Deciding Federal Law Issues in Civil Proceedings: State Versus Federal Trial Courts

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Consider these situations:

One: A state legislature has just changed the basis for marriage dissolution from a fault-oriented concept to a no-fault theory requiring only a showing of irreconcilable differences which have caused the irremediable breakdown of the marriage.[1] A woman who married when the state permitted divorce only upon a finding of specified types of misconduct by a defendant spouse believes that, by thus changing the basis for marriage dissolution, the state has deprived her of important vested property rights. Essentially her position is that to permit her husband to procure a dissolution decree under the new law would deprive her of property without due process of law, and also violate the federal constitutional prohibition against state impairment of contractual obligations.[2] Following her husband's filing of a dissolution petition in an appropriate state court alleging irreconcilable differences, she petitions a federal district court on the aforementioned federal constitutional grounds to enjoin him from pursuing his state court action.[3]

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1. *See, e.g.*, ARIZ. REV. STATS. ANN. §§ 25-311 to 25-339 (1973); CAL. CIV. CODE § 4506(1) (West 1970); ORE. REV. STATS. § 107.025 (1971).

2. *See, e.g., In re* Marriage of Walton, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (1972); Ryan v. Ryan, 277 So. 2d 266 (Fla. Sup. Ct. 1973).

3. At least on her impairment-of-contractual-obligations claim, petitioner runs a severe risk of having her action dismissed by the federal court on the grounds of the insubstantiality of the federal question, the United States Supreme Court having long ago decided that, though an agreement to marry is a "contract" for many purposes, it is not embraced within the notion of "contract" as that term is used in U.S. CONST. art. I, § 10, prohibiting the states from "impairing the Obligation of Contracts." *See* Maynard v. Hill, 125 U.S. 190 (1888). However, though federal constitutional claims similar to the other ones she asserts have been rejected by some state courts (see cases cited note 2 *supra*), they do not appear to have been definitely decided by the United States Supreme Court. It is therefore assumed that these could survive a motion to dismiss made on the alleged grounds of their insubstantiality.

Two: The governing officials of a private university learn that some students plan to burn down the campus ROTC building. Were the students to do this in fact, they would violate criminal statutes prohibiting, *inter alia*, arson, trespass and willful destruction of property; they would also be civilly liable for any damage they might cause. Nevertheless, university officials are convinced that such criminal and civil remedies would leave much to be desired if the students actually burned the building down. Rather than await the students' move, the officials decide, it would be better to persuade a state court to enjoin them from carrying out their intentions.[4] Among the advantages the officials perceive in doing this is that the students would thus be deprived of rights to a jury trial and to have their guilt proved beyond a reasonable doubt which obtain in criminal proceedings. As for the damage remedy, because of the probable "judgment-proof" character of the students involved, procuring the injunction, they feel, might prove to be a classic case of an ounce of prevention being worth much more than a pound of cure. As the students see it, however, the school officials' move for a state court injunction is a deliberate effort to deprive them of valuable constitutional rights. They therefore petition an appropriate federal district court to enjoin the university officials from pursuing their state court injunction action.[5]

Three: In a grand jury hearing, an attorney testifies under a grant of transactional immunity. Shortly thereafter, a state bar grievance committee begins proceedings to determine whether he should be disbarred. In those disciplinary proceedings, the committee seeks to use the attorney's grand jury testimony against him. The attorney contends that such use of the testimony would violate his constitutional rights be-

4. *Cf.* Board of Regents v. New Left Educ. Project, 404 U.S. 541 (1972).

5. In Walker v. City of Birmingham, 388 U.S. 307 (1967), defendants, believing that an *ex parte* temporary injunction prohibiting them from engaging in a civil rights march violated their federal constitutional rights, defied the injunction. Their convictions for contempt were upheld by the United States Supreme Court which held that an injunction must be obeyed, despite questions of its constitutional validity, until challenged and vacated in court. Noted the Court: "The petitioners give absolutely no explanation of why they did not make some application to the *state court* [which had issued the injunction] during that period." *Id.* at 319 (emphasis added). Neither the Court nor the petitioners indicated, however, whether they believed that a *federal court* injunction prohibiting the enforcement of the state court injunction might have been procurable. From the petitioner's perspective, such a possibility would have been of academic interest only, under the circumstances, since time was of the essence. Not being an issue in the case, any discussion of it by the Court would have been inappropriate. For an example of a case in which a federal district court enjoined, albeit temporarily (on grounds of its apparent unconstitutionality under the procedural due process requirements of Fuentes v. Shevin, 407 U.S. 67 (1972)) an *ex parte* state court order requiring a husband sued for divorce to vacate the family home, *see* Geisinger v. Voss, 352 F. Supp. 104 (E.D. Wis. 1972). *See also* Board of Regents v. New Left Educ. Project, 404 U.S. 541 (1972).

cause of the transactional immunity granted by the grand jury. But the committee introduces the testimony nevertheless. The attorney then seeks a federal district court injunction against the state bar disciplinary committee's proceedings, asserting that the committee's use of his grand jury testimony violates his constitutional rights.[6]

These three situations share certain common characteristics. In each, the initial litigation in the state court or agency is between private litigants.[7] Secondly, on the surface at least, all three situations involve essentially civil disputes, i.e., disputes that do not, or only remotely, implicate the criminal statutes of the states involved. Finally, in each case, rather than asserting federal constitutional claims as defenses in the state proceedings, the state defendant or respondent, on the basis of those federal constitutional claims, seeks to have a federal court enjoin one of the parties in the state tribunal from maintaining an action there.

These situations, and others like them, raise important questions about the relationship between state and federal courts which have yet to be answered by the United States Supreme Court. Among these are: 1) Do *Younger v. Harris*[8] and companion cases holding that, in most circumstances, a federal court should, because of considerations of equity, comity and "Our Federalism," refrain from granting a petition to enjoin a pending state proceeding where the constitutional claims of the federal court petitioner can be disposed of in those state tribunals, apply to the sorts of situations described above? 2) Does the Supreme Court's recent decision in *Huffman v. Pursue, Ltd.*,[9] applying the *Younger* principles to a particular type of state civil proceeding require their application to the kinds of situations described above? 3) In examining these questions, what light can be shed on the general problem of the right of litigants—plaintiffs or defendants—to have federal trial courts, rather than state trial courts, initially determine federal constitutional claims?

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To place the examination of these questions in a proper context, some well-known principles first need to be restated. One of these principles is that the jurisdiction of federal district courts and state trial

6. Anonymous v. Association of the Bar of City of New York, 515 F.2d 427 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3190 (U.S. Oct. 6, 1975).

7. Arguably, in the attorney's disciplinary hearing, there is a public aspect to the nature of the proceedings and the character of at least one of the parties, the state bar committee.

8. 401 U.S. 37 (1971).

9. 420 U.S. 592 (1975).

courts is, in many areas, concurrent.[10] Another is that this is true not only of the diversity jurisdiction under 28 U.S.C. section 1332,[11] but also of the federal question jurisdiction under 28 U.S.C. section 1331.[12] And a third is that, before 1875, when the present section 1331's predecessor was first enacted, most federal question cases *had* to be tried in the state courts because Congress had not yet conferred upon the federal trial courts general federal question jurisdiction.[13]

Given the concurrency of large areas of federal question jurisdiction in state and federal trial courts today, and the pre-1875 primacy of state trial court disposition of federal questions, it might seem to be a matter of present indifference whether a state or federal court first determines federal issues in any case. In recent years, however, the United States Supreme Court has been curiously ambivalent toward the right of litigants to have federal law questions initially decided by federal, rather than state, trial courts.

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10. R. FORRESTER, T. CURRIER & J. MOYE, FEDERAL JURISDICTION AND PROCEDURE: CASES AND MATERIALS 91 (2d ed. 1970).

