 In *San Carlos Apache Tribe*, the Court provided a conclusory statement that there had been more progress in state court than in the federal court.321

The next identifiable factor was the inconvenience of the federal forum. The *Colorado River* Court specifically noted that the state case involved more than 1,000 defendants who were almost 300 miles from the federal court in Denver,322 and the *San Carlos Apache Tribe* opinion echoed that observation.323 Such inconvenience was not significant in *Moses Cone*,324 but that opinion presented another factor: the federal or state nature of the governing law.325 In *Moses Cone*, the Federal Arbitration Act provided for the decision on the merits, and it was appropriate that a federal court interpret the

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325. Id. at 23.
Act.\textsuperscript{326} In \textit{Colorado River}, this factor was not significant, because federal law and state law would both be important in resolving the case.\textsuperscript{327} From this statement, one might conclude that diversity actions were especially appropriate for \textit{Colorado River}'s application, since such actions would always be governed by state law. To cut off this argument, the Moses Cone Court was careful to say that while the jurisdiction is concurrent with state courts, this would not favor the application of \textit{Colorado River}.\textsuperscript{328} The Court explained that \textit{Colorado River} applies only in the "clearest of justifications," and that only in rare instances would the presence of state law issues support the use of the doctrine.\textsuperscript{329}

A fifth factor in the \textit{Colorado River} doctrine seemed to be the presence of a specialized state court with particular expertise in the subject of the litigation. Although it was not listed as a separate factor, the Court repeatedly noted the presence of such courts in \textit{Colorado River}.\textsuperscript{330} As a sixth factor, the cases mention that a federal court should not dismiss or stay under \textit{Colorado River} if the state court procedures do not provide an adequate remedy.\textsuperscript{331}

Finally, the seventh factor mentioned in the cases was the fact that in \textit{Colorado River}, the federal government, which was the plaintiff in the federal court suit, had earlier been willing to litigate a number of similar cases in state court.\textsuperscript{332}

Although these factors are readily identified in the cases, the manner in which they are to be used is less than clear. The Court has been relatively vague about the weight to be given each factor. It has admonished the lower federal courts that they have a "virtually unflagging obligation" to hear cases over which they have jurisdiction.\textsuperscript{333} Similarly, the Court

\begin{flushleft}
\textsuperscript{326} \textit{Id.} at 23-26.
\textsuperscript{327} \textit{Id.} at 23, (citing \textit{Colorado River}, 424 U.S. at 820).
\textsuperscript{328} \textit{Id.} at 25.
\textsuperscript{329} \textit{Id.} at 26.
\textsuperscript{330} \textit{San Carlos Apache Tribe}, 463 U.S. at 552 (quoting importance in \textit{Colorado River}); Moses Cone, 460 U.S. at 16 (same); \textit{Colorado River}, 424 U.S. at 819.
\textsuperscript{331} Moses Cone, 460 U.S. at 26-27.
\textsuperscript{332} Moses Cone, 460 U.S. at 16 (noting importance of \textit{Colorado River}); Colorado River, 424 U.S. at 820.
\textsuperscript{333} \textit{San Carlos Apache Tribe}, 463 U.S. at 552; Moses Cone, 460 U.S. at 15; \textit{Colorado River}, 424 U.S. at 817.
\end{flushleft}
has declared that the lower courts should use *Colorado River* to dismiss a case only when they have the "clearest of justifications," and that the balancing of the factors described must be weighted heavily in favor of retaining jurisdiction. But the Court has refrained from explaining how much weight each factor should receive. More importantly, other than to say that no single factor is determinative, it has not explained what it means by the "clearest of justifications." Must every factor be present? Must every factor tip strongly in favor of dismissal? What if several factors support dismissal, but other factors are neutral or slightly favor the retention of jurisdiction?

