Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention

Bryce M. Baird
COMMENTS

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V. Fine Tuning Civil Rights Abstention Doctrine: Finding More Ways to Abstain

A. Abstention in Favor of State Administrative Proceedings

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INTRODUCTION

In Younger v. Harris, the Supreme Court created a justification for federal courts to dismiss claims over which they had jurisdiction, but, for reasons of “Our Federalism,” believed were better left to state courts to decide. Since Younger, much scholarship has been devoted to the development of the various abstention doctrines. Less, however, has been written about the unique role Chief Justice Rehnquist has played in extending the federalism component of Younger abstention to situations not contemplated by the Younger decision itself. As applied to civil rights plaintiffs, this ex-
pansion of federalism has, in effect, created a new doctrine of "civil rights" abstention: a doctrine which elevates the original notion of "Our Federalism," as found in Younger, to a point where it may be used to defy precedent, legislative history, and statutory language to exclude civil rights litigants from the federal forum which Congress and the courts have expressly guaranteed to such plaintiffs. Civil rights abstention is distinct from Younger abstention in that it is not subject to the same restrictions as Younger abstention, and it is not based upon equity jurisprudence, as was Younger, at least in part. Civil rights abstention is characterized by three elements: (1) reliance on the notions of comity and "Our Federalism" to expand the applicability of abstention to a larger class of federal cases; (2) removal of the Younger restrictions which limited use of federal abstention; and (3) abrogation of the Congressional grant of access to federal courts for civil rights plaintiffs by applying the doctrine of civil rights abstention, rather than following the jurisdictional mandate of 28 U.S.C. § 1343.

One of the obstacles to this type of analysis is the fact that both the Court and its commentators have continued to characterize what I call civil rights abstention as Younger abstention, or increasingly, Younger-Huffman abstention. Authors continue to criticize the

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6. For purposes of this Comment, the term "civil rights plaintiff" refers to any plaintiff attempting to litigate a claim under 42 U.S.C. § 1983 in federal court.

7. *See infra* part I.B.

8. *See infra* part I.A.


10. *See infra* text accompanying note 91.

11. The reference is to the case of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), which is discussed *infra* notes 124-50 and accompanying text. Huffman extended the Younger holding to civil proceedings, and in doing so, created the doctrine of civil rights abstention.
courts for unwarranted or impermissible extensions of the *Younger* doctrine, without recognizing that what they characterize as extensions are in reality transgressions of *Younger*. My purpose in focusing on the distinctiveness of civil rights abstention is two-fold. First, by removing the *Younger* pretense from abstention doctrine development, it is possible to expose civil rights abstention for what it is: an attempt at relieving the courts of unwanted civil claims.


14. Chief Justice Rehnquist has expressed his desire that Congress limit access to federal courts because the system is overloaded. Rehnquist told members of the American Bar Association that "[w]e must think not about creating new federal causes of action, but of remitting to state courts some of the business now handled by federal courts." Stacey Adler, *Limit Federal Suits: Rehnquist*, BUS. INS., Feb. 13, 1989, at 32. The notion that the Rehnquist Court has restricted access to federal courts has been suggested in both scholarly and popular publications, as well as in case law. See, e.g., *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 125 (1981) (Brennan, J., concurring in Rehnquist's judgment) ("The power to control the jurisdiction of the lower federal courts is assigned by the Constitution to Congress, not to this Court. In its haste to rid the federal courts of a class of cases that it thinks unfit for federal scrutiny, the Court . . . departs from this fundamental precept"); Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 957 (1991) ("Many legal scholars believe that . . . the Burger-Rehnquist Courts have restricted access to federal courts to cut back on [claims of rights violations] . . . ." (citation omitted)); Richard A. Matasar, *Treatise Writing and Federal Jurisdiction Scholarship: Does Doctrine Matter When Law is Politics?*, 89 MICH. L. REV. 1499, 1507 (1991) (reviewing ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* (1989)) (discussing Chemerinsky's view that the Burger and Rehnquist Courts have limited access to federal courts); Fred Barbash, *Rehnquist Utterly Consistent in Conservative Votes and Opinions*, WASH. POST, June 18, 1986, at A1 ("Rehnquist has worked to limit access to the federal courts . . . .")
Second, civil rights abstention analysis exposes the conflict between the congressional grant of jurisdiction to federal courts in civil rights cases, and the Supreme Court's heretofore successful circumvention of that grant. This Comment will first show how Congress, through the enactment of the Civil Rights Act of 1871, sought to give civil rights litigants an opportunity to litigate federal rights in a federal forum. Included in this discussion is a survey of modern case law, which has acknowledged the right to a federal forum for civil rights litigants. Part II examines the origins of "Our Federalism" as enunciated in Younger v. Harris\textsuperscript{15} and analyzes the scope of that concept as delineated in the decision. This part also outlines the development of the Younger doctrine prior to the creation of civil rights abstention. Part III begins with an analysis of Huffman v. Pursue, Ltd.,\textsuperscript{16} the case which first applied civil rights abstention. This part critically examines Chief Justice Rehnquist's opinions which have expanded the scope of civil rights abstention. Through a case by case analysis, this part exposes the differences that exist between civil rights abstention and Younger abstention. Particular emphasis is placed on the erosion of Younger's restrictions on the use of abstention. Part IV discusses in detail Rehnquist's 1981 opinion in Fair Assessment in Real Estate Association v. McNary,\textsuperscript{17} which not only embodied every major development in civil rights abstention to that time, but extended the scope of civil rights abstention as well. Through a comparative analysis of Fair Assessment and Younger, this part highlights the differences in civil rights abstention and Younger abstention, both in terms of the rationale and justification for the doctrines, and in the application of the doctrine to civil rights litigants. Finally, Part V of this Comment discusses the further development of civil rights abstention. This part analyzes three cases in which the Court expanded the application of civil rights abstention to bar civil rights litigants from litigating their claims in federal courts.