11. 28 U.S.C. § 1332(a) (1964) provides, in pertinent part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

12. 28 U.S.C. § 1331(a) (1958) provides, in pertinent part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

13. Though congressional power—some have even regarded it as a duty (*see* Justice Story's opinion in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816))—to confer federal question jurisdiction upon the lower federal courts was present from the nation's beginning, Congress, for almost the first hundred years, used this power sparingly, and, except for a short-lived general federal question jurisdictional grant to the federal courts (§ 11 of the Midnight Judges Act, 2 Stat. 92 (1801), repealed one year later by § 1 of Act of Mar. 8, 1802, 2 Stat. 1132; *see* Steffel v. Thompson, 415 U.S. 452, 464 n.14 (1974)), relied upon it only to entrust narrowly limited types of "federal question" cases to the jurisdiction of the United States circuit courts, the predecessors of the present federal district courts. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). Only after the Civil War was concluded and the Thirteenth, Fourteenth and Fifteenth Amendments were added to the federal constitution did Congress see fit, in 1875, to endow the federal first-instance courts with *general* federal question jurisdiction. That event represented a fundamental restructuring of federalism concepts in the United States. Among other things, it reflected a basic distrust of, or at least considerable hesitation about, the capacity of the states to give full scope to the post-Civil War amendments in their own courts. It also was premised upon the assumption that the federal judiciary, for all practical purposes enjoying lifetime tenure, would be more vigorous, skillful and dedicated in the enforcement of the rights guaranteed by those amendments and their implementing federal statutes. *Cf.* Mitchum v. Foster, 407 U.S. 225 (1972).

That such a right is of the highest importance and to be jealously guarded was expressly recognized by the Court in *England v. Louisiana State Board of Medical Examiners.*[14] Notwithstanding the imperatives of the abstention doctrine[15] and the conveniences of having all disputed matters decided in a single judicial proceeding, *England* held that parties who rightfully begin their litigation in federal court are entitled to have federal law issues decided there if those issues remain in the case after the state court to which the parties have been shunted by "*Pullman*-type" abstention at least, has resolved previously unsettled questions of state law and provided that the parties have not voluntarily submitted those federal issues to the state court for disposition there.[16]

More important than the result in *England* is its candid recognition that ultimate review of federal law issues by the United States Supreme Court [a federal tribunal] is an inadequate substitute for initial determination of those issues by a United States District Court [another federal tribunal]—since how *facts* are found may be crucial to the ultimate disposition of the questions of law.

The precise language of the Court in *England* is instructive:

> It is true that, after a post-abstention determination and rejection of his federal claims by the state courts, a litigant could seek direct review in this Court. [citations omitted] But such review, even when available by appeal rather than only by discretionary

14. 375 U.S. 411 (1964).

15. Reference to "the" abstention doctrine should not obscure the fact that several similar, but different, doctrines are known by that name. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 196-208 (2d ed. 1970) [hereinafter cited as WRIGHT]. Among the major varieties of abstention doctrines is the kind involved in *England* which is often referred to as the "Pullman-type" from the case first applying it, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Essentially, it requires a federal court to refrain from deciding a case raising both a federal constitutional claim and a question of unsettled state law that, if decided, could dispose of the case. In the application of this doctrine, a federal court should stay the proceeding until the parties have an opportunity to receive a state court decision on the state issue. Another variety of abstention requires a federal court to "refrain from exercising its jurisdiction in order to avoid needless conflict with the administration by a state of its own affairs." WRIGHT, *supra* at 199. Professor Wright has referred to this as "Burford-type" abstention from an important case in which the doctrine is elaborated, Burford v. Sun Oil Co. (319 U.S. 315 (1943)). *Id.* at 200. Aside from the two doubtful situations in which abstention might or might not be proper, *i.e.*, to alleviate crowded federal dockets and to procure definitive determinations of unsettled questions of state law without thereby avoiding either a premature and unnecessary federal constitutional decision or interference with a state's administration of its own affairs (*compare* Meredith v. City of Winter Haven, 320 U.S. 228 (1943) *with* Lehman Brothers v. Shein, 416 U.S. 386 (1974))—there is the important type of abstention practiced under the rule of *Younger v. Harris* and companion cases (see text accompanying note 8 *supra*), when because of notions of comity, equity and federalism, a federal court refuses to issue an injunction or declaratory judgment that would interfere with certain types of state proceedings already in progress.

16. See note 15 *supra.*

> writ of certiorari, is an inadequate substitute for the initial District Court determination—often by three judges, 28 U.S.C. § 2281—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.[17]

By contrast, in congressional enactments and other Supreme Court decisions a general federal policy has evolved which expresses great deference toward the right of state tribunals, once they have acquired jurisdiction of a federal issue, to dispose of it without interference by any action of lower federal courts. This policy is far from absolute, and the exceptions to it are not always reconcilable on rational grounds.

One expression of this policy is found in the rules governing removal of actions from state to federal courts. Under the general removal statute, for example, 28 U.S.C. section 1441,[18] which permits removal by certain defendants of cases that would have been cognizable as original actions in the federal courts, it has been held, because of the "well-pleaded complaint doctrine,"[19] that removal will not be permitted if the federal issue first emerges in the defendant's answer.[20] Even U.S.C. section 1443, the Civil Rights Removal Statute, which, unlike the general removal statute, permits the removability of a cause to be determined by the allegations contained in a defendant's responsive pleading,[21] has been restrictively interpreted by the Supreme Court so as to limit drastically its potential applicability.[22] In the hypothetical situations considered above, however, neither of these statutes would

17. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964).

18. 28 U.S.C. § 1441(a) (1948) provides: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

19. *See* Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877).

20. Tennessee v. Union & Planter's Bank, 152 U.S. 454 (1894).

21. 28 U.S.C. § 1443 (1948) provides: "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

22. *See* Johnson v. Mississippi, 421 U.S. 213 (1975); Georgia v. Rachel, 384 U.S. 780 (1966).

create any direct problems for the parties seeking injunctive relief in the federal courts, since none of the petitioners would be seeking to *remove* a proceeding from a state to a federal court.[23] Moreover, even the technical requirements of the "well-pleaded complaint" rule would present no special barriers to these litigants, it having been established that when a plaintiff seeks a federal court injunction against alleged federally unconstitutional conduct of a defendant, allegations in the complaint setting forth the specific federal constitutional provisions that have assertedly been violated by the defendant are necessary parts of the plaintiff's pleading and will not be ignored as mere surplusage.[24]

Until recently, it was widely believed that another federal statutory expression of a policy of deference to the right of state trial courts to dispose of federal issues without federal trial court interference was found in section 2283[25] of the Judicial Code, the so-called Anti-Injunction Statute. This code section generally prohibits federal courts from enjoining pending state court proceedings unless certain exceptional conditions exist. Those exceptional conditions are: 1) where the injunction is necessary in aid of the federal court's jurisdiction; 2) where it is granted to protect or effectuate its judgments; or 3) where the injunction is expressly authorized by Act of Congress. But in *Mitchum v. Foster*,[26] the Court held that 42 U.S.C. section 1983,[27] the 1871 Civil

23. A bill now pending in Congress, based on § 1312(a)(2) of The ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 1969, would permit, *inter alia*, a defendant to remove a civil action from state to federal court if an amount in controversy requirement is met and if the defendant properly asserts a substantial federal *defense* that, if sustained, would dispose of the action. *See* S.1876, 93rd Cong., 1st Sess. (1973). Even were this to become law, however, there is some question as to whether the action for marriage dissolution, described in the text accompanying notes 1-3 *supra*, would be removable, in the light of Supreme Court decisions disclaiming federal court jurisdiction in most types of domestic relations proceedings. *See* De La Rama v. De La Rama, 201 U.S. 303 (1906); Simms v. Simms, 175 U.S. 162 (1899); Barber v. Barber, 62 U.S. (How. 21) 582 (1859). It has been forcefully suggested, however, that the exclusion of domestic relations jurisdiction from the federal courts stems from a reading of the diversity statute, 28 U.S.C. § 1332 (1964), and is not a limitation on the diversity jurisdiction described in the judiciary article, U.S. Const. art. III, § 2, cl. 1. Spindel v. Spindel, 283 F. Supp. 797 (E.D.N.Y. 1968).

