to demonstrate by a preponderance of the evidence, rather than proof beyond a reasonable doubt, that all evidence was derived from an independent source.[136]

Despite these safeguards, however, the argument made by the petitioner in *Kastigar v. United States*[137] and the dissenting opinion therein by Justice Douglas[138] have some justification. The prosecutor or other law enforcement officials may obtain leads, names of witnesses, or other information not otherwise available, and it would be difficult if not impossible to identify, by testimony or cross-examination, the subtle ways in which the compelled testimony may disadvantage a witness.

> A witness who suspects that his compelled testimony was used to develop a lead will be hard pressed indeed to ferret out the evidence necessary to prove it. And of course it is no answer to say he need not prove it, for though the Court puts the burden of proof on the government, the government will have no difficulty in meeting its burden by mere assertion if the witness produces no contrary evidence. . . . Second, . . . the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony.[139]

V. Conclusion

The sufficiency of the present form of the use and derivative use immunity in the Bankruptcy Act cannot be determined without again asking if it is a "rational accommodation between the imperatives of the privilege [against self-incrimination] and the legitimate demands of government to compel citizens to testify."[140] Because of the courts' continued references to the bankruptcy provisions as a benefit bestowed by Congress to be accepted by the bankrupt upon such terms as Congress might impose, and due to the uniqueness of the bankruptcy proceedings in which compelling the testimony of the bankrupt is often the only meaningful way to protect creditors, it is likely that the courts, at least in the bankruptcy area, will give greater weight to the legitimate demands of the Government to compel citizens to testify.

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136. United States v. Seiffert, 501 F.2d 974 (5th Cir. 1974).
137. 406 U.S. 441 (1972).
138. Kastigar v. United States, 406 U.S. 441, 462 (1972) (dissenting opinion).
139. *Id.* at 469.
140. *Id.* at 446.

FEDERAL INTERVENTION IN ONGOING STATE PROCEEDINGS: EXPANSION OF AN ABSTENTION DOCTRINE

I. INTRODUCTION

Recent developments in the exercise of judicial restraint by the federal courts are bringing about a marked change from the 1960's in the role played by the national and state judiciaries in civil rights litigation. Decisions of the United States Supreme Court under Chief Justice Burger have served to increase the role of state courts in deciding federal constitutional questions and to discourage the challenge of state statutes in federal forums. This ongoing "alteration of the role of federal courts in the vindication of civil rights"[1] has been characterized by retired Justice William O. Douglas as "the strangulation of 42 *U.S.C.* § 1983 that has recently been evident."[2] In contrast, Judge Ruggero J. Aldisert of the Third Circuit welcomes the developing change, having been strongly critical of the expansion of section 1983 litigation[3] in the federal courts since *Monroe v. Pape*[4] and the "drift toward a national court system."[5]

It appears that the views of Judge Aldisert are gaining support, turning the tide of civil rights litigation away from the federal judiciary to the state court systems. This trend is likely to continue in future years as the abstention doctrines are further expanded.[6] This note will examine the growth of one type of federal court abstention: that in which a state court proceeding is pending when federal action is requested. More particularly, it will focus on the application to civil cases of the principles of *Younger v. Harris*,[7] prohibiting federal intervention in ongoing state criminal proceedings except in unusual and narrow

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1. Meiburger & Goldman, *Federal Practice and Jurisdiction*, N.Y.U. ANN. SURV. AM. L. 577 (1973). *See also* Comment, *The Extension of Younger v. Harris to Non-Criminal Cases*, 8 CREIGHTON L. REV. 454 (1974-75).

2. Boehning v. Indiana State Employees Ass'n, 96 S. Ct. 168, 170 (1975) (Douglas, J., dissenting).

3. Section 1983 of the Civil Rights Act of 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.

42 U.S.C. § 1983 (1970).

4. 365 U.S. 167 (1961).

5. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557, 571 [hereinafter cited as Aldisert].

6. *See, e.g.*, Hicks v. Miranda, 95 S. Ct. 2281 (1975). In *Hicks*, the Court held the principles of *Younger v. Harris*, 401 U.S. 37 (1971) (discussed *infra*) applicable to state criminal actions instituted after the filing of the federal complaint if no proceedings of substance have taken place in the federal court.

7. 401 U.S. 37 (1971).

circumstances. The two questions which pervade this analysis are: first, how far is the trend likely to be carried; and second, what will be its impact on the protection of federal constitutional rights?