I. THE RIGHT TO A FEDERAL FORUM

A. Legislative History

Before one can appreciate the significance of civil rights ab-
stention, one must understand the substantive rights Congress intended to afford United States citizens involved in civil rights cases, as well as the procedural mechanisms Congress provided for enforcing those rights. Sections 42 U.S.C. 1983 and 28 U.S.C. 1343 respectively establish such rights. In order to fully understand those sections, it is necessary to determine what Congress meant by enacting those statutes. This can be done by looking to the legislative history of the acts, a practice in which courts often engage. Indeed, the Supreme Court has done this on a number of occasions with respect to § 1983, and there is a wealth of legislative history surrounding § 1983's predecessor, Section One of the Civil Rights Act of 1871, on which to draw. Section One of that Act created a private right of action against persons who, under color of state law, had deprived an individual of his federal rights, and gave federal courts jurisdiction to hear such cases. It is clear from the floor debates

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18. 42 U.S.C. § 1983 provides in relevant part:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

20. See infra part I.B.

21. The language of Section One, as adopted by Congress read:
   Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon
surrounding the Act that Congress not only intended to create a federal forum for such actions, but that both the supporters and the opponents of the amendment expected the federal courts to be the primary forum in which the newly created cause of action would be litigated. Of those who supported the Act many spoke of the nature of the rights being protected, and the federal mechanism to enforce those rights. In support of the Act, Senator Frelinghuysen of New Jersey stated:

[S]ince the fourteenth amendment forbids any State from making or enforcing any law abridging these privileges and immunities ... the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights. Representative Lowe of Kansas in support of the Act remarked:

[R]ecords of the public tribunals are searched in vain for any evidence of effective redress [of federally secured rights].

... The case has arisen ... when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired.

Many Congressmen spoke of the need for a federal forum as a
result of deficiencies at the state court level in protecting the rights of minorities. Senator Osborn of Florida stated:

If the State courts had proven themselves competent to . . . maintain law and order, we should not have been called upon to legislate . . . . We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; i.e., the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts.25

Arguing in support of the Act, Representative Coburn of Indiana remarked:

The courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention the complaints of those who are denied redress elsewhere.

. . . . The United States courts are further above mere local influence than the county courts; their judges can act with more independence . . . ; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily . . . . We believe that we can trust our United States courts, and we propose to do so.26

Senator Morton of Indiana commented:

But it is said . . . the matter should be left with the States. The answer to that is, that . . . the States do not protect the rights of the people; the State courts are powerless to redress these wrongs. The great fact remains that large classes of people . . . are without legal remedies in the courts of the States.27

Still others emphasized the unique nature of the rights Congress had created, and why the federal courts were best suited to protecting those rights. Representative Dawes of Massachusetts stated:

The first remedy proposed by this bill is a resort to the courts of the United States. . . . [T]here is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution.28

Representative Elliott of South Carolina stated:

The Government of the United States [has] the right, under the Consti-

25. Id. at 653.
26. Id. at 459-60.
27. Id. app. at 252.
28. Id. at 476.
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... the assertion of immediate jurisdiction through its courts, without the appeal or agency of the State in which the citizen is domiciled.  

Of course, there were a number of speakers who opposed the Act. Ironically, in many instances, it is their comments that go further in portraying the Act as one that would allow wholesale access to federal court, without respect to the extent of injury suffered, or the amount of damages sought. Representative Kerr of Indiana, who opposed the Act, commented: "This section gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrong-doer in the Federal courts." Representative Biggs of Delaware remarked in opposition: "[F]or the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in Federal courts...." Senator Thurman of Ohio, who also opposed the Act, stated:

It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. [B]y this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.  

... I object to [Section One], first, because of the centralizing tendency of transferring all mere private suits, as well as the punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. ... It leaves it, I presume, in the option of the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been the least injured, but who has some malice to gratify, will be the most likely to avail himself of.  

As illustrated in the above statement, many of the Congressmen were concerned with the federal encroachment on what they perceived to be areas of State concern. Representative Voorhees of

29. Id. at 389 (emphasis added).
30. Id. app. at 50.
31. Id. at 416
32. Id. app. at 216. Senator Thurman also suggested that the Act impugned the integrity of the state courts:

Whatever may be said about [the 1871 Act], [it is] a disparagement of the State courts. ... To say that every man who may be injured, however slightly, in his rights, privileges, or immunities as a citizen of the United States can go to the Federal courts for redress is to say, in effect, that the judiciary of the States is not worthy of being trusted.

Id.
Indiana feared that "[t]he first and second sections [were] designed to transfer all criminal jurisdiction from the courts of the States to the courts of the United States." Representative Storm of Pennsylvania also was concerned that

[Section One] does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning.34

The legislative history is clear: Congress intended, and fully expected, that the federal courts would be the primary guarantors of federal rights.