24. *See* Allen v. Baltimore & Ohio R.R., 114 U.S. 311 (1885); *cf.* Lancaster v. Kathleen Oil Co., 241 U.S. 551 (1916).

25. 28 U.S.C. § 2283(a) (1948) provides: "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."

26. 407 U.S. 225 (1972).

27. 42 U.S.C. § 1983 (1871) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rights Statute, which permits plaintiffs to sue in law or *equity* to redress deprivations under color of state law of federal constitutional rights, constitutes an express congressional authorization for a federal court injunction against a pending state proceeding. Since, in the three factual situations described above, the state court defendants or respondents would base their petitions for a federal court injunction against a state court proceeding on the ground of the proceeding's unconstitutionality in whole or in part, section 2283 would not bar the maintenance of their federal court suits.

A potentially more hazardous obstacle these parties might confront, however, arises from the important group of six decisions, the most significant of which is *Younger v. Harris*,[28] in which the Supreme Court held that a defendant in a state criminal prosecution may not, except under extraordinary circumstances, enjoin it in the federal court, or receive even declaratory relief there[29] on the ground that it is based on a state statute that violates the federal constitution, but must instead lodge his or her federal constitutional objections in the state court, with ultimate recourse to the federal judiciary being limited to review by the United States Supreme Court. (The extraordinary circumstances under which *Younger* permits federal court intervention in a pending state prosecution are where the prosecution is commenced in bad faith or to harass the defendant, or presents other unusual circumstances, such as being based on a state statute that, in a federal constitutional sense, might be described as facially rotten to the core.[30])

Reconciliation of *Younger* and its companion cases with *England* is not easy. For if, as the Court acknowledged in *England*, review of federal law issues by the United States Supreme Court, after they have been first decided by a state trial court, is far less satisfactory than review of a decision by a federal trial court, it would be anomalous to require state criminal defendants to have their federal constitutional objections to the state statutes upon which their prosecutions are based initially decided by the state courts trying them, rather than by federal courts in the first instance, if those are the tribunals they prefer.

One step toward reconciling these two lines of cases is to note that, although in *England* itself, the Court recognized a fundamental right of

28. Younger v. Harris, 401 U.S. 37 (1971). The companion cases are: Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

29. 401 U.S. 66 (1971).

30. The precise language of the Court, refers to a statute that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." 401 U.S. at 53-54, *quoting* Watson v. Buck, 313 U.S. 387, 402 (1941).

a "litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims [not to] be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims,"[31] it nevertheless suggested that this right was not absolute. In a footnote, the Court qualified the basic right to federal disposition of the constitutional claim by stating that it exists "at least" in a case like *England* "not involving the possibility of unwarranted disruption of a state administrative process."[32] For the latter exception, the Court cited *Burford v. Sun Oil Co.*[33] and *Alabama Public Service Commission v. Southern Railway Co.*,[34] both cases in which federal district courts were required to abstain (and unlike what is done in "*Pullman*-type" abstention, to dismiss the federal proceedings, rather than simply to stay them), where federal court maintenance of the action might create "needless conflict with the administration by a state of its own affairs."[35] This type of federal court abstention, developed in *Burford* and other cases, is designed not merely to avoid a premature and perhaps unnecessary decision of a difficult issue of federal constitutional law, which is the underlying reason for the "*Pullman*-type" abstention, involved in *England* itself, but rather because of a belief that the state's sensibilities would be particularly offended were a federal, rather than a state, court initially to entertain a plaintiff's federal claims. This problem becomes especially apparent in cases involving the state's administration of its own government programs, such as the collection of its taxes[36] or the construction of its highways.[37] Implicit in *Burford* and similar cases is the assumption that the degree of exasperation, frustration and resentment a state might experience is substantially, indeed qualitatively, greater when such programs risk interference by federal court rulings than where that state's statutes, such as one imposing certain educational requirements for those who would practice medicine in the state (the type of statute challenged in *England*), might be held to violate the federal constitution by a federal trial court. When that degree of exasperation, frustration or resentment is reasonably anticipated, then, notwithstanding a litigant's general right to have federal, rather than state, trial courts initially dispose of his or her federal claims, those claims must be entrusted to the state trial courts for initial disposition. That principle, if indeed it is extractable from *England*, substantially undermines the Court's ringing pronouncement, elsewhere in the same

31. 375 U.S. at 415.
32. 375 U.S. at 415 n.5.
33. 319 U.S. 315 (1943). See note 15 *supra.*
34. 341 U.S. 341 (1951).
35. WRIGHT, *supra* note 15, at 199.
36. Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).
37. Martin v. Creasy, 360 U.S. 219 (1959).

opinion, about "the primacy of the federal judiciary in deciding questions of federal law."[38] It also suggests that whenever a federal trial court is asked to hold a state statute, practice or administrative ruling invalid under federal law, the court must first determine whether its potential interference will be regarded by the state as a major or only a minor affront, i.e., whether the state's potential concerns more closely resemble those in *Burford* than those in *England*. As will be seen shortly, however, this principle goes far toward explaining and reconciling the *Younger* line of cases with *England*.

Moreover, on the surface at least, several features distinguish *Younger* and its companion cases from the type of case *England* represents. In *Younger* resort was had to the federal courts after a state criminal prosecution had commenced, whereas in *England* the plaintiff had properly commenced a federal court proceeding before any had been started in a state court. Indeed, since *Younger* the Court has held in *Steffel v. Thompson*[39] that the extraordinary requirements for federal court intervention in a state court prosecution do not apply, at least where declaratory relief is sought,[40] if the state court prosecution has not in fact commenced—although, in order to satisfy "standing" requirements, that prosecution must have been threatened with sufficient immediacy.[41]

A second and perhaps more crucial difference is that in the *Younger* group of cases, the Court simply ignores the criminal defendant's possible interest in having a federal tribunal decide the federal constitutional question initially because of the potential superiority, actual or perceived, of the fact-finding process there over that of a state court as suggested by *England*.

To be sure, the Court in *Younger* balances the degree of possible irreparable injury to the state criminal defendant against the state's interest in being able to dispose, in its own courts, of alleged violations

38. 375 U.S. at 415-16.

39. 415 U.S. 452 (1974).

40. In *Steffel*, the plaintiff had originally sought a federal court injunction and declaratory relief against a threatened state prosecution. Following denial of all relief by the district court, the plaintiff appealed to the United States Court of Appeals for the Fifth Circuit only from the denial of declaratory relief. That court suggested that *Younger* required the application of its principles where a federal court injunction was sought against a threatened prosecution, and that *Samuels v. Mackell* (401 U.S. 66 (1971)) required denial of declaratory relief under the same circumstances. Becker v. Thompson, 459 F.2d 919, 922 (5th Cir. 1972). Since the plaintiff had abandoned his request for an injunction, however, Justice Brennan's majority opinion expressly avoided comment on the correctness of the court of appeals' views on the injunction question and decided merely that, in any event, a declaratory judgment, being a less intrusive remedy, does not require the presence of *Younger*'s extraordinary irreparable injury. 415 U.S. at 463.