3. The Temptation Presented to the Lower Federal Courts

The Court's failure to explain how courts should weigh the factors identified above is exacerbated by the Court's failure to articulate clearly the purpose behind *Colorado River*. The Court has made it clear that *Colorado River* is not a type of abstention, with abstention's traditional concerns regarding federalism and comity. Although this is perhaps the clearest part of *Colorado River*, it is also frequently ignored. Instead, the Court has said that the doctrine recognizes "principles" which rest on "considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" Within the same breath, however, the Court has written that the pendency of concurrent litigation in state and federal courts generally does not bar an action in the federal court. The factors described earlier are then listed, apparently as the "principles" which concern the wise administration of the judiciary.

336. The Court has said merely that no single factor "is necessarily determinative." *Colorado River*, 424 U.S. at 818.
337. *Id.* at 813, 817.
341. *Id.*
Unfortunately, these factors are described in a manner which presents severe temptations to federal judges who have a strong self-interest in reducing their docket loads. At the beginning of *Colorado River*, the presence of a res seemed crucial. The Court gave it considerable attention and repeatedly referred to the traditional importance of the res concept.\(^{342}\) It would seem that if private concurrent litigation did not involve a common res, there would be little danger of inconsistent state and federal court judgments which could not be resolved by the normal res judicata and collateral estoppel rules.\(^{343}\) Therefore, there would be no need for a federal court to abandon control of the property over which it had jurisdiction. But while the presence of a res would seem to be crucial, the Court later said that no single factor was determinative.\(^{344}\) A federal trial judge itching to rid his docket of a complicated piece of concurrent litigation can use this latter statement to apply *Colorado River* even when no common res is present. He can treat the res factor as simply one out of many, on a par with the factor addressing the geographical distance of the parties from the federal forum.

The Court's statement that other courts may consider "the inconvenience of the federal forum"\(^{345}\) also is made in a tempting manner. The only explanation of that phrase is a citation to *Gulf Oil Corp. v. Gilbert*,\(^{346}\) in which the Court dismissed, on grounds of forum non conveniens, a tort action filed in the Southern District of New York because it concerned an accident which occurred in Virginia, was witnessed

\(^{342}\) *Id.* at 818-19.

\(^{343}\) Obviously, the danger of inconsistent judgments exists wherever there is concurrent litigation. If this litigation does not involve a res, once one court has entered a judgment, the second court should use the principles of res judicata and collateral estoppel to reach an identical judgment. This averts the problem of inconsistency. However, these twin principles are of far less value when a res is the subject of private litigation, since the parties in state court often are different than the parties in federal court.

\(^{344}\) *Moses Cone*, 460 U.S. at 15; *Colorado River*, 424 U.S. at 818. The very existence of the *Moses Cone* opinion further eroded the significance of the res factor. The federal defendant had conceded that no res was present. *Moses Cone*, 460 U.S. at 19. Instead of summarily deciding the case on this basis alone, the Court went on and paid far more attention to other factors.

\(^{345}\) *Colorado River*, 424 U.S. at 818.

by Virginians, and was governed by Virginia law.\textsuperscript{347} The Court said that the extreme inconvenience of the federal litigation meant that the New York court was not the appropriate court.\textsuperscript{348} However, \textit{Gulf} was decided before the adoption of a federal rule which allows federal courts to transfer venue to other federal districts.\textsuperscript{349} This rule firmly rebuts the notion that a federal court can dismiss a case in favor of a state case merely because the state court is more convenient to the parties than the federal court.\textsuperscript{350} Today, the forum non conveniens doctrine used in \textit{Gulf} allows a federal court to dismiss a case in favor of state court only in very rare instances.\textsuperscript{351} It should be noted that this doctrine, as well as the tests used by the venue transfer statutes which have replaced the doctrine, allows courts to consider whether the choice of forum was made to vex or harass the other side.\textsuperscript{352}

