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Balancing Federal Court Intervention with State Sovereignty

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BALANCING FEDERAL COURT INTERVENTION WITH STATE SOVEREIGNTY

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Mathew D. Staver writes about the Abstention Doctrine. The Article provides an analysis of the Anti-Injunction Act and the applicability of the Pullman, Younger, Rooker-Feldman, Brillhart, *and* Colorado River *Abstention Doctrines, paying particular attention to how each doctrine affects a litigator's practice.*

Most litigators have a vague memory of the Abstention Doctrine from their law school civil procedure course. Seemingly unimportant, judged by the amount of time devoted to the doctrine in law school, the practitioner may be surprised the first time an astute adversary raises the Abstention Doctrine in a motion to dismiss. Hoping to quickly respond to the motion and move on to the merits of the case, the advocate may be dismayed to learn that there is an entire body of law on the subject. The Abstention Doctrine is a piecemeal theory. Part of the doctrine has been codified. However, most of the Abstention Doctrine is spread throughout a patchwork of case law where it has been decompartmentalized and subsequently identified by case names.[1]

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1. For a brief comparison of abstention doctrines, *see* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4241 (1988). For an argument toward reorienting the abstention doctrines, *see* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049 (1994). For an analysis of *Burford* abstention applied to RICO, *see* Tracy Doherty et al., *Niath Survey of White Collar Crime: Racketeer Influenced*

At the heart of the Abstention Doctrine is the balance between state and federal sovereignty. This balance is sometimes referred to as federalism or comity. The Abstention Doctrine essentially requires federal courts to step aside in order to allow the state adjudicatory process to run its course. The federal plaintiff must be familiar with abstention issues or run the risk of protracted litigation in federal court which may eventually be halted when abstention is raised. This Article will review various aspects of the Abstention Doctrine including the Anti-Injunction Act, the *Pullman*, *Younger*, *Rooker-Feldman*, *Brillhart*, and *Colorado River* Abstention Doctrines. After discussing the various Abstention Doctrines, this article will then apply these doctrines to the case of *Cheffer v. McGregor*.[2] The plaintiff in *Cheffer* filed a complaint in federal court seeking an injunction prohibiting enforcement of a state court injunction. This classic federal-state conflict lies at the heart of the Abstention Doctrine.

I. THE ANTI-INJUNCTION ACT

The Anti-Injunction Act was first codified in 1793.[3] The Act provides that "[a] court of the United States may not grant an injunction to state proceedings in the state court except as expressly authorized by an act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[4]

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and Corrupt Organizations, 31 AM. CRIM. L. REV. 769 (1994). Finally, for an examination of the conflict between *Colorado River* Abstention and legislative enactments, *see* David J. McCarty, *Preclusion Concerns as an Additional Factor When Staying a Federal Suit in Deference to a Concurrent State Proceeding*, 53 FORDHAM L. REV. 1183 (1985).

2. 6 F.3d at 705.

3. *See* Act of March 2, 1793, ch. 22 § 5, 1 Stat. 335, *as amended*, 28 U.S.C. § 2283 (1997). The Anti-Injunction Act of 1793 provided in part that a "writ of injunction [shall not] be granted [by any federal court] to stay proceedings in any court of a state," thus establishing a general prohibition against federal intervention. *Id.*

4. 28 U.S.C. § 2283 (1997). Passed by Congress in 1793, the precise origins of the Act are shrouded in obscurity, but the basic purpose was to prevent "needless friction between state and federal courts." Mitchum v. Foster, 407 U.S. 225, 233 (1972) (quoting Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 9 (1940)). The law remained unchanged until amended in 1874

In *Mitchum v. Foster*,[5] the United States Supreme Court held that actions brought under 42 U.S.C. § 1983 are specifically excepted from the Anti-Injunction Act; therefore, the statute does not ban federal courts from enjoining enforcement of a state court order.[6]

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to permit federal courts to stay state court procedings that interfered with the administration of federal bankruptcy procedings. The present wording was adopted in 1948. The Supreme Court then recognized additional exceptions to the Act under at least six other federal laws: (1) legislation providing for removal of litigation from state to federal courts under 42 U.S.C. §§ 1441-50; (2) legislation limiting the liability of shipowners under 46 U.S.C. § 185; (3) legislation providing for federal interpleader actions under 28 U.S.C. § 2361; (4) legislation conferring federal jurisdiction over farm mortgages under 11 U.S.C. § 203; (5) legislation governing federal habeas corpus proceedings under 28 U.S.C. § 2251; and (6) legislation providing for control of prices under the Emergency Price Control Act of 1942, § 205(a), 56 Stat. Section 205(a) expired in 1947. *See Mitchum*, 407 U.S. at 234-35. In addition to the above exceptions, Congress recognized other exceptions to the Anti-Injunction Act. One such exception is the "*in rem*" exception where a federal court is permitted to enjoin a state court proceeding in order to protect its jurisdiction of a *res* over which it first obtained jurisdiction. A second is the "relitigation" exception permitting a federal court to enjoin relitigation in a state court of issues already decided in federal court. A third exception permits a federal injunction against a state court proceeding when the plaintiff in the federal court is the United States itself, or a federal agency asserting "superior federal interests." *Id.* at 235-36.

5. 407 U.S. 225 (1972). In *Mitchum*, a state court proceeding was brought to close the defendant's bookstore under a state public nuisance law. The state court entered a preliminary injunction closing the bookstore. The defendant then filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the Northern District of Florida, alleging a violation of his First and Fourteenth Amendment rights. The federal plaintiff requested injunctive and declaratory relief against the state court proceedings on the ground that the state law was unconstitutional. The district court refused to enjoin the state court proceeding because it found that federal injunctive relief was barred by the Anti-Injunction Act. The United States Supreme Court reversed, holding that suits brought under § 1983 are not barred by the Anti-Injunction Act. *See id.* at 243.

6. *See id.* In reversing the district court by finding that actions brought under 42 U.S.C. § 1983 were excepted from the Anti-Injunction Act, the Supreme Court stated:

> [I]f 42 U.S.C. § 1983 is not within the 'expressly authorized' exception of the anti-injunction statute, then a federal equity court is wholly without power to grant any relief in a § 1983 suit seeking to stay a state court proceeding. In short, if a § 1983 action is not an 'expressly authorized' statutory exception, the anti-injunction law absolutely prohibits in such an action all federal equitable intervention in a pending state court proceeding, whether civil or criminal, and regardless of how extraordinary the particular circumstances may be.

Mitchum, 407 U.S. at 229. The Court found that without a § 1983 exception,

The *Mitchum* Court noted that Congress envisioned § 1983 would alter the relationship between the state and federal governments.

> [The] legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.
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> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. For these reasons we conclude that under the criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the 'expressly authorized' exception of that law.[7]

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the federal judiciary would be impermissibly limited.

7. *Id.* at 242-43 (citations omitted).

The *Mitchum* decision addressed only the applicability of the Anti-Injunction Act, not the *Younger* Abstention Doctrine.[8] Similarly, the Fifth Circuit Court of Appeals found that the Anti-Injunction Act did not bar a federal court injunction against enforcement of a state court order.[9] In *Machesky*, the federal court was faced with a state court injunction that prohibited civil rights protestors from demonstrating within three hundred feet of certain businesses.[10] In the suit against the state court judge, the federal court enjoined enforcement of the state court order. Finding that the Anti-Injunction Act did not apply, the court noted: "Where the interests in comity collide with the paramount

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8. In discussing the *Younger* decision, *Mitchum* pointed out that during the previous term the Court had "eschewed any reliance on the [Anti-Injunction] statute in reversing the judgment, basing [the *Younger*] decision instead upon . . . 'Our Federalism'." *Mitchum*, 407 U.S. at 230. Later in *Mitchum*, the Court again insisted that its decision was in no way meant to "qualify . . . the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Id.* at 243. Chief Justice Burger, joined by Justices White and Blackmun, stressed in his concurring opinion that the *Mitchum* decision "does nothing to 'question or qualify in any way the principles of equity, comity, and federalism.'" *Id.* at 225 (Burger, J. concurring). Burger suggested that on remand the lower court, "before reaching a decision on the merits of [the] appellant's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in *Younger*, prevent the issuance of an injunction against the state . . . " *Id.* at 244. Professor Stravitz argues that the Court specifically created the *Younger* Abstention Doctrine in anticipation of the Court's holding in *Mitchum*, because without *Younger*, a complete exception to the Anti-Injunction Act would result in unrestrained federal court intervention in state court proceedings. *See* Howard B. Stravitz, *Younger Abstention Reaches a Civil Maturity: Pennzoil Co. v. Texaco*, 57 FORDHAM L. REV. 997, 1027-28 (1989). However, the *Mitchum* Court cited *Fenner v. Boykin*, 271 U.S. 240 (1926); *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935); *Beal v. Missouri Pac. R.R. Co.*, 312 U.S. 45 (1941); *Watson v. Buck*, 313 U.S. 387 (1941); *Williams v. Miller*, 317 U.S. 599 (1942); *Douglas v. City of Jeannette*, 312 U.S. 157 (1943); *Stefanelli v. Minard*, 342 U.S. 117 (1951); and *Cameron v. Johnson*, 390 U.S. 611 (1968), to support the proposition that the *Younger* Abstention Doctrine's foundation was laid many years prior to 1971.

9. *See* Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969).

10. *See id.* at 290.

institutional interests protected by the First Amendment, comity must yield."[11] The court granted federal injunctive relief against enforcement of the state court order.

In *Munoz v. County of Imperial*,[12] a California state court enjoined the selling of water for use outside the county. Munoz was not a party to the underlying state court action. In granting the request for federal injunctive relief under § 1983 enjoining enforcement of the state court order, the federal court acknowledged that Munoz was not a party to the state court action and could do nothing to appeal or otherwise influence the result of the state court proceeding.[13] "There [were] no means by which [Munoz could] challenge the [state court injunction];" so therefore, federal injunctive relief was not precluded by the Anti-Injunction Act.[14]

II. THE *PULLMAN* ABSTENTION DOCTRINE

Although the Abstention Doctrine has its roots in English and early American jurisprudence, the Supreme Court first acknowledged the doctrine in the 1941[15] decision of *Railroad Commission of Texas v. Pullman Co.*[16]

A. The Background of the Pullman *Abstention Doctrine*

In *Chisholm v. Georgia*,[17] the Supreme Court ruled that states may be sued by its citizens. The Court's opinion sparked an immediate backlash. Some argued that the states might face bankruptcy if they could be sued for damages. In response to this "startling and unexpected"[18] deci-

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11. *Id.*

12. 510 F. Supp. 879 (S.D. Cal. 1981).

13. In reviewing whether to grant injunctive relief based on a violation of § 1983, the court must determine that the act sought to be enjoined involves state action. A state court injunction constitutes state action. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964); Shelley v. Kraemer, 334 U.S. 1 (1948); Gresham Park Community v. Howell, 652 F.2d 1227 (5th Cir. 1981); Henry v. First Nat'l Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979).

14. Munoz, 510 F. Supp. at 885.

15. *See* Zwickler v. Koota, 389 U.S. 241, 248 (1967).

16. 312 U.S. 496 (1941)

17. 2 U.S. 419 (1793).

18. Hans v. Louisiana, 134 U.S. 111 (1890). Justice Bradley used this lan-

sion announced in *Chisholm*, Congress proposed the Eleventh Amendment to the United States Constitution as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[19]

The Supreme Court interpreted the Eleventh Amendment to forbid all individual suits brought in federal court against any state regardless of citizenship.[20] For approximately a century a wronged plaintiff could not initiate a federal suit against a state.

However, the 1908 *Ex parte Young*[21] decision dramatically changed the judicial landscape by allowing federal litigants to sue states for alleged constitutional violations. The Supreme Court pierced the previously impervious shield of state sovereign immunity by creating an exception to the Eleventh Amendment.[22] The Court held that while a state could not be sued by one of its citizens, an officer of the state acting in an unconstitutional manner could be sued by one of its citizens.[23] Consequently, the result of the Court's

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guage to describe both the political and intellectual response to the *Chisholm* decision should the Constitution be interpreted to forbid suits against states by citizens of other states but not citizens of the same state.

19. For a modern historical examination of the Eleventh Amendment, *see* William A. Fletcher, *A Historical Interpretation of the 11th Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction*, 35 STAN. L. REV. 1033, 1058-62 (1983).

20. *See Hans*, 134 U.S. at 1.

21. 209 U.S. 123 (1908). In *Ex parte Young*, shareholders of a railroad company challenged, in federal court, Minnesota legislation that fixed railroad rates, alleging the legislation was confiscatory in violation of the Fourteenth Amendment. The court issued a preliminary injunction which, among other things, prohibited the Attorney General of Minnesota, Edward Young, from enforcing the legislation. Young attempted to force compliance with the new rate, and the court held him in contempt.

22. The Court's creation of the exception presents an amusing example of a judicially-created legal fiction. For a discussion of incorrectly applied Federalist principles and a neo-modern look at the Eleventh Amendment, *see* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1481-84 (1987).

23. *See Ex parte Young*, 209 U.S. at 159-60. Specifically, the Court said:

> The act to be enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act

opinion was that, even without their consent, states could be sued merely by naming the official who engaged in unconstitutional behavior.

Congress sought to ameliorate the effects of *Ex parte Young* by restricting preliminary injunctions and by requiring that petitions for particular types of preliminary injunctive relief against state officials be heard by a three-judge panel of the district court. The decisions of the three-judge panel were directly appealable to the United States Supreme Court.[24]

B. Pullman *Abstention: The Case*

In 1941, the Supreme Court limited *Ex parte Young* when it handed down *Railroad Commission of Texas v. Pullman Co.*[25] The facts of *Pullman* involved a Texas Railroad Commission order regarding who could be in charge of train cars for sleeping passengers. In Texas, the majority of trains pulled more than one sleeping car under the charge of caucasian conductors.[26] However, in some areas of Texas where train traffic was less busy, trains only included one car for sleeping passengers. These single sleeping cars were generally under the charge of black porters.[27]

The Texas Railroad Commission ordered all sleeping cars be placed under the charge of conductors, not porters, and the Pullman Company, along with other railroad companies, brought suit in federal court.[28] The Texas Railroad

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> to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional.

Id. at 159.

24. On August 12, 1976, the three-judge panel requirement was abolished. *See* Pub. L. No. 94-381, 90 Stat. 1119 (codified at 28 U.S.C. § 2284 (1982)).

25. 312 U.S. at 496 (1941). For a thorough analysis of the *Pullman* Abstention Doctrine, *see* Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

26. *See Pullman*, 312 U.S. at 497.

27. *See id.* The Court notes that "[a]s is well known, porters on Pullmans are colored and conductors are white." *Id.*

28. *See id.* at 497-98. The order read in pertinent part "'no sleeping car shall

Commission's order was assailed as a violation of Texas law and the United States Constitution, specifically, the Equal Protection, Due Process, and Commerce Clauses.[29] A three-judge panel prohibited enforcement of the order.[30] The federal court found that the Texas Railroad Commission lacked authority to promulgate the order.[31] The Supreme Court reversed the lower court's decision, finding that the three-judge panel should have abstained from reaching the merits of the case.[32]

1. Analyzing the *Pullman* Holding

In *Pullman*, the Supreme Court reiterated the general rule that federal courts ought to avoid reaching a constitutional question if the case can properly be resolved by addressing the state issue.[33] However, the Court not only avoided reaching the constitutional question, it abstained from deciding the case based on state law. According to the Court, since the Texas law was "far from clear,"[34] the Texas Supreme Court, and not the federal courts, should first be afforded the opportunity to interpret state law.[35] The Court

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be operated on any line of railroad in the State of Texas . . . unless such cars are continuously in the charge of an employee . . . having the rank and position of Pullman conductor'." *Id.* (ellipsis in original).

29. *See id.* at 498.

30. *See id.*

31. The Texas Railroad Commission found power to promulgate the order under Tex. Civil Code Ann. § 6445, which granted the authority "to prevent any and all . . . abuses" in conducting the business of the railroad. *See Pullman*, 312 U.S. at 498, n.1.