41. *Id.* at 459.

of its own criminal laws, including any question that those laws may contravene the federal constitution. And, in the process, *Younger* holds that because of the combined dictates of equity, comity and, most importantly, "Our Federalism," the normal jurisdictional prerequisite to equitable relief of irreparable injury is superseded by a requirement of extraordinary irreparable injury, whenever a federal injunction is sought against a pending state criminal prosecution. But in determining whether that sort of extraordinary irreparable injury was faced by the state defendant in *Younger*, the Court concerned itself exclusively with whether *the mere hardship in defending oneself* in a state criminal proceeding constituted such injury, and found that it did not.[42] The Court failed entirely, first to assess, and then to throw into the scales, the value of the loss to the defendant in not having a federal tribunal determine the facts underlying his federal constitutional objections to the state statute under which he was charged. In other words, it gave no consideration whatsoever to the possibility that the defendant's right to have the United States Supreme Court ultimately review his constitutional claims might be an inadequate and unsatisfactory substitute for his right to have those claims[43] initially determined by a federal trial court,

42. Long before *Younger*, the doctrine had been well-established that the mere burden of being a defendant in a state criminal prosecution, even if that prosecution was constitutionally invalid, was insufficient to establish the irreparable injury necessary to enjoin the prosecution; the defendant, it was said, could always raise his constitutional objections in the course of the prosecution itself. Only after *Dombrowski v. Pfister* was decided, did some defendants in state criminal trials appear to have some possibilities of procuring injunctions in the federal courts against pending state prosecutions. For *Dombrowski* seemed to say that if the constitutional infirmity in the state prosecution stemmed from the overbreadth or vagueness of the statute upon which it was based—and if the fact of the prosecution itself could be shown to have a "chilling effect" on the exercise of preferred First Amendment freedoms—a federal court injunction could issue—at least until the state had procured an authoritative limiting construction of the statute that would constitutionally cover the kind of conduct of which the defendant was accused. 380 U.S. 479 (1965). In *Younger* and its companion cases, however, the Court, speaking of what it had done in *Dombrowski*, in effect said: "That is not what we meant at all." Recognizing that there had been language in *Dombrowski* that might have created the impression of easier federal court enjoinability of pending state prosecutions, the Court nevertheless rejected such a reading of *Dombrowski* and stated that in that case it had not departed from the traditional requirement of a showing of extraordinary irreparable injury as a prerequisite to such an injunction.

43. To be sure, important distinctions are made in American law between "claims" and "defenses." *See* Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952). It might even be urged that the use of the word "claims" to refer to what are essentially a criminal defendant's constitutional defenses to a state charge do not come within what was contemplated by the Court in *England* when it referred to the right to have a federal claim decided by the federal trial courts in the first instance. Two answers may be suggested to this. One is that in *England* itself, the Court did not limit this right to plaintiffs alone, but held that it was one that belonged to "litigants." Thus, though the plaintiffs in *England* were those who originally brought the federal court action, it could have been removed from state court by the defendants, had it originally been brought there,

where he would have "the benefit of a federal trial court's role in constructing a record and making fact findings."[44]

Had the Court engaged in that sort of assessment and balancing, its result might have been the same. An injunction might still have been denied because the balance of interests might still have been struck in favor of the state's right to be free of federal trial court intervention once it has begun a prosecution in its own courts for an alleged violation of its own criminal law. Nevertheless recognition of this additional factor by the *Younger* Court in weighing the interests of the criminal defendant against those of the state, even if it had led to the same result, would have facilitated the task that the Court will inevitably confront—namely, to decide whether the *Younger* requirement of extraordinary irreparable injury applies to the kinds of situations described at the start of this article, i.e., where a federal court injunction is sought against a state proceeding which is civil in nature and where the parties on both sides of the litigation are private, rather than governmental, in character.

For another, and perhaps the most critical, difference between the *Younger* line of cases and *England* is that, whereas the former were criminal prosecutions, the latter was a civil proceeding. Thus, a long-standing rule of noninterference by the federal courts in pending state criminal prosecutions, based in large part on a belief in the states' special sensibilities about such interference,[45] was reemphasized and clarified in *Younger* and its companion cases. In addition, though this factor was not articulated in *Younger* and succeeding cases of the "February sextet," the Court could very well have understood that, despite the denial of federal trial court jurisdiction to enjoin a state court prosecution in those cases, federal intervention might not be limited to United States Supreme Court review; often a federal first-instance trial of the facts of sorts might still be available in a habeas corpus proceeding,[46] under the combined doctrines of *Fay v. Noia*,[47] *Townsend v.*

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under the general removal statute, 28 U.S.C. § 1441 (1948). As a result, the Court stated that even defendants can reserve their right to return to the federal court for a disposition of their objections to plaintiffs' federal constitutional claims, if those issues remain in the case after the state court has definitively resolved the previously unsettled question of state law. 375 U.S. at 422 n.13. A second response to concerns about confusing claims and defenses in applying the *England* principle is that, although the federal constitutional assertions might qualify as defenses in the state proceeding, they are transformed into claims when the state court defendant becomes a plaintiff in the federal court and seeks to enjoin the state prosecution on grounds of its alleged federal unconstitutionality. See text accompanying notes 6-9 *supra*.

44. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964).

45. See text accompanying notes 14-16 *supra*.

46. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. at 417 n.8.

47. 372 U.S. 391 (1963).

Sain,[48] and 28 U.S.C. section 2254(d)[49]—although by no means in all cases.

Concurring in *Younger*, Justice Stewart, joined by Justice Harlan, emphasized that, since *Younger* and its companion cases all involved state criminal prosecutions, the Court was not dealing "with the considerations that should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently."[50] And in a footnote, these same justices suggested that, in contrast to a federal equity court's intervention in state criminal prosecutions, the "offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party in a proceeding under a civil statute."[51] And even in *Mitchum v. Foster*,[52] which was decided the following year, the Court, while resolving prior doubts by holding that the 1871 Federal Civil Rights Statute, 42 U.S.C. section 1983, was one in which Congress had "expressly" authorized federal court injunctions of state court proceedings, and thus was one of the "express" exceptions in the Anti-Injunction Statute, carefully limited its holding to that question. It expressed no view on whether the principles of comity, equity and "Our Federalism" which underlie *Younger* and its companion cases applied to efforts to obtain federal court injunctions of state civil proceedings. Although the issue of whether the *Younger* doctrine applied to state civil proceedings was raised in two cases that came before the Court in 1973[53] and 1974,[54] those cases were decided on other grounds. In *Huffman v. Pursue, Ltd.*,[55] however, decided in 1975, the Court finally

48. 372 U.S. 293, 312-19 (1963).

49. 28 U.S.C. § 2254(d) (1966) provides, in pertinent part: "In proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

. . . .

"(3) that the material facts were not adequately developed at the state court hearing. . . ."

50. 401 U.S. at 55.

51. *Id.* at 55 n.2.

52. 407 U.S. 225 (1972).

53. Gibson v. Berryhill, 411 U.S. 564 (1973).

54. Speight v. Slayton, 415 U.S. 333 (1974).

55. 420 U.S. 592 (1975).

came to grips, at least in a limited sense, with the question of *Younger*'s applicability to a state civil proceeding.

The state civil proceeding in *Huffman v. Pursue, Ltd.*, was not an ordinary one, i.e., not between private litigants. Although the defendant in *Huffman* was a private party (a lessee of a theater), plaintiffs were public officials. Under an Ohio public nuisance statute providing that a theatre exhibiting obscene films is a nuisance, and requiring some and allowing other sanctions to be administered upon a finding that a public nuisance has been committed, plaintiffs brought a nuisance proceeding against defendant's predecessor in an Ohio state court. That court ordered, among other things, the closing of the theater because "obscene movies" had been displayed there. The defendant, having succeeded to the leasehold interest in the theatre before the state court judgment was entered, then sought from a federal district court in Ohio an injunction and declaratory judgment that the state statute was unconstitutional and unenforceable.