B. Modern Case Law

Consistent with this statutory grant, modern case law also has acknowledged the right of a civil rights plaintiff to proceed in a federal forum.35 Both pre-Younger and post-Younger cases have construed actions under § 1983 to be free from State exhaustion requirements,36 immune from the Anti-Injunction Act,37 and in general, properly litigated in federal courts.38 The leading pre-Younger case is Monroe v. Pape.39 In that case, the Court reviewed much of the legislative history, and concluded that the language of the Civil Rights Act of 1871, the predecessor of § 1983, combined with the remarks of those voting on the Act, was sufficient to establish that indeed Congress did intend to provide a federal forum for civil rights

33. Id. app. at 179.
34. Id. app. at 86.
35. There is also a significant body of older case law supporting the right of access to federal courts. See, e.g., Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909) ("The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 383 (1821) ("The Constitution gave to every person having a claim upon a State, a right to submit his case to the Court of the nation.").
39. Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds by Monell v. Department of Social Servs., 436 U.S. 658 (1978). The Monroe family brought an action against Chicago and 13 of its police officers for violation of their Fourteenth Amendment rights under 42 U.S.C. § 1983. The complaint alleged that the 13 police officers, without warrants, broke into the Monroes' home, forced them to stand naked in the living room while they ransacked the entire house, and took Mr. Monroe to the police station. It was further alleged that Mr. Monroe was detained there for 10 hours on "open" charges, interrogated about a murder, not taken before a magistrate or permitted to phone his family or an attorney, and subsequently released without charges. The district court dismissed the complaint, and the court of appeals affirmed. Id. at 169-70.
Writing for the Court, Justice Douglas concluded: "The [Civil Rights Act of 1871]—in particular [Section One] with which we are now concerned—had several purposes.... [One of the purposes] was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." According to Douglas, the debates clearly illustrated that

one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

This portion of Monroe was affirmed two years later in McNeese v. Board of Education. In McNeese, a suit was brought by black students against the school board for maintaining a segregated school district in violation of the Fourteenth Amendment of the Constitution. In holding for the students, Justice Douglas announced that federal civil rights claims were entitled to be litigated in federal courts. "It is immaterial whether respondents' conduct [was] legal or illegal as a matter of state law. Such [civil rights] claims [were] entitled to be adjudicated in the federal courts."

In Zwickler v. Koota, the Court emphatically discussed the duty of federal courts to hear civil rights cases:

Congress imposed the duty upon all levels of the federal judiciary to give

40. Id. at 180.
42. 365 U.S. at 173-74.
43. Id. at 180.
44. 373 U.S. 668 (1963).
45. Id. at 674.
46. Id. (citations omitted). Earlier in the opinion, Douglas noted that "[t]he First Congress created federal courts as the chief—though not always the exclusive—tribunals for enforcement of federal rights." Id. at 672.
47. 389 U.S. 241 (1967).
due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, "... to guard, enforce, and protect every right granted or secured by the Constitution of the United States ...." 48

Even after the Younger decision, the Court continued to recognize the right of a civil rights plaintiff acting under federal law to access federal court. Only one year after Younger, in Lynch v. Household Finance, 49 Justice Stewart, writing on the subject of the plaintiff's choice of forum, stated: "The Congress that enacted the predecessor of §§ 1983 and 1343(3) seems clearly to have intended to provide a federal judicial forum for the redress of wrongful deprivations of property by persons acting under color of state law." 50 The decision in Mitchum v. Foster, 51 decided two months after Lynch, recounted the relevant legislative history of § 1983, and used broad language in affirming the federal forum guarantee. "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment 'against state action, ... whether that action be executive, legislative, or judicial.'" 52 The Court found that

[The Act of 1871] was thus an important part of the basic alteration in our federal system .... As a result of the new structure ... the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established. Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and the laws of the Nation. 53

It is important to recognize that the Civil Rights Acts of 1871 was intended to change the then-existing federal-state relationship. The Younger Court missed this point when it emphasized that the

48. Id. at 248 (citations omitted). The Court also stated:
"We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum."

Id. (quoting Stapelton v. Mitchell, 60 F. Supp. 51, 55 (D. Kan. 1945)).

49. 405 U.S. 538 (1972).

50. Id. at 543.

51. 407 U.S. 225 (1972). For a discussion of Mitchum, see infra notes 102-06 and accompanying text.

52. 407 U.S. at 240 (quoting Ex parte Virginia, 100 U.S. (10 Otto) 339, 346 (1879). It is significant that Justice Stewart included action by any branch of state government. Rehnquist subsequently indicated that deference should be afforded to state executive actions. See Rizzo v. Goode, 423 U.S. 362 (1976).

53. 407 U.S. at 238-39 (citations and footnote omitted).
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policy of non-interference with state interests, or “Our Federalism,” that the Court was endorsing was based on a choice by Congress made after the “profound debates that ushered our Federal Constitution into existence”.

“It should never be forgotten that ‘Our Federalism,’ born in the early struggling days of our Union of States, occupies a highly important place in our nation’s history and its future.” However, it was the failure of that relationship to ensure federal rights that led to the enactment of the Civil Rights Act. Indeed, the Civil Rights Act was precisely intended to change that relationship, and allow the federal courts to act directly to vindicate federal rights. In his dissent in Younger, Justice Douglas immediately seized upon the majority’s failure to apprehend this point, stating:

There is no more good reason for allowing a general statute dealing with federalism passed at the end of the 18th century to control another statute passed also dealing with federalism, almost 80 years later, than to conclude that the early concepts of federalism were not changed by the Civil War.