32. *See Pullman*, 312 U.S. at 501-02.

33. *See id.* at 498. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936) (refusing to reach the constitutional question in instances where other grounds were present through which the Court could settle the controversy). *See also* Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909) (stressing the proper course is to avoid reaching the constitutional question if possible unless "important reasons" support a deviation).

34. *Pullman*, 312 U.S. at 499.

35. Writing for the majority, Justice Frankfurter commented: "Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation." *Id.* Had the state law been unambiguous, the Supreme Court likely would have decided the case on state law. The *Pullman* doctrine is usually invoked when the state law

reasoned that federal courts risked interpreting state law inaccurately when the law is ambiguous and the state courts have not interpreted its meaning.[36] An inaccurate interpretation by federal courts could later be contradicted by the state courts, thus wasting judicial resources and possibly requiring subsequent federal intervention.[37] Therefore, when confronted with an ambiguous state law[38] which has not been interpreted by the state courts, the federal courts should "exercise their wise discretion by staying their hands,"[39] meanwhile retaining jurisdiction to rehear the constitutional issue should the need arise.[40]

The *Pullman* Abstention Doctrine does not apply when the state law is clear and unambiguous, when every application of the state law is unconstitutional, or when the state

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in question is ambiguous and the state courts have not had the opportunity to interpret the law.

36. The Court stated that a federal court's decision on an ambiguous state law which has not yet been interpreted by the state courts would be merely "a forecast" instead of an accurate determination of the law. Railroad Comm'n of Tex. v. Pullman, 312 U.S. 496, 499 (1941).

37. A "tentative answer" to the state law question could be "displaced tomorrow by a state" court's decision, resulting in a waste of the "resources of equity." *Id.* at 500.

38. The use of the term "ambiguous" should not be confused with "vague." A federal court may invalidate a state law because it is vague or overbroad. However, if a state law is susceptible to more than one interpretation with one interpretation rendering it unconstitutional and another rendering it constitutional, then the federal courts should consider abstaining until the state courts have the opportunity to interpret its meaning. However, if it appears the state courts either had the opportunity to interpret itsmeaning, or would probably refrain from interpreting the law, the federal court should not abstain.

39. With shades of Justice Black's later soliloquy on "Our Federalism," in *Younger v. Harris*, 401 U.S. 37 (1971), Justice Frankfurter paid homage to the necessity of giving due regard to the independence of the state and federal systems whereby state governments should be afford the opportunity to order their affairs without federal intervention. *See Pullman*, 312 U.S. 500-01. That the two discourses are similar in rationale is further underscored by Justice O'Connor's discussion of "comity and federalism" concerns in weighing whether federal courts should abstain based on *Pullman*. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 508 (1985) (O'Connor, J., concurring).

40. *See Pullman*, 312 U.S. at 501-02. Although Justice Frankfurter did not direct the lower court to retain jurisdiction for that specific purpose, the evolution of the *Pullman* Abstention Doctrine dictates that federal courts do so. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 (1983); England v. Louisiana State Bd. of Med. Exam'r, 375 U.S. 411 (1964).

courts have had the opportunity to interpret the state law but have not done so. The principle behind *Pullman* rests upon the rule of statutory construction that a state or federal statute is presumed constitutional. When a state statute is ambiguous to the point that one interpretation of its application would be unconstitutional, but another interpretation would be constitutional, then federal courts should allow state courts the first opportunity to interpret the law.[41] *Pullman* obviously does not apply when a federal statute is at issue.

2. The Expansion of the *Pullman* Abstention Doctrine

In 1957, the Supreme Court, in *Government & Civic Employees Organizing Committee v. S.F. Windsor*,[42] partially clarified whether state or federal courts should address a constitutional challenge to state law. *Windsor* involved a federal suit to enjoin the enforcement of an Alabama state statute which denied employment benefits to public employees who joined labor unions.[43] The United States Supreme Court ultimately abstained from reaching the constitutional question.[44] The Court reasoned that the Alabama Supreme

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41. The Court has been inconsistent when deciding whether *Pullman* is appropriate or whether the state law is unclear. *Compare* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) (finding *Pullman* abstention to be inappropriate by the Ninth Circuit because the statute was unclear, but the Supreme Court failed to address it in deciding the case) *with* Harrison v. NAACP, 360 U.S. 167 (1959) (ruling that *Pullman* should be applied because the state did have the opportunity to construe the state statute, despite a lower court's finding that the statute was unconstitutional). For a discussion of the inadequacies of the *Pullman* Abstention Doctrine, *see* Martha A. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977) (arguing that the doctrine is not worth the costs inflicted upon the litigant).

42. 353 U.S. 364 (1957) (*per curiam*).

43. *See id.* The plaintiffs alleged that Alabama Code § 720 (1953) abridged their freedom of speech and association in addition to violating the Due Process, Privileges and Immunities, and Equal Protection Clauses of the Fourteenth Amendment. *See id.*

44. The case was batted up and down both the federal and state court systems before the Supreme Court's final adjudication. First, a three-judge panel abstained from reaching the constitutional question. The Supreme Court affirmed the abstention. The plaintiffs then commenced an action in the Alabama state courts, eventually reaching the Alabama Supreme Court. *See Windsor*, 353 U.S. at 365. Next, the plaintiffs resubmitted the case to the three-judge panel,

Court "might have construed the statute in a different manner" if the court had been presented with the constitutional claim.[45] The fact that the Alabama court did not have the opportunity to construe the statute in light of the constitutional claim meant that any decision by a federal court would result in an insufficient bona fide interpretation of Alabama state law.[46]

The *Windsor* decision caused confusion which remained unsettled until 1964 when the Supreme Court handed down *England v. Louisiana State Board of Medical Examiners*.[47] The *England* Court settled what procedures should be followed if the federal plaintiff desired to preserve the right to a choice of forum.[48] The Court held that a federal plaintiff remanded to a state court proceeding is not forced to litigate the constitutional question in state court.[49] The federal plaintiff is only required to "inform [the state court] what [the] federal claims are, so that the state statute may be

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but the panel dismissed the case finding the issue was resolved by the Alabama courts. The plaintiffs again sought review by the United States Supreme Court. *See id.* The facts of this case provide the greatest fodder for criticism of the *Pullman* Abstention Doctrine. The plaintiffs, exhausted by two fruitless trips to the United States Supreme Court, abandoned their claim after they were directed to pursue their claim a second time in the Alabama state courts. *See* Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1086 n.65 (1974).

45. *Windsor*, 353 U.S. at 366.

46. *See id.*

47. 375 U.S. 411 (1960). The Court's decision in *Windsor* appeared to remove from the federal litigant the right to a choice of forum. As noted later, the *England* Court clarified this matter and preserved the litigant's right to choose a forum.

48. *England*'s facts involved a group of chiropractors who filed suit to enjoin enforcement of the Louisiana Medical Practice Act as applied to them, alleging the Act violated the Fourteenth Amendment. *See England*, 375 U.S. at 412. A three-judge panel abstained per *Pullman*. A state action then commenced resulting in a ruling against the chiropractors. *See id.* at 414. The plaintiffs then returned to the three-judge panel for resubmission of their constitutional issues, but the district court dismissed the action, finding that the case had been resolved by the Louisiana court system. *See id.* However, the district court viewed the case as illustrative of the predicament in which a federal plaintiff can become caught in the web of the *Windsor* decision. *See id.* at 414-15. *See* England v. Louisiana State Bd. of Med. Exam'r, 194 F. Supp. 521, 522 (E.D. La. 1961), *rev'd and remanded*, England v. Louisiana State Bd. of Med. Exam'r, 375 U.S. 411 (1964).

49. *England*, 375 U.S. at 419.

construed 'in light of' those claims."[50] Compliance with *England* can be accomplished by the federal plaintiff clearly stating for the record that, although the constitutional claims are exposed in the state court proceedings, they are exposed solely for the purpose of resolving the statute in light of the constitutional issues, not to litigate the constitutional issues in state court since the plaintiff intends to return to federal court to relitigate the constitutional claims.[51] The federal litigant's right to a choice of forum was therefore preserved by the Court's decision in *England*.[52]

III. THE *YOUNGER* ABSTENTION DOCTRTINE

In addition to the *Pullman* Abstention Doctrine, the federal litigant must also consider the *Younger* Abstention Doctrine which was unveiled by the Court in *Younger v. Harris*.[53] The *Younger* Abstention Doctrine is based upon a long tradition of federalism and comity growing out of English and early American jurisprudence.[54]

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50. *England*, 375 U.S. at 420. However, the Court generously exempted the *England* plaintiffs from this requirement because the Court found that their confusion regarding the *Windsor* decision prompted them to submit their constitutional claims to the state court and that their confusion was justifiable. *See id.* at 422.

51. *See id.* at 421.

52. However, a federal litigant is not prohibited from litigating the constitutional claims in state court. The Court took strides to stress that if the litigant "freely and without reservation" submits the constitutional issues to the state court for the state court's decision, the litigant may do so. The litigant will be bound by the state court decision and cannot avoid a contrary decision by re-litigating the issues in federal court. *See England*, 375 U.S. at 419.

53. 401 U.S. 37 (1971).

54. *See, e.g.*, Anthony J. Dennis, *The Illegitimate Foundations of the Younger Abstention Doctrine*, 10 U. BRIDGEPORT L. REV. 311 (1990); George D. Brown, *When Federalism and Separation of Powers Collide — Rethinking Younger Abstention*, 59 GEO. WASH. L. REV. 114 (1990); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049 (1994); David Logan, *Judicial Federalism in the Court of History*, 66 OR. L. REV. 453 (1988); Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, (1984); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Donald H. Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266 (1976).

A. The Background of the Younger *Abstention Doctrine*

The seeds of the Abstention Doctrine have their roots in English jurisprudence, where courts of equity were prohibited from interfering with criminal proceedings. As early as 1888, in the case of *In re Sawyer*,[55] the United States Supreme Court refused to intervene in a prospective criminal proceeding.[56] The *Sawyer* Court discussed historical English rules for courts of equity and cited the Anti-Injunction Act[57] as a basis for declining to intervene.[58]

In 1908, the Supreme Court decided *Ex parte Young*,[59] rejecting the argument that federal courts lacked the jurisdiction to enjoin prospective state criminal proceedings. Creating a slightly more permissive intervention standard,[60] the Court declared the contested state statute unconstitutional.

In 1926, the Court again tightened the abstention standard *vis-à-vis* the holding of *Fenner v. Boykin*.[61] In discussing *Ex parte Young*, the *Fenner* Court noted that while federal courts may enjoin state proceedings, they may do so only under "extraordinary circumstances where the danger of irreparable loss is both great and immediate."[62] Hence,

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55. 124 U.S. 200 (1888).

56. *See id.* at 209-10, 219-20.

57. *See* 28 U.S.C. § 2283.

58. *See id.* at 220.

59. 209 U.S. 123 (1908).

60. The Court held that "officers of the state . . . who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the . . . Constitution, may be enjoined by a Federal court of equity from such action." *Id.* at 155-56. Although the opinion attempted to reconcile the glaring disparity between *In re Sawyer* and *Ex parte Young*, the Court did so ineffectively, relegating the discussion of *In re Sawyer* to two anemic sentences. *See Ex Parte Young*, 209 U.S. at 162. The two cases can only be reconciled if *Ex parte Young* is viewed as a judicial relaxation of *Sawyer*'s firm principle of non-intervention.

61. 271 U.S. 240 (1926).

62. *Id.* at 243. The Court stated that the criminal defendant must "first set up and rely upon his defense in the state courts" before resorting to federal court. *Id.* at 244. *Ex parte Young* held that assertion of constitutional defenses in the state proceeding was not an adequate remedy at law. 209 U.S. at 164-65.

the *Fenner* Court added a definitive prong upon which later analysis would turn in measuring irreparable harm.[63]

The Court, in 1943, laid another brick in the foundation of the *Younger* Abstention Doctrine. In *Douglas v. City of Jeannette*,[64] the Court declined to intervene in a state court proceeding,[65] despite the fact that the Court could have decided the case without reaching the Abstention Doctrine.[66] Instead, citing *Fenner*,[67] the Court held that the federal plaintiffs had not suffered irreparable injury because they could assert their constitutional defense in the state court proceeding. The Court found that intervention was unnecessary and inappropriate.

The 1965 decision of *Dombrowski v. Pfister*[68] marked a relaxed era in the evolution of Abstention Doctrine. The Court addressed the Anti-Injunction Act,[69] noting that the

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63. *Younger* quotes *Fenner*, noting that the "irreparable injury" must be "both great and immediate." *Younger*, 401 U.S. at 46 (quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926). Before the *Younger* Court gave the four-page *Fenner* opinion a role in jurisprudential history, *Fenner* languished in ignominy. Until the *Younger* decision, the Court's earlier opinion in *Ex parte Young* dominated abstention jurisprudence.

64. 319 U.S. 157 (1943).

65. The state action in question involved the enforcement of Municipal Ordinance No. 60, which prohibited the distribution of wares, merchandise, or other articles without first obtaining a license. Douglas v. City of Jeannette, 319 U.S. 157, 159 (1943). The plaintiffs were Jehovah's Witnesses who had previously been prosecuted and were then threatened with additional prosecution under the ordinance for distributing religious literature.

66. The Court handed down *Murdock v. Pennsylvania* on the same day as *Douglas* 319 U.S. 105 (1943). Both cases involved the exact same ordinance and some of the same plaintiffs. In *Murdock*, the Court declared the ordinance unconstitutional as applied. *See id.* at 115. However, although the Court in *Douglas* mentioned the *Murdock* holding, the Court did not decide the *Douglas* case based on the unconstitutionality of the ordinance. *See Douglas*, 319 U.S. at 159. Rather, the Court chose to abstain. *See id.* at 163. In *Douglas*, the Supreme Court upheld a district court's refusal to enjoin application of a city ordinance to religious solicitation, even though on the same day the Supreme Court in *Murdock* found the statute unconstitutional as applied to a criminal conviction. The Supreme Court reasoned that since injunctive relief looks to the future, and it was not alleged that the state courts and prosecutors would fail to enforce the *Murdock* ruling, the Court found nothing to justify an injunction. *See id.* at 165.

67. 271 U.S. at 240. The Court also cited *Davis & Farnum Manufacturing Co. v. City of Los Angeles*, 189 U.S. 207 (1903).

68. 380 U.S. 479 (1965).

69. *See Dombrowski*, 380 U.S. at 484 n.2; 28 U.S.C. § 2283 (1997). Many of

Act only bars suits involving cases already pending in the state court, but not injunctions against the commencement of state court proceedings.[70] *Dombrowski* noted that in cases involving First Amendment allegations of overbreadth, abstention is not proper.[71] *Dombrowski* appeared to signal a new direction for federal court litigants facing the Abstention Doctrine.

B. Younger *Abstention: The Case*

1. Analyzing the *Younger* Holding

The Supreme Court's decision in *Younger v. Harris*[72] tightened the *Dombrowski* standard and clarified the Court's analysis. The federal plaintiff[73] in *Younger* requested and

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the previous Supreme Court decisions either failed to specifically discuss the Anti-Injunction Act or did so only in general terms. Although at the time of the *In re Sawyer* decision the only exception to the Anti-Injunction Act was a case "authorized by a bankrupt act," later amendments to the Anti-Injunction Act made provision for three exceptions to the general rule against federal court intervention: (1) expressly authorized by Act of Congress; (2) necessary in aid of a federal court's jurisdiction; or (3) as needed to protect or effectuate a federal court's judgments. *See* 28 U.S.C. § 2283 (1997).

70. *See Dombrowski*, 380 U.S. 484 n.2.

71. *See id.* at 486. In *Douglas*, the Supreme Court found abstention was appropriate in part because of an assumption that defense of a criminal prosecution would generally assure ample vindication of constitutional rights. 319 U.S. at 157. However, in the case of an overly broad statute which chills free expression, this assumption is not warranted. According to *Dombrowski*, the threat of sanctions may deter free speech, and therefore in the context of First Amendment freedoms, the Supreme Court has "not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression – of transcendent value to all society, and not merely to those exercising their rights – might be the loser." *Id.* at 486.

