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Martha A. Field

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THE UNCERTAIN NATURE OF FEDERAL JURISDICTION

MARTHA A. FIELD*

One of the first things we teach entering law students is the importance of clarity in rules governing courts' jurisdiction. One reason for jurisdictional rules to be clear and simple is that litigating at length over the proper forum in which to litigate is a poor use of limited judicial resources, expensive to the parties and to the public. It would be better, if a case is filed in an appropriate forum, for it to be able to proceed to the issues on the merits rather than spend time game-playing with jurisdictional doctrines.

Another reason simplicity is desirable in jurisdictional rules is that jurisdictional objections can be raised for the first time quite late in the proceedings. True, the general rule that a judgment can be collaterally attacked for want of jurisdiction even after it is, for most purposes, final has little significance for federal jurisdictional issues.¹ But another facet of the same principle is that jurisdictional issues can be raised on appeal, by any party or by the court on its own motion, even when the issues have not been mentioned at trial or at any earlier appeal. It is not infrequent in federal jurisdictional decisions for an issue to arise for the first time before the United States Supreme Court, and for that issue to be considered

* Professor of Law, Harvard University. B.A., Radcliffe College; J.D., University of Chicago.

1. Federal jurisdictional issues generally, at least if debatable, do not provide a basis for collateral attack. See *Des Moines Navigation & R.R. v. Iowa Homestead Co.*, 123 U.S. 552 (1887); *McCormick v. Sullivan*, 23 U.S. (10 Wheat.) 192 (1825). Even in the state jurisdictional context, the general rule allowing collateral attack admits of many exceptions. For example, if the issue is the existence of in personam jurisdiction, persons who were participants in the prior judgment are bound by any ruling if they litigated the jurisdictional question, *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931); otherwise they are often deemed to have waived jurisdictional objections, see *Mrowczynski v. Mrowczynski*, 142 N.J. Super. 312, 361 A.2d 554, 557 (App. Div. 1976); RESTATEMENT OF JUDGMENTS § 19 (1942); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 33 (1971). When the issue is subject matter jurisdiction, litigated questions, if at all debatable, become res judicata, e.g., *Durfee v. Duke*, 375 U.S. 106 (1963); *American Sur. Co. v. Baldwin*, 287 U.S. 156 (1932); if issues that were not raised are at all debatable, parties to previous litigation may be precluded from collateral attack, e.g., *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940); *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

on its merits and to be dispositive, rendering meaningless all the litigation on the merits that has occurred in the lower courts.² Jurisdictional requirements that are simple to spot, as well as easy to apply, thus seem a definite advantage.

Nonetheless, the more one studies federal jurisdiction, the more forcefully one must conclude that much uncertainty surrounds the decision of many federal jurisdictional issues. In many cases, some of which I will describe in detail later, federal jurisdictional rules are extraordinarily unclear. They are also extremely complex. And it is not obvious what policy the complexities fulfill.

I believe that one reason for the confusion in federal jurisdictional rules is that we have little sense of what we are trying to achieve when we bestow or withhold federal jurisdiction. To some extent this is inevitable. The general purposes oft recited for the establishment of federal courts and the extension or contraction of their jurisdiction—federal judges' greater proficiency in federal law and greater sympathy toward federal claims, state judges' comparative proficiency on state law issues and their possible bias in favor of local litigants, and comparative docket pressures of state and federal courts, for example—differ in the various regions of the country and vary in importance according to the facts of the particular case, the legal issues raised, and the particular judge one happens to draw. Nonetheless, there is a peculiar schizophrenia in the case discussions of the policies favoring state or federal forums. When, in federal constitutional litigation, for example, a court wishes to support the exercise of federal jurisdiction, it speaks of the importance of federal tribunals as the primary guardians of federal rights. Thus, in *England v. Louisiana State Board of Medical Examiners*³ the Supreme Court said:

There are fundamental objections to any conclusion that a liti-

2. See, e.g., *Ford Motor Co. v. Department of the Treasury*, 323 U.S. 459 (1945); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908); cf. *Edelman v. Jordan*, 415 U.S. 651 (1974) (eleventh amendment bar to jurisdiction raised for the first time in the court of appeals); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Supreme Court refused abstention request, although implicitly acknowledging such a claim could be first raised before that court); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (Supreme Court recognized that a failure to empanel a three-judge court when statutorily required would result in a reversal and remand, even if not previously requested).

3. 375 U.S. 411 (1964).

gant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction." The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40. Nor does anything in the abstention doctrine require or support such a result. . . . Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. . . .

[Supreme Court review of state court decisions on federal claims,] even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. . . . Thus . . . a litigant may not be unwillingly deprived of [a primary fact determination by the district court].⁴

Other cases in which the Supreme Court has stressed the importance of original federal jurisdiction in enforcing federal constitutional rights include *Steffel v. Thompson*,⁵ *Mitchum v. Foster*,⁶ *Zwicker v. Koota*,⁷ *Monroe v. Pape*,⁸ and *Ex parte Young*.⁹

There is, however, an equally long, equally well respected list of cases maintaining the contradictory position: state courts have the

4. *Id.* at 415-17 (footnotes omitted).

5. 415 U.S. 452 (1974).

6. 407 U.S. 225 (1972).

7. 389 U.S. 241 (1967).

8. 365 U.S. 167 (1961).

9. 209 U.S. 123 (1908).

same responsibility toward federal claims that federal courts have and state courts cannot be presumed to do a less competent job. The rhetoric of this position reads as follows: "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court";¹⁰ "state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States',"¹¹

The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the "gap" complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial system to enforce federal rights, subject to review by this Court.

Misapplication of this Court's opinions is not confined to the state courts, nor are delays in litigation peculiar to them.¹²

This line of cases is available for support in cases when the state forum is to prevail. When both lines of decision are read, we simply do not know whether federal courts are "the primary and powerful reliances for vindicating" federal rights¹³ or whether that proposition improperly belittles state judges and disregards their responsibilities under the supremacy clause. We do not know which of these sets of propositions is appropriate to consider in interpreting the contours of particular jurisdictional statutes or judge-made jurisdictional doctrines.

This underlying uncertainty in our policies concerning federal jurisdiction has counterparts in our more specific rules concerning jurisdictional requirements. Federal jurisdictional rules are unclear in different ways. In some areas we simply cannot tell what the jurisdictional rules are. In other instances the rule is well estab-

10. *Dombrowski v. Pfister*, 380 U.S. 479, 485 (1965).

11. *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)).

12. *Amalgamated Clothing Workers v. Richmond Bros. Co.*, 348 U.S. 511, 518-19 (1955); accord, *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

13. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928).

lished, but its terms are so elastic that the result they yield on any given set of facts is not predictable. Finally, there are areas with rules and counterrules ready to be applied or aptly ignored, according to which disposition is desired. The examples I discuss below reflect all these situations.

I. FEDERAL QUESTION JURISDICTION

A. *Tests for Jurisdiction*

It is not possible to define with accuracy the tests for federal question jurisdiction. The federal question statute, 28 U.S.C. § 1331, provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."¹⁴ The critical issue is the meaning of "arising under." It is clear that the meaning differs from that of the same words in the constitutional grant of judicial power in section 2 of article III—"The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"¹⁵—for "arising under" there is broad indeed.¹⁶ If statutory jurisdiction were as broad, almost every case would be a federal question case; the burden on the federal courts would be overwhelming.

There is no consensus concerning the meaning of "arising under" in the statute. Mr. Justice Holmes announced the classic definition in 1916 when he said, "A suit arises under the law that creates the cause of action."¹⁷ As I will discuss shortly, even that rule provides little certainty because of the great flexibility that exists in deter-

14. Federal Question Jurisdictional Amendments Acts of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (amending 28 U.S.C. § 1331).

15. U.S. CONST. art. III, § 2.

16. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (federal question jurisdiction exists, in constitutional sense, whenever any federal proposition forms an "original ingredient" of the cause, whether or not the federal proposition is at issue); Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 160-63 (1953) (defending the different interpretations of similar language in constitutional and statutory contexts). But see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting) (treating *Osborn* and other decisions on the scope of the constitutional "arising under" as though they were interchangeable with statutory precedents).

17. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

mining whether a federal cause of action exists.¹⁸ But even more basic, it is a matter of dispute whether Holmes' requirement is prerequisite to federal question jurisdiction, as he believed, or whether it is one of two or more alternative paths to federal question jurisdiction. If the latter, there is little agreement as to what the other tests may be. In fact, there is almost no discussion of the problem in the cases.

Judge Friendly, in *T.B. Harms v. Eliscu*,¹⁹ did address the issue and concluded that "Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended."²⁰ As a supplemental test, Judge Friendly suggests "a case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such a law."²¹ The cases he cites to support the existence of the test—a test he also describes as "appropriate pleading of a pivotal question of federal law"²²—do not however, support its existence. In one of the two cases he uses to support the test, *DeSylva v. Ballentine*,²³ the parties did not question federal jurisdiction nor did the Supreme Court mention the issue. True, it was probably because the case so obviously turned on interpretation of a federal statute that all concerned overlooked the jurisdictional problem,²⁴ but *DeSylva* hardly announces an important new basis for federal question jurisdiction. The other case Friendly relied on, *Smith v. Kansas City Title & Trust*,²⁵ is murky indeed. It can be read to fit into Judge Friendly's test, but other interpretations are also possible.

Although Judge Friendly's formulation seems more innovative than he admits, it has been included by the American Law Institute [ALI] in its description of the current tests for federal question jurisdiction in the Institute's Study of the Division of Jurisdiction Between State and Federal Courts,²⁶ a study that in turn is

18. See notes 31-38 & accompanying text *infra*.

19. 339 F.2d 823 (2d Cir. 1964).

20. *Id.* at 827.

21. *Id.*

22. *Id.*

23. 351 U.S. 570 (1956).

24. Compare *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), discussed in text accompanying notes 39-51 *infra*.

25. 255 U.S. 180 (1921).

26. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS

often cited. Accordingly, Friendly's addition may become part of the accepted test. It appears a functional addition; cases turning on federal law seem appropriate for federal courts. It is not clear whether it would allow many of them in, however, since Friendly seems to adhere to the *Louisville & Nashville Railroad v. Mottley*²⁷ ruling as well. *Mottley* holds that in deciding whether federal question jurisdiction exists, a court looks only to the well-pleaded portions of the complaint; anticipation of defenses cannot confer jurisdiction.²⁸ Adhering to this rule, it will be the rare case indeed where one can know from the complaint that the federal question is pivotal. Well-pleaded *declaratory judgment* complaints might disclose a pivotal federal question, but declaratory judgments are not recognized as legitimate forms of action for purposes of applying the well-pleaded complaint rule. Instead, *Skelly Oil Co. v. Phillips Petroleum Co.*²⁹ held that, in a declaratory judgment action, one must look to the form of action that would have been brought if declaratory relief were not available and judge the existence of federal question jurisdiction under that old form of action.