II. Abstention in General

Abstention is the doctrine that a federal court should in certain circumstances refrain from exercising jurisdiction of a case, though it has been properly invoked under the Constitution and federal statutes. As noted by Charles Wright, it is more precise to refer to the "abstention doctrines," since there are several conceptually distinguishable lines of cases in which federal courts decline to proceed though they have the power to do so.[8] Wright himself identifies four abstention policies, including: (1) avoiding the decision of a federal constitutional issue where a case may be disposed of on questions of state law; (2) avoiding resolution by the federal courts of unsettled questions of state law; (3) avoiding needless conflict with the administration by a state of its own affairs; and (4) easing the congestion of the federal docket.[9]

There are at least two additional and related abstention doctrines: the requirement that state remedies—administrative and/or judicial—be exhausted before federal jurisdiction is exercised, and the reluctance of federal courts to interfere in ongoing state court proceedings. Although the different types of abstention cases involve varying factual situations, procedural consequences, and arguments for or against their validity, they are not always clearly distinguished by the courts.[10] Furthermore, all of the abstention doctrines are playing an important role in the present shifting tide of federal-state relations.

III. Abstention in the Light of Ongoing State Judicial Proceedings

The paradigm scenario for abstention cases in which a state court proceeding is pending involves a challenge in federal court under section 1983 of the Civil Rights Act of 1871[11] for an alleged violation of the complainant's federal constitutional rights resulting from the state action. The federal court challenge is initiated at any time after the state proceedings have begun, but before available state remedies have been exhausted. The plaintiff generally seeks an injunction against the state proceedings on the claim that the state statute on which the proceeding is based or the conduct of state officials violates his or her federal constitutional rights.

The requested exercise of federal judicial power provokes a confrontation between opposing values: the federal desire to properly protect rights guaran-

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8. *See* C. Wright, Law of Federal Courts § 52, at 196 (2d ed. 1970).
9. *Id.*
10. *Id.*
11. 42 U.S.C. § 1983 (1970). *See* note 3 *supra.*

teed to individuals by the United States Constitution and the state's interest in enforcing its laws and administering its own affairs. Underlying this conflict is the problem of allocating responsibility for preventing and vindicating the abridgement of civil rights. The United States Constitution explicitly binds state as well as federal judges to the task of upholding the "[s]upreme law of the land."[12] In response to the failure of post-Civil War state judiciaries to fulfill this obligation, Congress enacted the Civil Rights Act of 1871, creating a federal remedy, "supplementary to the state remedy,"[13] for federal constitutional infringements under color of state law. Since the Supreme Court pronouncement in *Monroe v. Pape*,[14] that state judicial administrative remedies need not be exhausted before federal protection may be granted, federal forums have been actively engaged in section 1983 litigation. Whatever may be the practical and philosophical problems allegedly arising from the expansion of federal activity in civil rights cases brought directly to the federal courts,[15] there are additional considerations involved when section 1983 violations arise out of pending state judicial proceedings. The policy of assuring federal protection of constitutional rights faces opposition in the policies of federalism and comity; that is,

> sensitivity to the legitimate interests of both State and National Governments, and a system in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[16]

Judge Friendly has called the conflict produced by these opposing values a Faustian one.

> It is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the states. Yet, we also have state courts whose judges, like those of the federal courts, must take an oath to support the Constitution and were intended to play an important role in carrying it out.[17]

In several major decisions since 1971, the United States Supreme Court has shown increasing concern for the doctrine of "our federalism" in civil rights litigation. This increased concern developed first in the criminal context,[18] and has recently been extended by the Supreme Court to a limited class of civil actions.[19]

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12. U.S. CONST. art. VI.
13. Monroe v. Pape, 365 U.S. 167, 183 (1961).
14. 365 U.S. 167 (1961).
15. *See* Aldisert, *supra* note 5.
16. Younger v. Harris, 401 U.S. 37, 44 (1971).
17. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 90 (1973), *quoted in* Aldisert, *supra* note 5, at 561.
18. *See* Younger v. Harris, 401 U.S. 37 (1971).
19. *See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

IV. *Younger v. Harris* AND PROGENY: ABSTENTION IN THE CRIMINAL CONTEXT

In 1971, the Supreme Court held in *Younger v. Harris*[20] and its companion cases[21] that, except in rare circumstances, a federal court may not enjoin ongoing state criminal proceedings.[22] Harris was being prosecuted in a California court under the state's Criminal Syndicalism Act.[23] His federal claim under section 1983 challenged the Act as facially violative of the first and fourteenth amendments to the United States Constitution, and alleged that the prosecution and the Act itself inhibited his exercise of protected constitutional rights. A three-judge federal district court held that the California statute was impermissibly vague and overbroad and issued an injunction against "further prosecution of the currently pending action against plaintiff Harris for alleged violation of the Act."[24] The Supreme Court reversed, finding that the federal intervention was a "violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."[25]