72. 401 U.S. 37 (1971). The Court decided five companion cases on the same day. In *Boyle v. Landry*, 401 U.S. 77 (1971), the Court reversed the lower court's decision citing a lack of irreparable injury to plaintiffs. The Court in *Perez v. Ledesma*, 401 U.S. 82 (1971), reversed, based in part on *Younger*'s principles, the lower court's suppression order. In *Samuels v. Mackell*, 401 U.S. 66 (1971), the Court held the same policies articulated in *Younger* regarding injunctive relief should be utilized in determining whether to issue declaratory relief. Both *Dyson v. Stein*, 401 U.S. 200 (1971), and *Byrne v. Karalexis*, 401 U.S. 216 (1971), were per curiam reversals based on abstention rationale.

73. Although John Harris was the party indicted and the original federal plaintiff, Jim Dan, Diane Hirsch, and Farrell Broslawsky intervened in the suit, claiming that Harris' prosecution would cause them to "suffer immediate and

received injunctive relief[74] from a three-judge district court panel[75] which enjoined the district attorney[76] from prosecuting Harris under an unconstitutional statute.[77]

Writing for the majority, Justice Black reversed the lower court's decision based on sensitivity with respect to equity,[78] comity,[79] and federalism.[80] The general rule pro-

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irreparable injury." Younger v. Harris, 401 U.S. 37, 39 (1971). However, the Court held the intervenors lacked a genuine controversy and therefore had no standing to join the action. *See id.* at 42.

74. The federal plaintiff also requested that the district court "grant 'such other and further relief as to the Court may seem just and proper'" which, in a footnote, the Supreme Court stated was an improper request for declaratory relief. *Younger*, 401 U.S. at 39 n.2.

75. Before 1976, constitutional challenges to state laws required the assembly of a special panel of three judges. On August 12, 1976, the three-judge panel requirement was abolished. *See* Pub. L. No. 94-381, 90 Stat. § 1119 (codified at 28 U.S.C. § 2284 (1982)).

76. Evelle J. Younger was the state district attorney from Los Angeles County. *See Younger*, 401 U.S. at 39.

77. The statute in question was the California Criminal Syndicalism Act, CAL. PENAL CODE §§ 11400-11401 (West 1982). In *Whitney v. California*, 274 U.S. 357 (1927), the Supreme Court upheld the constitutionality of the California Criminal Syndicalism Act, but later specifically overruled the *Whitney* Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (*per curiam*), by holding a similar statute, the Ohio Criminal Syndicalism Act, repugnant to the Federal Constitution.

78. Longstanding equitable principles of English jurisprudence, dating as far back as the sixteenth and seventeenth centuries, dictate that courts of equity should not interfere with criminal proceedings. *See* Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C. L. REV. 591, 606 (1975). Equitable intervention requires the court to consider: (1) whether the party in the criminal proceeding has an adequate remedy at common law; and (2) whether the party will suffer irreparable injury if the court denies equitable relief and refuses to interfere with the criminal proceeding. *See id.* at 600-04. As Justice Black's citation to the theory of equitable jurisprudence denotes, these two pillars of equity jurisprudence are still utilized in American jurisprudence in deciding whether to exercise equitable powers. *Younger*, 401 U.S. at 43-44.

79. Comity encompasses the notion that, based on judicial courtesy and deference, the courts of one jurisdiction will give credit and effect to the laws and judicial holdings of courts from another jurisdiction. *See* Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 349 (1930).

80. The Court entwines the concepts of comity and federalism so tightly that it is virtually impossible to discern where one concept begins and the other ends. *See Younger*, 401 U.S. at 45. Justice Black terms "Our Federalism" as the "recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to

vides that federal courts should not interfere with pending, ongoing state criminal proceedings except under "special circumstances."[81] Special circumstances[82] include prosecutorial bad faith[83] or blatant and flagrant unconstitutional construction.[84] However, the Court expressed no opinion "about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun."[85]

The Court held that although Harris had an actual controversy[86] with the state because he was actually facing

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perform their separate functions in their separate ways." *Id.* at 44. Justice Black's eloquent description of our federalist form of government has ignited heated debate among legal scholars regarding the proper amount of deference for states' rights shown by the Court via utilization of abstention doctrines. *See* Donald H. Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266 (1976); Howard B. Stravitz, *Younger Abstention Reaches a Civil Maturity: Pennzoil Co. v. Texaco*, 57 FORDHAM L. REV. 997 (1989); *but see* Georgene M. Vairo, *Making Younger Civil: The Consequences of Federal Deference to State Court Proceedings A Response to Professor Stravitz*, 58 FORDHAM L. REV. 173 (1989). *Cf.* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987) (arguing that only states which fail to follow the federal design of the law should face federal court intervention).

81. *Younger*, 401 U.S. at 41. The Court later states that the "normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Id.* at 45. This appears to contradict the Court's practice prior to the *Younger* decision when the Warren Court permitted intervention in state court criminal prosecutions. *See* Martin H. Redish, *The Warren Court, the Burger Court, and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031 (1983) (comparing the two Chief Justices' legacies for willingness to intervene and stray into activist territory).

82. In a footnote, the *Younger* Court discussed its holding in *Samuels v. Mackell*, 401 U.S. 66 (1971), noting that declaratory relief is also improper when a prosecution involving a challenge to a state statute is pending in state court at the time the federal suit is initiated. *See Younger*, 401 U.S. at 41 n.2.

83. *See Younger*, 401 U.S. at 49-50, 56. Prosecutorial exception is akin to a glass house, devoid of protection. *See* C. Keith Wingate, *The Bad Faith Harassment Exception to the Younger Doctrine: Exploring the Empty Universe*, 5 REV. LITIGATION 123 (1986).

84. *See Younger*, 401 U.S. 37 at 56 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

85. *Younger*, 401 U.S. at 41. The lack of ongoing state proceedings involving the federal plaintiff is a major exception to the *Younger* Abstention Doctrine.

86. The Court first defined "case or controversy" in *Muskrat v. United States*, 219 U.S. 346, 253-54 (1911) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803) and *In re Pacific Ry. Comm'n*, 32 FED. 241 (1887)), in discussing the re-

prosecution, the other three plaintiff-intervenors did not have an actual controversy and lacked standing.[87] Intervenors Dan, Hirsch, and Broslawsky merely alleged they felt inhibited from exercising their constitutional rights.[88] The Court found their vague, speculative inhibitions insufficient to grant standing.[89] The Court hypothesized that an actual controversy might exist for the three plaintiff-intervenors had they alleged a threat of prosecution, the likelihood of prosecution, or a remote possibility of prosecution,[90] but mere speculation of prosecution is insufficient to provide a basis for suit.[91] Thus, only Harris had standing to bring suit.[92]

The Court's core holding is that, absent special circumstances, a criminal defendant may not enjoin a pending, ongoing, state prosecution by filing an action in federal

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quirement that the exercise of judicial power is limited by the Constitution to "cases" and "controversies."

87. *See Younger*, 401 U.S. at 41-42.

88. *See id.* at 42. Intervenors Dan and Hirsch alleged they felt inhibited to advocate the replacement of capitalism with socialism while Intervenor Broslawsky felt uncertain whether he could, as part of his class studies, teach Karl Marx's doctrines or read from the Communist Manifesto. *See id.* at 39-40.

89. Emanating from the case or controversy requirement is the requirement that the federal plaintiff must have "standing" to bring the lawsuit. The federal plaintiff must show both a palpable injury and a traceable connection between the injury and the conduct of the offender. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-64 (1992); Gollust v. Mendell, 501 U.S. 115, 125 (1991); International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 77-78 (1991).

90. If the three plaintiff-intervenors alleged a threat of prosecution, the Court probably would not have abstained from deciding their claims. Federal injunctive relief would be proper for these three plaintiff-intervenors because they, unlike Harris, were not parties to any ongoing state criminal proceedings.

91. Here *Younger* cited *Golden v. Zwickler*, 394 U.S. 103 (1969), where the Court found the plaintiff's controversy to be purely conjectural in nature and without a basis in reality. The dispute was previously argued in *Zwickler v. Koota*, 389 U.S. 241 (1967), where the Court ruled that the lower court erred in abstaining from deciding the federal plaintiff's constitutional claim regarding the distribution of anonymous campaign literature. *See id.* at 254. In *Golden*, the federal plaintiff, was a former candidate for the House of Representatives who had since been appointed to the New York State Supreme Court and, according to the Court, would not, in all likelihood, ever again be a candidate for the House of Representatives and would probably never again face the threat to his constitutional rights. *See Golden*, 394 U.S. at 109.

92. *See* Younger v. Harris, 401 U.S. 37, 41-42 (1971).

court. The key to the Court's decision was the fact that the federal plaintiff, Harris, was then a subject of a pending state prosecution.[93] Harris was indicted in a California state court prior to filing his federal complaint.[94] Because Harris would have the opportunity to raise his constitutional defenses in the state court proceeding,[95] the Court held he was not in danger of suffering irreparable injury.[96] To enjoin the pending State prosecution would be to crack the doctrinal foundation described by the Court as "Our Federalism."[97] Abstention was necessary to preserve the separate functions of the state and federal governments.

The *Younger* Court specifically refused to express any "view about the circumstances under which federal courts may act *when there is no prosecution pending in state courts at the time the federal proceeding is begun.*"[98] In a separate concurring opinion,[99] Justice Stewart emphasized that *Younger* dealt "only with the proper policy to be followed by a federal court when asked to intervene . . . in a criminal prosecution which is contemporaneously pending in a state court."[100] Justice Stewart further noted that the *Younger* decision did not "resolve the problems involved when a fed-

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93. *See id.* at 39-40.

94. *See id.*

95. *See Younger*, 401 U.S. at 49-50. The Court distinguished Harris' opportunity to raise his constitutional claims in the state proceeding from the federal plaintiff in *Dombrowski*, where the federal plaintiff was not assured that raising the constitutional claims in the state proceedings would result in the vindication of the violated constitutional rights because the threatened prosecution was employed to harass the defendants. 380 U.S. at 479.

96. The Court stated that even irreparable injury is "insufficient unless it is 'both great and immediate.'" *Younger*, 401 U.S. at 46 (quoting Fenner v. Boykin, 271 U.S. 240, 243-44 (1926). In his concurring opinion which Justice Harlan joined, Justice Stewart defined a threat that is great and immediate to include "official lawlessness" of the sort that amounts to bad faith prosecution or official harassment. *Younger*, 401 U.S. 37, 56 (1971) (Stewart, J., concurring).

97. For an analysis of whether the federalist defense of judicial review can be sustained under modern scrutiny, *see* Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers*, 61 CAL. L. REV. 1669 (1988).

98. *Younger*, 401 U.S. at 41 (emphasis added).

99. The concurring opinion also applies to *Samuels v. Mackell*, 401 U.S. 66 (1971); *Fernandez v. Mackell*, 401 U.S. 66 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); and *Byrne v. Karalexis*, 401 U.S. 216 (1971).

100. *Younger*, 401 U.S. at 55 (Stewart, J., concurring).

eral court is asked to give injunctive . . . relief from *future* state criminal prosecutions,"[101] because *Younger* clearly confined "itself to deciding the policy considerations that . . . must prevail when federal courts are asked to interfere with pending state prosecutions."[102]

The import of the pending state proceeding was further emphasized by the Court's later decision in *Steffel v. Thompson*.[103] In *Steffel*, the Supreme Court answered the question specifically reserved in *Samuels*:[104] "whether declaratory relief is precluded when a state prosecution has been threatened, but is not pending, and a showing of bad faith enforcement or other special circumstances has not been made."[105] The Supreme Court was advised at oral argument that a state court proceeding was concurrently addressing the same issues presented in the federal court.[106] Nevertheless, the Court refused to abstain.

The litigant in *Steffel* was not involved in any pending state court proceedings but had been threatened with arrest under a state criminal statute.[107] Steffel filed suit in the district court seeking injunctive and declaratory relief restraining the respondents from enforcing a state statute in violation of his protected constitutional rights, but the district court denied all requested relief finding the suit lacking in "'the rudiments of an active controversy between the parties.'"[108] Plaintiff Steffel appealed the denial of declaratory relief to the Fifth Circuit Court of Appeals.[109]

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101. *Id.* at 55 (emphasis in the original).

102. *Id.* at 56.

103. 415 U.S. 452 (1974).

104. 401 U.S. at 66; *see also* Steffel v. Thompson, 415 U.S. 452, 454 (1974).

105. *Steffel*, 415 U.S. at 454. In *Steffel*, Guy Steffel and a companion were handbilling against American involvement in Vietnam at the North Dekalb Shopping Center. Police officers told them to stop handbilling or face arrest. While Mr. Steffel ceased handbilling when he left the shopping center, his companion stayed on the premises, continued handbilling, and was arrested. *See id.* at 455-56.

106. Steffel's companion pursued a claim for relief in the state court system, while Steffel, who was not arrested, pursued a claim for relief through the federal court system. *See id.* at 456.

107. The threatened charge was criminal trespass in violation of Ga. Code Ann. § 26-1503 (1972). *See Steffel*, 415 U.S. at 456.

108. *Id.*

109. Steffel abandoned his appeal from denial of injunctive relief in his appel-

The Fifth Circuit recognized that *Younger* and *Samuels* were expressly limited to circumstances where state prosecutions were pending when the federal action was initiated, but the court refused to grant relief based on the opinion that the irreparable injury standard also applied to requests "'for injunctive relief against *threatened* state court criminal prosecution' as well as against a pending prosecution."[110] Steffel then appealed to the United States Supreme Court. Writing for the Court, and reaffirming the need for sensitivity toward the notions enumerated in *Younger*, Justice Brennan observed that "[n]either *Younger* nor *Samuels*, however, decided the question whether federal intervention might be permissible in the absence of a pending state prosecution."[111] The *Steffel* decision answered this question by holding:

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.[112]

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late brief. He appealed only the denial of declaratory relief. *See Steffel*, 415 U.S. at 456 n.6.

110. *Id.* at 457.

111. *Id.* at 461.

112. *Id.* at 462. "Appellants in these two cases were all indicted in a New York State Court on charges of criminal anarchy." *Samuels*, 401 U.S. at 67. *Steffel* pointed out that in the absence of a pending state action, the Abstention Doctrine is not applicable:

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

Steffel, 415 U.S. at 462. In *Connecticut Magazine v. Moraghan*, 676 F. Supp. 38 (D. Conn. 1987), the court refused to abstain in a case involving a federal plaintiff who was not a party to the underlying state action and who filed a federal challenge to the enforcement of a state court order. Since there was no pending prosecution against the federal plaintiff, and thus no adequate remedy

The Court observed that in *Roe v. Wade*,[113] while the prosecution of Dr. Halliford for violating a Texas abortion law was pending, the federal court was not prevented from granting Plaintiff Roe, against whom no action was pending, a declaratory judgment that the statute was unconstitutional.[114] Justice Brennan stated: "[T]he relevant principles of equity, comity, and federalism 'have little force in the absence of a *pending* state proceeding.'"[115] The focus is on pending state action against the federal plaintiff rather than pending state action against some other third party. Although similar questions may be litigated in the state claim, "Abstention would be improper in a case merely because the same federal law questions presented are also being litigated in another case."[116]

In *Wooley v. Maynard*,[117] the federal plaintiff was arrested, prosecuted, convicted, and sentenced for violating the state law which required the display of a particular license plate on all automobiles registered within the state. After serving his sentence, the state court defendant filed a claim in federal court seeking to enjoin enforcement of the state statute on the basis that the statute was in violation of the First Amendment. In addressing the principles of equitable restraint enunciated in *Younger*, the Supreme Court noted that the federal plaintiff was not attempting to annul the results of a state trial, but rather was trying to obtain prospective relief to preclude future prosecution under the statute. Under those circumstances, the federal plaintiff could not "be denied consideration of a federal remedy."[118]

The two pillars of *Younger* include (1) a pending state proceeding (2) against the same party bringing the federal action. The *Younger* Abstention Doctrine does not apply

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available to the federal plaintiff, the court refused to abstain.