Incidentally, the existence of the *Mottley* well-pleaded complaint rule, and the fact that it is generally deemed to be of some significance, convinces me that Holmes' cause of action test *cannot* be the exclusive test of federal question jurisdiction. My reasoning is that the cause of action under which a suit is brought is *always* properly part of the complaint; accordingly, if the cause of action had to be federal, the well-pleaded complaint rule would be superfluous. There must be additional categories of federal question jurisdiction for the *Mottley* test to have significance. That test does not, however, tell us what the additional categories are. I would welcome general adoption of Friendly's pivotal federal question test, *coupled with* an overturning of *Skelly Oil* so that declaratory judgment complaints that appropriately disclose an important federal controversy can confer federal question jurisdiction. That rule is not the law today, however.

484-85 (1969) [hereinafter cited as ALI Study].

27. 211 U.S. 149 (1908).

28. *Id.* at 152.

29. 339 U.S. 667 (1950).

Enough has been said to show it is difficult to know what the tests for federal question jurisdiction are, although federal question is one of the most important headings of federal courts' jurisdiction and although the issue has been with us for many years with little perceptible development. No resolution or attempt at resolution seems to be on the horizon. The ALI in its 1969 study of jurisdiction noticed the problem but ultimately decided not to enunciate a standard for federal question jurisdiction in its proposed statute; it was afraid of creating confusion if it brought any rationale to the area:

The existing doctrines as to when a case raises a federal question are neither analytical nor entirely logical, but a considerable body of case law has been built up on this subject that is reasonably well understood by courts and litigants and that works well in practice. It has therefore seemed the safer course to follow the traditional language, with only minor change, and thus to make it clear that the subsection preserves that body of law.³⁰

B. *Implied Causes of Action*

At least we know that there *is* federal question jurisdiction in cases where there is a federal cause of action.³¹ Even this part of the test, however, is less clear than it seems. The problem is determining whether a federal cause of action (usually meaning remedy³²) exists. Federal statutes and constitutional provisions often are not explicit in this regard; they may establish a right without specifying the remedy for its violation, whether it is to be created as a matter of federal law, or whether state remedies should be relied upon. The fourth amendment of the United States Constitution is an example; *Mapp v. Ohio*³³ and *Bivens v. Six Unknown Named Agents*³⁴ are two of the cases that struggled with questions of remedy when the wording of the amendment itself provided lit-

30. ALI Study, *supra* note 26, at 179.

31. *But see* *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900); *Roecker v. United States*, 379 F.2d 400 (5th Cir.), *cert. denied*, 389 U.S. 1005 (1967).

32. In the cases cited in note 31, *supra*, there were express federal remedies yet no federal jurisdiction was found.

33. 367 U.S. 643 (1961).

34. 403 U.S. 388 (1971).

the guidance. Even if the statute or constitutional provision in question does provide a federal remedy, it often will not specify whether that remedy is to be exclusive; or whether it is to be supplemented by other federal remedies which federal courts are to devise; or whether it is to be supplemented by state remedies.³⁵

The answers to these questions are generally unknowable until courts tell them to us. Courts are to decide the issues weighing all the circumstances and bearing in mind what fits best with congressional intent, in the case of a statute,³⁶ or with constitutional intent, if a remedy for a constitutional violation is at issue.³⁷ Once a particular statute or constitutional provision is held to embody or not embody a particular federal remedy, we have guidance for the future, but not until then.³⁸

C. *The Duke Power Case*

The renowned *Duke Power v. Carolina Environmental Study Group*³⁹ provides one final illustration that the complications of

35. In *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), for example, it was not obvious from reading the Copyright Act, under which Harms sued, that his action for adjudication of ownership of a copyright did not state a federal cause of action. It had long been held, however, that infringement was the only federal cause of action "arising under" the Copyright Act (together with certain specifically granted remedies such as a suit for statutory royalties for record production). *Id.* at 828.

36. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Cort v. Ash*, 422 U.S. 66 (1975); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

37. See, e.g., *Carlson v. Green*, 446 U.S. 14 (1980); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

38. A recent decision respecting the scope of 42 U.S.C. § 1983 (1976) suggests that enactment provides a federal cause of action for violations of *all* federal statutes in suits against persons acting under color of state law. *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980). It remains to be seen whether the Supreme Court will carry through with the implications of the *Thiboutot* opinion, which did not discuss directly the Court decisions concerning implication of causes of action from federal enactments. See *First Nat'l Bank v. Marquette Nat'l Bank*, 636 F.2d 195, 198 (8th Cir. 1980) (arguing that *Thiboutot* did not extend § 1983 protection for statutes that did not concern "important personal rights akin to fundamental rights"). It was already established that § 1983 provides a federal right of action for violation of all federal constitutional provisions by persons acting under color of state law, see *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972) (but query whether that ruling should apply to actions under the contract clause, see *Spears v. Mount Etna Morris*, 313 F. Supp. 52 (W.D. Mo. 1969)). Moreover, the same result may possibly obtain in all constitutional suits against federal officials or persons acting under color of federal law. See *Davis v. Passman*, 442 U.S. 228 (1979); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

39. 438 U.S. 59 (1978). *Duke Power* is known principally for its justiciability holdings.

detecting whether federal question jurisdiction exists are virtually boundless. Chief Justice Burger there added yet another twist to the complexities of federal question jurisdiction by joining together the uncertainties of federal remedial law and the doctrine of *Bell v. Hood*.⁴⁰ *Bell v. Hood* developed the doctrine that federal question jurisdiction does not exist if the claimed federal question is insubstantial. The Court in *Bell v. Hood* held that federal question jurisdiction is lacking only if the federal question claim is "wholly insubstantial and frivolous."⁴¹ If it is simply wrong, the court should dismiss the case for failure to state a claim, but jurisdiction exists, with the possibility of pendent state claims.⁴² The practice of finding implied causes of action and the *Bell v. Hood* doctrine together enabled the Chief Justice to find jurisdiction in a case in which its absence had gone undetected prior to Supreme Court review.⁴³

In *Duke Power*, the Chief Justice said that federal question jurisdiction would exist if it was arguable that a federal cause of action could be implied, whether or not the Court actually ruled there was a federal cause of action.⁴⁴ He then discovered an arguably implied remedy—a cause of action against the regulatory agency flowing from the due process clause.⁴⁵ He proceeded thereby to sustain jurisdiction under *Bell v. Hood*, holding it was unnecessary to decide whether a federal cause of action actually existed.⁴⁶ The Chief Justice went on to uphold on the merits the constitutionality of the Price-Anderson Act,⁴⁷ with its limitation on liability for nuclear accidents.⁴⁸

40. 327 U.S. 678 (1946). The Court in *Bell* held that federal question jurisdiction can be defeated only if the asserted federal question claim is "wholly insubstantial and frivolous." *Id.* at 682-83. A decision that a complaint fails to state a claim upon which relief can be granted is a decision on the merits; however, federal court jurisdiction still exists, with the possibility of a judgment on pendent state claims. *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

41. *Id.* at 682-83.

42. *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

43. The Court had earlier employed a similar technique in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 277-79 (1977). *See also Burks v. Lasker*, 441 U.S. 471, 475-76 & n.5 (1979).

44. 438 U.S. at 70-71.

45. *Id.* at 69 & n.13.

46. *Id.* at 70-72.

47. 42 U.S.C. § 2210 (1976).

48. 438 U.S. at 84-94.

This approach to federal question jurisdiction is expansive indeed. It is almost always *arguable* that there is a federal cause of action.⁴⁹ Indeed, in *Duke Power* the Chief Justice was the first to articulate this argument. Justice Rehnquist wrote a less imaginative but more convincing concurring opinion in which he explained why federal jurisdiction did not in fact exist.

For many years the Supreme Court decided no cases raising important questions about federal question jurisdiction. The Court decided *Duke Power* by applying a combination of the old tests, but it created no new categories of federal question jurisdiction, and it did not take the opportunity to clarify the law in the area.

One might maintain, with the ALI, that it is best to leave well enough alone and let judges and litigants continue to work within this reasonably well understood, although ultimately incoherent, system. Seeking more consistent rules might simply add another level of intellectualization to an area already abounding in that characteristic.

I do not agree with the ALI position, however. Federal question jurisdiction strikes me as an area that can be rationalized and one in which relatively predictable rules can be developed that will lead to sensible results. *Duke Power* in some ways was a perfect case for answering some of the basic federal question issues that have been with us for years; it was a case that so clearly turned on federal law that no one bothered to question jurisdiction over it, but in which, under conventional tests, jurisdiction did not exist.⁵⁰ *Duke Power* presented an opportunity to announce that federal question jurisdiction exists if a well-pleaded complaint, including a declaratory judgment complaint, shows that the controversy turns on federal law.

If, however, one opts for the ALI approach,⁵¹ it would seem pref-

49. *Id.* at 95. *Duke Power* also showed an extraordinary eagerness to reach the merits, and thereby sustain the constitutionality of the challenged statute, in its standing/ripeness ruling. Justices Stevens and Stewart wrote separate objections to this aspect of the Court's opinion. *Id.* at 94 (Stevens, J., concurring); *id.* at 102 (Stewart, J., concurring).

50. The plaintiffs claimed that the limitations of the Price-Anderson Act unconstitutionally limited recovery rights in the event of a nuclear accident.

51. While the ALI declined to draft the jurisdictional statute in analytic terms, its approach differs less from mine if one takes into account its commentary. The commentary explicitly endorses the notion that federal question jurisdiction should exist when "the complaint discloses a need for determining the meaning or application of federal law," ALI

erable to make the jurisdictional determination openly discretionary than to act as though it is governed by a mass of rules that purport to fit into a coherent system. One advantage to making discretion explicit is that you thereby inform litigants, and lower court judges, to talk about the factors that are relevant and not to take too seriously the distinctions now discussed. Another advantage of starting to discuss the real variables is that such discussion, over time, can help to develop factors that lead to more appropriate, predictable, and uniform results.