Concluding that the statute violated the First Amendment, the federal court "permanently enjoined the execution of that portion of the state court's judgment that closed" the theatre "to films which had not been adjudged obscene."[56] On appeal to the United States Supreme Court, the plaintiff-appellants raised, *inter alia*, "the *Younger* problem" i.e., whether the District Court "should have stayed its hand in deference to the principles of federalism which find expression in *Younger v. Harris*."[57]

By a vote of six to three, in an opinion written by Justice Rehnquist, the Court concluded that "in the circumstances presented here the principles of *Younger* are applicable even though the state proceeding is civil in nature."[58] This limitation of the *Huffman* result to the particular circumstances of that case is reiterated at several other points in the majority opinion.[59] Indeed, that opinion is explicit on this point when it says that, for "the purposes of the case before us . . . we need make no general pronouncements upon the applicability of *Younger* to all civil litigation."[60]

What then did the Court find to be unique about the civil proceeding in *Huffman* that required the application of the *Younger* doctrine to it, while recognizing that the same result might not necessarily follow in all civil proceedings? The answer appears in a passage of the opinion that first acknowledges that one of the major underpinnings of *Younger*

56. *Id.* at 599.
57. *Id.*
58. *Id.* at 594.
59. *See, e.g., id.* at 603-05.
60. *Id.* at 607.

was "the traditional reluctance of courts of equity, even within a unitary system, to interfere with a criminal prosecution."[61] The opinion, however, then states:

> But whatever may be the weight attached to this factor in civil litigation involving private parties, we deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding. . . . Similarly, while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal law.[62]

That the state proceeding, then, was "both in aid of and closely related to criminal statutes"[63] was, in the Court's opinion, crucial to its determination that *Younger*'s extraordinary irreparable injury requirements were to be applied to *Huffman*.

Besides analogizing the particular civil proceeding in *Huffman* to criminal proceedings generally, Justice Rehnquist's opinion seeks to rest the *Huffman* result upon a variety of policy considerations presumably extracted from language used by Justice Brennan in *Steffel v. Thompson*. *Steffel* had held that the *Younger* requirements do not apply when federal declaratory relief is sought against state criminal statutes before any state prosecution has been commenced. In that context, Justice Brennan had written for the *Steffel* majority that:

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.[64]

This conclusion in *Steffel*, that the absence of the factors enumerated in the above passage allowed federal declaratory relief to issue under the circumstances of that case, does not mean that the presence of any of those factors inevitably triggers the application of the *Younger* requirements. Nevertheless, Justice Rehnquist's opinion in *Huffman* proceeds on the assumption that the latter proposition provides the guiding principle.

61. *Id.* at 604.
62. *Id.* at 604-05.
63. *Id.* at 604.
64. 415 U.S. at 462.

In applying that principle to the *Huffman* facts, the Court, as noted earlier, first determines that though the state nuisance proceeding was technically civil in character, it was also intimately related to the state's enforcement of its criminal laws. Issuance of the federal district court injunction had, in the Court's view, therefore failed an expanded version of one of the *Steffel* "tests," i.e., though it had not disrupted a state's criminal justice system, it did disrupt the "State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws."[65] Secondly, since the state nuisance proceedings were already in progress when the federal court injunction was sought, Justice Rehnquist concludes that, by granting the injunction, the federal district court had caused a duplication of legal proceedings.[66] And finally, since the federal court injunction had been sought on constitutional grounds, he finds that federal intervention could "be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.' "[67]

Except for the quasi-criminal character of the state nuisance proceedings involved in *Huffman*, the factors relied upon by the Court would appear to be present in each of the three hypothetical situations posited at the start of this article and in many more like them; namely, the potential duplication of legal proceedings and a negative reflection upon a state court's ability to enforce federal constitutional principles whenever a federal court injunction is sought against a pending state proceeding, though it is strictly civil in character.

How valid, in fact, are these considerations? Though duplication of legal proceedings would seem at first blush a vice to be sedulously avoided, an examination of federal-state court relations in other contexts reveals that the principle is not absolute, and that countervailing considerations have on occasion justified such duplication, potential or actual.

One instance that comes immediately to mind is in the issuance of federal court injunctions to stay state court proceedings under 28 U.S.C. section 2361 at the request of a plaintiff in a federal statutory interpleader action.[68] The federal interpleader device, often the only means for a "stakeholder" to avoid multiple litigation and inconsistent determi-

65. 420 U.S. at 605.

66. *Id.* at 604.

67. *Id. quoting* Steffel v. Thompson, 415 U.S. at 462.

68. 28 U.S.C. § 2361 provides in part: "In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court."

nations as to his or her obligations to diverse claimants, is evidently regarded as so valuable, that the duplication of legal proceedings that may be caused by a section 2361 injunction is tolerable.

Similarly, removal of actions from state to federal courts can cause varying degrees of duplication of legal proceedings, depending upon which removal statute is invoked and how far the state court proceedings have progressed when removal is effected. Thus, if removal of a civil action or proceeding is sought under 28 U.S.C. section 1441,[69] the general removal statute, there will ordinarily have been a minimum investment of state court resources, since the petition for removal must be filed within thirty days of the time that it first becomes clear that the case is or has become removable.[70] By contrast, removal of a criminal prosecution under the Civil Rights Removal Statute may be effected at any time before trial,[71] which means that it can occur after the proceedings have been in progress for some time, if the conditions permitting removal under that statute take that long to become apparent. In either case, the slight or major duplication of legal proceedings is once again regarded as justified by the values inhering in the right to remove—a right, incidentally, that is not granted anywhere in the federal constitution, but that has been with us from the First Judiciary Act of 1789.[72]

Moreover, the very value sought to be served by *Younger*, *Steffel* and *Huffman*, i.e., avoiding federal court interference in a state's pending judicial proceeding, has at times been regarded as of sufficient importance to justify simultaneous state and federal legal proceedings over the same issue. Thus, in *Kline v. Burke Construction Co.*,[73] it was held that, notwithstanding the theoretical availability of relief under the "all writs statute," federal courts will not enjoin state court proceedings involving the same parties and issues in a pending federal court in personam action. The right to plead the first judgment to be rendered as res judicata in the other action was regarded by the Court as a sufficient reason for allowing this aggravated instance of what is inveighed against in *Huffman*—the duplication of legal proceedings.[74]

What of the concern expressed in *Huffman*—or for that matter in *Younger* and its companion cases—that a federal court injunction directed against a pending state proceeding, in the circumstances of these cases, reflects negatively upon the state court's ability to enforce constitutional principles? The fact is that a basic apprehension about the

69. See note 18 *supra*.
70. 28 U.S.C. § 1446(b) (1965).
71. *Id.* § 1446(c) (1965).
72. WRIGHT, *supra* note 15, at 130.
73. 260 U.S. 226 (1922).
74. *See also* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286 (1970).

ability of state courts to enforce federal constitutional principles, and a belief in the superior ability of federal courts to perform this function, have been cornerstones of federal policy since the end of the Civil War. As the Supreme Court noted in *Mitchum v. Foster*:

> This legislative history [behind 42 U.S.C. section 1983] 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.[75]

Certainly, the grant of general federal question jurisdiction to the federal first-instance courts in 1875, coupled with the general removal statute, indicates a basic reservation about the state courts' ability properly to enforce federal constitutional principles. That reservation is even today based on reasonable concerns. Even if regional idiosyncrasies are ignored (stronger anti-labor union bias in some parts of the country than in others, varying degrees of racism or sexism in different communities, etc.), the fact that federal district court judges, unlike their counterparts in the state courts, hold their posts "during good behavior" (which, in a practical sense, means in most cases "for life"), and are therefore insulated from shifting political pressures on a whole range of constitutional issues, raises at least a reasonable presumption that federal constitutional questions will receive more objective and competent consideration in the federal courts than in the state courts. And, as *England* tells us, it is not a sufficient implementation of this principle if the United States Supreme Court enters the picture when the damage has already been done, i.e., when a state trial court has already made the record and entered fact findings.[76]

Concern for the sensibilities of state judges when pending state proceedings are halted as a result of a federal court injunction, as expressed by the *Huffman*[77] decision, appears further misplaced if one compares some procedural aspects of removal and injunctions. Under 28 U.S.C. section 1446, removal is effected when a copy of the removal petition is filed with the clerk of the state court.[78] One result of effecting a removal is immediately to deprive a state court of jurisdiction over the proceeding; any substantive steps the state court purports to take in the action are therefore null and void.[79] This is a direct and immediate interference with state judicial proceedings.