113. 410 U.S. 113 (1973).

114. *See Steffel*, 415 U.S. at 471 n.19.

115. *Id.* at 462 (quoting Lake Carriers Ass'n v. MacMullan, 406 U.S. 498, 509 (1972)) (emphasis added).

116. Collin v. Smith, 447 F. Supp. 676, 683 (E. D. Ill. 1978).

117. 430 U.S. 705 (1977).

118. *Id.* at 71.

when there is no pending state proceeding against the federal plaintiff at the time the federal complaint is filed.

2. The Expansion of the *Younger* Abstention Doctrine

The Supreme Court's decision in *Younger* dealt only with federal court intervention in pending, ongoing state *criminal* prosecutions. However, since the Court's 1971 opinion, the *Younger* Abstention Doctrine has been expanded to apply to more than just state criminal proceedings.

a. Declaratory Relief

Applying the *Younger* Abstention Doctrine, the *Samuels* Court declined federal intervention in an ongoing state proceeding despite the fact that the plaintiff requested both injunctive and declaratory relief.[119] In *Samuels* the Supreme Court found very little difference between injunctive and declaratory relief since

> [t]he Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting "[f]urther necessary or proper relief," and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to "protect or effectuate" the declaratory judgment, and thus result in a clearly improper interference with the state proceedings.[120]

The Supreme Court therefore held that

> in cases where the state criminal prosecution was begun prior to the federal suit, the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, in that wherein an injunction would be

119. *See id.* at 72.
120. *Id.* (internal citations omitted).

> impermissible under these principles, declaratory relief should ordinarily be denied as well.[121]

The Court also made clear its decision did not suggest that a declaratory judgment should never be issued in cases where injunctive relief would be considered improper.[122] The Court pointed out that

> there may be unusual circumstances [where even though] an injunction might be withheld, . . . a declaratory judgment might be appropriate and might not be contrary to the basic equitable doctrines governing the availability of relief.[123]

The same day in which *Younger* was decided, the Court handed down *Samuels v. Mackell*,[124] that expanded *Younger*'s proscription against federal injunctive relief involving a pending state criminal proceeding to also apply to declaratory relief.

b. Quasi-Criminal Proceedings

Huffman involved an Ohio public nuisance statute which provided, *inter alia*, that a place exhibiting obscene films was considered a nuisance.[125] Any establishment violating the statute was subject to closure for up to one year and any items considered obscene were subject to a forced sale.[126] In *Huffman*, a state trial court ruled in favor of the city in an action brought against a theater owner. Instead of appealing the state decision, the theater owner filed suit in the federal district court, alleging that the city's use of the statute deprived the owner of certain constitutional rights. The owner sought both injunctive and declaratory relief.[127]

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121. *Id.* at 73.
122. *Id.*
123. *Id.*
124. *See* 401 U.S. at 66.
125. *Id.*
126. *Id.*
127. *Id.*

The district court found the nuisance statute unconstitutional under the First Amendment and enjoined execution of the state court's judgment. The Supreme Court noted that the federalism principle enunciated in *Younger* applied with equal force to civil proceedings that essentially were quasi-criminal in nature.[128] The Court found critical similarities between a criminal prosecution and the Ohio nuisance proceedings.[129] The Court found that the *Younger* Abstention Doctrine should apply in part because the theater owner could have reached the same Supreme Court by proceeding through the state appellant process. Instead, the theater sought to use the federal court as a type of an appellate court over the state court proceeding.[130] The next expansion occurred in 1975 with *Huffman v. Pursue, Ltd.*,[131] where the Court expanded *Younger* to encompass quasi-criminal cases.[132]

c. Quasi-Judicial Proceedings

In another case which arose out of the state of Ohio, a religious school brought a civil rights action against the Ohio Civil Rights Commission, seeking to enjoin the Commission from exercising jurisdiction over a sex discrimination complaint brought by a discharged teacher.[133] After a pregnant teacher was told that her employment contract would not be renewed because of the school's religious doctrine that mothers should stay at home with their pre-school children, she contacted an attorney who threatened suit.[134] The school

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128. *Id.* at 604.
129. *Id.*
130. *Id.* at 605-06.
131. 420 U.S. 592 (1975).
132. The Court based its decision in part on the finding that the civil enforcement was "in aid of and closely related to criminal statutes." *Huffman*, 420 U.S. at 604. In his dissent, Justice Brennan, with whom Justices Douglas and Marshall joined, vigorously contested the above quoted language as "the first step toward extending to state *civil* proceedings generally the holding" in *Younger*, an extension with which he disagreed. *Id.* at 613-18 (Brennan, J., dissenting).
133. *See* Ohio Civil Rights Comm'n v. Dayton Christian Sch., 477 U.S. 619 (1986).
134. *See id.*

then rescinded its decision not to renew the teacher, but terminated her anyway because of her violation of their internal dispute resolution doctrine. The teacher then filed a complaint with the Ohio Civil Rights Commission. The Commission initiated administrative proceedings against the school.[135] During the pendency of the administrative proceedings, the religious school filed suit in federal district court seeking an injunction against the administrative process. The district court refused to enter an injunction, but the court of appeals reversed, relying on the Free Exercise Clause and the Establishment Clause of the First Amendment.[136] The Supreme Court ruled that the federal courts should have abstained from adjudicating the case under the *Younger* Abstention Doctrine.[137] The Court therefore held that the *Younger* Abstention Doctrine was applicable to quasi-judicial proceedings.[138] Following *Huffman*, the Court inexorably expanded *Younger* to include not only quasi-criminal cases,[139] but quasi-judicial cases.[140]

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135. *See id.*

136. *See id.* at 619-20.

137. *Id.* at 620. Citing Gibson v. Berryhill, 411 U.S. 564, 576-77 (1933), the Court noted that administrative proceedings looking toward the revocation of a license to practice medicine may in certain circumstances command a respect equal to typical court proceedings. The Court also pointed out that abstention may apply to preclude a federal court from enjoining lawyer disciplinary proceedings initiated by state ethics committees. *Dayton Christian Sch.*, 477 U.S. at 628 (citing Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982)) (administrative proceedings involving Bar disciplinary actions are "judicial in nature").

138. *See Dayton Christian Sch.*, 477 U.S. at 628.

139. *See also* Juidice v. Vail, 430 U.S. 327 (1977) (applying the principles of *Younger* abstention to appeals of contempt of court in judgment creditor action); Trainor v. Hernandez, 431 U.S. 434 (1977) (applying *Younger* to attachment proceedings); Moore v. Sims, 442 U.S. 415 (1979) (applying *Younger* to a Texas child welfare agency involving the loss of custody of a child based on allegations of child abuse).

140. *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986).

d. Civil Proceedings

In *Penzoil Co. v. Texaco, Inc.*,[141] a judgment debtor filed suit in federal district court challenging a Texas state court judgment in excess of eleven billion dollars and further challenged the constitutionality of the Texas judgment lien and appeal bond provisions which required that a bond be posted in excess of thirteen billion dollars. Under Texas law a judgment creditor can execute a lien on a judgment debtor's property unless the debtor files a Supersedeas Bond in at least the amount of the judgment plus interest and cost.[142] After the jury's verdict, but before the trial court entered judgment, it was clear that Texaco would not be able to post a bond in the amount of thirteen billion dollars. Since Texaco would not be able to post such a high bond, Penzoil would have been able to commence enforcement of the judgment on the verdict even before Texaco's appeal had been resolved.[143] Therefore, Texaco filed suit in federal district court claiming that the proceedings violated rights secured by the Constitution and various federal statutes. Texaco asked the district court to enjoin Penzoil from taking any enforcement action. The district court ruled in favor of Texaco and issued a preliminary injunction.[144] Applying the *Younger* Abstention Doctrine, the Supreme Court ruled that the court should have abstained under the principles of federalism.[145] More particularly, the Court pointed to the fact that the Texas courts never had the opportunity to construe the statute and thus federal intervention would have deprived the Texas courts of "an opportunity to adjudicate its constitutional claims."[146] In making this statement the Supreme Court clearly had in mind the principles annunciated in the *Pullman* Abstention Doctrine. Though the Supreme Court did not focus on the fact that this case involved

141. *See id.*
142. *See id.* at 6.
143. *See id.* at 6.
144. *See id.* at 8.
145. *See id.* at 10.
146. *Id.* at 17.

purely a civil matter, it is clear that the Court extended the Abstention Doctrine to civil proceedings. The Supreme Court eventually expanded the *Younger* Abstention Doctrine to civil proceedings.[147]

IV. THE *ROOKER-FELDMAN* ABSTENTION DOCTRINE

The so-called *Rooker-Feldman* Abstention Doctrine originated in the case of *Rooker v. Fidelity Trust Co.*,[148] and *District of Columbia Court of Appeals v. Feldman*.[149] The concept underlying the *Rooker-Feldman* Abstention Doctrine is that Congress has conferred only original jurisdiction, not appellate jurisdiction, on the federal district courts. The *Rooker-Feldman* Doctrine exists to prevent a party in a state court from having two bites at the apple: one through the state courts up through the United States Supreme Court, and a subsequent collateral attack through the federal courts. The *Rooker-Feldman* Abstention Doctrine prohibits a party who litigates a case up through the state court system, and not content with the ruling handed down by the state court, ceases litigation and then begins the same litigation in the federal court system. In other words, rather than choosing to request the United States Supreme Court by *writ of certiori* to review the case, the party ceases litigation and begins litigating the identical issue in the federal district court. The *Rooker-Feldman* Abstention Doctrine essentially holds that the federal district court does not have appellate jurisdiction over the state court. The avenue for the state court party is to continue through the state court proceeding up to the United States Supreme Court if possible. The *Rooker-Feldman* Abstention Doctrine is inapplicable in cases where the federal plaintiff was not a party to the state court proceeding. "The *Rooker-Feldman* Abstention Doctrine does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court."[150] In *Valenti v. Mitchell*,[151] the Third Circuit

147. *See, e.g.*, Pennzoil v. Texaco, 481 U.S. 1 (1987) (where neither party was the state).

148. 263 U.S. 413 (1923).

149. 460 U.S. 462 (1983).

150. United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995). The Sixth

stated it could find "no authority which would extend the *Rooker-Feldman* Abstention Doctrine to persons not parties to the proceedings before the State Supreme Court . . . ."[152]

The *Rooker-Feldman* Abstention Doctrine does not apply where the federal plaintiff was not a party to the state litigation. Moreover, the Supreme Court, in *Martin v. Wilks,*[153] has clearly established that a federal plaintiff is not required to intervene in a state court proceeding in order to protect threatened constitutional rights:

> Petitioners argue that, because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an impermissible "collateral attack" . . . . The position has sufficient appeal to have commanded the approval of the great majority of the Federal Courts of Appeals, but we agree with the contrary view . . . The law does not impose upon any person absolutely entitled to a hearing the burden of

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Circuit in *Owens* observed the following:

> Neither the Postal Service nor any other federal defendant was a party to the action in the Ohio courts . . . Clearly, a party cannot be said to be appealing a decision by a state court when it was not a party to the case. The *Rooker-Feldman* Doctrine does not apply to bar a suit in federal court brought by a party that was not a party in a preceding action in state court. . . . A party has no obligation to attempt to intervene in a state court action when it is not named in the suit in order to preserve its rights. Because the Postal Service was not a party in a state court action in this case, the *Rooker-Feldman* Doctrine does not apply and the district court properly exercised its jurisdiction.

Owens, 54 F.3d at 274.

151. 962 F.2d 288 (3d Cir. 1992).

152. *Id.* at 297-98. In *Huffman*, 420 U.S. at 598, the federal party was also party to a state court action prior to the time the federal suit was initiated. The federal plaintiff sought federal court review of a state court ruling. Following the entry of judgment by the state court, the state court defendant filed suit in federal court seeking injunctive and declaratory relief to enjoin prosecution. "Rather than appealing [the state court] judgment within the Ohio court system, [the state court defendants] immediately filed suit in the United States District Court for the Northern District of Ohio." Huffman, 420 U.S. at 598. Here *Rooker-Feldman* abstention was appropriate because the state court parties sought to use the federal courts as an appellate court.

153. 490 U.S. 755 (1989).

> voluntary intervention in a suit to which he is a stranger.[154]

Indeed, the *Rooker-Feldman* Abstention Doctrine does not require "that persons claiming a violation of their federal rights have an obligation before turning to [a] federal court to see whether there is some state court proceeding that they might join in order to present their federal claims there."[155] "A nonparty is not precluded from relitigating matters decided in a prior action simply because it passed by an opportunity to intervene."[156] Moreover, the Supreme Court stated, in *Steffel v. Thompson*, that a federal plaintiff is not required "first to seek vindication of his federal rights in a state declaratory judgment action."[157] A federal plaintiff is "not required to utilize state judicial remedies before, or instead of, bringing a Section 1983 action in federal court."[158]

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154. *Id.* at 762-63 (citations omitted). In *Huffman*, the Court addressed the issue of exhausting state remedies. At the time the state court party filed suit in federal district court, "it had available the remedy of appeal to the Ohio Appellate Court." 420 U.S. at 610. *Huffman* clarified its opinion by stating the following:

> By requiring [an] exhaustion of state appellate remedies for the purposes of applying *Younger*[,] we in no way undermine *Monroe v. Pape*, 365 U.S. 167 (1961). There we held that one seeking redress under 42 U.S.C. § 1983 for a deprivation of federal rights need not first initiate state proceedings based on related state causes of action. *Id.* at 183. *Monroe v. Pape* had nothing to do with the problem presently before us, that of the deference to be accorded state proceedings *which have already been initiated and which afford a competent tribunal for the resolution of federal issues.* Our exhaustion requirement is likewise not inconsistent with such cases as *City Bank Farmers' Trust Company v. Schnader*, 291 U.S. 24 (1934) and *Bacon v. Rutland R. Company*, 232 U.S. 134 (1914), which expressed the doctrine that a federal equity plaintiff challenging state administrative action need not have exhausted his state judicial remedies. Those cases did not deal with situations in which the state judicial process had been initiated.

Huffman, 420 U.S. at 609 n.21 (emphasis added).

155. Hoover v. Wagner, 47 F.3d 845, 848 (7th Cir. 1995).

156. Valenti v. Mitchell, 962 F.2d 288 (3rd Cir. 1992). *See also* Bickham v. Lashof, 620 F.2d 1238, 1243-45 (7th Cir. 1980).

157. 415 U.S. at 475.

158. Leaf v. Supreme Court of State of Wisconsin, 979 F.2d 589, 598 (7th Cir. 1992) (citing Patsy v. Board of Regents, 457 U.S. 496, 516 (1982)). In *Guarino v. Larson*, 11 F.3d 1151 (3d Cir. 1993), the Third Circuit noted the following:

V. THE *BRILLHART* ABSTENTION DOCTRINE

The *Brillhart* Abstention Doctrine originated in the case of *Brillhart v. Excess Insurance Co.*[159] To properly apply *Brillhart* it is essential to understand that the facts of the case dealt with (1) a pending parallel state suit, and (2) the Declaratory Judgment Act.[160] Anticipating a coercive suit, an insurance company sought declaratory relief in federal court of nonliability on an insurance policy. The issues presented in the federal court involved only *state* claims which were parallel to the state issues in the pending state proceeding. The United States Supreme Court affirmed the dismissal of the suit, agreeing that although the district court had jurisdication to hear the suit, "it was under no compulsion to exercise that jurisdiction."[161] The Supreme Court also agreed that when federal courts are presented with a suit under the Declaratory Judgment Act and there is a pending parallel state proceeding, the question is whether the controversy "can better be settled in the proceeding pending in the state court."[162]

> Our holding only applies where a litigant has been summoned to participate in a state court proceeding or has voluntarily chosen a state forum for some of his or her claims. In such cases, a litigant must present all of his or her claims arising from the same transaction in order to avoid waiving those claims he or she does not raise. We are not asserting that a litigant who has an opportunity to choose between a state or federal forum to raise his or her initial claim must choose a state forum in order to avoid waiver.