II. DIVERSITY JURISDICTION

Federal question is not the only basic jurisdictional area where the rules are unclear, although perhaps the uncertainties are most pervasive there. In diversity jurisdiction as well I will discuss a basic question that has long existed with little helpful development from the courts. While it is hard to understand or justify the Supreme Court's failure to resolve this issue, diversity jurisdiction generally is unlike federal question jurisdiction in that many of its basic issues are clear and easy to apply.

For a long time confusion has reigned over definitions of corporate citizenship for diversity purposes. Corporations' ability to manipulate their citizenship, and thereby to create or defeat federal jurisdiction to obtain the desired forum, is one of the abuses that led to *Erie Railroad v. Tompkins*.⁵² Since that time Congress has cut down on the problem of foreign reincorporation in order to manufacture diversity jurisdiction. In 1958 it enacted 28 U.S.C. § 1332(c), making a corporation "a citizen of any State by which it has been incorporated" as well as "of the State where it has its

STUDY, *supra* note 26, at 178, or, phrased otherwise, when "an important question of federal law is an essential element in the case." *Id.* at 179. But by declining to put any definitive resolution of the problem in the statute, it preserves the ambiguity that has long been with us.

Other parts of its statutory resolutions effectively bring its proposals closer to my own. It retains the well-pleaded complaint rule, but for these purposes it treats complaints seeking declaratory relief the same as those seeking coercive relief. *Id.* at 24-25, 171-72 (proposed 28 U.S.C. § 1311). Moreover, by proposing to change current law to permit removal generally on the basis of a federal defense, *id.* at 25 (proposed 28 U.S.C. § 1312(a)(2)), the ALI provides a federal forum for cases which do in fact turn on federal law.

52. 304 U.S. 64 (1938). See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928).

principal place of business.”⁵³

The chief uncertainty now lies in the effects of multiple incorporation. It seems settled that a corporation has only one principal place of business.⁵⁴ It is not clear, however, whether under the other clause of section 1332, making a corporation “a citizen of any State by which it has been incorporated,” the corporation can have multiple citizenship. The language certainly seems to suggest it should be a citizen of every state in which it is incorporated, and that approach would best serve the policy of reducing the number of diversity cases.⁵⁵ But some courts, even after the 1958 revision of section 1332,⁵⁶ have said a corporation is a citizen only of the forum state⁵⁷ (and of one principal place of business), for diversity purposes. For example, assume a corporation incorporated in Illinois and Michigan with a principal place of business in California. That corporation could sue or be sued by a person from Illinois in Michigan federal court, under the diversity jurisdiction, but not in Illinois federal court under this rule; by contrast, the corporation would be considered a co-citizen with the person from Illinois under the citizen-of-all-places-of-incorporation rule regardless of the forum where suit was brought.

This issue—the effect of multiple incorporation on diversity ju-

53. Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (codified at 28 U.S.C. § 1332(c) (1976)).

54. See *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960). There is difficulty, of course, in determining what the principal place of business is and what test should be applied to determine this when, for example, there is more than one place of operations or when a corporation's production and its management are located in different states.

55. Moreover, a corporation is not likely to be the subject of discrimination in a state in which it is incorporated, and accordingly the policies behind diversity jurisdiction would not seem to require federal jurisdiction here.

56. Prior to the revision another possibility was that a multi-state corporation was diverse to everyone. See *Nashua & L.R.R. v. Boston, L.R.R.*, 136 U.S. 356 (1890); *Gavin v. Hudson & M.R.R.*, 185 F.2d 104 (1950). Other early possibilities were that a corporation was a citizen of its first place of incorporation, *St. Louis & S.F. Ry. v. James*, 161 U.S. 545, 560-65 (1896), or of all places except those in which it was forced to incorporate as a condition of doing business, *id.*

57. *Hudak v. Port Authority Trans-Hudson Corp.*, 238 F. Supp. 790 (S.D.N.Y. 1965); *Majewski v. New York Cent. R.R.*, 227 F. Supp. 950 (W.D. Mich. 1964); see *Jaconski v. McCloskey & Co.*, 167 F. Supp. 537, 540 (E.D. Pa. 1958) (holding that under the 1958 revision one could not use the *Hudak* “diverse to all” theory when the corporation is incorporated in one state with a principal place of business in another). See also *Chicago & N. Ry. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 283-84 (1872) (formulating the “forum” doctrine).

risdiction—has been with us actively since the mid-nineteenth century. Before the century was out, the Supreme Court announced a host of plainly inconsistent rules,⁵⁸ including all the possibilities that are with us today, with no attempt to reconcile them. The Court has done little to clarify the situation since, although summary affirmance in *Jacobsen v. New York, New Haven & Hartford Railroad*,⁵⁹ when the cases it cites are read, does seem to reject as a possibility that a multistate corporation is diverse to everyone. I believe that Congress should be taken to have cleared up the question in enacting section 1332(c) and to have adopted the rule that a multistate corporation is diverse to no person from any state in which it is incorporated, but that has not transpired.

III. PULLMAN ABSTENTION DOCTRINE⁶⁰

As noted earlier, the implication of causes of action is an area in which the procedure to follow is fairly clear—that is, divine congressional or constitutional intent from all the circumstances—but where the test itself is sufficiently indefinite that the results of its application are not predictable.⁶¹ Nonetheless, precedents form over time. Once the federal courts have decided what remedies are available under a given statutory or constitutional scheme, we have a much more developed body of law than if we always had to reason from a generalized congressional or constitutional intent.⁶²

58. *St. Louis & S.F. Ry. v. James*, 161 U.S. 545, 560-65 (1896); *Nashua & L.R.R. v. Boston & L.R.R.*, 136 U.S. 356 (1890); *Chicago & N. Ry. Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 283-84 (1872); *Ohio & M.R.R. v. Wheeler*, 66 U.S. (1 Black) 286, 297-98 (1862).

59. 347 U.S. 909 (1954).

60. There are other kinds of abstention as well, one of which is discussed in the next section. See notes 61-81 & accompanying text *infra*. The administrative abstention developed in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), also deserves mention, however. This is an area in which federal courts defer to state courts for decision of federal issues as well as state issues, so that no return to federal court is possible. Yet the requirements for *Burford* abstention are utterly uncertain. There is no requirement of unclear state law or of a federal constitutional issue, and the abstention has something to do with the involvement of a state administrative agency. But abstention is certainly not available for every regulatory case. For an attempt to describe requirements for *Burford* abstention, and to discover a rationale behind it, see the section on administrative abstention in Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1153-63 (1974).

61. See notes 31-38 & accompanying text *supra*.

62. See, e.g., *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964) (treatment of the

The *Pullman*⁶³ abstention doctrine is like the implication of federal causes of action in that we know what the *Pullman* test is, but its terms are sufficiently flexible that knowledge of the test does not lead to predictable results. Unlike the law of federal causes of action, however, one cannot expect helpful precedents in the abstention area to develop over time.

The rule of *Pullman* abstention is that federal courts will defer to state courts in cases containing unclear issues of state law whose resolution could avoid or substantially modify a federal constitutional question.⁶⁴ When the federal court abstains under the doctrine, the federal litigants are sent to state court to present their state law issues. While they can reserve federal issues for a return to federal court,⁶⁵ before returning they must pursue state issues from the state trial court all the way up to the state supreme court, if that tribunal is available to them.⁶⁶

While the *Pullman* rule is clear, its application in any given fact situation is highly uncertain. The chief ambiguity in the rule lies in the requirement that state law be "unclear." But almost any rule of law is somewhat unclear, so most federal constitutional litigation against states arguably can come within the rule. Moreover, even if the rule spelled out the degree of unclarity required for abstention, how much uncertainty there is in interpreting any particular state enactment is a matter difficult to measure or explain, a matter where individual judgments may differ sharply.

This is an area, then, where uncertainties in application of an articulated test mean that results will differ greatly according to the particular tribunal. From the litigants' point of view the issue can be of great moment. If it is important to them to preserve their right to a federal forum for determination of federal issues, an abstention order means they may have to undergo the delay and expense of two trials rather than one—first in state court and then, if the constitutional issue remains, before the federal court. Moreover, the expense and delay may be increased if the abstention or-

remedies available under the Copyright Act). For a discussion of *T.B. Harms*, see note 35 *supra*.

63. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

64. *Id.* at 501.

65. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964):

66. *See, e.g., Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229 (1957).

der is made late in the federal proceedings—or even by the court of appeals or the Supreme Court. The case law affords many examples of the delay abstention can cause. *England v. Louisiana State Board of Medical Examiners*,⁶⁷ for example, was decided on the merits only after nine years of litigation; a final decision came five years after abstention was ordered. The decision in *Spector Motor Service, Inc. v. O'Connor*⁶⁸ was rendered nine years after the action began and seven years after the Supreme Court first ordered abstention.⁶⁹ In *Leiter Minerals, Inc. v. United States*,⁷⁰ abstention prevented the case from ever being decided. Eleven years after the litigation began and eight years after abstention was ordered, it was dismissed as moot.⁷¹

I would resolve the problems of abstention by holding that the costs of the *Pullman* doctrine outweigh its benefits and that it should no longer be followed. In cases requiring abstention, one could still obtain answers to disputed state issues by use of state certification procedures. Even if that were done, however, the problem of identifying the standard for abstention/certification would remain. And it may be that “unclear state law” is a standard we cannot effectively narrow in order to guide judges’ discretion.⁷² If we cannot effectively narrow the abstention standard, and if, unlike federal common law, review of abstention decisions will not yield meaningful precedents, then I think we should cut down the reviewability of decisions relating to abstention.⁷³

Another question that should certainly be faced in any major rethinking of federal question jurisdictional practices is whether we ought to retain the practice of letting jurisdictional rules be raised for the first time after trial. Where we do not succeed in simplifying jurisdictional rules, cutting back on the practice of allowing them to be raised at any time would cut down some of the enor-

67. 375 U.S. 411 (1964).

68. 340 U.S. 602 (1951).

69. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944).

70. 352 U.S. 220 (1957).

71. *United States v. Leiter Minerals, Inc.*, 381 U.S. 413 (1965).

72. The current definition is so broad as to provide little guidance and predictability. The fear is that a narrowed definition would wrongly omit cases in which abstention or certification is appropriate.

73. I think we should restrict review at least if abstention is involved and not the much more economical certification procedure.

mous waste which jurisdictional litigation produces today.