The requisite special circumstances imposed by *Younger* to justify federal injunctive interference are much more restrictive than the traditional equitable criterion of "irreparable injury." The irreparable harm resulting from a failure to intervene must be both "great and immediate."[26] In order to fall within the *Younger* exception, the federal plaintiff has the heavy burden of showing "bad faith, harassment, or any other unusual circumstances that would call for equitable relief."[27] An example given by the Court of an extraordinary situation in which injunctive relief may be granted absent "the usual prerequisites of bad faith and harassment" is prosecution under a statute which 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."[28]

Neither the possible unconstitutionality of a statute on its face, nor the chilling effect of a law regulating expression, in and of themselves justify an injunction against good faith efforts at enforcement.[29] To invoke relief by the lower federal courts, "the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single prosecution."[30]

The policies underlying the *Younger* decision are: (1) "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly

20. 401 U.S. 37 (1971).
21. Byrne v. Karalexis, 401 U.S. 216 (1971) (per curiam); Dyson v. Stein, 401 U.S. 200 (1971) (per curiam); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).
22. Younger v. Harris, 401 U.S. 37 (1971).
23. CAL. PEN. CODE §§ 11400, 11401 (West 1954).
24. Younger v. Harris, 281 F. Supp. 507, 517 (C.D. Cal. 1968).
25. Younger v. Harris, 401 U.S. 37, 41 (1971).
26. *Id.* at 46. *See* Fenner v. Boykin, 271 U.S. 240 (1926).
27. Younger v. Harris, 401 U.S. 37, 54 (1971).
28. *Id.* at 53-54, *quoting* Watson v. Buck, 313 U.S. 387, 402 (1941).
29. Younger v. Harris, 401 U.S. 37, 50-52 (1971).
30. *Id.* at 46. *See Ex parte* Young, 209 U.S. 123, 145-48 (1908).

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;"[31] and (2) the "even more vital" considerations of comity and federalism. Traditional equitable reluctance to intervene in criminal prosecutions is based on potential erosion of the jury function and avoidance of duplicative judicial proceedings.[32] The concepts of comity and federalism involve "a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate function in their separate ways."[33]

The strong language used by the Supreme Court in *Younger* and the restrictive interpretation which it placed upon *Dombrowski v. Pfister*[34] represent a clear victory for the policy of federal noninterference with state criminal proceedings. The High Court directive to lower federal courts is that "the normal thing to do when . . . asked to enjoin pending proceedings in state courts is not to issue such injunctions."[35] The unconstitutionality of the challenged statute or conduct of state officials justify federal intervention only in very extreme and unusual cases.

The Douglas dissent in *Younger* urges a sharply contrasting position. Justice Douglas believes that the "special circumstances" justifying federal intervention include not only bad faith and harassment by state officials, but also cases "where for any reason the state statute being enforced is unconstitutional on its face."[36] For the majority of the court, constitutional questions should be raised and decided in the pending state proceedings except in unusual cases; for Douglas, the lower federal courts should, in a section 1983 action, intervene whenever a facially unconstitutional statute is challenged. In *Younger*, intervention is required under the Douglas view because the state statute under

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31. Younger v. Harris, 401 U.S. 37, 43-44 (1971).
32. *Id.* at 44.
33. *Id.*
34. 380 U.S. 479 (1965). In *Dombrowski*, the federal plaintiffs were granted an injunction to prevent state officers from prosecuting them or threatening to prosecute them under a state statute which was unconstitutionally vague and overbroad and abridged their first amendment rights. The Supreme Court held that abstention was inappropriate where "statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities." Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965).

Younger, however, retreated from the *Dombrowski* position. The Court in *Younger* stated:

> we hold that the *Dombrowski* decision should not be regarded as having upset the settled doctrines that have always confined very narrowly the availability of injunctive relief against state criminal prosecutions. We do not think that opinion stands for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute 'on its face' abridges First Amendment rights.

Younger v. Harris, 401 U.S. 37, 53 (1971). The Court found, however, that the circumstances presented by *Dombrowski* fell within the narrow *Younger* exception. *Id.* at 47-49.