Id. at 1161 n.7.

159. 316 U.S. 491 (1942).

160. *See* 28 U.S.C. § 2201(a) (1997). The Act provides that a court "may declare the rights and other legal relations of any interested party seeking such declaration." *Id.*

161. *Brillhart*, 316 U.S. at 494.

162. *Id.* at 495. Although *Brillhart* did not set out an exclusive list of factors governing a federal court's exercise of this discretion, it did provide some useful guidance. For example, the district court should examine "the scope of the pending state court proceeding and the nature of the defenses open there." *Id.* This inquiry requires the court to consider "whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc." *Id.* "[A]t least where another suit involving the same parties and presenting opportunity for ventilation of the same state law issues is pend-

Some time after *Brillhart* was decided, the Supreme Court handed down *Colorado River Water Conservaton District v. United States*[163] and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[164] Under the *Colorado River* Abstention Doctrine a federal court may abstain only under "exceptional circumstances."[165] A split of opinion arose among the circuit courts wherein some held that a federal court may stay a declaratory judgment action in favor of a pending parallel state proceeding under only exceptional circumstances,[166] whereas other circuit courts held that the more discretionary *Brillhart* standard applies to declaratory actions when there is a parallel state proceeding.[167] The Supreme Court resolved this dispute in *Wilton v. Seven Falls Co.*[168] The Court noted that *Brillhart* had not been overruled by *Colorado River* or *Moses H. Cone* in that neither case dealt with the Declaratory Judgment Act.[169] "Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and sustantial discretion in deciding whether to declare the rights of litigants."[170] The *Wilton* Court noted that the De-

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ing in state court, a district court might be indulging in '[g]ratuitous interference,' if it permitted the federal declaratory action to proceed." *Wilton*, 515 U.S. at 283 (quoting *Brillhart*, 316 U.S. at 495).

163. 424 U.S. 800 (1976).

164. 460 U.S. 1 (1983).

165. *Colorado River*, 424 U.S. at 813.

166. *See, e.g.*, Employers Ins. of Wausau v. Missouri Elec. Works, 23 F.3d 1372, 1374 n.3 (8th Cir. 1994) (stating that, pursuant to *Colorado River* and *Moses H. Cone*, a district court may not stay or dismiss a declaratory judgment action absent "exceptional circumstances"); Lumbermens Mutual Cas. Co. v. Connecticut Bank & Trust, 806 F.2d 411, 413 (2d Cir. 1986).

167. Travelers Ins. Co. v. Louisiana Farm Bureau Fed., Inc., 996 F.2d 774, 778 n.12 (5th Cir. 1993) (holding that the "exceptional circumstances" test of *Colorado River* and *Moses H. Cone* is inapplicable in declaratory judgment actions); Mitcheson v. Harris, 955 F.2d 235, 237-38 (4th Cir. 1992).

168. 515 U.S. 277 (1995).

169. *See Wilton*, 515 U.S. at 285.

170. *Id. See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); E. Borchard, *Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 MINN. L. REV. 677 (1942); Edwin Borchard, DECLARATORY JUDGMENTS 312-14 (2d ed. 1941).

claratory Judgment Act creates "an opportunity, rather than a duty," to grant relief to qualifying litigants.[171]

The rule then under the *Brillhart* Absention Doctrine is that when a federal court is faced with a suit involving the resolution of state issues brought under the Declaratory Judgment Act by parties who are also parties in a pending parallel state proceding, the court has substantial discretion to stay the proceedings in favor of the pending state suit.[172] In such a case the *Colorado River* and *Moses H. Cone* "exceptional circumstances" test is inapplicable.[173]

VI. THE *COLORADO RIVER* ABSTENTION DOCTRINE

The *Colorado River* Abstention Doctrine originated in the case of *Colorado River Water Conservation District v. United States*.[174] Considerations underlying the *Colorado River* Abstention Doctrine include conservation of judicial resources and comprehensive disposition of litigation.[175] Under the *Colorado River* Abstention Doctrine, a federal court may abstain from hearing a claim when there is a pending state proceeding only under "exceptional circum-

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171. 515 U.S. at 288.

172. *See id.* at 289-90.

173. *Id.*

174. 424 U.S. 800 (1976). The facts in *Colorado River* involved the management and allocation of water. Colorado enacted legislation under which the state was divided into seven Water Divisions, each with a procedure designed to resolve disputes regarding water claims. Seeking to adjudicate reserved rights claimed on behalf of itself and certain Indian tribes, as well as rights based on state law in one of the Water Divisions, the United States, which had previously asserted non-Indian reserved water rights in three other State Water Divisions, brought suit in federal district court. One of the federal defendants sought in state court to make the Government a party to proceedings in one of the Water Divisions for the purposes of adjudicating all of the Government's claims, both state and federal, pursuant to The McCarran Amendment, 43 U.S.C. § 666 (1997). This law requires consent to join the United States in any suit (1) for the adjudication of water rights, or (2) the administration of such rights, where it appears that the United States owns or is acquiring such rights by appropriation under state law or otherwise. The district court dismissed the action based on abstention. The court of appeals reversed. The Supreme Court found that abstention was not proper under any existing theory but the court nevertheless granted dismissal.

175. *See Colorado River*, 424 U.S. at 817.

stances."[176] The *Colorado River* Court found exceptional circumstances under the facts of the case.

> [T]he Court deemed dispositive a clear federal policy against piecemeal adjudication of water rights; the existence of an elaborate state scheme for resolution of such claims; the absence of any proceedings in the District Court, other than the filing of the complaint, prior to the motion to dismiss; the extensive nature of the suit; the 300-mile distance between the District Court and the situs of the water district at issue, and the prior participation of the Federal Government in related state proceedings.[177]

The Court noted that as between state and federal courts, the rule is that the "pendency of an action in the state court is no bar to proceedings concerning the same

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176. 424 U.S. at 813-14.

177. *Wilton*, 515 U.S. at 284.

The Supreme Court in *Madsen* found that as applied to the state court defendants the injunction was a content-neutral restriction. This was based upon the fact that the injunction took into consideration past actions and attempted to restrain those activities. However, the same state court injunction would probably operate as a content-based restriction when applied against nonparties who had no past history of illegal behavior. *See Machesky v. Bizell*, 414 F.2d 283 (5th Cir. 1969) (permitting a federal injunction against a state court injunction which the federal court found to be unconstitutionally overbroad because it lumped protected speech with unprotected speech in such a way as to abridge important public interests). "*Machesky* holds that where an injunction is attacked on First Amendment grounds and is facially overbroad, abstention for comity and federalism reasons is inappropriate." *McKusick*, 96 F.3d at 49 fn. 6. The *McKusick* court incorrectly assumed that since the *Madsen* injunction was found to be content-neutral as applied to parties, it was also content-neutral as applied to nonparties. *McKusick*, 96 F.3d at 488-489. The Supreme Court in *Madsen* addressed only parties, and specifically indicated that the parties were prohibited from challenging the "in concert" section since this did not apply to them. Thus *Madsen* addressed only the application of the injunction to the state defendants, *Madsen* 114 S.C. at 2530, whereas *Cheffer* addressed only the "in concert" provision. *Cheffer*, 6 F.3d at 708-711. It is clear that a state court injunction taking into consideration past illegal behavior may operate as a content-neutral restriction on such activities, but the same injunction operating like a statute and applied against nonparties without past illegal behavior is a content-based restriction. Thus, *McKusick* misreads the reach of the *Madsen* case.

matter in the Federal court having jurisdiction."[178] As between federal district courts, there is no similar rule, but "the general principle is to avoid duplicative litigation."[179] In assessing the appropriateness of dismissal, the federal court may consider factors such as the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. No one factor is necessarily determinative, and only "the clearest of justifications will warrant dismissal."[180] When considering these various factors, the Supreme Court in *Colorado River* noted the following:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. [I]t was never a doctrine of equity that a federal court should exercise judicial discretion to dismiss a suit merely because a State court could entertain it.[181]

The key to the *Colorado River* Abstention Doctrine is to determine whether there is a parallel state proceeding that can provide complete relief.[182] The parallel factor and the availability of complete relief are, "for all practical purposes, identical."[183] "A suit is 'parallel' when substantially the same parties are *contemporaneously litigating* substantially

178. *Id.* (quoting McClellan v. Carland, 217 U.S. 268, 282 (1910)).
179. *Colorado River*, 424 U.S. at 817.
180. *Id.* at 818-19.
181. *Id.* at 813-14 (citations and quotations omitted).
182. *See* Baskin v. Bath Township Bd. of Zoning Appeals, 15 F.3d 569, 571 (6th Cir. 1994) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)).
183. Heitmanis v. Austin, 899 F.2d 521, 528 (6th Cir. 1990).

the same issues in another forum, thus making it likely that judgment in one suit will have a *res judicata* effect on the other suit."[184]

> Colorado River abstention is inappropriate in this case because the defendants fail to satisfy the threshold requirement that there be a concurrent state court proceeding . . . [W]e feel compelled to accept the plaintiff's allegation that the state court proceeding is over and done with. Accordingly, we must conclude that there is no pending state proceeding and the *Colorado River* abstention does not apply . . . .[185]

The *Colorado River* Abstention Doctrine clearly does not apply if substantially the same parties litigating substantially the same issue in a federal court have ceased their litigation in the state courts.[186] If the federal plaintiff is not a party to the state court proceeding, then *Colorado River* likewise does not apply.[187]

VII. APPLYING THE *PULLMAN*, *YOUNGER*, *ROOKER-FELDMAN*, *BRILLHART*, AND *COLORADO RIVER* ABSTENTION DOCTRINES

The *Pullman* Abstention Doctrine does not apply when the state law is clear and unambiguous, the state courts have interpreted state law, or even when the state courts have had the opportunity to interpret the state law but have failed or refused to do so. Notwithstanding the United States Supreme Court's expansion of *Younger*, the *Younger* Absten-

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184. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1229 n.1 (7th Cir. 1979); *see also* Burnstein v. Hosiery Mfg. Corp. of Morgantown, Inc., 850 F. Supp. 176 (E.D. N.Y. 1994); Strasen v. Strasen, 897 F. Supp. 1179, 1186 (E.D. Wis. 1995).

185. *Strasen*, 897 F. Supp. at 1186 (citations omitted).

186. *See Leaf*, 979 F.2d at 589. Abstention is improper where there is no pending proceeding in a state court. *See* Aekenbrandt v. Richards, 504 U.S. 689 (1992).

187. In the context of abstention generally, *see* United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995); *Hoover*, 47 F.3d at 849; Bickham v. Lashof, 620 F.2d 1238 (7th Cir. 1980). *See also* Martin v. Wilks, 490 U.S. 755, 756 (1989); *Steffel*, 415 U.S. at 472 ("requiring the federal courts totally to step aside when no state [litigation] is pending against the federal plaintiff would turn federalism on its head").

tion Doctrine does not apply when there is no pending state proceeding against the federal plaintiff at the time the federal complaint is filed. The *Rooker-Feldman* Abstention Doctrine does not apply if the federal plaintiff is not using the federal court system as a type of appellate panel to review the state court ruling. *Rooker-Feldman* is only concerned with a federal plaintiff who begins in the state court system and fails to exhaust the state court appellate process. For example, *Rooker-Feldman* would apply to prohibit federal court intervention in a case where a state court plaintiff proceeds with litigation through the state court system, and then not content with the decision, begins litigating the same issue again in the federal district court. The *Brillhart* Abstention Doctrine applies only to circumstances involving a federal suit addressing state issues under the Declaratory Judgment Act with parties who are also parties to a pending parallel state proceeding. The *Colorado River* Abstention Doctrine is inapplicable when substantially the same parties are not litigating substantially the same issues in a state forum. *Colorado River* is inapplicable if the state proceedings have terminated or if the federal plaintiff was not a party to the state action.

In order to illustrate the application of these doctrines, focus will now turn toward the case of *Cheffer v. McGregor*.[188] In *Cheffer*, the Eleventh Circuit Court of Appeals allowed federal intervention to block enforcement of a state court injunction that established "buffer zones" around a Florida abortion clinic.[189] The state court injunction, styled *Women's Health Care Center, Inc. v. Operation Rescue*,[190] involved a conflict that arose when abortion opponents began picketing the Aware Woman's Center for Choice, an abortion clinic located in a residential neighbor-

188. 6 F.3d 705 (11th Cir. 1993), *vacated and remanded on other grounds*, 41 F.3d 1421 (11th Cir. 1993) (*en banc*).

189. Although the holding in *Cheffer* was vacated, the Eleventh Circuit did so to allow the district court to consider what impact, if any, the United States Supreme Court decision of *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), had on the holding.

190. 626 So. 2d 664 (Fla. 1993), *rev. in part, aff. in part sub nom*, Madsen v. Woman's Health Ctr., Inc., 512 U.S. 753.

hood in Melbourne, Florida. In September of 1992, the state court judge entered a permanent injunction prohibiting certain named defendants from trespassing upon the private property of the clinic and from physically blocking, impeding, or obstructing access to or egress from the abortion clinic.[191] During February and March of 1993, a new campaign was launched against the abortion clinic. The original named defendants were not involved in this renewed picketing effort.[192] However, in April, state court judge Robert B. McGregor issued an amended permanent injunction directed against the same previously named defendants and those acting "in concert" with them.[193] This new injunction creat-

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191. *See Operation Rescue*, 626 So. 2d at 666.

192. *See* Mathew D. Staver, *Injunctive Relief and the Madsen Test*, 14 ST. LOUIS U. PUB. L. REV. 465, 466-69 (1995).

193. The injunction was directed against Operation Rescue, Operation Rescue America, Operation Goliath, Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, Shirley Hobbs, and all persons acting in concert or participation with them or on their behalf, with notice in any manner or by any means of the order. The injunction then enjoined the defendants from the following:

> (1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. . . .
>
> (2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.
>
> (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic . . . An exception to the 36-foot buffer zone is the area immediately adjacent to the Clinic on the east. . . . The [defendants] . . . must remain at least five (5) feet from the Clinic's east line. Another exception to the 36-foot buffer zone relates to the record title owners of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zones does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert with the [defendants]. . . .
>
> (4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.
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> (5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to

ed a thirty-six-foot "buffer zone" surrounding the abortion clinic encompassing a public right-of-way, public sidewalk and street. The named defendants and those "acting in concert" with them were forbidden from entering this speech-free zone. The state court injunction also prohibited any pro-life image that could be observed from within the clinic, and required that the pro-life speaker first receive consent from

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> communicate by approaching or by inquiring of the [defendants]. In the event of such invitation, the [defendants] may engage in communications consisting of conversation of a nonthreatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as "sidewalk counseling," that person shall have the absolute right to leave or walk away and the [defendants] shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.
>
> (6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the [Clinic's] employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the [Clinic's] employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways or the residences of any of the [Clinic's] employees, staff, owners or agents. The [defendants] and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.
>
> (7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the [Abortion] Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic.
>
> (8) At all times on all days, from harassing, intimidating or physically abusing, assualting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assits in providing services at the [Abortion] Clinic.
>
> (9) At all times on all days, from encouraging, inciting, or securing other person to commit any of the prohibited acts listed herein.