The Mitchum Court recognized this distinction, explaining:

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.... In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a ‘suit in equity’ as one of the means of redress.

Two years later in Steffel v. Thompson, the Court summarized the Civil Rights Act of 1871 and the Judiciary Act of 1875, stating: “[T]he lower federal courts...became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and the treaties of the United States.”

54. 401 U.S. 37, 44 (1971).
55. Id. at 44-45.
56. See supra notes 25, 42-43 and accompanying text; see also Prieser v. Rodriguez, 411 U.S. 475, 516 (1973) (Brennan, J., dissenting) (“[Section 1983’s] legislative history ‘makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights’....” (quoting Mitchum v. Foster, 407 U.S. 225, 242 (1972))).
57. 401 U.S. at 62 (Douglas, J., dissenting).
59. 415 U.S. 452 (1974). For further discussion of Steffel, see infra notes 118-22 and accompanying text.
60. The 1875 Judiciary Act, now codified at 28 U.S.C § 1331 (1988), conferred general federal question jurisdiction on the lower courts subject only to a jurisdictional amount limitation.
61. 415 U.S. at 464 (quoting FELIX FRANKFURTER & JAMES M. LANDIS, THE
One of the most extensive restatements of the guaranteed right to a federal forum appeared in *Patsy v. Board of Regents*. The case involved the issue of whether or not exhaustion of state administrative remedies prior to commencing an action under § 1983 was required by the statute. In holding that exhaustion was not required, the Court examined the legislative history of § 1983 and cases construing that history, and concluded:

The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era. During that time, the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power... .

... [I]n passing § 1 [of the Civil Rights Act of 1871], Congress assigned to the federal courts a paramount role in protecting constitutional rights.

The most recent affirmation of the right to a federal forum came in *Will v. Michigan Department of State Police*. *Will* reaffirmed the dicta in *Quern v. Jordan* that a State is not a person for purposes of § 1983. The Court, however, acknowledged the right to a federal forum by adding in no uncertain terms that § 1983 was created with the intention that civil rights plaintiffs could avoid state adjudications of their federal civil rights.

Given that a principle purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal forum for civil rights claims against States, we can-
not accept [the] argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.69

Throughout twenty-six years of jurisprudence, the Supreme Court has repeatedly held that Congress intended to afford civil rights litigants a right to federal court adjudication of their federal civil rights. Much of the same language can be found in concurring and dissenting opinions during roughly the same period.70 One of the more noteworthy dissents was Justice Powell’s in Maine v. Thiboutot,71 a case concerning the award of attorney’s fees in civil rights cases. In dissenting to that part of the majority’s decision which in-

69. Id. at 66.

70. Harrison v. NAACP, 360 U.S. 167, 180 (1959) (Douglas, J., dissenting) (“From the time when Congress first implemented the Fourteenth Amendment by the comprehensive Civil Rights Act of 1871 the thought has prevailed that the federal courts are the unique tribunals which are to be utilized to preserve the civil rights of the people.”); Younger v. Harris, 401 U.S. 37, 63 (1971) (Douglas, J., dissenting) (“With ... the Act of 1871, Congress sought to [expand] the judicial power. Section 1983 is ... not only an expression of the importance of protecting federal rights from infringement by the states but also, where necessary, the desire to place the national government between the state and its citizens.”) (quoting Landry v. Daley, 288 F. Supp. 200, 223 (N.D. Ill. 1968))); Pierser v. Rodriguez, 411 U.S. 475, 513-14 (1973) (Brennan, J., dissenting) (“By enactment of the Ku Klux Klan Act in 1871, and again by the grant in 1875 of the original federal-question jurisdiction to the federal courts, Congress recognized important interests in permitting a plaintiff to choose a federal forum in cases arising under federal law.”); Huffman v. Pursue, Ltd., 420 U.S. 592, 617 (1975) (Brennan, J., dissenting) (“Section 1983 ... and the Judiciary Act of 1875 ... completely altered Congress’ pre-Civil War policy of relying on state courts to vindicate rights arising under the Constitution and federal laws.”) (citing Zwickler v. Koota, 389 U.S. 241, 245-46 (1967))); Hicks v. Miranda, 422 U.S. 332, 355-56 (1975) (Stewart, J., dissenting) (“The statute ... 42 U.S.C. § 1983, established in our law ‘the role of the Federal Government as a guarantor of basic federal rights against state power.’”) (quoting Mitchum v. Foster, 407 U.S. 225, 239 (1972))); Juidice v. Vall, 430 U.S. 327, 342 (1977) (Brennan, J., dissenting) (“Congress created this cause of action [§ 1983] over a century ago, and at the same time expressly charged the federal judicial system with responsibility for the vindication and enforcement of federal rights under it against unconstitutional action under color of state law ... .”); Trainor v. Hernandez, 431 U.S. 434, 456 (1977) (Brennan, J., dissenting) (“When it enacted § 1983, Congress weighed the competing demands of ‘Our Federalism,’ and consciously decided to protect federal rights in the federal forum.”); Allen v. McCurry, 449 U.S. 90, 108 (1980) (Blackmun, J., dissenting) (“Congress [through § 1983] deliberately opened the federal courts to individual citizens in response to the States’ failure to provide justice in their own courts.”); Fair Assessment in Real Estate Ass’n v. McNary, 454 U.S. 100, 123 (1981) (Brennan, J., concurring in the judgment) (“Congress has expressly provided jurisdiction over ... claims [that Constitutional or federal rights have been denied by any state] in the district courts.”) (citations omitted)); Pennzoil v. Texaco, 481 U.S. 1, 19 (1987) (Brennan, J., concurring in the judgment) (“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 ... .”)(citations omitted)).

terpreted § 1983 and § 1343 to include statutory claims as well as constitutional claims, Powell argued that "the right to a federal forum in every case [has been] viewed as a crucial ingredient in the federal remedy afforded by § 1983." What is notable about this dissent is the fact that Justice Rehnquist joined Powell in this position. Given Rehnquist's expansion of abstention to defeat civil rights plaintiffs' access to federal courts, however, it is apparent that Rehnquist has either ignored or internally resolved this inconsistency.