75. 407 U.S. at 242.
76. See note 17 & accompanying text *supra*.
77. 420 U.S. 592 (1975).
78. 28 U.S.C. § 1446(e) (1965).
79. *See* McCauley v. Consolidated Underwriters, 301 S.W.2d 181 (Tex. Ct. Civ.

By contrast, though *Younger* and its companions, as well as *Steffel* and *Huffman*, refer to federal court injunctions against state proceedings, in reality those injunctions, or declaratory relief decrees, when granted, are directed against parties to the state court suit, and not to the state courts themselves. There is nothing in those injunctions or declaratory decrees that would prevent a state court from going forward with the proceedings; all they signify is that if the person enjoined[80] ignores the injunction and seeks to pursue the state court action, that person will be in contempt of the federal court injunction and can be dealt with accordingly.[81] To be sure, in other contexts it has generally been held that a federal court injunction directed against a state court litigant in his efforts to secure a state court remedy is an injunction against state court proceedings in violation of the federal Anti-Injunction Statute.[82] But that principle does not negate the suggested conclusion that the federal court injunctions discussed herein represent a less drastic intrusion into a state court's conduct of its own affairs than does an authorized removal of an action from a state to a federal court.

All this suggests that, notwithstanding concerns for equity, comity and federalism expressed in *Younger* and its progeny, a federal district court's direct and stark interference by way of injunction with the work of a state court should be permitted if the value to be served by such interference is perceived as outweighing its potential impairment of harmonious relations between federal and state sovereignties. The crucial question is how to determine the value of the interest to be served if federal intrusion is permitted.

One thing is certain, however. Value cannot be measured if the Court fails to acknowledge the presence of the interest to be evaluated. Justice Rehnquist's opinion in *Huffman* is disappointingly ambiguous on this point: it either ignores the presence of that interest, or to the extent that it does not, subjects it to a "heads-I-win-tails-you-lose" or "Catch-22" treatment.

App. 1957); Hopson v. North American Ins. Co., 71 Id. 461, 466, 233 P.2d 799, 802 (1951).

80. Ordinarily the plaintiff in the state court proceeding.

81. "It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our Government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account." *Ex parte* Young, 209 U.S. 123, 163 (1908).

82. *See, e.g.*, Toucy v. New York Life Ins. Co., 314 U.S. 118 (1941).

For example, in *Huffman* the theatre owner appellee had sought to persuade the court that the *Younger* requirements should be limited to criminal proceedings, because:

> [Although] a state court criminal defendant may, after exhaustion of his state remedies, present his constitutional claims to the federal courts through habeas corpus, no analogous remedy is available to one, like appelleee, whose constitutional rights may have been infringed in a state proceeding which cannot result in custodial detention or other criminal sanction.[83]

Responding to this argument, Justice Rehnquist at first appears to ignore the *England* principle entirely when he states that, "[a] civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts,"[84] and that, in the *Huffman* circumstances, "an appeal to this Court lies as a matter of right."[85] Justice Rehnquist's conclusion that the appellee in *Huffman* was therefore "assured of eventual consideration of its claim by this Court,"[86] while apparently correct as far as it goes, may be of small comfort to someone in the appellee's shoes if, when that consideration occurs, the facts have already been found and the record made by a state trial court on his or her federal constitutional claims.

Immediately after this discussion, however, Justice Rehnquist's opinion appears to recognize the *England* principle, without identifying it as such, and then treats the problem it raises in a manner that suggests the recognition was far from perfect. He states first:

> Appellee's argument, that because there may be no civil counterpart to federal habeas it should have contemporaneous access to a federal forum for its federal claim, apparently depends on the unarticulated major premise that every litigant who asserts a federal claim is entitled to have it decided *on the merits* by a federal, rather than a state, court.[87]

It is not clear that the phrase "on the merits" used in this passage necessarily means in a first-instance proceeding, rather than on appeal, although in context and on balance, it appears to refer to trial court proceedings. Justice Rehnquist's response to this contention, however, raises more problems than it solves:

> We need not consider the validity of this premise in order to reject the result which appellee seeks. Even assuming, *arguendo*, that litigants are entitled to a federal forum for the resolution of all federal issues, that entitlement is most appropriately asserted by a

83. 420 U.S. at 605.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 606 (emphasis added).

> state litigant when he seeks to *relitigate* a federal issue adversely determined in *completed* state proceedings.[88]

If Justice Rehnquist means by this that, notwithstanding the disposition of these claims in a state court trial, the litigant is entitled to a de novo trial on the same claims in a subsequent federal trial, can such a procedure be reconciled with the previously expressed policy of nonduplication of legal proceedings in the state and federal courts? In a footnote to the last quoted passage, however, Justice Rehnquist makes it clear that he did not intend to suggest therein that the proceedings in the federal court would be de novo on the federal constitutional claims already adjudicated in the state court proceedings when he states:

> We in no way intend to suggest that there is a right of access to a federal forum for the disposition of all federal issues, or that the normal rules of res judicata and judicial estoppel do not operate to bar relitigation in actions under 42 U.S.C. § 1983 of federal issues arising in state court proceedings. Cf. *Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973). Our assumption is made solely as a means of disposing of appellee's contentions without confronting issues which have not been briefed or argued in this case.[89]

If this is not a "Catch-22" situation, it is difficult to know what is. People in the appellee's circumstances, i.e., those wishing to have their federal claims determined initially by a federal trial court, are in effect told: if your opponent has started the litigation in a state court, then you must raise your federal claims in that proceeding. You may reassert those claims in a subsequent proceeding in a federal trial court, but because of res judicata and estoppel principles, you will probably be bound by the determination of those claims already made in the state trial court. Oh yes, you may seek United States Supreme Court review of your constitutional claims by appealing from the state court's judgment, but you will be bound by the state trial court's record and fact findings.

This is hardly a satisfactory resolution of the concerns expressed by the appellee in *Huffman* or of those implicit in the hypothetical situations described earlier. Unfortunately, even in the dissenting opinion filed in *Huffman* by Justice Brennan, in which Justices Douglas and Marshall joined,[90] there is only a minor reference to the *England* case

88. *Id.*

89. *Id.* at 606 n.18.