It should be observed that the various rules I discuss in this paper as "federal jurisdictional rules" are jurisdictional in different senses and to different degrees. Some strictly delimit federal courts' power: for example, rules determining the existence of federal question jurisdiction and diversity jurisdiction. Others, like *Pullman* abstention, concern the propriety of exercising jurisdiction which undoubtedly exists.⁷⁴

There are counterparts to both kind of issues in the state system. Usually when we think of state jurisdictional issues we think of strictly jurisdictional ones—those defining the limits of particular state courts' power to act. Most questions of in personam and in rem jurisdiction are of this type. But *forum non conveniens* is a rule concerning the exercise of state court jurisdiction that is definitely of the discretionary variety; it asks whether a particular state court should exercise jurisdiction that it undoubtedly possesses or whether instead the greater convenience of an alternative forum warrants deference in its favor.

Like most federal jurisdictional doctrines, and certainly the more prudential ones, *forum non conveniens* cannot be raised after trial to void a decree already rendered.⁷⁵ Unlike federal doctrines, however, it also cannot be raised for the first time on appeal.⁷⁶ Indeed, the *forum non conveniens* doctrine is usually considered reviewable only to determine whether the trial judge abused his discretion.⁷⁷

The reviewability of abstention decisions greatly exacerbates abstention's chief cost—the length of time it takes to get a definitive decision. For example, under current law if a trial court declines to abstain, its decision is reviewable but not immediately;⁷⁸ first the court disposes of the case on the merits. A party whose case has been fully adjudicated in a federal district court and in the court of appeals therefore may face an abstention decision for the first time

74. Other rules are discretionary in this sense as well; for example, see some of the justiciability decisions cited in note 126 *infra*.

75. Because the defense "is not an absolute lack of jurisdiction," *Wilburn v. Wilburn*, 192 A.2d 797 (D.C. 1963), the decree is not void for lack of power.

76. See, e.g., *Flaiz v. Moore*, 359 S.W.2d 872 (Tex. 1962).

77. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 485 (1947).

78. See generally 28 U.S.C. § 1291 (1976).

in the Supreme Court of the United States. Indeed, under current law that may result even if the possibility of abstention has not previously been noted by either party, because the Court can, and does, raise the issue on its own motion.⁷⁹ If the Supreme Court does decide to abstain, the parties are remanded to state court to start the litigation anew on state issues, perhaps years after their litigation began.⁸⁰ The disposition of the federal issues that have already been fully adjudicated is set aside. Only after the parties work their way up through the state appellate system can they return to federal court for resolution of the federal issues.

I am not advocating that the *forum non conveniens* model of nonreviewability be carried over to federal jurisdictional issues generally or even to all the discretionary/prudential ones. I believe that the preferable alternative to nonreviewability is to develop criteria for jurisdictional rules sufficiently definite that they can be applied at the outset of litigation without substantial risk of error. But in areas in which we find ourselves unable further to specify or clarify jurisdictional criteria and in which we do not see a substantial risk of trial judges using their discretion to deviate from federal policy on a particular issue, we should strongly consider the *forum non conveniens* model of nonreviewability

Thus, in the abstention context I have suggested elsewhere that decisions to abstain be reviewable, and reviewable before the state court litigation takes place, but that decisions *not* to abstain be nonreviewable.⁸¹ This suggestion obviously involves a value judgment that we need to protect against trial judges' overuse of the abstention doctrine to avoid cases properly within their jurisdiction; a decision to exercise jurisdiction that in any event exists cannot be such a serious mistake that it is worth the costs associated with review. This solution of nonreviewability should not be available for jurisdictional issues which are less prudential and which go to federal courts' power, nor should it be used in areas in which review could contribute to developing much more definite jurisdictional rules.

Even when nonreviewability seems inappropriate, however, it is

79. See, e.g., *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

80. See notes 68-71 & accompanying text *supra*.

81. See Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977).

not necessary to allow federal jurisdictional issues to be raised for the first time on appeal. That certainly should not be allowed for the more prudential federal jurisdictional decisions, as opposed to those that go strictly to the federal courts' power to proceed. Even if standards for jurisdiction can be made clear and definite, the parties or the court can be expected to notice them at some point during the trial; otherwise they should be deemed waived.

IV. *Dombrowski v. Pfister*, *Younger v. Harris*, AND THEIR PROGENY

A. *The Younger Doctrine*

Finally, I want to discuss the *Dombrowski-Younger* line of cases to illustrate a different kind of uncertainty and flexibility in federal jurisdictional doctrine. In *Dombrowski v. Pfister*,⁸² plaintiffs sought declaratory relief and an injunction restraining state officials from prosecuting them under a statute alleged to violate the first amendment by its overbreadth. No state prosecution was pending when the federal action was brought.⁸³ The Supreme Court held that the district court should decide the case on the merits because special circumstances justified the exercise of jurisdiction—allegations of overbreadth in the coverage of the statute and of bad faith on the part of the state prosecutors.⁸⁴ In *Younger v. Harris*,⁸⁵ which did involve a pending prosecution, the plaintiff sought to enjoin the district attorney from prosecuting him for violating California's Criminal Syndicalism Act.⁸⁶ Despite an overbreadth allegation, the Supreme Court held the federal district court should defer in favor of criminal prosecution in the state court, which the Court thought an adequate forum in which to raise the federal constitutional issue.⁸⁷

Dombrowski, *Younger*, and the cases decided under their authority have come to stand for the principle that, except in extraordinary circumstances, a federal court should not interfere by

82. 380 U.S. 479 (1965).

83. *Id.* at 484 n.2.

84. *Id.* at 490-91.

85. 401 U.S. 37 (1971).

86. CAL. PENAL CODE §§ 11400-11401 (West 1970).

87. 401 U.S. at 49.

injunction in state criminal proceedings, threatened or pending. A federal court may not issue declaratory relief either if there are pending state proceedings,⁸⁸ but it may when proceedings are only threatened,⁸⁹ although doubts have been raised whether the declaratory relief will have res judicata effect or merely persuasive force.⁹⁰ For these purposes, "pending" state proceedings are defined as those commenced in state court "before any proceedings of substance on the merits" have occurred in federal court.⁹¹ A federal plaintiff therefore may win the race to the courthouse only to discover that the attempt to sue has led the district attorney to prosecute, thereby vitiating the federal law suit and bringing about the criminal prosecution that was feared. There are paths around the *Younger* doctrine: one may seek a preliminary injunction against the threatened prosecution at the outset in federal court.⁹² (That avenue is available only if prosecution is simply threatened; pending prosecutions cannot be halted through interlocutory federal relief.⁹³) Another way state adjudication can sometimes be avoided is by complying with the state law that is challenged until "proceedings of substance on the merits" occur in federal court. In that event, the state has nothing to prosecute for until the federal suit is already under way, so the state is prevented from robbing the plaintiff of a federal forum by creating a pending proceeding.

88. See *Samuels v. Mackell*, 401 U.S. 66 (1971).

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

90. See *id.* at 470 (quoting *Perez v. Ledesma*, 401 U.S. 82, 124-26 (1971) (Brennan, J., concurring in part and dissenting in part)); *id.* at 476-78 (White, J., concurring); *id.* at 479-84 (Rehnquist, J., concurring). By contrast, *Samuels v. Mackell*, 401 U.S. 66 (1971), had said that, in the pending prosecution situation, declaratory relief was unavailable equally with injunctive relief because "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid." *Id.* at 72. See also *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

91. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). Prior to *Hicks* the line was drawn according to which party won the race to the courthouse. See, e.g., *Dombrowski v. Pfister*, 380 U.S. at 484 n.2. Justice Rehnquist, however, foreshadowed the *Hicks* holding in his concurring opinion in *Steffel v. Thompson*, 415 U.S. at 479-84.

92. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

93. The interlocutory injunction may also be useful only in situations in which the plaintiff's challenge is to state interference with a continuing course of conduct.

B. *Authority Behind the Dombrowski-Younger Doctrine*

What is the authority for the *Dombrowski-Younger* doctrine? The source of its ban against injunctions is less than clear. The Anti-Injunction Act, 28 U.S.C. § 2283,⁹⁴ prohibits injunctions against state proceedings except in certain circumstances. The Act does not apply unless state proceedings are pending when the injunction is sought,⁹⁵ an exception which includes some of the cases the *Younger v. Harris* doctrine affects. Moreover, section 2283 does not apply to cases arising under section 1983,⁹⁶ as this section is an "expressly authorized" exception.⁹⁷ This exception includes all the criminal cases in the *Younger v. Harris* line, because all constitutional litigation against state officers falls within section 1983.⁹⁸

Mr. Justice Black, the author of the *Younger v. Harris* opinion, there explained *Younger's* deference to state proceedings as deriving from the policy behind the Anti-Injunction Act, even though the Act itself does not apply.⁹⁹ Indeed, at that time it was still unclear whether the Civil Rights Acts *were* within the exceptions to section 2283; Justice Black found it unnecessary to decide the issue, holding that the same result would obtain whether the Act applied or not: the federal court would exercise jurisdiction upon a showing of bad faith or harassment but not otherwise.¹⁰⁰

It is strange, to say the least, that the exceptions to a statute should be interpreted to yield exactly the same results as the statute itself and also that "the policy of the Act" can accomplish this both for the Act and its exceptions without identification of what

94. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1976).

95. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *Ex parte Young*, 209 U.S. 123, 161-62 (1908).

96. 42 U.S.C. § 1983 (1976).

97. *Mitchum v. Foster*, 407 U.S. 225 (1972).

98. *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972).

99. *Younger v. Harris*, 401 U.S. at 43-54.

100. *Id.* at 54; see *Mitchum v. Foster*, 407 U.S. 225, 229 (1972). Indeed, if the cases were directly governed by the Anti-Injunction Act, the *Dombrowski-Younger* doctrine would be considerably narrower than it is, for the Act is limited to injunctions against pending prosecutions. Under the Act one can test the constitutionality of state enactments under any circumstances except when the race to the courthouse has been won in state court. See *Dombrowski v. Pfister*, 380 U.S. 479, 484 n.2 (1965); *Ex parte Young*, 209 U.S. 123, 161-63 (1908).

that policy is. Justice Black confessed that "the precise reasons for this long-standing public policy against federal court interference have never been specifically identified."¹⁰¹ Black identified two "primary sources" of the policy: first, "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief";¹⁰² and, second, "Our Federalism," which he defined as "the notion of 'comity,' that is a proper respect for state functions."¹⁰³

This explanation does not adequately support the *Younger* doctrine. In the first place, it is not a long-standing doctrine, although the Supreme Court usually talks as though it is. It stems principally from dictum in *Douglas v. City of Jeannette*¹⁰⁴ to the effect that federal injunctions against state prosecutions are unnecessary absent a showing of irreparable harm from being left to raise federal constitutional issues in the context of the state prosecution.¹⁰⁵ It should be noted that this statement, and the *Dombrowski-Younger* doctrine which is built upon it, invokes a total change of presumption from the usual rule that, if a case falls within the federal jurisdiction and if a plaintiff chooses the federal rather than the state forum, the plaintiff has a right to pursue the suit there, absent "special circumstances" warranting the nonexercise of federal jurisdiction.¹⁰⁶ Although the *Dombrowski-Younger* cases fall within federal jurisdictional grants, including the Civil Rights Acts, the *Dombrowski-Younger* doctrine creates a presumption in favor of state jurisdiction, thereby requiring the federal plaintiff to show special circumstances, usually bad faith or harassment, in order for federal jurisdiction to be exercised.