Madsen, 114 S. Ct. 2521-22; Operation Rescue v. Women's Health Ctr., 626 So. 2d 664; 679-80 (1993). A map attached to the injunction indicated a buffer zone included a public sidewalk in front of the clinic as well as a public street and adjacent right-of-way. *See Operation Rescue*, 626 So. 2d at 682; Staver, *supra* note 192, at 486.

any person associated with, or seeking services from, the clinic before speaking or distributing literature to them within a three-hundred-foot buffer zone around the clinic. A three-hundred-foot buffer zone was also placed around any residential area where any owner, employee, or volunteer lived.[194]

After the issuance of the amended permanent injunction, a number of pro-life individuals were arrested for entering the thirty-six foot buffer zone. Myrna Cheffer was not among those arrested. However, she filed suit in federal district court against the state court judge, seeking to enjoin enforcement of the state court injunction because the vagueness and overbreadth of the injunction caused her to fear prosecution under the injunction. Cheffer stated she did not condone nor participate in trespassing or blockading activities. However, she feared prosecution for violating the order through application of the "in concert" section by merely entering the thirty-six foot buffer zone. Cheffer stated that she knew of others who were neither named in the injunction nor acted in concert with any of the named defendants but who had been prosecuted under the injunction after entering the buffer zone expressing a pro-life message. Indeed, during court proceedings the state court judge stated that the injunction was intended to apply against anyone with a "pro-life" view.[195] Cheffer therefore brought suit in federal court seeking declaratory and injunctive relief against the state court injunction.[196]

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194. *See Madsen*, 512 U.S. at 760.

195. *Id.* at 793-797 (Scalia, J., dissenting). *See also* Cheffer v. McGregor, 6 F.3d 705, 711 (1993); Mathew D. Staver, *Injunctive Relief and the Madsen Test*, 14 ST. LOUIS U. PUB. L. REV. 465, 476 (1995). Courts lack "equitable power to issue an injunction that binds the world at large." McKusick v. City of Melbourne, 96 F.3d 478, 484, n. 5 (11th Cir. 1996). *See*, e.g., Regal Knitwear Co. v. National Labor Relations Bd., 324 U.S. 9, 13 (1944) ("The courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not be adjudged according to the law."); Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, J.) ("[A court] cannot lawfully enjoin the world at large, no matter how broadly it words its decree."). The Supreme Court has also held that an injunction against independent nonparties may violate "established principles of equity, jurisdiction and procedure." *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 477 (1934).

196. Cheffer asked the federal court to enjoin enforcement of the "in concert"

In *Cheffer* the defendant argued that the Abstention Doctrine should bar Cheffer's federal suit.[197] First, the defendant argued that since Cheffer was represented by the same attorney who represented the state court defendants, Cheffer's interests would be adequately defended. Second, Cheffer could intervene in the ongoing state proceedings. Third, Cheffer could file an amicus brief. Finally, the defendant argued that imposing a federal injunction against a state injunction could ultimately result in the state court judge being found in contempt of a federal court order if the state court continued to enforce the state ordered injunction. According to the defendant, allowing such a clash between the federal and state systems would cause a calamitous result.

In the district court, Cheffer claimed that the injunction acted as a prior restraint on her free speech rights, and that the threat of prosecution chilled her ability to exercise her rights. She sought both declaratory and injunctive relief alleging a violation of her civil rights using 28 U.S.C. § 1983.[198] The district court denied motions for a temporary restraining order and a preliminary injunction, finding that the balance of equities did not weigh in Cheffer's favor. Cheffer appealed the district court decision to the Eleventh Circuit Court of Appeals, which ruled that Cheffer had standing to sue, that the Abstention Doctrine did not apply,

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provision of the state court injunction from being applied against anyone who merely espoused a pro-life viewpoint if they were not actively aiding and abetting the named state court defendants. Alternatively, Cheffer requested declaratory relief. Specifically, Cheffer asked the federal court declare that the "in concert" provision could not be applied against any person with a pro-life view without proof that the demonstrator knowingly aided and abetted the state court defendants. *Cheffer*, 6 F.3d at 705.

197. *Id.* at 709.

198. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1997).

and that she met the necessary criteria for injunctive relief.[199]

A. The Application of Pullman

Pullman and its progeny dealt with a statute, regulation, or perhaps an ordinance but never an injunction.[200] In *Madsen v. Women's Health Center*,[201] the Supreme Court

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199. *See Cheffer*, 6 F.3d at 709-10.

200. *See Pullman*, 312 U.S. at 498. *See, e.g.*, City of Houston v. Hill, 482 U.S. 451 (1987) (concerning a state law controversy involving a city ordinance); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (discussing the state law issue of the constitutionality of the Hawaii Land Reform Act of 1967); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (arising from the difficulty with the state's public nuisance statute); Reetz v. Bozanich, 397 U.S. 82 (1970) (discussing the constitutionality of state fishing laws and regulations); Zwickler v. Koota, 389 U.S. 241 (1967) (challenging a New York penal statute).

201. 512 U.S. 753 (1994). The petitioners in *Madsen* were some of the same named defendants in the state court case known as *Women's Health Center, Inc. v. Operation Rescue* discussed above. The injunction at issue in *Madsen* was the same injunction at issue in *Cheffer*. The difference between the two cases is that *Madsen* dealt with the named state court defendants while *Cheffer* dealt with the application of the same injunction to non-parties through the "in concert" provision. The Supreme Court in *Madsen* found that as applied to the state court defendants the injunction was a content-neutral restriction. This was based upon the fact that the injunction took into consideration past actions and attempted to restrain those activities. However, the same state court injunction would probably operate as a content-based restriction when applied against nonparties who had no past history of illegal behavior. *See Machesky v. Bizell*, 414 F.2d 283 (5th Cir. 1969) (permitting a federal injunction against a state court injunction which the federal court found to be unconstitutionally overbroad because it lumped protected speech with unprotected speech in such a way as to abridge important public interests). "*Machesky* holds that where an injunction is attacked on First Amendment grounds and is facially overbroad, abstention for comity and federalism reasons is inappropriate." *McKusick*, 96 F.3d at 49 n.6. The *McKusick* court incorrectly assumed that since the *Madsen* injunction was found to be content-neutral as applied to parties, it was also content-neutral as applied to nonparties. *McKusick*, 96 F.3d at 488-89. The Supreme Court in *Madsen* addressed only parties, and specifically indicated that the parties were prohibited from challenging the "in concert" section since this did not apply to them. Thus *Madsen* addressed only the application of the injunction to the state defendants, *Madsen* 512 U.S. at 776, whereas *Cheffer* addressed only the "in concert" provision. *Cheffer*, 6 F.3d at 708-11. It is clear that a state court injunction taking into consideration past illegal behavior may operate as a content-neutral restriction on such activities, but the same injunction operating like a statute and applied against nonparties without past illegal behavior is a content-based restriction. Thus, *McKusick* misreads the reach of the *Madsen* case.

discussed the differences between an injunction and an ordinance or statute. A judge "is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public."[202] In discussing the "obvious differences . . . between an injunction and a generally applicable ordinance," the Court noted that an ordinance reflects a legislative preference to promote a particular societal interest whereas an injunction is a remedy "imposed for violations . . . of a legislative or judicial decree."[203] For purposes of applying *Pullman*, the differences between an injunction and a statute are really irrelevant, except any injunction has already been favored with a judicial decree while a statute may have never had its day in court. In *Pullman*, the Court stated that the question of state law rested with the Texas Supreme Court because the interpretation of the statute was "far from clear."[204] The Court expressed concern that a later ruling by the state court would result in an apparent contradiction requiring the issue to be relitigated in the federal court forum.[205] *Pullman* may apply when the state law is subject to more than one interpretation and the state courts have not had the opportunity to interpret its meaning. However, an injunction, by its very nature, has already been crafted by a state court. *Pullman* should rarely, if ever, apply to a state court injunction.[206] In *Wisconsin v. Constantineau*,[207] the

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202. *Madsen*, 512 U.S. at 762. A state court injunction constitutes state action even if both opposing parties are private actors. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964); Shelley v. Kramer, 334 U.S. 1 (1948); Gresham Park Community v. Howell, 652 F.2d 1227, 1238-39 (5th Cir. 1981); Henry v. First National Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979).

203. *Madsen*, 512 U.S. at 764.

204. 312 U.S. at 499.

205. *See id.* at 499-500.

206. In *Gottfried v. Medical Planning Services, Inc.*, F.3d 1998 WL 177955. (6th Cir. 1998), the Sixth Circuit, in a case substantially similar to the facts raised in *Cheffer*, found that none of the Abstention Doctrines applied, but then noted, under the principles of comity and federalism outlined in the *Pullman* Abstention Doctrine, federal courts should abstain from entering an injunction against a state court until the state court had an opportunity to clarify the reach of the injunction to nonparties. *Id* at 8. Though the *Pullman* Abstention Doctrine applies in a case addressing an ambiguous statute which the courts have not had the opportunity to address, *Pullman* generally should not apply

Supreme Court clearly settled the issue of how a federal court is to weigh the clarity of the state law embroiled in a constitutional controversy before deciding whether *Pullman* applies. In *Constantineau*, a law enforcement officer posted a notice to all liquor stores forbidding the sale of alcohol to the federal plaintiff for one year.[208] The federal plaintiff was not provided notice or the opportunity for a hearing.[209] Though urged to apply *Pullman* and avoid the constitutional question, the Court instead found the practice of posting notices unconstitutional.[210] Since the statute was clear and unambiguous, *Pullman* did not apply.[211] *Pullman* abstention is only appropriate when state law is unclear.[212]

The Supreme Court reached a similar conclusion in *Hawaii Housing Authority v. Midkiff*.[213] The state argued

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when a court injunction is at issue since the court has obviously had the opportunity to address the matter. Moreover, a nonparty generally does not have the opportunity to request modification or clarification to a state injunction. However, the court in *Gottfried* pointed to an unpublished Ohio case which ruled that an original action in prohibition could be used to challenge an injunction that restricts the free speech of a nonparty. *Gottfried* 1988 WL 177955 at 6.

207. 400 U.S. 433 (1971).

208. *See id.* at 435.

209. *See id.*

210. *See id.* at 437. The Court found that the facts of the case demanded an opportunity for due process. The statute lacked any provision for the victim of the posting to be heard. *See id.* at 437-39.

211. *See id.* at 439.

212. *Constantineau*, 400 U.S. at 438 (quoting Harman v. Forssenius, 380 U.S. 528, 534 (1965)).

213. 467 U.S. 229 (1984). *Hawaii Hous. Auth.* involved a factually complicated constitutional challenge to the Hawaii Land Reform Act, which was designed to redistribute the landownership of Hawaiians more evenly since the vast majority of the land in Hawaii was owned by a very few people. *See id.* at 231-35. In *Gottfried v. Medical Planning Services, Inc.*, 1998 WL 177955 (6th Cir. 1998), the Sixth Circuit, in a case substantially similar to the facts raised in Cheffer, found that none of the Abstention Doctrines applied, but then noted, under the principles of comity and federalism outlined in the *Pullman* Abstention Doctrine, federal courts should abstain from entering an injunction against a state court until the state court had an opportunity to clarify the reach of the injunction to nonparties. *Id.* at *8. Though the *Pullman* Abstention Doctrine applies in a case addressing an ambiguous statute which the courts have not had the opportunity to address, *Pullman* generally should not apply when a court injunction is at issue since the court has obviously had the opportunity to address the matter. Moreover, a nonparty generally does not have the opportunity to request modification or clarification to a state injunction. However, the

that the Court should apply *Pullman* and avoid reaching the constitutional issues because the controversy involved state law.[214] In rejecting this argument, the Court found *Pullman* inapplicable because the state statute was clear and unambiguous.[215] *Pullman* is appropriate when the state law is unclear.[216] *Pullman* is not appropriate where the state statute cannot be interpreted in such a way as to avoid reaching the constitutional question.[217] Because abstention is the exception and not the rule, the *Pullman* Abstention Doctrine is limited to unclear issues of state law.[218]

In the *Cheffer* case, the issues of state law are not, and cannot be, unclear. According to *Pullman*, the ostensible basis for federal court abstention in reaching the merits of the constitutional claim was to allow the Texas Supreme Court the opportunity to resolve the uncertain area of law. In *Cheffer*, the state court crafted the injunction. *Pullman* abstention is therefore inappropriate.[219]

B. The Application of Younger

1. The Pending Prosecution

The Eleventh Circuit Court of Appeals found that the *Younger* Abstention Doctrine[220] did not block Cheffer's suit. "The Supreme Court has directed that Federal Courts should not intervene in ongoing state proceedings 'when the moving party has an adequate remedy at law and will not

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court in *Gottfried* pointed to a recently decided Ohio case which ruled that an original action in prohibition could be used to challenge an injunction that restricts the free speech of a nonparty. *Id.* at *6.

214. *See Hawaii Hous. Auth.*, 467 U.S. at 236. The state also advanced a *Younger* abstention argument. *See id.*

215. *See Hawaii Hous. Auth.*, 467 U.S. at 237.

216. *See id.*

217. *See id.* at 236. The Court, by inference, said that if the state statute is "fairly subject to an interpretation which will render unnecessary" the constitutional issue, then *Pullman* abstention is appropriate. *Hawaii Hous. Auth.*, 467 U.S. at 236 (quoting *Harman*, 380 U.S. 528, 534 (1965)).

218. *See Hawaii Hous. Auth.*, 467 U.S. at 236.

219. The Eleventh Circuit Court of Appeals in *Cheffer* did not address the *Pullman* Abstention Doctrine.

220. *See Younger*, 401 U.S. at 37.

suffer irreparable injury if denied equitable relief.'"[221] "*Younger* abstention is only appropriate, however, when the federal constitutional claims at issue can be raised by the federal plaintiff in an on-going state court proceeding."[222] Noting that Cheffer had no remedy in state court "except to subject herself to a criminal contempt citation," the court reasoned that *Younger* abstention was inappropriate and that the district court had jurisdiction to hear Cheffer's claim.[223] The Eleventh Circuit was aware that similar issues presented in the federal court were pending in a contemporaneous state court proceeding before the Florida Supreme Court.[224] However, the Eleventh Circuit did not apply the *Younger* Abstention Doctrine, nor did it require that Cheffer intervene in the state court action to have her constitutional claim adjudicated.

In order to correctly ascertain whether the principles of *Younger* apply, the litigant must first recognize the crucial distinguishing factor involving a pending state proceeding against the federal plaintiff. The federal party in *Younger* "was indicted in a California state court," *prior to filing a complaint* requesting a federal court to enjoin the pending state prosecution against him.[225] *Younger* articulates the "national policy forbidding federal courts to stay or enjoin *pending* state court proceedings except under special circumstances."[226] However, the *Younger* Court limited its holding by stating: "We express no view about the circumstances under which federal courts may act when there is no prose-

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221. *Cheffer*, 6 F.3d at 709 (quoting *Younger*, 401 U.S. 37, 43-44 (1971)).

222. *Cheffer*, 6 F.3d at 709. *See also* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619, (1986) (holding that *Younger* applies as long as in the course of the state proceedings the federal plaintiff would have a full and fair opportunity to litigate the constitutional claim).

223. *Cheffer*, 6 F.3d at 709.

224. The same amended permanent injunction was being challenged in both state and federal court. The named defendants challenged the constitutionality of the injunction in state court, while Cheffer, who was not a party to the state court proceeding, challenged application of the injunction to non-parties through the "in concert" provision.

225. Younger v. Harris, 401 U.S. 37, 38-39 (1971).

226. *Id.* at 41 (emphasis added).

cution pending in state courts at the time the federal proceeding is begun."[227]

The *Younger* Abstention Doctrine's foundation rests on a sensitivity toward the principles of equity, comity, and federalism.[228] *Younger* reflects a respect for state functions, a continuation of the federalist principle that the Federal Government will function best if the states and their institutions are free to execute their separate functions, and an acknowledgment of the fact that the nation is comprised of a union of individual state governments.[229] *Younger* addressed these issues by refusing to allow a federal plaintiff, who was a defendant in a pending state criminal prosecution, to obtain a federal court ruling in the midst of the pending state action.[230] Separate concurring opinions of Justices Stewart and Harlan further explained the parameters of the *Younger* holding. Noting several cases to which the *Younger* decision would apply, Justices Stewart and Harlan declared: "In all of these cases, the Court deals only with the proper policy to be followed by a federal court when asked to intervene by injunction or declaratory judgment in a criminal prosecution which is *contemporaneously pending in a state court.*"[231] As noted by the Court, "a proceeding was already pending in the state court, affording Harris an opportunity to raise his constitutional claims."[232] Hence, the existence of the pending state prosecution was central to the *Younger* decision.