It is even more apparent that the \textit{Colorado River} Court was playing fast and loose with the "convenience" factor when one closely examines the facts of the case. Although the Court complained that the federal court in Denver was 300 miles from the defendants,\textsuperscript{353} it was fairly close to most of the attorneys,\textsuperscript{354} and few of the defendants would have to appear per-

\begin{itemize}
\item \textsuperscript{347} \textit{Id}. at 502-03.
\item \textsuperscript{348} \textit{Id}. at 507-08.
\item \textsuperscript{350} \textit{See} 15 \textit{WEIGHT, MILLER & COOPER}, supra note 13, § 3828, at 278-280.
\item \textsuperscript{351} \textit{Id}. at 280 n.7.
\item \textsuperscript{352} In regard to the relevance of motivation to forum non conveniens analysis, \textit{see id}. at 281, (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981); \textit{Gulf Oil}, 330 U.S. at 508-09). Although the factors used to decide whether venue should be transferred do not expressly include motivation, that concern is subsumed in the rule that the plaintiff's choice of forum, ordinarily of great weight, may be overcome if the forum chosen has no relation to the plaintiff or the subject matter of the suit, suggesting that it was chosen to harass the defendant. Chrysler Capital Corp. v. Woehling, 663 F. Supp. 478, 482 (D. Del. 1987); G.H. Miller & Co. v. Hanes, 566 F. Supp. 305, 307 (N.D. Ill. 1983). Strong evidence that the selected forum will be inconvenient to the parties or witnesses also will justify a change of venue. \textit{See Schmid Labs v. Hartford Accident & Indem. Co.}, 654 F. Supp. 734, 736-37 (D.D.C. 1986); \textit{Intergraph Corp. v. Stottler, Stagg & Assocs.}, 595 F. Supp. 976, 978-79 (N.D. Ala. 1984); Coface v. Optique Du Monde, Ltd., 521 F. Supp. 500, 507 (S.D.N.Y. 1980); Cunningham v. Ford Motor Co., 413 F. Supp. 1101, 1105-06 (D.S.C. 1976).
\item \textsuperscript{353} \textit{Colorado River}, 424 U.S. at 819; \textit{Moses Cone}, 460 U.S. at 16.
\item \textsuperscript{354} According to the list of counsel for the appeal to the Tenth Circuit, five of the defendants were represented by attorneys from Denver, one by a Durango lawyer,
sonally in court for any length of time. More importantly, the federal court was authorized to sit in Durango, which is located in the midst of most of the defendants. The federal court could have made itself convenient to the parties merely by hearing the case in Durango, not Denver.

The other factors listed by the Court are also subject to dangerous misinterpretation. The "lack of progress" factor, the laudable goal of which is to protect a court that has invested substantial time in a case, instead invites abuse. The state court case in Colorado River was filed after the federal suit, and the Court failed to indicate exactly what progress had been made in the state case. The conclusory treatment which the Court gave this factor invites a wily attorney whose client is sued in federal court merely to file immediately a countersuit in state court, along with a motion to dismiss in federal court.

The "adequacy of state remedy" factor is another danger. In areas where federal and state courts have concurrent jurisdiction, only rare procedural or service problems would mean that the state remedy would be inadequate. Again, a judge trying to control her docket would be tempted to say that this factor almost always supports dismissal of the federal case. A similar concern is present regarding the "governing law" factor. If the Court's indirect warnings on the subject are ignored, a federal court could dismiss every federal concurrent diversity action, since state law would be the governing law. Of course, this would play havoc with the policies behind federal diversity jurisdiction.

The temptations posed by these factors suggest that Colorado River's "wise judicial administration" purpose is based largely on judicial self-interest. This suspicion is reinforced by two facts. First, the federal court in Denver could have eliminated any "inconvenience" to the state plaintiffs merely by scheduling the federal trial in Durango, as authorized by stat-

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another by an attorney from Glenwood Springs, and three amici curiae by a Boulder attorney. The United States was represented by Justice Department lawyers from Washington, D.C. See United States v. Akin, 504 F.2d 115, 116 (10th Cir. 1974).