The *Douglas v. City of Jeannette* dictum, which fostered this change of presumption from federal to state jurisdiction, was picked up as the general policy in *Dombrowski v. Pfister* for the pur-

101. *Younger v. Harris*, 401 U.S. at 43.

102. *Id.* at 43-44.

103. *Id.* at 44.

104. 319 U.S. 157 (1943).

105. *Id.* at 163-64.

106. See, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964); *Propper v. Clark*, 337 U.S. 472, 492 (1949).

pose of showing that there are exceptions and that federal courts sometimes will exercise jurisdiction. In so picking up the restrictive *Douglas* statement as the general rule, the Court in *Dombrowski* seemed not to realize, however, that federal jurisdiction should be exercised as a matter of course and not as an exceptional circumstance. Cases supporting the exercise of jurisdiction as a matter of course date back to *Ex parte Young*,¹⁰⁷ in which the Court had clearly articulated the need for federal jurisdiction. *Young* had been followed repeatedly prior to *Dombrowski*, at least in cases where the plaintiff desired to pursue a continuing course of conduct free from state interference.¹⁰⁸

Justice Black's argument for the policy of federal noninterference suffers from an additional weakness. Traditions of equity do not support deferring to state forums here. It is true that there is a principle of equity disfavoring injunctions against criminal prosecutions,¹⁰⁹ and that, as a result, state courts do not easily enjoin state criminal prosecutions and federal courts do not easily enjoin federal ones. Moreover, it is a traditional rule of equity that injunctions should not issue in the absence of irreparable harm. Nonetheless, in our federal system, we have not measured irreparable harm for *federal* injunctions by asking whether *state* remedies would afford adequate relief.¹¹⁰ It is that approach to irreparable harm, peculiar to the *Dombrowski-Younger* doctrine, that creates a presumption in favor of state jurisdiction, even in cases Congress

107. 209 U.S. 123 (1908).

108. See, e.g., *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927).

Sometimes when a federal plaintiff had sought to enjoin a state prosecution for a single violation of state law that had already occurred, the federal court would defer to the state proceedings. See, e.g., *Fenner v. Boykin*, 271 U.S. 240 (1926). But see Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. Rev. 740, 785-88, 906 (1974) (maintaining that *Fenner* was one of a very few cases contrary to the general view and that "[p]rior to *Younger* the Supreme Court consistently encouraged the use of lower federal court declaratory and injunctive relief against unconstitutional state criminal laws"). See also Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193. At any rate, most of the *Dombrowski-Younger* cases, including *Dombrowski* and *Younger* themselves, involve plaintiffs wishing to pursue a continuing course of conduct.

109. See, e.g., *In re Sawyer*, 124 U.S. 200 (1880).

110. See, e.g., *McConihay v. Wright*, 121 U.S. 201 (1887); *Payne v. Hook*, 74 U.S. (7 Wall.) 425 (1869).

has placed in the federal courts, and makes federal courts available only when state courts are inadequate on the facts of the particular case. This judge-created presumption against the exercise of federal jurisdiction flies in the face of our usual notions of Congress' ability to regulate federal courts' jurisdiction by setting forth circumstances in which the parties, or one of them, may have access to the federal courts. In other contexts, the Court has recognized a "duty," imposed by Congress' jurisdictional statutes, to "give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."¹¹¹ Accordingly, the Court has applied the irreparable harm requirement and the rule that no injunction shall issue if there is an adequate remedy at law by asking only whether available remedies *on the law side of the federal court* afford the plaintiff sufficient protection; it has not looked to available state remedies just because concurrent federal jurisdiction exists.¹¹²

C. *Methods of Avoiding the Younger Doctrine*

The *Younger* doctrine is far reaching in its scope. The paradigm case for its application (and the *only* context in which the doctrine has any historical support¹¹³) is the case in which a federal plaintiff who has engaged in a one-time violation of state law seeks to enjoin the state prosecution. As the doctrine is applied today, however, it carries over to other situations, so that the policy against federal court interference with state criminal proceedings becomes, in effect, a policy against federal adjudication of the constitutionality of state criminal enactments generally. Consider, for example, a person who has violated a state criminal statute by engaging in conduct she/he wishes to continue and who comes to federal court to challenge the constitutionality of the state statute. The federal court could follow the practice of allowing relief against future prosecutions although not against prosecutions for conduct that

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

112. Moreover, the alternative of a state prosecution may not provide an adequate forum for hearing the federal plaintiff's claims, so the irreparable harm requirement may be satisfied on that basis. Professor Laycock makes a convincing case that the state prosecution is usually inadequate to protect the needs of the federal plaintiff, especially the plaintiff anxious to continue the conduct that the state wishes to punish. Laycock, *supra* note 108.

113. See note 108 *supra*.

has already occurred. At one time such a differentiation between present and future prosecutions was accepted, and the anti-injunction ban had much less bite.¹¹⁴ Today, courts instead take the position that passing on the validity of the state criminal enactment, even as it relates to future prosecutions, would affect the current prosecution as well, and that the adjudication therefore cannot be allowed.¹¹⁵

The principal way for litigants today to avoid being forced to resort to state court remedies is to comply with the questionable state law before challenging it in federal court. The *Younger* bar does not affect the availability of these previolation suits as a means for securing federal adjudication of the constitutionality of state criminal enactments.

Plaintiffs often have trouble, however, in establishing the justiciability of these anticipatory actions. In *Younger v. Harris*, for example, a prosecution for violating the state's criminal syndicalism statute was pending against Harris, but three other plaintiffs who had not violated the law joined in the suit. The Court, speaking through Mr. Justice Black, ordered the case dismissed as to the three nonviolating plaintiffs because "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs . . ."¹¹⁶ He did suggest that a different result might have obtained if their allegations had differed: "if these three had alleged that they would be prosecuted for the conduct they planned to engage in, and if the District Court had found this allegation to be true—either on the admission of the State's district attorney or on any other evidence—then a genuine controversy might be said to exist."¹¹⁷ Allegations designed to show the immediacy and concreteness of a grievance, however, are often dismissed in this fashion after the fact as insufficiently specific, even when plaintiffs have done all that seemed necessary beforehand to establish the justiciability of

114. See, e.g., *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927).

115. See, e.g., *Roe v. Wade*, 410 U.S. 113, 125-27 (1973) (that controversy was nonetheless decided in federal court because of the existence of other plaintiffs not subject to present prosecutions). But see *Wooley v. Maynard*, 430 U.S. 705, 710-12 (1977).

116. *Younger v. Harris*, 401 U.S. at 42.

117. *Id.*

their claim.¹¹⁸

Many of the cases most used to illustrate that anticipatory (previolation) lawsuits still provide an effective means for challenging in federal court the constitutionality of a state criminal enactment are, in fact, not true anticipatory actions. *Steffel v. Thompson*,¹¹⁹ for example, in some ways was an anticipatory action because Steffel was not threatened with prosecution for past infractions. Twice he had been threatened with arrest if he declined to stop handbilling, and both times he had stopped. His companion the second time, however, had refused to stop, and he had been arrested and arraigned. The plaintiff alleged that he wanted to continue handbilling, and the parties stipulated that if he did continue he might be arrested and charged.¹²⁰ Even here, the district court dismissed the complaint on the grounds, among others, that "the rudiments of an active controversy between the parties . . . [are] lacking,"¹²¹ but the Supreme Court held the controversy was justiciable.

Steffel v. Thompson does not, however, demonstrate that plaintiffs will have a federal forum available to them if only they proceed correctly. It was only because the police, in their discretion, had declined to prosecute Steffel for past offenses that Steffel was able to avoid being ousted from federal court. Otherwise, even after winning the race to the courthouse, his case could have been removed by the state beginning to prosecute him in their courts "before any proceedings of substance on the merits have taken place in federal court." If the state so chose to act, "the principles of *Younger v. Harris* [would] . . . apply in full force."¹²² Steffel therefore could not be guaranteed access to a federal forum if he had violated the statute and not been prosecuted. If he had violated the statute and had been prosecuted, *Younger* would prevent federal courts from hearing his claim while the state proceedings were pending, and when they were through, *res judicata* would pre-

118. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *Golden v. Zwickler*, 394 U.S. 103 (1969).

119. 415 U.S. 452 (1974).

120. *Id.* at 453-54.

121. *Becker v. Thompson*, 334 F. Supp. 1386, 1389-90 (1971), *aff'd*, 459 F.2d 919 (5th Cir. 1972), *rev'd sub nom.* *Steffel v. Thompson*, 415 U.S. 452 (1974).

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

vent him from litigating his claim in federal court.¹²³

Only if Steffel never had violated the statute could he have avoided the *Younger* doctrine; in so helping his *Younger* problem, however, he would have hurt (although not necessarily fatally destroyed) his justiciability case. The fact that Steffel had actually violated the statute in the past and had been threatened with arrest showed his interest in handbilling, and the risks that it posed for him, much more convincingly than if he had never violated the law.¹²⁴ Mr. Justice Stewart, concurring in *Steffel*, agreed that it was an exceptional case, saying that cases in which a nonviolator could show "a genuine threat of enforcement of a disputed state criminal statute" . . . [would] be exceedingly rare."¹²⁵

This is not to say, of course, that the truly anticipatory action, in which no violation of state law has occurred prior to federal litigation, will never succeed. It can.¹²⁶ But the criteria for justiciability

123. Until recently it might have been an open question whether res judicata could preclude a litigant from federal court in a § 1983 action, see, e.g., *Ellis v. Dyson*, 421 U.S. 426 (1975); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); Note, *The Preclusive Effect of State Judgments on Subsequent 1983 Actions*, 78 COLUM. L. REV. 610 (1978); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1330 (1977), or whether instead § 1983 actions would follow the federal habeas corpus model in which res judicata is no bar, see *Brown v. Allen*, 344 U.S. 443 (1953). But recently the Supreme Court has strongly indicated that normal principles of res judicata will apply in § 1983 actions. *Allen v. McCurry*, 101 S. Ct. 411 (1980) (formally discussing only relitigation of fourth amendment claims).