35. Younger v. Harris, 401 U.S. 37, 45 (1971).
36. *Id.* at 59 (Douglas, J., dissenting).

which Harris was being prosecuted "is the prototype of the one we held unconstitutional in *Brandenburg v. Ohio*."[37]

Douglas' position reflects a different philosophy of the power and necessary state-federal balance in the protection and vindication of civil rights. "[I]n times of repression, when interests with powerful spokesmen generate symbolic programs against nonconformists, the fedaral judiciary, charged by Congress with special vigilance for protection of civil rights, has special responsibilities to prevent an erosion of the individual's constitutional rights."[38] At least where freedom of expression is at stake, individuals should not be forced to undergo criminal prosecution under unconstitutional statutes in the interests of protecting the proper federal respect for state functions.[39] "When criminal prosecutions can be leveled against them because they express unpopular views, the society of the dialogue is in danger."[40]

The disagreement between the majority of the Court in *Younger* and Douglas in dissent is not in theory based on how much protection should be given to the exercise of federal constitutional rights, but rather on how and by whom that protection is to be accorded. In practice, however, the two views very likely do not vindicate the abridgement of civil rights to the same extent. Certainly the defendant in a *Younger* situation will endure greater burden and hardship if he must await reversal of an unconstitutional conviction by state appellate courts or by the United States Supreme Court on appeal[41] rather than by injunctive relief at the convening of a three-judge federal district court.

The fear that civil rights will suffer as a result of expanding abstention doctrines is based largely on a mistrust of state judges and their willingness to invalidate unconstitutional state statutes.[42] The extent to which this mistrust is justified is a question beyond the scope of this Note. It would seem, however, that at least in some state systems, the fear has real merit. Where judicial appointments are principally given as rewards for party loyalty, qualifications of judges will inevitably suffer. In addition, it might be expected that state judges would display greater allegiance to the enactments of state legislatures than would federal judges.

A contrary view has been expressed by federal Judge Ruggero Aldisert, who attacks as based on misconception the general mistrust and disrespect for state judges. "In reality, state judges have had to become federal constitutional

37. *Id.* at 65, *referring to* Brandenburg v. Ohio, 395 U.S. 444 (1969).
38. Younger v. Harris, 401 U.S. 37, 58 (1971) (Douglas, J., dissenting).
39. "The eternal temptation, of course, has been to arrest the speaker rather than to correct the conditions about which he complains. I see no reason why these appellees should be made to walk the treacherous ground of these statutes. They, like other citizens, need the umbrella of the First Amendment as they study, analyze, discuss, and debate the troubles of these days." *Id.* at 65.
40. *Id.*
41. *See* notes 82-84 *infra*, and accompanying text.
42. "Implicit in the *Mitchum* [*Mitchum v. Foster*, 407 U.S. 225 (1972)] holding is a determination that state courts are not as competent as the federal courts to determine federally created rights." Comment, *The Extension of Younger v. Harris to Non-Criminal Cases*, 8 CREIGHTON L. REV. 454, 468 (1974-75).

experts since the criminal law revolution began with *Mapp*, *Miranda*, and *Gideon*."[43] His fear is not that civil rights litigation will suffer if left to state courts, but rather that excessive resort to the federal system encourages state judges to leave unpopular decisions to the federal judiciary.[44]

An evaluation of the policies emerging from *Younger* cannot rest solely on the views expressed in that decision or on its application by the federal courts. *Younger* only began the process of redefining federal-state functions in civil rights litigation. Writers and courts soon began asking: "Do the *Younger* abstention standards apply to a request for injunctive relief against the continuance of a pending state court proceeding which is *non-criminal* rather than criminal in nature?"[45]

V. Application of *Younger* Doctrine to Pending State Civil Proceedings

Justice Stewart, concurring in *Younger v. Harris* and joined by Justice Harlan, stated that the *Younger* 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."[46] On the other hand, Justice White, joined by Justices Blackmun and Burger, expressed a different view in a dissent to *Lynch v. Household Finance Corp.*[47]: "Appellee . . . invokes *Younger* and companion cases as a ground for affirming the judgment of the District Court. Of course, those cases involved federal injunctions against state criminal proceedings, but the relevant considerations, in my view, are equally applicable where state civil litigation is in progress, as is here the case."[48]

In a Supreme Court case decided later in the *Lynch* term, a major first step was taken toward applying the considerations of comity and federalism to federal court action in the context of an ongoing state civil proceeding. The federal plaintiff in *Mitchum v. Foster*[49] sought injunctive and declaratory relief against a state civil suit which had closed down his bookstore under a public nuisance statute. Mitchum alleged that his first and fourteenth amendment rights had been abridged under color of state law. A single-judge federal district court issued temporary restraining orders against the state proceedings, but the orders were dissolved by a three-judge court convened pursuant to Title 28, sections 2281 and 2284 of the *United States Code*.

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43. *See* Aldisert, *supra* note 5, at 572.
44. *Id.* at 562. *Contra, The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 52, 207 (1972).
45. Comment, *The Extension of Younger v. Harris to Non-Criminal Cases*, 8 Creighton L. Rev. 454 (1974-75).
46. Younger v. Harris, 401 U.S. 37, 55 (1971).
47. 405 U.S. 538 (1972).
48. Lynch v. Household Fin. Corp., 405 U.S. 538, 561 (1972) (dissenting opinion).
49. 407 U.S. 225 (1972).