355. Colorado River, 424 U.S. at 824 n.6 (Stewart, J., dissenting).

ute. This would have made the trial convenient for the 1,000 private litigants, but it would have required the judge to move himself and his staff to Durango for an extended period of time. Second, had the federal court in either Colorado River or San Carlos Apache Tribe retained the suit, the United States and the various tribes of the West would immediately have filed similar water suits in every other federal district court in the West, swamping those courts with water cases. The Court’s decision in Colorado River and San Carlos Apache Tribe in that sense reminds one of the motivations behind the creation of the well-pleaded complaint rule.357

4. The Three True Factors in Colorado River

There is another explanation, however. The Court repeatedly has shown its reluctance to let federal courts escape cases merely because of overcrowding.358 It is more likely that Colorado River simply was not sufficiently clear in identifying the factors on which the decision was based. A closer reading of the case reveals three major factors. First, the presence of a res was critical. It was the factor first discussed by the Court, and the factor to which the most attention was paid. It is reinforced by the traditional recognition that any water allocation dispute is best resolved in a single adjudication.

Second, the presence of the McCarren Amendment was crucial because it furnished a federal statute which commanded the Court (at least in the Court’s opinion) to override the normal rule of tolerating concurrent litigation. Indeed, the careful reader of Colorado River will note that the Court said that of the factors counseling against concurrent proceedings, the “most important of these is the McCarren Amendment itself.”359 It is incorrect to say that the Court’s desire to avoid piecemeal litigation was an important factor; the real factor was the existence of a federal statute which directed the court

357. See supra text accompanying notes 65-69.
to prevent concurrent, piecemeal litigation. The second Colorado River factor is not some vague opposition to piecemeal litigation; it is a congressional statutory mandate that courts prevent such parallel litigation in water rights disputes.

The third factor in Colorado River really was a variation of the traditional forum non conveniens argument, as suggested by the citation to Gulf and the numerous references to the particular expertise of the special state water court system. Such expertise is today one of the few reasons why a federal court may dismiss a case on forum non conveniens grounds, and it is the one part of Gulf that has not been overturned by federal venue statutes. This factor also permitted the federal court to consider the reason why the original defendant chose to launch a second, reactive case. In short, a court considering whether to apply Colorado River should look to see whether a res is present (and, if so, which court legitimately acquired jurisdiction over it first), whether federal law commands the federal court to overlook its traditional tolerance of piecemeal litigation, and whether there are strong forum non conveniens arguments in favor of the state court.

Although these requirements seem stiff and difficult to satisfy, such characteristics are appropriate. As mentioned earlier, the Court repeatedly has admonished that Colorado River should be used only with the clearest of justifications, and that a lower court's consideration of the doctrine must be weighted heavily against its exercise. The question is whether the lower federal courts have respected those warnings.

B. Lower Court Application of Colorado River

A study of eighty cases which have cited Colorado River reveals that the lower federal courts have allowed their dislike of private concurrent jurisdiction and their respect for state courts to override the intent behind the Colorado River doctrine. A statistical analysis is revealing.

360. Id.

361. A list of these cases is on file with the Oklahoma City University Law Review. The cases were selected at random from the 240 citations to Colorado River listed in Shepard's United States Citations.
Seventy-eight cases used *Colorado River* to reach a decision. Forty of these cases (51 percent) either dismissed or stayed the federal action. This statistic is astounding when one recalls the Court’s repeated admonitions that federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them” and that *Colorado River* is appropriate only in circumstances which “are considerably more limited” than those appropriate for abstention.