124. See *Boyle v. Landry*, 401 U.S. 77 (1976).

125. 415 U.S. at 476 (Stewart, J., concurring) (quoting the majority opinion).

126. Challenges to an enactment brought before violation are sometimes justiciable. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507-10 (1972); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Zwickler v. Koota*, 389 U.S. 241, 252-55 (1967); cf. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (federal law); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 621 (1976) (state court appeal); *Sosna v. Iowa*, 419 U.S. 393, 398-403 (1975) (not criminal law); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967) (federal law); *Adler v. Board of Educ.*, 342 U.S. 485 (1952) (appeal from state court); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (not directly subject to law). Just as often, however, they are not. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Boyle v. Landry*, 401 U.S. 77, 81 (1971); *Younger v. Harris*, 401 U.S. 37, 41-42 (1971); *Golden v. Zwickler*, 394 U.S. 103 (1969); cf. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (federal law); *Warth v. Seldin*, 422 U.S. 490 (1975) (not criminal law); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967) (federal law); *Poe v. Ullman*, 367 U.S. 497 (1961) (state court appeal); *United Public Workers v. Mitchell*, 330 U.S. 75, 86-91 (1947) (federal law). Like many federal jurisdictional doctrines, the criteria that separate the cases finding ripeness and standing from those finding it wanting are anything but consistent or clear. Indeed the jus-

are sufficiently elastic that it is ultimately unpredictable whether a case like Steffel's, brought by a person whose associates had violated the enactment but who himself had not done so, will withstand a nonjusticiability challenge. There are devices that sophisticated civil liberties litigants may use to create a concrete and adverse dispute without violating state law. One practice, I am told, is to write to the local district attorney's office threatening violation, with the hope of receiving back a threat to prosecute if the violation occurs. But the fact remains that the justiciability criteria are so indefinite that a person wishing to challenge the constitutionality of a state criminal enactment cannot be confident of access to a federal forum by the anticipatory action, and *Younger* can exclude the litigant from federal court when a violation of state law predates the federal proceeding.

A remaining possibility for obtaining federal jurisdiction in a nonanticipatory situation is for the federal plaintiff, while the state proceeding is threatened or pending against him,¹²⁷ to file a damage action in federal court against state officers, a municipality, or any other proper defendant, charging a violation of her/his constitutional rights in connection with the violation of state law. The theory of the damage action would obviously differ according to the facts and the particular constitutional challenge made, but Steffel, for example, were he threatened with prosecution for violating the anti-handbilling statute, could sue the threatening police officers for interfering with his first amendment rights. Problems exist if the aim is to prevail on the merits of this litigation. Most noticeably, the officers will not be liable in damages if they acted in good faith and with probable cause.¹²⁸ The aim, however, would

ticiability area is one generally recognized as encompassing discretionary judgments concerning the wisdom of hearing particular cases and as not applying consistent tests. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 519 (1975) (Brennan, J., dissenting); A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (lauding this flexible application by the courts).

127. Res judicata and collateral estoppel could operate once the state proceeding was completed. *Allen v. McCurry*, 101 S. Ct. 411 (1980).

128. *Pierson v. Ray*, 386 U.S. 547, 551 n.5. See *Wood v. Strickland*, 420 U.S. 308 (1975). District attorney immunity from damages can be even greater. See *Imbler v. Pachtman*, 424 U.S. 409 (1976). The problem is lessened if a plaintiff can sue a municipality or county for a constitutional violation that represents its official policy. See *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Counties and cities are not entitled to a good faith defense. See *Owen v. City of Independence*, 445 U.S. 622 (1980). States, however, are protected from

be to have the federal court, in the course of the adjudication, pass on the constitutionality of the handbilling statute—a ruling the district judge might conceivably avoid by saying that in any event the defendants would not be liable because no evidence of bad faith exists. Even if the judge did pass on the statute and held it unconstitutional, that alone would not necessarily bar any state prosecution.¹²⁹

While the Supreme Court has passed on the *Younger* doctrine's applicability to declaratory judgment proceedings as well as injunctive ones,¹³⁰ it has not passed on its applicability to damage actions. There are reasons to hold *Younger* inapplicable. The paradigm *Younger* example concerns noninterference by injunction with state criminal proceedings. The purpose of damage actions typically differs from that of injunctive relief more than does the purpose of declaratory relief. Moreover, damage actions are less likely to raise the problem that has troubled the Court in the declaratory relief context: declaratory relief may have, and is designed to have, the same effect as an injunction, although there is no contempt sanction for its violation.¹³¹ A damage award, however, would carry consequences apart from its declaration concerning the state law's validity. Nonetheless, lower federal courts have

these suits by federal sovereign immunity law. See *Edelman v. Jordan*, 415 U.S. 651 (1974).

129. It would provide the plaintiff with a federal adjudication to use as persuasive authority in defending a state action, and one that could possibly become binding on the state as precedent after court of appeals and/or Supreme Court review, unless the absence of bad faith, and hence of liability, persuaded the federal appellate courts to refuse to rule on the statute's constitutionality. Moreover, after the federal proceeding was final, if circumstances were such that the issue were entitled to *res judicata*/collateral estoppel treatment, its decision might support an injunction against continuation of state proceedings under the relitigation exception to § 2283.

130. *Steffel v. Thompson*, 415 U.S. 452 (1974); *Samuels v. Mackell*, 401 U.S. 66 (1971).

131. A declaratory judgment, however, may support an injunction when a state officer disregards the declaratory judgment; in that event the plaintiff in the declaratory action may be able to return to federal court and obtain an injunction on the strength of the earlier declaratory relief proceeding. The only alternative to thus allowing declaratory relief to bring about an injunction is to deprive the declaratory judgment of *res judicata* effect and thereby to make it merely advisory. See generally *Steffel v. Thompson*, 415 U.S. 452, 460-73 (1974); *id.* at 476-78 (White, J., concurring); *id.* at 482-84 (Rehnquist, J., concurring). While it is conceivable that an adjudication of unconstitutionality in a damage action might similarly support an injunction, see note 129 *supra*, an adjudication in a damage action is much less likely to have that effect because the parties and issues are more likely to differ from those in an injunctive proceeding, and *res judicata*/collateral estoppel is less likely to apply.

on occasion applied *Younger* to damage actions,¹³² and a general extension of *Younger* to this area is not inconceivable.

While it is not clear exactly how to assess the scope of these various possible routes around the *Younger* doctrine, it is clear that plaintiffs' access to federal courts to test the constitutionality of state criminal enactments has been severely obstructed by the combination of the *Younger* doctrine with notions of justiciability. Moreover, the Supreme Court does not seem troubled by the notion that there may be no avenue to federal court for persons wishing to challenge the constitutionality of state enactments. Last December, in *Allen v. McCurry*,¹³³ the Court characterized the lower court's decision as stating "a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises."¹³⁴ Rejecting the principle, the Court said:

The authority for this principle is difficult to discern.

It cannot lie in the Constitution. And no such authority is to be found in 1983 itself.

The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues.¹³⁵

Yet the Court itself had recognized, earlier in the decision, that "one strong motive behind enactment [of the Civil Rights Acts] was grave congressional concern that the state courts had been deficient in protecting federal rights,"¹³⁶ and a strong case can be made that an important purpose of the Civil Rights Acts was to allow federal courts to serve as the primary tribunals for

132. See *Martin v. Merola*, 532 F.2d 191, 195 (2d Cir. 1976); *Guerro v. Mulhearn*, 498 F.2d 1249, 1252-53 (1st Cir. 1974). See also *Fulford v. Klein*, 529 F.2d 377 (5th Cir. 1976), *aff'd per curiam*, 550 F.2d 342 (5th Cir. 1977) (en banc).

133. 101 S. Ct. 411 (1980).

134. *Id.* at 419.

135. *Id.* at 419-20.

136. *Id.* at 417.

hearing constitutional complaints relating to state laws.¹³⁷ As the Court said in *Mitchum v. Foster*,

[The] legislative history [of the Civil Rights Act of 1871] 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.

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.” *Ex parte Virginia*, 100 U.S., at 346. 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. *Ex parte Young*, 209 U.S. 123.¹³⁸

Surely to exclude from federal courts tests of the constitutionality of state criminal enactments, as the *Younger* doctrine manages to do to a great extent,¹³⁹ vitiates this purpose behind the Civil Rights Acts.

D. *The Extension of Younger to Civil Proceedings*

So far I have described the *Younger* doctrine's protection

137. *Zwickler v. Koota*, 389 U.S. 241 (1967); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961).

138. 407 U.S. 225, 242 (1972).

139. Indeed, in *Wooley v. Maynard*, 430 U.S. 705 (1977), the Chief Justice stated the proposition that “a [federal] court will not enjoin the enforcement of a criminal statute” without the presence of “exceptional circumstances.” *Id.* at 711-12 (quoting *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 95 (1935)).

against federal interference with state criminal proceedings and its implementation to prevent most constitutional challenges to state criminal enactments from ever being heard in federal court. Originally, *Younger* was thought to be limited to the criminal area, and what one can glean of a rationale for the doctrine pertains to criminal proceedings. More recently, however, the Supreme Court has applied the doctrine to quasi-criminal state enforcement proceedings: an action to remove a public nuisance by closing a movie theatre that showed obscene films,¹⁴⁰ a civil contempt proceeding,¹⁴¹ an action by the state to recover fraudulently obtained welfare benefits,¹⁴² and an action to place allegedly battered children in temporary custody.¹⁴³ In *Moore v. Sims*,¹⁴⁴ the Court summed up these holdings, saying *Younger* "is also fully applicable to civil proceedings in which important state interests are involved."¹⁴⁵ In several of the cases, the Court reserved for another day the question whether *Younger* applies to civil litigation generally. Justices Brennan and Marshall called that reservation "tongue in cheek,"¹⁴⁶ however, pointing out that in the contempt proceeding involving enforcement of a default judgment in a bill-collection case "the underlying suits in the New York courts were collection suits typically involving small loans between purely private parties."¹⁴⁷ Similarly, they observed that in the welfare case a private party could have been plaintiff as well as the state, and the state's "fortuitous presence" should not affect the result.¹⁴⁸ Moreover, several lower courts have applied the doctrine to civil cases generally.¹⁴⁹

A primary reason for not extending *Younger* to civil proceedings

140. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

141. *Judice v. Vail*, 430 U.S. 327 (1977).