The refusal of the three-judge federal court to intervene in the state proceeding was not, however, based upon a judicial abstention doctrine, but rather on the Anti-Injunction Act.[50] The effect of the Anti-Injunction Act on requests for federal relief in section 1983 actions was not considered by the Supreme Court in *Younger*, because relief in that case was found to be precluded by the underlying abstention policies of equity, federalism and comity. In *Mitchum*, however, the Court held that "§ 1983 is an Act of Congress that falls within the 'expressly authorized' exception" to the Anti-Injunction Act.[51] The tone throughout most of the *Mitchum* opinion contrasts sharply with that of *Younger*, emphasizing the federal role in protecting the exercise of constitutional rights from infringement by the states.[52] Ironically, however, *Mitchum* paves the way for the Court's continuing expansion of the *Younger* doctrine. In concluding that the Anti-Injunction Act does not bar federal injunctive relief in section 1983 cases, the Court stated that "we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding."[53]

On remand, therefore, the Supreme Court directive was expressed in the concurring opinion of Chief Justice Burger, joined by Justices Blackmun and White. The Chief Justice stated:

> We have not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state *civil* proceedings. Therefore, on remand in this case, it seems to me the District Court, before reaching a decision on the merits of appellant's claim, should properly consider whether general notions of equity or principles of federalism, similar to those invoked in *Younger*, prevent the issuance of an injunction against the state "nuisance abatement" proceedings in the circumstances of this case.[54]

Mitchum did not therefore *require* federal court abstention absent unusual circumstances in the context of a pending state civil proceeding, but nevertheless indicated that the policies of federalism and comity should play a role in such determination. The *Younger* doctrine was not applied outright to the facts of *Mitchum*, but the seed was planted for a later Supreme Court holding to the same effect.[55]

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50. 28 U.S.C. § 2283 (1970): "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."

51. Mitchum v. Foster, 407 U.S. 225, 243 (1972).

52. 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."
Mitchum v. Foster, 407 U.S. 225, 242 (1972).

53. *Id.* at 243.

54. *Id.* at 244 (Burger, C.J., concurring).

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

VI. Extension of *Younger v. Harris* by Lower Federal Courts

Abstention cases involving pending state civil proceedings illustrate the extremely active role played by lower federal courts in "making" constitutional law. As early as 1972, the Fifth Circuit Court of Appeals expressed the belief in *Palaio v. McAuliffe*[56] that "application of the principles of *Younger* should not depend upon such labels as 'civil' or 'criminal', but rather should be governed by analysis of the competing interests that each case presents."[57]

In *Palaio*, the Solicitor General of Fulton County, Georgia, instituted civil proceedings in state court to have two films shown at defendant Palaio's movie theatre declared obscene and seized. Shortly thereafter, Palaio filed a section 1983 action in federal district court, raising the same first and fourteenth amendment constitutional objections to the controlling state statute which he had raised by answer in state court. The state judge held that one of the two films was obscene and ordered its seizure. A criminal action against Palaio was then commenced in state court. The federal district court refused to enjoin either of the ongoing civil and criminal actions, and the court of appeals affirmed.[58]

The rationale for abstention in *Palaio* was the state's strong interest in the enforcement of its criminal laws, "by whatever means."[59] Therefore, the heavy burden imposed by *Younger* for obtaining federal interference in purely criminal state proceedings was extended to proceedings found to be an integral part of the state's enforcement of its criminal laws. The court concluded that "for the purpose of determining the propriety of granting federal anticipatory relief, the suit to declare the films subject to seizure was functionally equivalent to a direct criminal prosecution for exhibiting the films. In both proceedings, the aim of the moving party was the enforcement of state criminal laws."[60]

In another 1972 case, *Cousins v. Wigoda*,[61] the Seventh Circuit also denied federal injunctive relief to restrain ongoing state civil proceedings. Following the election of delegates to the National Democratic Party Convention, Cousins filed notice with the Credentials Committee of the Convention of his intent to challenge the seating of Wigoda and the other elected delegates on the grounds that the election violated Democratic Party rules. Wigoda, in response, sought a state court judgment declaring that the delegates "had been duly elected and were therefore entitled to be seated at the Convention and to fully participate therein,"[62] and an injunction against any attempt by Cousins "to interfere with or impede the functioning of plaintiff and the delegates and alternates in their duly elected office."[63] After an unsuccessful attempt to remove the litigation to federal court, Cousins initiated an action in federal district court, alleging that