These statistics reveal the extent to which the lower federal courts have failed to recognize the importance of *Colorado River*’s first two factors. The federal courts have ignored the requirements of a res and a congressional policy opposing piecemeal litigation in a particular type of dispute. Eighty-three percent of the cases which discussed *Colorado River* did not involve anything which remotely resembled a res; sixty-seven percent of the cases did not even discuss whether a res was present or not. Of the forty decisions which dismissed or stayed federal lawsuits, only six involved a res.\textsuperscript{366}

The failure to look for a federal policy which opposed piecemeal litigation was even clearer. The most important element of *Colorado River* was the McCarren Amendment, a federal statute which established a “clear federal policy” that courts should avoid piecemeal adjudication of water rights.\textsuperscript{367} Eighty-eight percent of the lower federal court decisions, however, were oblivious to this. Of the eight which did discuss the matter, five found a federal statute which supported piecemeal litigation,\textsuperscript{368} and three found statutes opposing it.\textsuperscript{369}

\textsuperscript{366} See Levy, 635 F.2d at 962-63 (pension fund controlled by liquidated corporation); Croy, 604 F.2d at 227 (proceeds of life insurance policy); Idaho, 567 F.2d at 859 (funds taken from state school endowment); Delaney, 602 F. Supp. at 1069-70 (control of corporation); Utah, 434 F. Supp. at 39 (water rights); AIMS, 609 F. Supp. at 259 (money controlled by liquidated insurance company).

\textsuperscript{367} *Colorado River*, 424 U.S. at 819. See also Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 16 (1983) (“By far the most important factor in *Colorado River* was the clear federal policy . . . as evidenced in the McCarren Amendment.”).


Not only have the courts failed to consider this factor properly, they affirmatively have misread it. *Colorado River* said that it was based on a federal statute which established a policy opposing piecemeal litigation in the type of dispute at issue.\(^{370}\) The lower courts have not read this as a commandment to make sure that an analogous statute (with a similar policy against piecemeal litigation) is present in the cases before them. Instead, they have read the *Colorado River* opinion itself as a blanket condemnation of piecemeal litigation. Nine decisions have said that docket control or judicial economy are legitimate grounds for dismissing or staying a case under *Colorado River*.\(^{371}\) In doing so, these cases ignored the Supreme Court's repeated declaration that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction."\(^{372}\) Obviously, these lower court opinions present a dangerous inroad on federal diversity jurisdiction, which is concurrent with state court jurisdiction.

Since the lower courts have paid so little attention to the first two of *Colorado River*'s factors, it is clear that they have placed their emphasis on the third. This third factor is a hodgepodge of unrelated items: the relative convenience of the federal and state courts, the order in which each court obtained jurisdiction, the relative progress made by each court, and the role of federal or state law in governing resolution of the dispute.\(^{373}\) These items border on the trivial. In *Colorado River*, "inconvenience" meant 1,000 state court defendants having to travel 300 miles over mountain roads for a trial.

\(^{370}\) 424 U.S. at 819; 460 U.S. at 16.
\(^{371}\) *Lumen*, 780 F.2d at 695 (stay); *West Gulf Maritime*, 751 F.2d at 729-30 (dismissal); United States v. Adair, 723 F.2d 1394, 1404 (1984) (dismissal); *Thompson*, 601 F. Supp. at 474 (stay); *Bluewater-Toltec*, 580 F. Supp. at 1444 (dismissal); *Nelson*, 573 F. Supp. at 1099 (stay); *Gueneveur*, 551 F. Supp. 1045, 1047 (stay); *Classen*, 516 F. Supp. at 1244 (stay); *Holmes*, 505 F. Supp. at 878-79 (dismissal). See also Burton v. Exxon Corp., 536 F. Supp. 617, 623, 624 n.8, (S.D.N.Y. 1982) (refusing to dismiss or stay case despite concerns about judicial economy; suggesting that if state court can dispose of all claims significantly sooner than could federal court, federal court would consider issuing stay). But see Costings, Inc. v. National Cold Drawn, Inc., 611 F. Supp. 958, 960 (E.D. Wis. 1985) (refusing to dismiss or stay despite warning that concurrent litigation would be a grand waste of effort).

\(^{372}\) *Moses Cone*, 460 U.S. at 15; *Colorado River*, 424 U.S. at 817.