C. The Need for a Federal Forum

The preceding sections of Part I have established that Congress intended to create a federal forum for the purpose of hearing civil rights claims, and that the Supreme Court has acknowledged the right of a civil rights plaintiff to proceed in federal court. Related to the question of a civil rights plaintiff's right to litigate claims in federal court is whether or not there is a need for the plaintiff to present her claims to a federal court. If, after all, there is no difference between state and federal adjudication of federal rights, then abstention doctrine poses no threat to a civil rights plaintiff. If, however, there is a disparity in the competencies of the courts, then there is a threat to the civil rights plaintiff that she will be required, because of abstention, to litigate in a forum of lesser ability. "Our Federalism" dictates deference to state courts, not on the basis of the inherent competency of state courts in resolving issues of federal law, but out of sensitivity to state interests, and a desire to not unduly interfere with the legitimate activities of the state.

Many commentators believe, however, that there is a disparity in the abilities of state and federal courts to adjudicate federal rights. According to one commentator: "There is a widespread perception that the forum of litigation may be as outcome-determina-

72. Id. at 20. Powell added: "Nearly every commentator who has considered the question has concluded that § 1343(3) was intended to supply federal jurisdiction in all § 1983 actions." Id. at 21.
73. See infra note 90; cf. Huffman v. Pursue, Ltd., 420 U.S. 592, 610-11 (1975) (recognizing that state judges are bound by an oath to uphold the Constitution).
74. See, e.g., Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1106 (1977) (arguing that the Court's assumption of parity between state and federal courts is an attempt to "weaken disfavored federal constitutional rights by remitting their enforcement to less receptive state forums"); Donald H. Zeigler, Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts, 33 Hastings L.J. 665, 686 (1987) (suggesting that there are often disadvantages to litigating federal constitutional claims in state rather than federal court, including: state judges who are not uniformly well-qualified; state judges who lack expertise in federal law; state judges who may be subject to majoritarian political pressure; and state judges who may be biased in reviewing actions of other state officials) (footnotes omitted).
tive as the underlying merits.”

The reasons for such a belief are well-documented. From a historical perspective, it is clear that the Congress which enacted the Civil Rights Act of 1871 recognized the inadequacy of certain state forums in protecting federal rights.

More recently, the American Law Institute (ALI) concluded that, in state courts, “[e]rroneous application of federal law may result either from a misunderstanding as to the law or from a lack of sympathy to it.” While the ALI noted that federal judges were subject to the same failings as state court judges, the study concluded, “that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts.”

This conclusion echoes Justice Douglas’ admonishment three years earlier in Greenwood v. Peacock:

Prosecution for a federally protected act is punishment for that act. The cost of proceeding court by court until the federal right is vindicated is great. Restraint of liberty may be present; the need to post bonds may be present; the hire of a lawyer may be considerable; the gantlet of state proceedings may entail destruction of a federal right through unsympathetic and adverse fact-findings that are in effect unreviewable.

A number of commentators have criticized the Court’s creation of procedural barriers to federal adjudication of federal rights as diminishing substantive civil rights. This idea had already been recognized in 1981 when Senator Charles Mathias introduced The Civil Rights Improvement Act of 1981, a bill designed to amend the Civil Rights Act of 1871 for the express purpose of overturning certain Supreme Court decisions which had “seriously curtailed access to Federal courts for civil rights litigants.” Senator Mathias ex-

76. See supra notes 25-27 and accompanying text.
78. Id.
80. Id. at 844 (Douglas, J., dissenting) (emphasis added).
81. See, e.g., Zeigler, supra note 74, at 666 (arguing that while “the Court has not diluted the content or substance of rights directly . . . , it has created procedural barriers that leave victims without a practical remedy”); Michael Wells, Is Disparity a Problem?, 22 Ga. L. Rev. 283, 325 (1988) (stating that “virtually everyone now acknowledges, that the rules of procedure . . . have a major impact on how the substantive principles of law operate in practice”). In other words, if you don’t know the rules, you can’t play the game.
83. 127 Cong. Rec., S7245 (1981) (statement of Sen. Mathias). Of the six decisions Mathias referred to specifically as “significantly curtailing access to the Federal courts for those seeking relief under section 1983”—Huffman, Hicks, Rizzo, Trainor, Juidice, and Moore—Rehnquist authored four and concurred in the remaining two. Id. at S7249.
explained that the substantive rights of former state court defendants to subsequently sue under § 1983 could be obliterated by a bar to relitigation of matters raised in an earlier state proceeding.  

These examples demonstrate the broad and longstanding concern that federal rights are not adequately protected in state court proceedings. The Court, commentators, American Law Institute and Congresses separated by 110 years have all expressed that a federal forum is necessary to effectively vindicate federal rights.