56. 466 F.2d 1230 (5th Cir. 1972).
57. Palaio v. McAuliffe, 466 F.2d 1230, 1232-33 (5th Cir. 1972).
58. *Id.* at 1231.
59. *Id.* at 1233.
60. *Id.*
61. 463 F.2d 603 (7th Cir. 1972).
62. Cousins v. Wigoda, 463 F.2d 603, 605 (7th Cir. 1972).
63. *Id.*

the state complaint was "frivolous as a matter of law," and that the threat of injunction "discourages persons from participating in the political meetings and processes" through which the challenge was being effectuated.[64]

The federal district court granted injunctive relief as to the component of the state complaint praying for an injunction, on the grounds that the request for a state injunction had an impermissible chilling effect on the exercise of first amendment rights, that it was made in bad faith, and that it had "no likelihood of success."[65]

The court of appeals reversed, vacating the district court injunction. Its decision to require abstention was based upon the principles of federalism and comity and on the particular inappropriateness of a federal forum for the resolution of the delegate controversy. Although the considerations of federalism and comity were held to be less compelling when the pending state litigation is civil rather than criminal, nevertheless, "they require special respect for the state judicial process if federal jurisdiction is not invoked until after state litigation is commenced."[66]

Cousins v. Wigoda is particularly significant for two reasons. First, it provides some indication of the beliefs of newly appointed Supreme Court Justice Stevens concerning federal court abstention.[67] With the retirement of Justice Douglas, the lone dissenter in *Younger v. Harris*, the Supreme Court has lost its strongest voice for active federal vigilance in the protection of civil rights. It appears from *Cousins* that Stevens' addition to the Court will not interfere with the adoption of policies favoring restraint when federal courts are asked to intervene in ongoing state proceedings.

Second, whereas the pending civil proceeding in *Palaio* protects state interests somewhat analogous to those protected by a criminal prosecution, the civil action in *Cousins* is a purely private one. The Seventh Circuit, therefore, extended *Younger* policies well beyond the step taken in *Palaio*. The state interest to which the federal court in *Cousins* deferred is far less direct than the state interest in a proceeding which is brought by state officials in order to close down a public nuisance. The state interest in *Cousins* is described by the court as follows:

> There are valid reasons why the courts of Illinois may properly assume jurisdiction over some aspects of the controversy between Cousins and Wigoda. In the state complaint Wigoda has alleged full compliance with the provisions of the Illinois Election Code; Cousins has not yet disputed those allegations, but retains the right to do so. Moreover, assuming vacancies in the slate of delegates may occur, by death, resignation, or by the successful prosecution of one or more challenges

64. *Id.*
65. *Id.* at 606.
66. *Id.*
67. For other Stevens' decisions on abstention, see *Indiana State Employees Association v. Boehning*, 511 F.2d 834 (7th Cir.), *rev'd*, 96 S. Ct. 168 (1975), and *Horvath v. Chicago*, 510 F.2d 594 (7th Cir. 1975).

> before the Credentials Committee of the National Convention, Illinois law may control, or may affect, the manner of selecting substitutes or alternates. Indeed, the Rules of the National Convention contemplate reference to state law in connection with various issues.[68]

Generalization from *Cousins* to probable Seventh Circuit action if asked to intervene in other types of private civil proceedings is dangerous, however, because of the particular nature of the delegate controversy. The two forums which, according to the court, "have an appropriate part to play in resolving the dispute between the parties" are the courts of Illinois and the Credentials Committee of the Democratic Party.

> Neither side suggests, however, that the issues should be resolved in a federal forum, or at least in a federal district court which does not have jurisdiction of the Convention or its Credentials Committee. It is perfectly clear, therefore, that the entire controversy cannot be resolved in the United States District Court for the Northern District of Illinois.[69]

In 1973, the Fourth Circuit joined the Fifth and Seventh Circuits in applying the *Younger* doctrine to a pending civil action.[70] The federal plaintiff in *Lynch v. Snepp*[71] requested injunctive relief against a state court order prohibiting anyone but students, employees, those with permission of school authorities, law enforcement officials and parents from entering public school property. The state action resulted from an "imminent emergency" in the schools created by episodes of violence and disruption.