\(^{373}\) These items were listed in *Colorado River*, 424 U.S. at 818, 820.
which promised to last months;\textsuperscript{374} no other case examined involved so many inconvenienced parties so distant from a trial which was to last for so long. Furthermore, in most cases a simple transfer of venue would be more appropriate than dismissing the case.\textsuperscript{375}

The order of progress item merely reflects the results of a race to the courthouse, and it has been replaced by consideration of the relative progress made by each court.\textsuperscript{376} This concern for progress is little better. A federal defendant can trivialize this criterion merely by responding to a federal complaint with an immediate countersuit in state court and a motion to dismiss on \textit{Colorado River} grounds in federal court. In essence, such a defendant can prevent any progress in the federal court.

The fourth item mentioned—the governing law—should be irrelevant.\textsuperscript{377} If the presence of state law issues is deemed relevant, any federal lawsuit based on diversity jurisdiction is subject to dismissal in favor of a concurrent state lawsuit, a result not contemplated by the diversity jurisdiction statutes.\textsuperscript{378} The \textit{Moses Cone} Court, mindful of this problem, warned that only "in some rare circumstances" will the presence of state law issues weigh in favor of surrender of federal jurisdiction.\textsuperscript{379} Nevertheless, thirteen courts in this survey used the predominance of state law issues to support the stay or dismissal of the federal action.\textsuperscript{380}

\begin{footnotes}
\item 374. \textit{Id.} at 820.
\item 376. \textit{Moses Cone}, 460 U.S. at 21-22.
\item 377. The only exception, of course, would be if the governing law is furnished by a statute over which a federal court has exclusive jurisdiction.
\item 378. 28 U.S.C. § 1332(a) (Supp. 1987).
\item 379. \textit{Moses Cone}, 460 U.S. at 26. The Court's only explanation of what might constitute such rare circumstances was a reference to a footnote in which it pointed out that the bulk of the \textit{Colorado River} litigation would depend on state water law and that Congress had adopted an affirmative policy which approved state court adjudication of federal water rights. \textit{See id.}, (citing \textit{Moses Cone}, 460 U.S. at 23 n.29).
\end{footnotes}
In short, these four items should be of relatively little importance. None of them would seem sufficient to establish the "exceptional circumstances,"\textsuperscript{381} the "clearest of justifications,"\textsuperscript{382} needed for the federal courts to justify abdication of their "virtually unflagging obligation"\textsuperscript{383} to hear cases over which they have been given jurisdiction. Nevertheless, a number of cases have relied only on these items, sometimes only one or two of them, to hold that dismissal or a stay is appropriate under \textit{Colorado River}\.\textsuperscript{384}

\begin{footnotesize}
\begin{enumerate}
\item It should be noted that three of these cases involved a mixing of \textit{Colorado River} (in which the presence of state law issues should be a minor factor) and \textit{Pullman} (in which the presence of unsettled state law issues is crucial). \textit{See Riverside Labs.}, 678 F. Supp. at 1361; \textit{United States Jaycees}, 491 F. Supp. at 582; \textit{Santa Fe}, 71 F.R.D. at 575. This mixing of \textit{Pullman} and \textit{Colorado River} illustrates another problem: if these lower courts had used the presence of state law only to support \textit{Pullman} abstention (as would have been proper), they could only have stayed the federal action; by using \textit{Colorado River}, however, they "justified" dismissing the federal actions completely.
\item 381. \textit{Colorado River}, 424 U.S. at 818.
\item 382. \textit{Id.} at 819.
\item 383. \textit{Id.} at 817.
\end{enumerate}
\end{footnotesize}
Perhaps by recognizing that convenience, order of filing, progress, and governing law cannot by themselves justify a dismissal or stay, the lower federal courts have relied upon other factors. Their references to judicial economy and docket control already have been discussed. In addition, they have let a concern for a state interest sneak into their analysis. Eight cases in the survey said that the presence of a state interest was an important factor in applying Colorado River; only two said that this was not a relevant criterion. The problem is that Colorado River did not say that state interest could be used as a factor, so the courts which do use it violate that opinion's admonition to dismiss or stay a federal case only because of the "clearest of justifications."