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

143. *Moore v. Sims*, 442 U.S. 415 (1979).

144. *Id.*

145. *Id.* at 423.

146. *Judice v. Vail*, 430 U.S. 327, 345 (1977) (Brennan, J., dissenting).

147. *Id.* at 344.

148. *Trainor v. Hernandez*, 431 U.S. 434, 455 (1977).

149. See *Louisville Area Interfaith Comm. v. Nottingham Liquors, Ltd.*, 542 F.2d 652 (6th Cir. 1976); *Lynch v. Snepp*, 472 F.2d 769, 775 n.5 (4th Cir. 1973); *Cousins v. Wigoda*, 463 F.2d 603 (7th Cir. 1972). But see *Marshall v. Chase Manhattan Bank*, 558 F.2d 680, 684 (2d Cir. 1977) (rejecting the applicability of *Younger* in a civil action to which the state was not a party).

is that the central theory behind the doctrine relates to the undesirability of enjoining criminal prosecutions. When one steps over the line from criminal to civil, as I shall demonstrate, the doctrine becomes potentially boundless, swallowing not only much of our Civil Rights Acts but also much of other federal jurisdictional provisions. Other reasons as well argue against an extension to civil proceedings. Mr. Justice Brennan has argued that functional differences between state civil and criminal proceedings call for different treatment; safeguards are provided against initiating unfair criminal proceedings, but civil proceedings may be started "merely upon the filing of a complaint, whether or not well founded."¹⁵⁰ Moreover, a state criminal defendant often¹⁵¹ can return to federal district court under habeas corpus; a civil defendant, however, loses altogether his opportunity for litigation of his constitutional issues in federal district court.¹⁵² Finally, policy reasons for noninterference are less convincing for civil than for criminal proceedings, which have traditionally been left more exclusively to the states; Congress has not allowed criminal prosecutions to be removed from state to federal court except in very limited circumstances,¹⁵³ while state civil proceedings are much more readily removable.¹⁵⁴

If the Supreme Court insists on extending *Younger* to civil proceedings, the extension should remain limited to state civil proceedings that are like criminal proceedings and, at any rate, should be limited to civil *enforcement* proceedings to which the state is a party. So limited, the intrusion upon the civil rights jurisdiction is

150. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 615 (1975).

151. The same Court that has extended *Younger v. Harris* to civil litigation has also cut back on the availability of federal habeas corpus for state criminal defendants. See *Stone v. Powell*, 428 U.S. 465 (1979); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976).

152. When the Supreme Court first applied *Younger* in a civil context in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 (1975), it suggested that district court consideration might be available after the state proceeding was complete. The Court has held very recently, however, that *res judicata* is a bar in § 1983 proceedings. *Allen v. McCurry*, 101 S. Ct. 411 (1980).

153. See 28 U.S.C. § 1442 (1976) (federal officers sued or prosecuted); *id.* § 1442(a) (members of armed forces sued or prosecuted); *id.* § 1443 (civil rights cases).

154. See 28 U.S.C. § 1441 (1976). But see *Shelly v. Pennsylvania*, 451 F. Supp. 899 (M.D. Pa. 1978) (removal by a defendant is proper only where the federal court has jurisdiction of plaintiff's original cause of action and not where only a federal defense is raised).

obviously greater than the description above covering only criminal enactments. Nonetheless, the *Younger* doctrine still does not entirely displace sections 1983 and 1343. Indeed, it would not even if the doctrine contained no exceptions but instead removed all challenges to state enactments from federal jurisdiction. The Civil Rights Acts would still support federal challenges to state officials' actions, or even state statutes, *if there is no corresponding proceeding that could be brought in a state court against the challenger*. Thus, a section 1983 action would support a federal challenge to prison guards' interference with a prisoner's mail, for it is difficult to see what proceeding could be brought against the prisoner in that scenario. Although many federal section 1983 actions do remain possible even under the broadest *Younger* reading, the doctrine nonetheless has removed from the federal courts a large category of challenges to state enactments that undoubtedly were considered an important aspect of the civil rights jurisdiction. Indeed, it was hostility to certain state enactments, the Black Codes, and a lack of trust in state courts' willingness to follow federal pronouncements concerning them, that led to the original Civil Rights Acts and the conferral of federal jurisdiction to challenge state laws.

Supreme Court decisions to date are consistent with limiting the *Younger* doctrine to deference to state enforcement proceedings, criminal or civil. The possibility some have detected of extending *Younger* to civil proceedings generally¹⁵⁵ raises further and very serious problems.

In the past, under the *Younger* doctrine the federal courts have deferred to state enforcement proceedings as the alternative to the federal district court. They have not looked to state declaratory judgment or injunctive proceedings to see whether being left to pursue these remedies, instead of proceeding in the federal district court, will amount to irreparable harm. Because the *Younger* doctrine, by definition, concerns deference to pending state criminal proceedings, state injunctive and declaratory proceedings have not been considered an alternative to invoking federal jurisdiction. Presumably that should change if the federal courts were deferring to civil proceedings generally.

155. See note 149 & accompanying text *supra*.

If federal courts were to look at state injunctive and declaratory relief as alternatives to federal court adjudication, and were to ask whether they provided an adequate remedy, a tremendous expansion of the *Younger* doctrine would take place. Those proceedings are almost always available on the state side when they are on the federal side. In fact, the chief "exceptional circumstance" *Younger* allows to justify federal relief today—harassment and bad faith—shows the need for injunctive or declaratory relief more than it shows the need for a federal forum. Accordingly, a rule that required the federal court to exercise its jurisdiction only when state declaratory or injunctive relief was inadequate, and that indulged in the presumption that state judges are as competent as federal judges at applying the Federal Constitution, would almost always defer in favor of state court adjudication. As a result, constitutional challenges to state enactments would be heard almost entirely in state courts.

Indeed, at this point one would wonder why federal courts do not defer when constitutional challenges are brought against a state officer for her/his conduct,¹⁵⁶ as well as against state enactments. I do not mean to imply that courts are very likely thus to extend *Younger*. I do not believe such a development is likely, because it would convert the *Younger* doctrine into a general preference for the state forum over the federal forum under all statutes conferring federal jurisdiction. Surely courts will halt before reaching that position. I am simply suggesting that there may be no *logical* stopping place for the *Younger* doctrine if it is to expand beyond deference to state enforcement proceedings and is to include civil cases generally.¹⁵⁷ On the other hand, even this result might

156. An example is the complaint against the prison guard for wrongfully denying mail to a prisoner.

157. There has been some suggestion that this possibility of deferring to civil proceedings generally under the *Younger* doctrine is fanciful because, even if the doctrine were stated as equally applicable to civil proceedings as to criminal, few civil proceedings could be included other than state enforcement proceedings. The reason given is that only rarely would proceedings between purely private parties be challenged under § 1983. See 17 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 4254 nn.17-19 (1978 & Supp. 1980). The assumption is that only § 1983 cases can fall within the *Younger* doctrine. The reasoning seems to be that only § 1983 proceedings are excepted from the Anti-Injunction Act by *Mitchum v. Foster*, 407 U.S. 225 (1972).

I do not think it makes sense to hold that only § 1983 cases can fall within the *Younger*

be narrowed by an argument that the whole rationale behind the doctrine has been deference to state proceedings *against* the federal plaintiff and did not extend to situations in which the federal plaintiff would have to *bring* an action in state court to provide an alternate forum.¹⁵⁸

E. *Discretionary Nature of Younger*

There are several ways in which this sweeping doctrine demonstrates the discretionary nature of federal jurisdiction. First, the creation of the doctrine shows the flexibility courts exercise; the courts have created it although it has no authority behind it—no statutory authority and no identifiable legitimate policy. It is a doctrine that lacks any rationale that survives analysis. In its broad sweep it undermines and contradicts other categories of jurisdiction that, in other contexts, the Supreme Court accepts with enthusiasm. Because the reasoning behind the doctrine is never made clear, its capacity to overturn other principles of jurisdiction seems almost unlimited. Thus in *Rizzo v. Goode*,¹⁵⁹ the Supreme Court used *Younger* and the “principle of federalism” it espoused to bar injunctive relief against state executive officers—Philadel-

doctrine. The problem with that position is that it makes the exercise of federal jurisdiction *more* difficult in § 1983 cases than in any others, plainly contrary to the purposes of the Civil Rights Acts and to many Supreme Court statements on this subject. To make the exercise of federal jurisdiction more difficult in civil rights actions because they are excepted from § 2283's anti-injunction ban is surely to stand *Mitchum v. Foster* on its head. Indeed, it is also peculiar that the exception to the Anti-Injunction Act should apply the Act's policies more stringently than the Act itself, as the *Younger* doctrine does when it prohibits federal courts from proceeding in situations where the federal plaintiff has won the race to the courthouse. This is particularly strange anti-injunction policy for cases within the civil rights statutes. *Mitchum v. Foster*, 407 U.S. at 242-43. But that merely demonstrates once again that the *Younger* doctrine does not fit with *Mitchum v. Foster* and with the purposes of the Civil Rights Act.

158. Courts could follow this argument without limiting deference to state enforcement proceedings. They might believe it is legitimate for the federal courts to decline to interfere with someone—the state or a private party—who wants to bring an action against the federal plaintiff, and at the same time believe that they should not require the federal plaintiff to be plaintiff in state court. They might think that requiring the initiation of a state suit would smack more of depriving the plaintiff of the right to choose a federal forum than requiring her/him to submit as defendant to state suits brought against her/him. Under this rationale courts could sometimes defer to state declaratory or injunctive proceedings, but only when they were initiated by the federal defendant.

159. 423 U.S. 362, 379-80 (1976).

phia officials charged with responsibility for discriminatory police practices—even though no state judicial proceedings were involved.¹⁶⁰

The discretion and flexibility arise, second, because the only apparent exceptions to the *Younger* doctrine rest on discretion. Certainly, the articulated exceptions to the doctrine, “bad faith, harassment, or any other unusual circumstance that would call for equitable relief,” are not closely defined.¹⁶¹ And as we have seen, the apparent ways around the doctrine rest on the federal court’s discretion. One may bring a federal proceeding before violating the state’s law in hopes that the case will be found justiciable. One inclined to undertake risks may violate the enactment to be challenged, win the race to the courthouse in filing a federal suit, seek declaratory and interlocutory relief, and hope that the federal judge, in his discretion, will grant the interlocutory relief and thereby stave off state prosecution.