Not only do civil rights plaintiffs have a right to litigate their claims in federal court, but in order to ensure expert adjudication of those claims, they have a need to access the federal forum as well.

II. THE BIRTH AND DEVELOPMENT OF "OUR FEDERALISM"

A. The Birth of "Our Federalism"

The concept of "Our Federalism" with respect to federal court abstention was first enunciated by Justice Black in Younger v. Harris. 85 Younger involved a challenge to a California Criminal Syndicalism Act, which proscribed activity leading to an illegal overthrow of the government or private industry. 86 John Harris Jr., who had been indicted under the Act for distributing leaflets, sought to avoid the state criminal proceeding by initiating a federal suit seeking injunctive relief from prosecution on the grounds that the statute violated the First and Fourteenth Amendments. 87 In dismissing the suit, the Supreme Court offered two reasons for abstaining in deference to the pending state criminal action. First, the basic doctrine of equity jurisprudence mandated that courts of equity 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. 88 Second, Black then supported this reasoning 89

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84. Id. (citing Allen v. McCurry, 449 U.S. 90 (1980)). According to Mathias, if a state court criminal defendant raised constitutional issues in his defense, he would be barred from bringing a § 1983 claim for an unconstitutional deprivation of rights. Id.
86. Id. at 38-39. The statute prohibited printing, publishing, editing, issuing, circulating or publicly displaying any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aiding and abetting the commission of a crime "as a means of accomplishing a change in industrial ownership or control, or effecting any political change." Id. at 39 nn.1 & 3.
87. Id. at 38-39.
88. Id. at 43-44.
89. Id. at 44. Black specifically stated that the equity jurisprudence rationale was "reinforced" by the "notion of comity." Id. Reinforce is defined: "To give more force or effectiveness to, strengthen, support." AMERICAN HERITAGE DICTIONARY 1042 (2d College ed. 1981). When combined with the definition of reinforce, Black's statement might lead
by asserting that comity and "Our Federalism" also mandated ab
stention in the situation faced by the Court.\textsuperscript{90} Although the Court
did identify and discuss these two distinct lines of reasoning, Black
chose to base the specific holding of the case solely on grounds of
equity jurisprudence. "[O]ur holding rests on the absence of the fac-
tors necessary under equitable principles to justify federal inter-
vention . . . ."\textsuperscript{91} One factor the Court did not consider was Harris' right to
proceed in federal court under § 1983 and § 1343. As was shown in
Part I, the Court had by the time of this decision already recognized
both the legislative and judicial authority for a civil rights plaintiff
to litigate in federal court. One might conclude that the Younger de-
cision was meant, either implicitly or explicitly, to change the
Court's position on the issue. Such was not the case.\textsuperscript{92} The Court did
not address the access issue, relying instead on established norms in
applying abstention to state criminal defendants.\textsuperscript{93} Traditionally,

one to conclude that the comity rationale was secondary to the equity analysis. Black,
however, confused the issue by stating that the equity rationale was reinforced by "an
even more vital consideration, the notion of 'comity' . . . ." 401 U.S. at 44 (emphasis
added). That language taken alone could lead to the conclusion that comity was more im-
portant to Black than equity. The holding of the case, however, was not based on comity
or federalism, but on equity. See infra text accompanying note 91.

\textbf{90.} 401 U.S. at 44. Justice Black explained his conception of "comity" as
a proper respect for state functions, 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 functions in their separate
ways. This, perhaps for lack of a better and clearer way to describe it, is re-
ferred to by many as "Our Federalism" . . . .

\textbf{Id.}

Justice Black described "Our Federalism" as
a system in which there is sensitivity to the legitimate interests of both State
and National Governments, and 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 le-
gitimate activities of the States.

\textbf{Id.}

\textbf{91.} \textit{Id.} at 54.

\textbf{92.} In a sense, the \textit{Younger} Court did not need to reach the issue. Ultimately, the
holding was based on an insufficient showing of factors necessary to overcome traditional
equitable principles as they related to state criminal prosecutions. \textit{Id.} at 56. Thus, the
conflict is between equitable restraint and the right to litigate in federal court, and it does
not implicate the "Our Federalism" component of the decision. Whether or not the argu-
ment supporting the right to a federal forum can overcome the traditional doctrine of eq-
uity jurisprudence was not played out in the decision, nor will it be contemplated here.
One reason the issue has not been developed is because the later abstention decisions
have been based on "Our Federalism"—a much more tenuous justification in light of Con-
gress' intent to provide a federal forum, the Court's position recognizing that intent, and
the fact that our federalism was intended only as a reinforcement of Justice Black's eq-
uity jurisprudence analysis in \textit{Younger}.

\textbf{93.} \textit{Younger} itself contained no new restrictions on the right of access to a federal
under equity jurisprudence, state court criminal defendants were not given injunctions against further state action even when the statutes they were being prosecuted under were unconstitutional. In those instances, a federal determination that a state statute was unconstitutional would not prevent the state court criminal action from proceeding. Thus, a federal forum would prove meaningless. If the Younger decision had stopped there, the broader doctrine of civil rights abstention might not have evolved. Younger would have decided only that where there is a conflict between a defendant's right to a federal forum and a state's right to enforce its laws in state courts, the doctrine of equity jurisprudence would militate against allowing federal interference. Younger went further, however, by creating "Our Federalism," and indicating that it was an "even more vital consideration" than equity doctrine. It was "Our Federalism" that was seized upon by future courts, eventually to the exclusion of equity, and used to establish the more broad based civil rights abstention doctrine.