The improper use of a state interest as a factor can be traced to what may seem to be a matter of semantics. Since the three abstention doctrines (Pullman, Burford, and Younger) produce the same effect as does Colorado River, it has been tempting for courts to label the latter as a fourth

state law and comprehensiveness of state case); Nelson v. Hall, 573 F. Supp. 1097, 1100 (D. Colo. 1983) (stay based on comity, adequacy of state court relief, order of filing, and comprehensiveness of state litigation); Classen v. Weller, 516 F. Supp. 1243, 1244-45 (N.D. Cal. 1981) (staying case because of concerns for judicial economy and similarity of federal and state issues, even though federal claim was a matter of exclusive federal jurisdiction); Santa Fe, 71 F.R.D. at 575 (dismissal based on governing state law and strong state interest).


386. Illinois Bell Telephone Co. v. Illinois Commerce Comm'n, 740 F.2d 566, 571 (7th Cir. 1984) (comity irrelevant); Burton v. Exxon Corp., 536 F. Supp. 617, 623 (S.D.N.Y. 1982) (use of comity to dismiss federal case which was filed before state case would encourage parties to commence state actions simply to avoid litigating in federal court).

387. Moses Cone, 460 U.S. at 25; Colorado River, 424 U.S. at 819.

388. All four doctrines allow or require federal courts to dismiss or to stay cases over which they have jurisdiction.
type of abstention.\textsuperscript{389} Sometimes, this has been done for the sake of simplicity\textsuperscript{390}—it is easier to refer to "the four types of abstention" than to "the three abstention doctrines and the Colorado River doctrine"—and one important commentator has said that the number of categories into which one divides the abstention doctrines is of little significance.\textsuperscript{391} But while Colorado River may sound like abstention, it is not abstention at all. The Court was careful to state expressly that it was not developing a new type of abstention.\textsuperscript{392} More importantly, it warned that while abstention was based on concerns for federalism and comity, Colorado River was based on something much different.\textsuperscript{393} Unfortunately, the frequent descriptions of Colorado River as an abstention doctrine have led some courts to incorporate abstention's concerns for comity and state interest into a doctrine that is actually concerned with wise judicial administration.\textsuperscript{394} The presence of an important state interest simply is irrelevant for Colorado River purposes.

Finally, some courts have considered the motivation behind the second lawsuit. Where a court perceived no legitimate reason for the second federal filing, it invariably dismissed or stayed the federal action;\textsuperscript{395} where there was a

\begin{enumerate}
\item[391.] 17A WRIGHT, MILLER & COOPER, supra note 13, § 4241, at 28.
\item[392.] Colorado River, 424 U.S. at 817.
\item[393.] Id.
\item[394.] See cases cited in supra note 385.
\item[395.] See American Disposal Services v. O'Brien, 839 F.2d 84, 88 (2d Cir. 1988) (state court party lost federal action filed by party who lost in state court); Fuller v. Ramon I. Gil, Inc., 782 F.2d 306, 308-09 (1st Cir. 1986) (federal action filed because of defeat in state court); Telesco v. Telesco Fuel & Masons' Materials, 765 F.2d 356, 363 (2d Cir. 1985) (court describes federal suit as vexatious); Merrill Lynch, Pierce, Fenner & Smith v. Haydu, 675 F.2d 1169, 1174 (11th Cir. 1982) (court condemns federal plaintiffs effort to evade removal statute requirements); Glover v. City of Portland, 675 F. Supp. 398, 405 (M.D. Tenn. 1987) (court finds federal plaintiff was forum-shopping after losing a motion in state court); Continental Ins. Co. v. Cumberland Trucking Co., 670 F. Supp. 827, 829 (N.D. Ill. 1985) (court finds that federal action
legitimate reason, the federal court invariably retained jurisdiction. This practice makes a great deal of sense. As discussed earlier, Colorado River indirectly suggested that the motivation behind the second filing could be relevant. Furthermore, there is no reason why a federal court should allow a party to use procedural rules for illegitimate purposes. Indeed, since the courts feel no obligation to consider Colorado River's first two requirements of a res and a statutory command against piecemeal litigation, an explicit motive test is probably the best single test available. It would allow courts to protect deserving private interests while at the same time providing those courts with some protection against needless consumption of judicial resources because of one party's desire to harass another.