The court of appeals failed to find under the facts of *Lynch* the requisite "special circumstances" necessary to overcome the "presumption against federal interference" in light of the pendency of state proceedings.[72] Echoing the language of *Palaio* and *Cousins*, the court called for a weighing of state and federal interests to determine whether a particular case is appropriate for federal intervention.[73] "[W]hen coordinate courts are on a collision course the disruptive effect on federalism is not likely to be dissipated by assurance that only civil jurisdiction is involved."[74]

VII. *Younger* Expansion by the Supreme Court

Palaio, Cousins and *Lynch* have been discussed here in some detail because they applied *Younger* principles to three civil actions antecedent to the 1975 Supreme Court decision in *Huffman v. Pursue, Ltd.*[75] *Huffman* endorsed the

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68. Cousins v. Wigoda, 463 F.2d 603, 606 (7th Cir. 1972).
69. *Id.* at 607.
70. Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973).
71. 472 F.2d 769 (4th Cir. 1973).
72. Lynch v. Snepp, 472 F.2d 769, 774 (4th Cir. 1973).
73. The state interest in *Lynch* was the maintenance of peace and prevention of disruption in the public schools. The federal interest was the protection of free speech and assembly. *Id.* at 770-771.
74. *Id.* at 775 n.5.
75. 420 U.S. 592 (1975).

expansion of *Younger* to civil proceedings "in aid of and closely akin to" criminal prosecutions, but declined to make a general pronouncement upon its applicability to all civil litigation.[76]

The pending civil proceeding in *Huffman* was a nuisance action to close down a movie theatre which was allegedly displaying obscene films. Rather than appealing the adverse judgment rendered by the state trial judge within the state appellate system, Pursue filed a section 1983 action in federal court seeking "injunctive relief and a declaratory judgment that the statute was unconstitutional and unenforceable."[77] A three-judge district court, without considering the applicability of *Younger* principles, concluded that the statute constituted "an overly broad prior restraint on First Amendment rights insofar as it permanently or temporarily prevented the showing of films which had not been adjudged obscene in prior adversary hearings."[78] The Supreme Court reversed and remanded for a determination as to whether the requisite "irreparable harm, both great and immediate" could be demonstrated to justify "federal judicial interference with state court proceedings of this kind."[79]

The Supreme Court in *Huffman* reiterated its strong concern for the principles of federalism and comity. Federal intervention in an ongoing state action inhibits the state judicial process, reflects negatively on its capacity to resolve constitutional issues, and results in duplicative legal proceedings. Therefore, "[t]he component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding."[80]

There are, however, differences between criminal and civil proceedings which argue against imposition of the same abstention standards in both situations. First, although the burden on a criminal defendant is greater than the burden on a civil defendant if the state court renders an adverse judgment, the criminal process provides safeguards against spurious prosecution and federal protection against unconstitutional convictions which are not available in a civil action. Second, the weight which should be given to the policies of federalism and comity in evaluating federal intervention is diminished by the lesser and more indirect state interest in many civil proceedings.

The criminal defendant is protected against spurious prosecution by preliminary safeguards which must be followed before a prosecution comes into existence, including the arrest, charge and information or indictment. The civil proceeding comes into existence upon the mere filing of a complaint, whether or not well founded. The dissenting opinion in *Huffman* asserts that this difference

76. Huffman v. Pursue, Ltd., 420 U.S. 592, 607 (1975).
77. *Id.* at 598.
78. *Id.* at 599.
79. *Id.* at 612-13.
80. *Id.* at 604.

> threatens serious prejudice to the potential federal court plaintiff not present when the pending state proceeding is a criminal prosecution. . . . To deny by fiat of this Court the potential federal plaintiff a federal forum in that circumstance is obviously to arm his adversary (here the public authorities) with an easily wielded weapon to strip him of a forum and a remedy that federal statutes were enacted to assure him.[81]

If a federal court refuses to intervene in an ongoing criminal prosecution, federal protection against constitutional infringement is available not only by way of appeal to the Supreme Court, but additionally through the habeas corpus proceeding. This protection is not available to a civil defendant, whose only possibility of federal relief is by way of appeal to the Supreme Court. Though appeal lies as a matter of right under Title 28, section 1257(2) of the *United States Code*[82] where the validity of a state statute has been drawn in question and the state court has held it valid, cases reaching the Supreme Court by appeal are frequently rejected summarily.[83] Former Chief Justice Warren stated:

> It is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari. As regards appeals from state courts our jurisdiction is limited to those cases which present substantial federal questions. In the absence of what we consider substantial in the light of prior decisions, the appeal will be dismissed without opportunity for oral argument.[84]

The *Huffman* opinion rejects the differential protection argument as a basis for limiting *Younger* to civil proceedings. "The issue of whether federal courts should be able to interfere with ongoing state proceedings is quite distinct and separate from the issue of whether litigants are entitled to subsequent federal review of state court dispositions of federal questions."[85] The controlling considerations in *Younger* as well as in *Huffman* are the doctrines of federalism and comity, rather than the availability of a federal forum, a "luxury" which the Court finds too costly in terms of the interests which *Younger* and *Huffman* seek to protect.[86]

The dangers of the *Huffman* expansion and the approach taken by the Supreme Court in that opinion are illustrated by the facts of *Speight v. Slaton*.[87] The state had prosecuted Speight, operator of the Harem bookstore, under a criminal obscenity statute. A mistrial resulted when the jury could not decide whether the books he sold were obscene. The state then proceeded to institute a civil nuisance proceeding and thereby succeeded in closing the bookstore and