Furthermore, *Younger* abstention cases discussing the requirement of a pending state proceeding are manifold. In the *Younger* companion case, *Samuels v. Mackell*,[233] the Court abstained because the federal plaintiffs were parties to a proceeding in state court and had an opportunity to raise their constitutional claims therein. As noted by the

227. *Id.*
228. *See id.* at 43-44.
229. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 601 (1975) (discussing *Younger*).
230. *See Younger*, 401 U.S. at 53-54.
231. *Id.* at 55 (Stewart, J., Harlan, J., concurring) (emphasis added).
232. *Id.* at 49.
233. 401 U.S. 66 (1971).

Samuels Court, the federal plaintiffs "in these two cases were all indicted in a New York state court on charges of criminal anarchy."[234] As in *Younger*, the *Samuels* Court expressed "no views on the propriety of declaratory relief when no state proceeding is pending at the time the federal suit is begun."[235] In both *Younger* and *Samuels*, abstention was proper because the federal plaintiffs were also parties to state court proceedings which were pending at the time the federal suit was initiated.

For the same reason that *Younger* applies to the facts in *Juidice v. Vail*,[236] *Younger* does not apply to the facts of *Cheffer*. In *Juidice*, a state court party had been found in contempt of court as a judgment debtor.[237] While still a party in the state court, Vail attempted to bring a federal action to enjoin enforcement of the statutory provisions authorizing the contempt judgment.[238] Again, as in *Younger* and *Samuels*, the federal plaintiff was a party to a state court proceeding which allowed an adequate opportunity to present a constitutional claim for relief.[239]

The fact that the federal plaintiffs in the previously discussed cases were also party defendants in a pending state proceeding is precisely why the *Younger* Abstention Doctrine is inapplicable to *Cheffer*. Unlike Harris in *Younger*, the federal plaintiff in *Cheffer* was not a party to any pending proceeding in state court and had never been arrested under the state court injunction.

The federal plaintiff in *Steffel v. Thompson*[240] is almost identical to the federal plaintiff in *Cheffer*. Like the litigant in *Cheffer*, the federal plaintiff in *Steffel* was not involved in any pending state court prosecution.[241] Rather, a companion of Steffel was involved in a pending state prosecu-

234. *Id.* at 67.
235. *Samuels*, 401 U.S. at 73-74.
236. 430 U.S. 327 (1977).
237. *See id.* at 329.
238. *See id.* at 330.
239. *See id.* at 337.
240. 415 U.S. 452 (1974).
241. *See Steffel*, 415 U.S. at 455-56.

tion.[242] In contrast to the *Younger* litigants, Steffel had been personally threatened with arrest under a Georgia criminal trespass statute.[243] Though Steffel "desired to return to the shopping center to distribute handbills, he [did not do] so because of his concern that he, too, would be arrested for violation" of the Georgia Statute.[244]

Similarly, in *Cheffer*, several pro-life protesters had been named as defendants in a court ordered injunction bought by several abortion clinics. This injunction applied to the named defendants and those acting "in concert" with them. Ms. Cheffer was not a named defendant. However, she wanted to distribute literature and discuss alternatives to abortion on a public sidewalk outside the abortion clinic within the thirty-six foot buffer zone. The injunction prohibited the named defendants and those acting in concert with them from using the public sidewalk.[245] The injunction required city officials to post a sign stating: "WARNING. Demonstrations and picketing in this area are limited by court order. Violators of this court order are subject to arrest."[246] The local police enforced the injunction by arresting anyone espousing a pro-life message who dared enter the thirty-six foot speech free zone. When these non-party arrestees were brought before the state judge who issued the injunction, the judge stated that his order applied to anyone with a pro-life view.[247] Ms. Cheffer became aware of how the "in concert" section of the injunction was being applied. Though not named in the injunction, she feared prosecution under the injunction.[248] Accordingly, Ms. Cheffer is unlike the three

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242. *See id.* at 454-59.
243. *See id.* at 456-59.
244. *Id.* at 456.
245. The state court judge loosely applied the "in concert" provision to any person entering the thirty-six foot buffer zone who espoused a pro-life view regardless of whether they were actively aiding and abetting the named defendants. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 783-820 (1994) (Scalia, J., dissenting); Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993); Staver, *supra* note 192, at 476.
246. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d. at 680.
247. *See Madsen*, 512 U.S. at 793-97 (Scalia, J., dissenting). *See* Appendix to Justice Scalia's dissenting opinion. *See id.* at 815-20.
248. *See Cheffer*, 6 F.3d at 708.

federal intervenors in *Younger* whom the Court dismissed for lack of a genuine controversy.[249]

The *Younger* Court characterized the allegations of the threat of prosecution by the other three plaintiff-intervenors as merely "imaginary or speculative."[250] In contrast, the *Steffel* Court held that Mr. Steffel's allegations of the threat of prosecution could not be characterized as either speculative or imaginary.[251] The *Steffel* Court went on to state that "the prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been 'chimerical.'"[252]

In like manner, Cheffer's claims were neither speculative, nor imaginary. Because other unnamed pro-life protesters not associated with the named defendants had been prosecuted under the "in concert" provision of the injunction, Cheffer's fear of prosecution was legitimate and real. Approximately fifty other non-party pro-life protesters were arrested for entering the so-called "buffer zone."[253] Conse-

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249. *See id.* at 708-09.

250. *Younger*, 401 U.S. at 41.

251. *See* Steffel v. Thompson, 415 U.S. 452, 459 (1974).

252. *Id.* at 459 (*quoting* Poe v. Ullman, 367 U.S. 497 (1961)).

253. *Cheffer*, 6 F.3d at 707. State and federal courts may issue an injunction against a defendant and those acting "in concert" with the defendant. *See* FED. R. CIV. P. 65(d). Rule 65(d) was patterned after the Clayton Act, which was enacted to curtail abuses of federal strike injunctions. H.R. REP. NO. 612 (1912). Judge Learned Hand once observed:

> [A court] cannot lawfully enjoin the world at large no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen* [sound and fury signifying nothing], and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisidiction is limited to those over whom it gets personal service, and who therefore have their day in court. Thus, the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him . . . This is far from being a formal distinction; it goes deep into the powers of a court of equity. . . It is by ignoring such procedural limitations that the injunction of a court of equity may by slow steps be made to realize the worst fears of those who are jealous of its prerogative.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832-33 (2d Cir. 1930) (emphasis add-

quently, unlike the three plaintiff-intervenors in *Younger*, Ms. Cheffer had an "acute, live controversy" with the state

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ed). The United States Supreme Court has also recognized certain limitations of an injunction:

> It is true that persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing an act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant and privy to his contempt, the provision merely makes explicit as to them that which the law already implies. But by extending the injunction to 'all persons to whom notice of the injunction should come,' the District Court assumed to make punishable as a contempt the conduct of persons who act idependently and whose rights have not been adjudged according to law . . . To subject them to such peril violates established principles of equity jurisdiction and procedure.

Chase Nat'l Bank v. City of Norwalk, Ohio, 291 U.S. 431, 437 (1934). The injunction at issue in *Cheffer* sought in essence to enjoin the entire world. The state court judge ordered that a sign be posted around the abortion clinic stating: "WARNING. Demonstrations and picketing in this area are limited by court order. Violators of this court order are subject to arrest." Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 680 (Fla. 1993). Unfortunately, some courts have not been careful when crafting and enforcing injunctions. Courts should be cautious when applying injunctions to those acting "in concert." *See, e.g.*, Regal Knitwear Co. v. NLRB, 324 U.S. 9, 13 (1945) (stating that a court "may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law"); Swetland v. Curry, 188 F.2d 841, 843 (6th Cir. 1951) (stating that a non-party "may not be held guilty of contempt for violating an injunction unless he is shown to be identified with or is an aider or abetter of the party originally enjoined."); Kean v. Hurley, 179 F.2d 888, 890 (8th Cir. 1950) (stating that "persons who are not parties to the injunction or in privity with them . . . are not bound by the decree and cannot be held liable for acts done contrary thereto even though the decree assumes to bind them."); Petersen v. Fee Int'l Ltd., 435 F. Supp. 938, 942 (W.D. Okl. 1975) (discussing how Rule 65(d) follows the common law rule that non-parties are bound by an injunction only if they are legally identified with a named party or aided or abetted the named party in his violation of the decree); Wright v. County Sch. Bd. of Greensville County, Va., 309 F. Supp. 671, 677 (E.D. Va 1970) *rev'd* 442 F.2d 570 (4th Cir. 1971) (discussing how Rule 65(d) fixes the scope of valid injunctions, and terms in a decree exceeding the rule are of no effect; non-parties who act independently are not subject to sanctions); *Baltz v. Fair*, 178 F. Supp. 691, 693 (N.D. Ill. 1959) (stating that "Persons who are not parties to the injunction or in privity with them . . . are not bound by the decree in so far as it operates in personam and cannot be held for acts done contrary to its terms"); Chilsolm v. Caines, 147 F. Supp. 188, 191 (E.D.S.C. 1954) (stating that an "injunction cannot issue to bind the public at large" even though it purports to do so); Baltimore Transit Co. v. Flynn, 50 F. Supp. 382, 386 (D. Md. 1943) (stating that a court "cannot lawfully enjoin the world at large").

regarding her constitutionally protected rights.[254]

A cursory examination of *Hicks v. Miranda*,[255] might compel one to assert that the Court's holding argues for application of the *Younger* Abstention Doctrine to the facts of *Cheffer*. In *Hicks*, the Supreme Court noted that the "principles of *Younger v. Harris* should apply in full force" when "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."[256] Because of a violation of the obscenity standards, the federal plaintiff in *Hicks* faced possible criminal prosecution at the time the federal lawsuit was initiated. However, although the federal plaintiff's employees were charged, the state criminal proceedings against the plaintiff had not yet begun. The state criminal proceedings were not begun until after the federal plaintiff filed a complaint in federal court. The fact that the *Hicks* federal plaintiff was a party to an ongoing state proceeding, though the state criminal proceedings were not initiated until after the federal suit was initiated, is a crucial fact that distinguishes *Hicks* from the facts surrounding *Cheffer*. Again, Cheffer was not involved in any state proceedings, nor was prosecution against her about to commence. Therefore, the *Younger* Abstention Doctrine is inapplicable to *Cheffer*.

Since Cheffer was not involved in any pending state proceeding, she had no opportunity to adjudicate her consti-

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254. Younger v. Harris, 401 U.S. 37, 41 (1971); *see* Cheffer v. McGregor, 6 F.3d 705, 708-09 (11th Cir. 1993).

255. 422 U.S. 332 (1975). The Court said that the federal plaintiff "had a substantial stake in the state proceedings. . . . " *Id.* at 348. Such language might seem to indicate that a federal plaintiff, not a party in the state proceeding, possessing a "substantial stake," could be barred from adjudicating her constitutional claim in federal court under *Younger* analysis. However, *Hicks* does not stand for the proposition that a federal plaintiff who has an interest in the outcome of a pending state proceeding, although not a party, is barred from bringing an action in federal court. To the contrary, the facts in *Hicks* indicate that the federal plaintiffs's employees had already become enmeshed in ongoing state proceedings. The *Hicks* federal plaintiff had already been a target of state investigation and was on the verge of being charged by the state. The mere fact that the *Hicks* federal plaintiff beat the state officials to the court house was not enough to exempt him from the *Younger* Abstention Doctrine.

256. *Hicks*, 422 U.S. at 349.

tutional claims. In the absence of federal court intervention, Ms. Cheffer would face the difficult choice of either intentionally flouting state law,[257] or foregoing her constitutionally protected activity in order to avoid becoming entangled in a state proceeding. However, as noted in *Steffel*, "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute which he claims deters the exercise of his constitutional rights."[258] The Supreme Court's opinion in *Steffel* is directly on point and controls the outcome of whether the principle of *Younger* applies to the facts of *Cheffer*. Clearly, abstention is not appropriate when a party lacks the opportunity to vindicate

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257. There is a significant difference between an unconstitutional statute or ordinance and an injunction. According to the United States Supreme Court, one may violate an unconstitutional statute or ordinance at will and later challenge its constitutionality. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). Any fine or conviction levied for the violation will be null and void *ab initio* once the law is ruled unconstitutional. However, if one is found in contempt of violating an injunction that is later ruled unconstitutional, the contempt finding and punishment remain. *See* Walker v. Birmingham, 388 U.S. 307 (1967). This is known as the collateral bar rule. Simply put, a party subject to a court order must obey it or face contempt. The court order must be respected until it is later vacated or declared unconstitutional. *See, e.g.*, *Walker*, 388 U.S. at 307 (sustaining contempt conviction for violation of an *ex parte* injunction and upholding the lower court's application of the collateral bar rule even where the equities cut so dramatically in favor of the accused contemnors); United States v. United Mine Workers, 330 U.S. 258, 293 (1947) ("an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings"); Howat v. Kansas, 258 U.S. 181, 190 (1922) ("It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or a higher court, its orders based on its decisions are to be respected, and disobedience of them is contempt of its lawful authority, to be punished"); In re Establishment Inspection of Hern Iron Works, 881 F.2d 722, 726 (9th Cir. 1989); In re Novak, 932 F.2d 1397, 1401 (11th Cir. 1986) ("Disobedience of an invalid court order may be punished as a criminal contempt"); In re Providence Journal Co., 820 F.2d 1342, 1346 (1st Cir. 1986), *modified on reh'g en banc*, 820 F.2d 1354 (1st Cir. 1987). The collateral bar rule is premised on the idea of preventing chaos and respect for the rule of law. *See Walker*, 388 U.S. at 320-21. The only exceptions to the collateral bar rule are lack of subject matter or personal jurisdiction. Some courts have found another exception "where the injunction was transparently invalid or had only a frivolous pretense to validity." In re Providence Journal Co., 820 F.2d at 1347 (quoting *Walker*, 388 U.S. at 315); *see also* In re Establishment Inspection of Hern Iron Works, 881 F.2d at 727.

258. Steffel v. Thompson, 415 U.S. 452, 459 (1974).

their constitutional claims in a court proceeding. To apply *Younger* to such a scenario offends the core of "Our Federalism." As reaffirmed in *Steffel*:

> In the instant case, principles of federalism not only do not preclude federal intervention, they compel it. Requiring the federal courts totally to step aside when no state criminal prosecution is pending against a federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) – as they are here – we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution had been commenced.[259]

Without the ability to pursue her claim in federal court, Cheffer found herself "placed between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [s]he . . . believes to be constitutionally protected activity in order to avoid becoming enmeshed in [a] . . . criminal proceeding."[260]

When confronted with such a situation, the Supreme Court in *Wooley v. Maynard* said, "*Younger* does not bar federal jurisdiction."[261] In *Wooley*, the defendant was arrested, prosecuted, convicted, and sentenced for violating a state law which required the display of a particular license plate on all automobiles registered within the state. After serving his sentence, he filed a complaint in federal court seeking to enjoin enforcement of the state statute on the basis that the statute was a violation of his First Amendment rights. In addressing the principles of equitable re-

259. *Id.* at 472-73 (internal quotes omitted).
260. Wooley v. Maynard, 430 U.S. 705, 710 (1977) (quoting Steffel v. Thompson, 415 U.S. 452, 462 (1974)).
261. *Wooley*, 430 U.S. at 711.

straint enunciated in *Younger*, the Supreme Court noted that the federal plaintiff was not attempting to annul the results of a state trial, but rather was trying to obtain prospective relief to preclude future prosecution under the statute. Under those circumstances, the plaintiff could not "be denied consideration of a federal remedy."[262] Likewise, Cheffer was not seeking to annul a state trial but she was seeking prospective relief.