One indication of the weight afforded to "Our Federalism" was that the majority chose to rely on that principle, rather than decide the case, as the respondents requested, under the Anti-Injunction Act. This is a significant point, for if the Younger Court had con-

94. Watson v. Buck, 313 U.S. 387, 400 (1941) (holding that criminal proceedings to enforce a state statute are not to be enjoined by a federal court even if unconstitutional, in the absence of a definite threat of prosecution and a clear showing of great and immediate danger of irreparable loss).

95. 401 U.S. at 44.

96. Id. at 40. The Anti-Injunction Act is codified at 28 U.S.C. § 2283 (1993). It pro-
CIVIL RIGHTS ABSTENTION

fined its decision to the language of Anti-Injunction Act, again, the policy argument of "Our Federalism" would not have been necessary, and consequently not available for future courts to rely on in expanding abstention doctrine. A decision based on the Anti-Injunction Act would have required future courts to evaluate requests for injunctions on the basis of three criteria: (1) whether or not Congress has specifically authorized such relief; (2) whether or not the injunction is "in aid of" the court's jurisdiction; and (3) whether or not the injunction is required to "protect or effectuate" the judgments of the court. Under this test, a decision to abstain is based upon a set of known, Congressionally authorized factors. Conversely, under Younger, the decision to abstain is based on a judicial determination that federal action would "unduly interfere with legitimate state activities." Rehnquist has relied on this language to create civil rights abstention by systematically removing the procedural conditions upon which Younger was predicated, thereby broadening the circumstances in which "Our Federalism" applies. The result of that action has been to deny a federal civil rights plaintiff the forum to which he is entitled.

vides in pertinent part: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283; see also Mitchum v. Foster, 407 U.S. 225, 230 (1972) (stating that the Younger Court "carefully eschewed any reliance on [28 U.S.C. § 2283] basing its decision instead upon what the Court called 'Our Federalism' ").

Rather than interpreting the language of § 2283, the Court cited only the reasons for the statute's existence. After admitting that the precise reasons for the policy embodied in § 2283 "have never been specifically identified," the Court nevertheless offered "equity jurisprudence" and "Our Federalism" as the underlying rational for the statute, and proceeded to base its holding on those two concepts. 401 U.S. at 43. Commentators Soifer and Macgill have noted that it was the substitution of the slogan "Our Federalism" for legislative history that has dominated the development of federalism since the Younger decision. Aviam Soifer & H.C. Macgill, The Younger Doctrine: Reconstructing Reconstruction, 55 TEX. L. REV. 1141, 1165 n.124 (1977).

97. 401 U.S. at 44.

98. As noted by the majority and concurring opinions, Younger was limited to cases in which a state criminal prosecution was already pending. As Justice Black stated for the majority, "[w]e express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." Id. at 41. Further, Justice Stewart pointed out in the concurrence:

[T]he Court deals only with the proper policy to be followed by a federal court when asked to intervene ... in a criminal prosecution which is contemporaneously pending in a state court.

... [W]e do not deal with the considerations that should govern a federal court when it is asked to intervene in state civil proceedings ...." Id. at 54-55 (Stewart, J., concurring). In redefining abstention doctrine, Rehnquist has removed both of these pre-conditions, and yet, has continued to characterize the new doctrine as expansions of the Younger abstention.
B. The Development of Younger Abstention Prior to the Establishment of Civil Rights Abstention

Rehnquist was not the first to embark on the expansion of Younger. In Samuels v. Mackell,99 one of five companion cases to Younger, the Court extended the Younger decision to declaratory as well as injunctive relief, arguing that “the basic policy against federal interference with pending state criminal prosecutions will be frustrated as much by declaratory judgment as it would be by an injunction.”100 While the Samuels case did extend the applicability of Younger, the decision ultimately remained based on principles of equity, and not “Our Federalism.”101 In fact, the term “Our Federalism” was not even used in the case. In that sense, unlike the changes brought later by Rehnquist, it was not the kind of expansion that has led to the wholesale transformation of the Younger doctrine.

Between 1972 and 1975, the Court sent conflicting messages as to the circumstances under which Younger would apply. In Mitchum v. Foster,102 a decision in which Rehnquist took no part, the Court held that § 1983 expressly authorized a suit in equity, and therefore, was to be construed as a statutory exception to the Anti-Injunction Act.103 Significantly, the Court also indicated that § 1983 was a part

99. 401 U.S. 66 (1971). Samuels involved a challenge to a New York criminal anarchy statute which made advocating the overthrow of the government by violence or any unlawful means a felony punishable by up to 10 years imprisonment and/or a $5,000 fine. The state court defendants were charged with voluntarily organizing a group for the purpose of advocating the violent overthrow of the State of New York. Samuels v. Mackell, 288 F. Supp. 348, 350 (S.D.N.Y. 1968), aff'd, 401 U.S. 66 (1971).

100. 401 U.S. at 73. Discussing the propriety of withholding declaratory relief in state tax collections cases, the Court stated:

Although we have found no case in this Court dealing with the application of this doctrine to cases in which the relief sought affects state criminal prosecutions rather than state tax collections, we can perceive no relevant difference between the two situations with respect to . . . the propriety of declaratory and injunctive relief . . . .

Id. at 71-72.

Given that the doctrine of non-interference in tax cases is based on the Tax Injunction Act, and § 1983 actions are excluded from the Anti-Injunction Act, this comparison is weak at best. See infra text accompanying note 103.