90. That dissenting opinion argues: 1) *Younger* was limited to criminal prosecutions. 420 U.S. at 613-14. 2) The *Huffman* result is only the first step toward extending to civil proceedings generally the holding of *Younger*. *Id.* at 613. 3) To do so would in effect nullify the statutory and judge-made exceptions to the Anti-Injunction statute (28 U.S.C. § 2283 (1948)) with respect to civil proceedings. 420 U.S. at 614-16. 4) This is particularly inappropriate in the case of a "federal plaintiff" as in *Huffman* bringing an action under 42 U.S.C. § 1983. *Id.* at 616-17. 5) Requiring this plaintiff to have exhausted, as a state court defendant, its state appellate remedies undermines

without an examination of the full implications of that case for the *Huffman* problem.[91]

Had the Court given full consideration to the *England* doctrine, it could very well have determined that, notwithstanding its perception of the state nuisance proceeding in that case as a quasi-criminal proceeding, it was sufficiently removed from the direct enforcement of a state's criminal laws to justify the federal court injunction *when the value of the state court defendant's right to have a federal court determine his or her federal defenses is thrown into the balance.*

A fortiori, where enforcement of the state's criminal law policies either is not, or is only remotely, implicated in the state proceeding—as is true in the three hypothetical situations posited above, or in others like them—a litigant's right to a federal tribunal for the initial determination of federal issues looms even larger. Any doubt as to how the scales should be tipped in other situations (e.g., in *Younger*, where state criminal law policies are directly implicated; in *Burford*, where the state's administration of its own governmental functions are in issue; in *Stefanelli v. Minard*[92] where orderly procedures in a state criminal prosecution are at stake; or even in *Huffman*, where the state's resort to a civil proceeding to implement a fundamental criminal law policy was involved) in which one of the parties was governmental in character, should not prevent federal court cognizance of state court defendants' suits to enjoin state court proceedings on federal constitutional grounds where those proceedings are essentially civil in character and in which none of the opposing parties is a public official.

In all probability, recognition of this principle would cause a substantial increase in the work of the federal courts. Many state court defendants who now appear to be satisfied with initial state court determination of their federal constitutional defenses would be greatly tempted to invoke the jurisdiction of the federal courts in an injunction or declaratory relief proceeding to decide the validity of those defenses.

But if *England* means what it says, the increased workload of the federal courts is a result to be welcomed, rather than deplored. It

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the holding of Monroe v. Pape (365 U.S. 167, 183 (1961)) and other cases "that a federal plaintiff suing under § 1983 need not exhaust state administrative or judicial remedies before filing his action under § 1983 in federal district court." 420 U.S. at 617.

91. 420 U.S. at 617.

92. 342 U.S. 117 (1951). *Stefanelli* held that federal courts should refuse to intervene in state criminal proceedings to suppress the use of evidence even when it was claimed to have been secured by unlawful search and seizure. "Here," stated the Court, "the considerations governing [the exercise of equitable discretion] touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States." *Id.* at 120. *See also* Perez v. Ledesma, 401 U.S. 82, 84-85 (1971).

would mean that the federal trial courts would, in effect, be restored to their rightful place in our constitutional scheme.

Moreover, should Congress enact S. 1876,[93] introduced by Senator Burdick and based upon the American Law Institute's Proposed Revision of the Federal Judicial Code[94] these state court defendants would be able to procure substantially equivalent relief, with only a negligible net increase in the federal courts' workload. It is even possible that a reduction would result, for the three state defendants or respondents described in our hypothetical situations then would not need to seek federal court injunctive or declaratory relief in order to receive a federal trial court determination of their constitutional claims. The bill, if adopted, would permit removal to the federal court if the state court defendant pleaded a substantial federal defense that would, if sustained, dispose of the case,[95] thereby overruling by legislation the illogical result of the 1894 case of *Tennessee v. Union & Planter's Bank*.[96] At the same time, the Burdick bill, while not eliminating the diversity jurisdiction, would drastically limit the scope of that jurisdiction by denying it to those who would invoke it if they have a substantial personal or business connection with the state in which the federal court, whose jurisdiction they seek to invoke, is located.[97]

But S. 1876 has been pending in one form or another for four

93. S. 1876, 93d Cong., 1st Sess. (1973). A similar bill, based generally on AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) [hereinafter cited as ALI STUDY], was introduced by Senator Burdick in the United States Senate in 1971. S. 1876, 92d Cong., 1st Sess. (1971). *See generally* Fraser, *Proposed Revision of the Jurisdiction of the Federal District Courts*, 8 VAL. U.L. REV. 189 (1974).

94. ALI STUDY, *supra* note 93.

95. S. 1876 § 1312(a)(2) provides: "Except as otherwise provided by Act of Congress, a civil action brought in a State court may be removed to the district court of the United States for the district embracing the place where such action is pending. . . .

. . . .

"(2) if the amount in controversy exceeds the sum or value of $15,000 exclusive of interest and costs, by any defendant, or any plaintiff, by or against whom, subsequent to the initial pleading, a substantial defense arising under the Constitution, laws, or treaties of the United States is properly asserted that, if sustained, would be dispositive of the action or of all counterclaims therein."

96. 152 U.S. 454 (1894).

97. S. 1876 § 1302 provides in part: "The jurisdiction of the district courts under subsection (a) of section 1301 of this title [which provides for general diversity of citizenship jurisdiction] shall be subject to the following exceptions:

. . . .

"(b)(1) No corporation incorporated or having its principal place of business in the United States, and no partnership, unincorporated association, or sole proprietorship having its principal place of business in the United States, that has and for a period of more than two years has maintained a local establishment in a State, can invoke that jurisdiction, either originally or on removal, in any district in that State in any action arising out of the activities of the establishment."

years now, and it is difficult to tell when, if, or in what form, Congress will enact it. Since an immediate decrease in the volume of diversity cases heard by the federal district courts does not appear to be imminent, the question arises whether the federal judicial system can tolerate the increase in the federal district courts' workload that would inevitably occur if *Younger*'s extraordinary requirements were held not to apply when a state court defendant seeks federal injunctive or declaratory relief against state court civil proceedings between private parties.

Justice Frankfurter, concurring in *Lumbermen's Mutual Casualty Co. v. Elbert*,[98] expressed strong views on the prospect of increasing the federal courts' workload.[99] To be sure, *Elbert* was a diversity case in which the plaintiff, in Justice Frankfurter's view, had played "at the game of working . . . the perverse potentialities of diversity jurisdiction."[100] But Frankfurter's reservations in *Elbert* about responding to the increased demands on the federal judiciary by increasing the number of federal judges was not limited to situations in which those demands were produced only by the expansion of the federal diversity jurisdiction. He wrote:

> The business of courts . . . is drastically unlike the business of factories. The function and role of the federal courts and the nature of their judicial process involve impalpable factors, subtle but far-reaching, which cannot be satisfied by enlarging the judicial plant . . . . In the farthest reaches of the problem a steady increase in judges does not alleviate; in my judgment, it is bound to depreciate the quality of the federal judiciary and thereby adversely to affect the whole system . . . . [Inflation of the number of district judges] will result, by its own Gresham's law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts.[101]

Was Justice Frankfurter correct in this conclusion? Would the prestige of the federal judiciary suffer if substantially more judges were added? Stated differently, do federal court judges enjoy their enormous prestige because they are so few in number, relatively speaking? Empirical evidence on this is, of course, difficult to come by. But one can't help speculating that the source of the federal judiciary's prestige and influence resides in the encouragement of judicial independence provided by Article III of the Constitution in prohibiting any reduction of federal judicial salaries or removal from office during good behavior, and the consequent attractiveness federal judicial appointments have for the ablest American attorneys. As for the effect upon the efficiency of an increased federal judicial plant, the second of Judge Frankfurter's

98. 348 U.S. 48 (1954).

99. *Id.* at 57-60.

100. *Id.* at 57.