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81. *Id.* at 615 (Brennan, J., dissenting).
82. 28 U.S.C. § 1257(2) (1970).
83. *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 3.4, at 83-87 (4th ed. 1969).
84. Address of Chief Justice Warren, American Law Institute Annual Meeting, May 19, 1954, *quoted in* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 3.2, at 81 (4th ed. 1969).
85. Huffman v. Pursue, Ltd., 420 U.S. 592, 606 (1975).
86. *Id.* at 605-06.
87. 356 F. Supp. 1101 (N.D. Ga. 1973).

seizing all merchandise on the premises, some of which admittedly was not "legally obscene." The request for federal intervention was denied by the district court.

The dissenting judge in *Speight* took note of the great potential for constitutional abuse in the civil nuisance proceeding because it allows the state to inhibit the exercise of first amendment rights without the safeguards of a jury trial and the higher criminal burden of proof. Although the individual civil defendant suffers economic loss rather than a prison sentence if judgment is rendered against him, the injury to the first amendment rights of society at large is not diminished if expression is unconstitutionally restricted by way of the less burdensome civil route.

Because the policies of federalism and comity defer to the state interest in an ongoing controversy, the more indirect state interest in a civil proceeding implies that less stringent standards for federal restraint should apply. The *Huffman* Court avoids fully considering this issue by finding that the state interest in a civil nuisance proceeding brought by state officials is akin to its interest in a criminal prosecution. The Court stated:

> 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 that 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.[88]

Palaio v. McAuliff[89] and *Lynch v. Snepp*[90] likewise involve civil proceedings in which the state interest is arguably analogous to its interest in a criminal proceeding. *Cousins v. Wigoda*,[91] however, required federal court abstention in a purely private civil proceeding. As indicated in the discussion of *Cousins*, it is unclear how far the Seventh Circuit will extend federal abstention in other types of pending private civil litigation. That circuit has recently required abstention in the case of an ongoing eminent domain proceeding, but the state is a party to such an action.[92]

A case now making its way through the New York courts poses the issue directly.[93] The federal plaintiff is challenging the constitutionality of a domestic relations law which gives only the woman in a divorce case the right to ask her spouse to pay legal fees. The claimant wants a three-judge federal district court to enjoin the state court from enforcing the statute. It remains to be seen if

88. Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).
89. 466 F.2d 1230 (5th Cir. 1972). *See* text accompanying notes 56-60 *supra*.
90. 472 F.2d 769 (4th Cir. 1973). *See* text accompanying notes 70-74 *supra*.
91. 463 F.2d 603 (7th Cir. 1972). *See* text accompanying notes 61-69 *supra*.
92. See Ahrensfeld v. Stephens, 44 U.S.L.W. 2318 (7th Cir. Dec. 23, 1975). *Contra*, Owens v. Housing Authority, 394 F. Supp. 1267 (D. Conn. 1975).
93. New York Post, Jan. 6, 1976, at 7, col. 1.

and how the federal court will apply *Younger* and *Huffman* policies to the problem of whether the constitutional issue should be decided by the federal or state court. This is the question which students of constitutional law and federal jurisdiction must now ask: Will the expansison of *Younger* reach to purely private civil litiagation?

VIII. Conclusion

Justices Brennan, Douglas and Marshall, dissenting in *Huffman v. Pursue, Ltd.*,[94] view that decision as an obvious first step toward the erosion of *Monroe v. Pape*[95] and toward the ultimate expansion of *Younger* to all civil proceedings.[96] There is no doubt but that *Huffman* further diminishes federal vigilance for the protection of civil rights. Whether the "February sextet" has initiated "an orchestra of oppressive proportions,"[97] however, depends upon the faithfulness of state judiciaries to the constitutional directives of the United States Supreme Court. If state courts erode such directives as they did *Escobedo v. Illinois*,[98] the Supreme Court will be forced, as in *Miranda v. Arizona*,[99] to be very explicit in its definition of constitutional requirements. In any case, the ongoing trend is clearly toward the expansion of federal abstention and its resulting delegation of constitutional litigation to the state judiciaries.

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94. 420 U.S. 592 (1975).
95. 365 U.S. 167 (1961).
96. Huffman v. Pursue, Ltd., 420 U.S. 592, 613 (1975) (Brennan, J., dissenting).
97. *See* Duke v. State, 477 F.2d 244, 255 (5th Cir. 1973) (Goldberg, J., concurring).
98. 378 U.S. 478 (1964).
99. 384 U.S. 436 (1966).