396. Voktas, Inc. v. Central Soya Co., 689 F.2d 103, 107, 109 (7th Cir. 1982) (court denies requests for stay of federal case because request was stalling tactic; in dicta, court says that a stay of a federal case would be appropriate if the case were vexatious); Shogren v. Chicago, Milwaukee, St. Paul & Pac. R.R., 630 F. Supp. 233, 234 (D. Minn. 1986) (refusal to use Colorado River where state action was filed after federal case in an effort to eviscerate federal diversity jurisdiction).

397. The opinion cited Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942). See Colorado River, 424 U.S. at 818. Brillhart turned in part on the vexatious nature of the federal suit. Brillhart, 316 U.S. at 495. Moses Cone noted that several lower federal courts had used motivation as a factor in applying Colorado River. Moses Cone, 460 U.S. at 17 n.20. The Court said that the use of this factor "has considerable merit." Id. at 18 n.20. It said however, that the other factors counseling against dismissal or a stay were strong enough that it would not have to consider the motivation behind the parallel state litigation. Id.
V. SUGGESTIONS FOR REFORM

There are four methods by which the problems described above could be prevented or significantly reduced. First and foremost, the Supreme Court should amend the well-pleaded complaint rule. This rule is the single largest generator of private concurrent litigation; if it were eliminated, a state defendant with a defense or counterclaim based on federal law would be able to remove the entire action to federal court instead of filing a second, reactive case in federal court. Similarly, a federal defendant would have no incentive to file a reactive state law case in state court, since the federal plaintiff would be able to remove that action. Admittedly, the well-pleaded complaint rule is firmly entrenched in the Supreme Court’s mind. This probably is because of the rule’s simplicity.

A rule that found federal question jurisdiction whenever it became apparent during litigation that a federal issue had become the main issue could leave the jurisdictional question undecided for months or even years. But this would not be a problem with a rule which said that a nonspurious federal matter raised in an answer or counterclaim provided federal question jurisdiction. Such a rule would allow the consolidation of a number of parallel state and federal cases, eliminating the need for federal courts to consider Younger or Colorado River.

The second suggestion would be for the Supreme Court to recognize expressly that Younger does not apply to private concurrent litigation. An overwhelming number of lower federal courts had reached that conclusion before Pennzoil, a decision which unfortunately has caused doubts about the continued validity of this case law. The Supreme Court should eliminate those doubts by reemphasizing the limited nature of the Pennzoil opinion, conceding that private concurrent litigation does not trigger the concerns of equity, federalism, and comity upon which Younger abstention is based, and warning

of the many dangers which Younger’s use in private litigation would create.

Third, the Supreme Court should reexamine its pronouncements in Colorado River, Moses Cone, and San Carlos Apache Tribe. The opinions in those cases tried but failed to convince the lower federal courts of the extremely limited circumstances in which dismissal (or a stay) was justified under Colorado River’s principles. The Court needs to clarify the need for the presence of a res and a federal statutory policy which opposes piecemeal litigation in the area of dispute. Until it does, lower federal courts will continue to abdicate their responsibility to hear cases because of relatively trivial concerns.

Fourth, the Supreme Court should recognize the importance of the motives which created the private concurrent litigation. Where the second lawsuit (whether reactive or repetitive) was filed in good faith and for legitimate reasons, a lower federal court should refuse to use Younger or Colorado River.

This would protect parties from vexatious, reactive litigation, and it would protect those parties who had legitimate reasons for filing either reactive or repetitive litigation. In private concurrent litigation, the primary interests at stake are the interests of the private parties, and it is those interests—not the far weaker interests of the state and federal governments—which should receive protection.