Some have argued that federal courts should abstain even when there is no pending state court proceeding when the federal plaintiff has not first attempted to intervene in the pending state courts or brought a separate action in the state system. This argument was raised and rejected outright in *Hoover v. Wagner*.[263] The facts in *Hoover* are very similar to the facts in *Cheffer*. The *Hoover* case also involved a state court injunction issued against certain named pro-life protestors and those acting "in concert" with them.[264] Like *Cheffer*, the injunction in *Hoover* created a buffer zone around abortion clinics. State officials, including the state courts, enforced the injunction against anyone espousing a pro-life view entering the buffer zone who spoke with or even glanced toward a nearby defendant who was named in

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262. *Id.*

263. 47 F.3d 845, 847 (7th Cir. 1995). The facts in *Hoover* involved two pro-life picketers and a journalist who brought suit in federal court challenging a state court injunction which restricted certain named defendants and those acting in concert with them from picketing certain named abortion clinics. The federal plaintiffs were not parties to the state court injunction and had never been named in any state court proceeding, but they claimed they were in fear of arrest for picketing in and around the abortion clinics and for taking photographs of the incidents. The state court injunction prohibited certain named defendants "and all persons acting in concert with them and having received notice of" the injunction from trespassing on or blocking access to specified abortion clinics; from congregating, demonstrating, or otherwise protesting with twenty-five feet of the entrances to the clinics; from photographing license plates of cars of those using the clinics; and from refusing to desist from "sidewalk counseling" at the request of the person being counseled. The plaintiffs further claimed that law enforcement officers and the state courts judges had applied the injunction to anyone standing in the vicinity of a named defendant without any additonal proof of active or knowing association with the named defendants. Moreover, the journalist alleged he had been threatened with arrest for taking photographs.

264. *Hoover*, 47 F.3d at 846-47.

the state court injunction.[265] Fearing arrest, the federal plaintiffs, who were not named in the state court injunction and were not involved in any state court proceeding, brought suit in federal court seeking injunctive and declaratory relief.[266]

Chief Judge Posner of the Seventh Circuit Court of Appeals opined that "[t]he core of the *Younger* doctrine is the proposition that a person who is being prosecuted by a state for violating its laws is not allowed to derail the prosecution by bringing a suit in federal court to enjoin the prosecution on the ground that the state statute on which it is based is unconstitutional."[267] The *Younger* Abstention Doctrine only applies to pending state court proceedings or "litigation *between the same parties* . . . raising the same issues [.]"[268] In *Hoover*, the federal defendants argued that the

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265. *See id.* at 847.

266. Because the federal plaintiffs were not named in the state court injunction and had not yet been arrested for violating its terms under the "in concert" provision, the federal court defendants argued the case should be dismissed for lack of standing. The Seventh Circuit nevertheless found that plaintiffs did have standing:

> All that a plaintiff need show to establish standing to sue is a reasonable probability – not a certainty – of suffering tangible harm unless he obtains the relief that he is seeking in the suit . . . Arrest, prosecution, and conviction are tangible harms, and so is abandoning one's constitutional right of free speech in order to avert those harms. Therefore the question on which standing turns in this case is the probability that unless the plaintiffs obtain a declaration or injunction limiting the enforcement of the Wisconsin state court's injunction, they will either forgo their right of free speech or be arrested, prosecuted, and perhaps even convicted. We cannot reckon the probability of these consequences as being low. The two abortion protestors in the trio of plaintiffs have made clear that they want to go right up to the line that separates legal from illegal protest. If that line is drawn in vague and wavering fashion by the state court injunction, or if the Milwaukee police and other law enforcement officers interpret the injunction in a way that subjects to arrest people who stop just short of the line, then either these plaintiffs will be arrested if they insist on going right up to the line, or they will draw well back from the line and as a result (since it is quite possible that the injunction goes as far as it could without violating the First Amendment) forgo the full exercise of their consitutional rights."

Id. at 847 (citations omitted).

267. *Id.* at 848.

268. Trainor v. Hernandez, 431 U.S. 434, 440 (1977) (emphasis added).

federal court should abstain from hearing the case because the plaintiffs could either file the same complaint in state court or intervene in one of several state court proceedings.[269] "There is no duty to intervene to stave off the use of a case as *res judicata* against one[self]."[270] "Certainly nothing in *Younger* or the cases following it suggests that persons claiming a violation of their federal rights have an obligation before turning to federal court to see whether there is some state court proceeding that they might join in order to present their federal claims there."[271] *Younger* does not impose a duty on the federal plaintiff to intervene in other suits pending in state court of which the federal plaintiff is not a party.

Requiring a federal plaintiff to discover and then join any factually similar pending state action would create timeliness constraints. In addition, if similarly situated plaintiffs could be forced to join an ongoing state proceeding they would be constrained by the allegations and pleadings of the pending state proceeding. Plaintiffs such as Cheffer and Hoover would be unfairly limited by the claims and defenses raised by the original state parties. Such a heavy burden would result in the denial of constitutionally protected freedoms and the inability to seek adequate redress. Requiring potential federal plaintiffs to seek out and join any factually similar state proceeding would certainly result in the denial of constitutionally protected rights.

In *Steffel*, the United States Supreme Court was informed during Oral Argument that the identical issue was pending in the state courts.[272] The *Steffel* court pointed to the facts in *Roe v. Wade*,[273] noting that while the pending prosecution of a physician under Texas law was found to render his action for declaratory and injunctive relief impermissible, this fact did not prevent the Supreme Court from granting Roe, against whom no action was pending, a de-

269. *See Hoover*, 47 F.3d at 848.
270. *Id.* at 848. *See also* Martin v. Wilks, 490 U.S. 755 (1989).
271. *Id.*
272. *See* Steffel v. Thompson, 415 U.S. 452, 475 n.22 (1974).
273. 410 U.S. 113 (1973).

claratory judgment that the statute was unconstitutional.[274] *Steffel* did not require the federal plaintiff to seek out and join the ongoing state proceeding. An action may be brought in federal court so long as the plaintiff is not a party to ongoing state proceedings.

2. Injunctive and Declaratory Relief

The Supreme Court in *Steffel* noted the difference between injunctive and declaratory relief by observing that the lower court erred in treating the requests for injunctive and declaratory relief as a single issue.[275]

> [W]hen no state prosecution is pending and the only question is whether declaratory relief is appropriate [,] . . . the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the expressed congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance.[276]

In analyzing the standard for declaratory relief, the Court noted that a pervasive sense of nationalism led to the enactment of certain civil rights laws and further found that the new exertion of federal power was no longer entrusted to the enforcement of state agencies.[277] In order to create a system which would permit federal courts to be the ultimate arbiters of federal constitutional rights against governmental intrusion, Congress, in 1934, enacted the Declaratory Judgment Act.[278] The *Steffel* Court observed the following:

> That Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction and to be utilized to test the constitution-

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274. *See Steffel*, 415 U.S. at 471 n.19; *Roe*, 410 U.S. at 125-27, 166.
275. *See Steffel*, 415 U.S. at 463.
276. *Id.* at 463 (quoting Perez v. Ledesma, 401 U.S. 82, 104 (1971) (separate opinion of Brennan, J.) (brackets in the original)).
277. *Steffel*, 415 U.S. at 464 n.13.
278. 28 U.S.C. §§ 2201-12 (1997); *Steffel*, 415 U.S. at 466.

> ality of state criminal statutes in cases where injunctive relief would be unavailable is amply evidenced by the legislative history of the Act . . . .[279]

Clearly, the "Declaratory Judgment Act was intended to provide an alternative to injunctions against state officials."[280] The Supreme Court held that "'a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.'"[281] Additionally, the *Steffel* Court pointed out that "when no state proceeding is pending and thus considerations of equity, comity, and federalism have little vitality, the propriety of granting federal declaratory relief may properly be considered independently of a request for injunctive relief."[282] Indeed, "'*different considerations* enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other.'"[283]

The "persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute."[284] Even though a declaratory judgment has the full force and effect of a final judgment, "it is a milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate but it is not contempt."[285] Requiring federal

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279. *Steffel*, 415 U.S. at 466.

280. *Id.* at 467.

281. *Id.* at 468 (quoting Douglas v. City of Jeannette, 319 U.S. 157, 254 (1943)).

282. *Steffel*, 415 U.S. at 462.

283. *Id.* at 469 (quoting Zwickler v. Koota, 389 U.S. 241, 252-55 (1967)) (emphasis in original).

284. *Steffel*, 415 U.S. at 470.

285. *Id.* at 471. Some might argue that a federal court should never enjoin enforcement of a state court injunction because a federal injunction against a state injunction might create a scenario where state police, prosecutors or judges could be held in contempt for enforcing the state court order. However, constitutional rights must not be abandoned simply because the enforcement officials might be punished for enforcing an unconstitutional injunction. Moreover, as noted in *Steffel*, declaratory relief is an alternative remedy which must be separately considered from the request for injunctive relief. Declaratory relief is

courts to step aside in situations where the plaintiff is not a party to any state civil or criminal prosecution "would turn federalism on its head."[286] Therefore, according to *Steffel*, "regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied."[287]

C. *The Application of* Rooker-Feldman

The *Rooker-Feldman* Doctrine does not apply to the facts of *Cheffer* because the federal plaintiff did not attempt to use the federal forum as an appellate court over the state forum. Cheffer was not a party to the ongoing state action and therefore did not have the opportunity to appeal the state court decision. "The *Rooker-Feldman* Doctrine does not apply to bar suit in federal court brought by a party that was not a party in the preceding action in the state court."[288] Indeed, the Third Circuit in *Valenti* noted that it could find "no authority which would extend the *Rooker-*

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a much milder remedy than injunctive relief. Whereas noncompliance with an injunction may result in contempt, noncompliance with a declaratory judgment does not result in contempt. At a minimum, a federal plaintiff should be afforded declaratory relief in the right circumstances.

286. *Id.* at 472.

287. *Id.* at 475. All too often federal courts treat injunctive and declaratory relief as a single issue. When a federal plaintiff fails to meet the criteria for injunctive relief, courts frequently deny both injunctive and declaratory relief in the same sentence without separate analysis. There are many cases where a federal plaintiff might not meet the threshold for injunctive relief but should still be awarded declaratory relief. To obtain a preliminary injunction a plaintiff generally must prove: (1) likelihood of success on the merits; (2) irreparable harm; (3) the harm to the plaintiff greatly outweighs the harm to the defendant and granting the relief is in the public interest; and (4) no adequate remedy at law. Declaratory relief requires none of the four criteria for injunctive relief. Violation of an injunction may result in contempt but not so with declaratory relief. While an injunction must be complied with, declaratory relief is advisory. The difference between an injunction and declaratory relief is like the difference between a command and hortatory advice.

288. U.S. v. Owens, 54 F.3d 271, 274 (6th Cir. 1995). *See also* Valenti v. Mitchell, 962 F.2d 288 (3d Cir. 1992).

Feldman doctrine to persons not parties to the proceedings before the state supreme court."[289]

D. The Application of Brillhart

The *Brillhart* Abstention Doctrine applies only to circumstances involving a federal suit addressing state issues under the Declaratory Judgment Act with parties who are also parties to a pending parallel state proceeding.[290] *Brillhart* clearly does not apply to the facts of *Cheffer*. First, consistent with the theme underlying the various aspects of absention, Cheffer was not a party to a pending state court proceeding. Second, *Cheffer* dealt with federal constitutional questions rather than state law. Third, *Cheffer* was not parallel to the state proceeding because it dealt with the application of the injunction to non-parties through the "in concert" provision, while the state case dealt with the application of the injunction to parties based on past history.[291] Finally, while the federal plaintiff in *Cheffer* requested declaratory relief, she also requested injunctive relief.

E. The Application of Colorado River

The *Colorado River* Abstention Doctrine applies only when substantially the same parties are litigating substantially the same issues in state court. *Colorado River* does not apply to the facts of *Cheffer* for two reasons. First, Cheffer was not a party to the state court action. There is no obligation that Cheffer attempt to intervene in the ongoing state proceeding in order to vindicate her rights. Second, the issues between the state and federal court, while similar, are not substantially identical. The state court parties litigated the underlying issue of the constitutionality of the injunction. That issue obviously involved questions of law and fact. The questions of fact revolved around whether there was sufficient evidence to support the imposition of an injunc-

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289. *Valenti*, 962 F.2d at 297-98.

290. *See Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

291. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 775 (1994).

tion. The questions of law revolved around whether the injunction exceeded constitutional protections. Moreover, the litigation in the state court proceeding involved the parties and their past actions. The litigation in the federal court involved only the application of the "in concert" provision which the state parties would not have standing to raise.[292]

Because Cheffer is not a party to the ongoing state action, and since her concern was focused on the application of the "in concert" provision to non-parties, the concerns raised in her complaint were not substantially similar to those litigated by the parties to the state court action. Therefore, the *Colorado River* Abstention Doctrine is inapplicable.

VIII. CONCLUSION

The main purpose of the Abstention Doctrine is to preserve the balance between state and federal sovereignty. The Anti-Injunction Act prohibits a federal court from issuing an injunction against a state proceeding except as expressly authorized by Congress or where necessary to aid its jurisdiction, or to protect or effectuate its judgment. Civil rights actions brought under 42 U.S.C. § 1983 are specifically excepted from the Anti-Injunction Act. First Amendment claims are therefore not barred by the Anti-Injunction Act.

The *Pullman* Abstention Doctrine is only applicable when the federal court is faced with an ambiguous state law susceptible to multiple meanings, one of which may prove the statute constitutional and the other may render it unconstitutional. *Pullman* does not apply when the state law is clear and unambiguous. Moreover, *Pullman* does not apply when the state courts have interpreted the state law, and may not apply where the state courts have had the opportunity to interpret the state law but have failed or refused to do so. *Pullman* should never apply to a state-ordered injunction because, by its very nature, the state court created the challenged law.

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292. *See id.* Named parties do not have standing to challenge an "in concert" provision since, by nature of that provision, it applies to non-parties.

The *Younger* Abstention Doctrine does not apply when there is no pending state proceeding against the federal plaintiff at the time the federal complaint is filed. The *Rooker-Feldman* Abstention Doctrine applies only to those circumstances where the federal plaintiff attempts to use the federal forum as an appellate court over a state court action. In other words, if a federal plaintiff begins an action in state court, receives a decision from the state court, and instead of appealing through the state court system, ceases the state action and presents the identical claim in federal court, the *Rooker-Feldman* Abstention Doctrine applies. *Rooker-Feldman* is only concerned with the federal plaintiff who begins in the state court system and fails to exhaust the state court appellate process. The *Brillhart* Abstention Doctrine applies only to circumstances involving a federal suit addressing state issues under the Declaratory Judgment Act with parties who are also parties to a pending parallel state proceeding. The *Colorado River* Abstention Doctrine is not applicable when substantially the same parties are not litigating substantially the same issue in a state forum. *Colorado River* is inapplicable if the state proceedings have terminated or if the federal plaintiff was not a party to the state court action.

One common thread underlying all of the doctrines of abstention is that abstention does not apply to a federal plaintiff who has never been a party to a state court action. Moreover, abstention does not apply to a federal plaintiff when there is no pending proceeding in state court against the federal plaintiff on the same issue as long as the federal plaintiff is not attempting to use the federal forum as an appellate court over an unsuccessful partial journey through the state court system. A plaintiff has the right to choose either the state or federal forum to raise constitutional claims. The Abstention Doctrine cannot be used to force a federal plaintiff to first seek redress in a state court by either filing a complaint there, intervening in another state court action, or filing an amicus brief in a pending state court proceeding. Despite the fact that a similar federal question is pending in a state court action, the federal plain-

tiff may still seek redress in a federal forum as long as the federal plaintiff is not a party to the ongoing state action.

The purpose of the Abstention Doctrine is to balance state and federal sovereignty. According to the Supreme Court, the federal courts are supposed to act as the guardians of federal rights. Federal courts have therefore been expressly authorized to issue injunctions as a means of redress. Therefore, except in rare circumstances where the balance between state and federal comity would be substantially upset, federal courts should not step aside from protecting federal rights.