Finally, the *Younger* doctrine is likely to serve as a discretionary tool of federal courts because it is unlikely they will apply the doctrine uniformly to exclude cases from federal court in the way the doctrine’s contours suggest. Federal courts could begin to accept cases simply by expanding the list of exceptional circumstances sufficient to justify the exercise of jurisdiction under *Younger*. It is likely they will keep some cases as well simply by making no mention of the doctrine or by distinguishing cases in an untenable fashion. To date there are few cases illustrating this tendency, but *Hicks v. Miranda*¹⁶² is of relatively recent vintage. Until that 1977 case it was not apparent that federal courts were closed to most section 1983 suits challenging state criminal enactments; instead, it seemed that federal jurisdiction, at least to grant declaratory relief, would turn upon whether the state or federal proceeding was first filed.

*Wooley v. Maynard*¹⁶³ does illustrate the Supreme Court’s tendency sometimes to back off, without adequate explanation, from applying *Younger* and related rules that taken literally might to-

160. See also *O’Shea v. Littleton*, 414 U.S. 488 (1974).

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

162. 422 U.S. 332 (1975).

163. 430 U.S. 705 (1977).

gether eliminate from federal court almost all challenges to state enactments brought by plaintiffs who had violated state law. The federal plaintiff in *Wooley* had been subjected to a series of prosecutions for covering up on his New Hampshire license plate the state slogan, "Live Free or Die." In the federal proceeding he sought to enjoin future prosecutions. Chief Justice Burger, writing for the majority, found "exceptional circumstances" justifying an injunction against future state prosecutions:

We have [the necessary exceptional circumstances and the clear need for an injunction] here for, as we have noted, three successive prosecutions were undertaken against Mr. Maynard in the span of five weeks. This is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time. The threat of repeated prosecutions in the future against both him and his wife, and the effect of such a continuing threat on their ability to perform the ordinary tasks of daily life which require an automobile is sufficient to justify injunctive relief.¹⁶⁴

The case was not technically within the *Younger* doctrine because there was no pending state prosecution; three state prosecutions had been completed. But the Chief Justice did not explain why issues decided in that series of state prosecutions were not res judicata for the federal decision concerning the constitutionality of New Hampshire's requirement that the slogan on the license plate be displayed. This case seems to illustrate that, when the Supreme Court is sympathetic to the exercise of federal jurisdiction, it can and does simply ignore the procedural barrier that lies in the way. I do not believe that the Court will be willing to be as restrictive across the board in allowing federal relief as the cases decided since the 1977 *Hicks v. Miranda* decision suggest.

In sum, as a result of *Younger* and its progeny, there is a large category of civil rights cases where today federal jurisdiction will be exercised only by the grace of the particular federal judge. Within this class of cases, federal jurisdiction for constitutional challenges is not a right, and the expectation is that it will not be allowed.

164. *Id.* at 712.

CONCLUSION

I have described only a few of many possible examples of the overcomplexity and resultant uncertainty and flexibility in the application of jurisdictional doctrines in federal courts. Other examples of basic problems with jurisdictional doctrines abound, doctrines whose growth seems to have been abandoned when they were still in an undeveloped, unrationalized, and uncertain state.¹⁶⁵ In talking of the uncertainty and flexibility in federal jurisdictional areas, I do not mean to overstate the case. There are open questions in all areas, and indeed it would not be advantageous to have all questions definitively settled. The law grows by trying different solutions and formulating answers one step at a time. There are areas where extreme uncertainty exists—congressional control over federal courts' jurisdiction, for example—but where the lack of a definitive answer is due more to the paucity of litigation than to any irresponsibility on the part of courts in developing the law.

Sovereign immunity is another area in which rules and counter-rules make it utterly impossible to predict in advance the result in any particular case. The Supreme Court, for example, maintains both that sovereign immunity protects states from federal suit without their consent *and* that Congress, acting in any area where it has regulatory power, can subject the states to suit, although the two propositions seem inconsistent.¹⁶⁶ The uncertainty here, however, may reflect a doctrine in flux—a court in the process of developing a solution but uncertain for the moment in which direction the law is to turn.

Areas like federal question jurisdiction are somewhat different because the uncertain issues, as well as being very basic, have been with us for a very long time. While there are not large numbers of

165. For one example, it is not at all clear how to ascertain whether a case turns on a federal issue for purposes of Supreme Court review of state court decisions. See *Department of Motor Vehicles v. Rios*, 410 U.S. 425, 427 (1973); *Evans v. Newton*, 382 U.S. 296 (1966); *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942); *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

166. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973); *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184 (1964). See generally Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1212-40 (1978).

cases raising the issues, they do come up with regularity. The failure to develop the basic jurisdictional principles seems difficult to justify in these circumstances.¹⁶⁷ In some areas of uncertainty, like the citizenship of corporations for diversity purposes, possible alternative solutions have been fully developed; all that is needed is for the Supreme Court to make a choice between existing alternatives, thereby resolving the ambiguity it has perceived in Congress' enactments on the subject. And in areas where more clarification is not possible, we could import more certainty into jurisdictional decisions made in particular cases by cutting down on the review—and certainly on the late raising—of issues concerning the exercise of jurisdiction.

Simplification of much jurisdictional doctrine would result from generally espousing the position that, where Congress has given concurrent jurisdiction, the federal courts should respect the parties' choice of forum.¹⁶⁸ This formulation would throw into question the legitimacy of the *Pullman* abstention doctrine in general or at least would reserve it for only the most extraordinary of cases. Of course, a rule would have to be developed as well for the situation when the parties both brought suit, but in different forums. I would suggest that the forum in which suit was first brought should proceed with the suit, except perhaps in the most extraordinary circumstances. State and federal courts then would avoid the duplicative, costly, and essentially unseemly race for a judgment with *res judicata* effect in the other forum. Instead a race-to-the-courthouse approach may best show respect for both state and federal forums as legitimate adjudicators of constitutional doctrine. It would reflect both the state interest in continuing with criminal or other enforcement proceedings unimpeded

167. The uncertainty in areas like federal common law is more understandable. While the current limits of federal judicial power to formulate common law are highly elusive, the problem is one that has been perceived fairly recently. The cases convey the sense that, although the ultimate course is not yet clear, alternative solutions are being tried and considered. *See, e.g.,* *Miree v. DeKalb County*, 433 U.S. 25 (1977); *United States v. Little Lake Misere Land Co.*, 412 U.S. 480 (1973).

168. One can argue that courts cannot respect *both* litigants' interests; one party or one forum must be preferred. But surely Congress has made those choices in its jurisdictional statutes, currently giving plaintiffs the choice subject to limited removal from state to federal court by defendants, *see* 28 U.S.C. §§ 1331, 1332, 1343, 1441 (1976 & Supp. III 1979), and the courts need not concern themselves with the wisdom of those choices.

and the federal interest in staying open as an important forum for adjudicating the constitutionality of state enactments, and it would adjust those interests in the least costly fashion. Until *Hicks v. Miranda* that solution of the *Younger* problem was a possibility, creating a workable compromise between the state and federal spheres by allowing a federal plaintiff who sued before being prosecuted to go forward, at least with declaratory relief,¹⁶⁹ while allowing state prosecutions commenced before federal suit to progress unimpeded. That possible solution disappeared with *Hicks*, and the current result instead seems to be that litigants cannot obtain federal jurisdiction, at least not as a matter of right, whenever their section 1983 challenge relates to some proceeding that can be brought against them in state court.

Our failure to simplify federal jurisdictional rules has allowed them to become essentially a bag of tricks, traps for the unwary, and huge hurdles even for the most wary litigants. The complexities and fine distinctions direct parties away from discussing, and courts from formulating, what are and should be the real factors affecting state-federal jurisdiction.

It is worth taking a moment to muse about why these rules are tolerated by decisionmakers, who in other contexts are quite conscious of efficient use of judicial resources? Why is this area one with so many conflicting precedents and underdeveloped doctrines?

A primary cause that comes to mind is the small number of cases raising these jurisdictional issues. There are areas of great theoretical importance, such as the basic requirements for federal question jurisdiction, where the same issues come up repeatedly over the years, but the overall number of cases raising the issues is small. One reason the litigants do not raise the issues more often is, of course, because they are so complex and costly to litigate.

Another reason the courts have not done better at rationalizing the basics of the doctrines is simply that the doctrines are procedural rules and they arise in cases in conjunction with substantive rules which are generally of more interest to the judges involved. Particularly at the Supreme Court level, rationalizing procedure is rarely a priority. The Court chooses most of its cases, and the pro-

169. *Steffel v. Thompson*, 415 U.S. 452 (1974).

cedural issues in a case are usually accompanied by substantive issues which have moved the Court to agree to hear the case. The procedural issues are seen largely in terms of how they will affect the substantive ones. Thus particular judges' positions on procedural rules change easily according to the effect they have on the merits of the case.¹⁷⁰

By the same token the flexibility the jurisdictional rules provide in their undeveloped state can prove useful to judges, allowing them to dispose of difficult cases without having directly to discuss the moral, social, or political value judgments behind those dispositions. Some of the results judges have reached by following this approach seem, however, singularly inappropriate. For example, many of our discretionary doctrines allowing nonexercise of jurisdiction in cases falling within congressional grants apply primarily, or even exclusively, in civil liberties cases. It is hard to see why this group of cases should be deemed less deserving of jurisdiction than, shall we say, diversity cases. The Civil Rights Acts provided that federal courts should be a forum for constitutional challenges to state enactments and practices, and if ever there is a likelihood of bias on the part of state tribunals, many of whom are subject to election, that probability seems greatest when a party challenges the constitutionality of state enactments.

Perhaps one reason these rules have nonetheless developed here is that many difficult cases are involved, so it is an area in which courts look for escape devices. Moreover restrictive jurisdictional practices may substitute for a value judgment that if articulated would reflect hostility to civil liberties cases on the merits.¹⁷¹

170. Justice Brennan said as much in his dissent to *Warth v. Seldin*, 422 U.S. 490 (1975), when he wrote, "[T]he opinion [of the Court], which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on the merits." *Id.* at 520. Compare, for example, the abstention position of Chief Justice Burger in *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 513 (1972) (joining in the dissent of Justice Powell), with his abstention position in *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (Burger, C.J., dissenting). Compare also his standing position in *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (joining the majority opinion authored by Justice Powell), with his standing position in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (writing for the majority).

171. It has sometimes been suggested as a way of cutting back the "excesses of the Warren era" that federal courts simply become unavailable to redress claims there developed. It is my position that if such a value judgment is made, it would be better to reject unwanted decisions on the merits, thus addressing the real variables at stake. *But see* A. BICKEL, *supra* note 126.