101. *Id.* at 59. *See also* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 28-31, 44-46 (1973).

concerns, increasing the number of federal district court judges would probably at some point require an accomodating increase in the number of judges on the various United States courts of appeals, and conceivably, some day, even on the United States Supreme Court.[102] Whether that would result in decreased efficiency of the federal judiciary is at best a debatable proposition. But even if this can be shown to be true, efficiency or administrative convenience has never been regarded as a *summum bonum* in American law;[103] efficiency in this context must be weighed against other values served by the maintenance of the federal judicial system. In this light it would appear that making federal trial courts available to those with federal defenses as well as those with federal claims, for the cogent reasons expressed by the Court in *England v. Louisiana Board of Medical Examiners*[104]—at least when this would not injure extraordinarily important state interests—is a value that transcends any administrative inconvenience to the federal courts, even assuming that such inconvenience would in fact ensue—an assumption that may not be at all warranted.

In this connection, it may be useful to suggest that Supreme Court recognition of the importance to litigants of a federal trial court determination of federal claims has not always been as clear as the expressions in *England v. Louisiana State Board of Medical Examiners*[105] would appear to indicate. Pronouncements by various members of the Court on this question, when compared, are often ambivalent, if not schizophrenic. For example, Justice Rehnquist's opinion in *Huffman v. Pursue, Ltd.*, rather casually implies that ultimate Supreme Court review is an adequate substitute for initial federal trial court determination of federal constitutional claims, notwithstanding the specific view to the contrary expressed in *England*.[106] Similar views are expressed in the 1955 decision of *Amalgamated Clothing Workers v. Richman Bros. Co.*[107] There, the Court grappled with the question of whether the 1948 enactment of 28 U.S.C. section 2283, the Anti-Injunction Statute, was designed to allow federal court injunctions of pending state proceedings only in the limited types of situations expressly described as

102. 348 U.S. at 47-49.

103. *Cf.* Reed v. Reed, 404 U.S. 71, 76 (1971).

104. 375 U.S. 411 (1964).

105. *Id.*

106. "A civil litigant may, of course, seek review in this Court of any federal claim properly asserted in and rejected by state courts. Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right. 28 U.S.C. § 1257(2). Thus, appellee in this case was assured of eventual consideration of its claim by this Court." 420 U.S. at 605. The *England* case itself, however, is not mentioned in Justice Rehnquist's *Huffman* opinion.

107. 348 U.S. 511 (1955).

exceptions in the statute, or whether an injunction might issue whenever the sense of the situation appeared to justify it. Responding to the argument that delay in that case might undercut a federal legislative scheme, Justice Frankfurter stated:

> 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 systems to enforce federal rights, subject to review by this Court. . . . The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.[108]

Similarly, even in *Dombrowski v. Pfister*,[109] perhaps the high water mark of federal injunction against a threatened state prosecution, Justice Brennan observed that:

> It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceeedings.[110]

Of course, the "orderly state proceedings" referred to in *Dombrowski*, as well as those in *Younger v. Harris*[111] and its companions, were orderly state criminal proceedings in which, as we have seen, the state may be said to have a very special stake.

More recently, in a 1970 case again dealing with congressional intentions in the 1948 Anti-Injunction Act, 28 U.S.C. section 2283, Justice Black was moved to declare that "Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."[112] To be sure, this case involved the section 2283 prohibitions against federal court injunctions to stay state proceedings, a question that has been rendered moot in our hypothetical situation because of the Court's subsequent decision in *Mitchum v. Foster*.[113] At the same time, if one keeps the *England* principle in mind, one cannot help marvelling at the unquestioning manner in which the availability of United States Supreme Court review is cited as an adequate means of correcting state court error.

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108. *Id.* at 518.
109. 380 U.S. 479 (1965).
110. *Id.* at 484-85.
111. 401 U.S. 37 (1971).
112. Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287 (1970).
113. 407 U.S. 225 (1972).

England, on the other hand, is not the only important United States Supreme Court case recognizing that Supreme Court review of federal constitutional issues, once those issues have been shaped by state trial courts, is an inadequate substitute for a federal trial of those issues in the first instance. As long ago as 1908, Justice Holmes observed in *Prentis v. Atlantic Coast Line Co.*:[114]

> If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals [of Virginia] after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent.[115]

Those observations of Justice Holmes assume special significance when note is taken of that portion of Justice Harlan's dissenting opinion in *Prentis* stating that:

> [I]f the final action of the commission . . . amounts to confiscation of the property of the corporation . . . then the way is plainly open to bring that question to this court upon writ of error. . . . In this way any Federal right, specially set up and denied by the state tribunals, can be adequately protected by the final judgment of this court.[116]

In sum, the expressions of faith in the ability of state tribunals to dispense federal constitutional justice found in many cases would appear to be at odds with the recognition, in other cases, of the right of a litigant with federal constitutional claims to have them adjudicated by a federal court. Perhaps these contrasting views can be reconciled by establishing the principle that, "though the state courts are good, the federal courts are better." Should reconciliation of these contrasting views prove inordinately difficult to achieve, it is submitted that the Court should squarely hold that the primacy of the federal judiciary in deciding federal law questions is a principle that transcends any pre-Civil War assumptions about the ability of state courts adequately to dispose of federal constitutional issues in the first instance. The mindless repetition of such platitudes about the role of the state courts is gratuitous in the light of all that has since occurred: the Civil War itself, the post-Civil War federal constitutional amendments, the enactment of

114. 211 U.S. 210 (1908).
115. *Id.* at 228.
116. *Id.* at 239.

what is today 42 U.S.C. section 1983, the decision in *Mitchum v. Foster*,[117] and finally—and perhaps most importantly—the decision and rationale of *England v. Louisiana State Board of Medical Examiners*.[118] Together, these factors suggest the establishment of at least a rebuttable presumption that in any given case, the most appropriate forum for deciding a federal constitutional issue in the first instance is a federal, rather than a state, trial court. Among the ways such a presumption could be rebutted would be: 1) a showing that the parties had unanimously chosen a state trial court for initial disposition; (plaintiffs by choosing the state court in the first instance, defendants by not seeking injunctive, declaratory, or other relief in the federal courts); or 2) a showing that the potential injury to a crucial state interest would outweigh the value to the litigants of having a federal court make the initial decision. In the absence of such, or similar, showings, federal district courts ought to be able to take away and decide, to the extent not prevented from doing so by the Anti-Injunction Act,[119] 28 U.S.C. section 2283, any pending state court proceeding raising federal constitutional issues. In such instances, there is little room for exaggerated solicitude about potential duplication of proceedings or negative reflections upon the ability of state courts to enforce federal constitutional principles.

In deciding whether a federal court injunction or declaratory judgment should issue against a pending state proceeding, the United States Supreme Court has thus far consistently ignored the value to the person seeking such relief of having a federal rather than a state court find the facts and make the record on his or her federal constitutional claims—a value that elsewhere, most notably in the *England* case, was recognized by the Court to be of fundamental importance. Had the Court recognized this interest of litigants in *Younger* and its companion cases, and in *Huffman v. Pursue, Ltd.*, the results of those cases might still have been the same. In those cases, the Court might have determined that, even when the litigants' right to a federal fact-finder and record-maker was thrown into the balance, the interests of the states involved in those cases outweighed such right. But as the interests of the state in the litigation recede—as in civil proceedings between private parties only—the balance should shift. When the Supreme Court directly confronts the question of whether the extraordinary requirements of *Younger v. Harris*[120] should apply to such proceedings, there would be ample justification for it to hold that they do not. A defendant in a state civil proceeding should therefore be permitted to seek a federal court injunc-

117. 407 U.S. 225 (1972).
118. 375 U.S. 411 (1964).
119. 28 U.S.C. § 2283 (1948).
120. 401 U.S. 37 (1971).

tion or a declaratory judgment against the plaintiff in such proceeding on the ground that it is based on a statute, as written or as applied, that violates federal constitutional law, without having to show that the state proceeding was instituted by that plaintiff in bad faith, or to harass the defendant, or is otherwise based on a statute that is, in a constitutional sense, rotten to the core.