101. 401 U.S. at 68.

102. 407 U.S. 225 (1972). Mitchum involved a challenge to the actions of state judicial and law enforcement officers who had closed down petitioner's bookstore as a public nuisance. Petitioner Mitchum alleged a deprivation of his First and Fourteenth Amendment rights, and while the state action was still pending, sought an injunction of the state's preliminary order which prohibited continued operation of the bookstore. The district court held that the anti-injunction statute applied, thereby denying an opportunity for the state court defendant to bring his federal claims into federal court. Id. at 227-28.

103. Id. at 242.
of a "new structure of law that emerged in the post-Civil War era [with] the role of the Federal Government as a guarantor of basic federal rights against state power... clearly established." While this statement, and the discussion of the legislative history of § 1983 which accompanied it, acknowledged that Congress intended to create a federal forum for civil rights litigants, the decision continued to characterize Younger as being based on "Our Federalism," as opposed to principles of equity. Ironically, it has been this characterization that has led to the undermining of the federal forum guarantee.

In Gibson v. Berryhill, the Court affirmed the holding in Mitchum that § 1983 constituted an express exception to the Anti-Injunction Act. The Court cautioned, however, that Mitchum held only that a district court was not absolutely barred by the Anti-Injunction Act from enjoining a state court proceeding when called upon to do so in a § 1983 action. Courts, however, still had discretion to abstain under notions of "equity, comity, and federalism." By adding that provision, the Court essentially recognized that even though a plaintiff could invoke § 1983 and § 1343 to defeat the Anti-Injunction Act, those sections by themselves are not enough to overcome the principles of "Our Federalism." Gibson is important for two other reasons. First, Justice White, writing for the majority, indicated that certain state administrative proceedings such as actions to remove a professional license should be afforded the same

104. Id. at 239. Contrast Mitchum's emphasis on Congress' intent to change the relationship between the nation and the states, and Younger's emphasis on the framers intent to establish "Our Federalism." In Younger, the Court stated that "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43. The Mitchum Court, however, explained that "[t]he predecessor of § 1983 was... an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment." 407 U.S. at 238; see also supra note 53.


106. Id. at 230-31. "In Younger, this Court emphatically reaffirmed 'the fundamental policy against federal interference with state criminal prosecutions.'" Id. at 230 (quoting Younger v. Harris, 401 U.S. 37, 46 (1971)).


108. Id. at 573.

109. Id.

110. It should be noted that the Younger Court found the Anti-Injunction Act to be based on the notions of equity, comity, and federalism. Younger v. Harris, 401 U.S. 37, 44 (1971). Thus, in Gibson, the Court came to the odd conclusion that § 1983 and § 1343 circumvented the statute codifying the elements of "Our Federalism," but that the elements themselves, when invoked by the judiciary, were sufficient to overcome the grant of a federal forum.

111. Gibson involved a state optometry board's actions to remove licenses from optometrists who were not members of the state's professional association. Younger was
respect given to state judicial proceedings. Traditional equity doctrine as restated in Younger, however, applied only to court proceedings, and not to administrative actions. The dicta in Gibson, therefore, appears to be based on the “Our Federalism” component of Younger, a term which because of its vagueness, could be used to justify expansion of federal deference to non-court proceedings. Second, Gibson raised the important issue of whether or not Younger abstention applied to civil cases. Justice White read Younger to leave open the question of whether or not “Our Federalism” applied to civil cases. The fact that the Gibson Court raised the question indicated that Younger could be invoked in civil cases, even though under the circumstances of the instant case, Younger was not applicable. The ideas that abstention could apply to non-judicial and civil proceedings had not been expressed in any of the post-Younger decisions prior to Gibson, but were used in subsequent cases to more fully develop both Younger and civil rights abstention.

Finally, in the last major decision on abstention prior to Rehnquist’s initial majority opinion on the subject, Rehnquist concurred in a decision which resolved one of the issues left open in the Samuels decision. Samuels held that declaratory relief was not available to a federal plaintiff seeking such relief in response to a pending state criminal prosecution. Steffel v. Thompson examined the propriety of such relief when a state criminal prosecution was

held inapplicable because the administrative agency was not an adequate forum in which the state defendants could vindicate their rights, by reason of bias, and the inability of the agency to entertain constitutional claims. 411 U.S. at 577.

112. Id. at 576-77.
113. 401 U.S. 37, 43 (1971). In Younger, the Court found that “equity jurisprudence” was one of the sources of the policy of non-interference with state court proceedings. According to the Younger Court, “courts of equity should not act...to restrain a criminal prosecution, when the moving party has an adequate remedy at law...” Id.
114. Rehnquist cited dicta in Gibson as supporting the proposition that abstention applied to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claims. Fair Assessment in Real Estate Ass’n v. McNary, 454 U.S. 100 (1981). Fair Assessment is discussed infra notes 246-74 and accompanying text.
115. The Younger Court used the term “Our Federalism” to indicate a respect for state “functions” and “activities,” 401 U.S. at 43-44. The concept was not limited, as was the term “equity jurisprudence,” to judicial proceedings. Id. at 43.
116. Gibson v. Berryhill, 411 U.S. 564, 575 (1973). Justice Stewart’s concurring opinion in Younger pointed out explicitly that the majority did not reach the issue of abstention in civil cases, and suggested that on the basis of traditional equity doctrine, civil actions would not be subject to Younger abstention. 401 U.S. at 55 (Stewart, J., concurring).
117. For a discussion of Samuels, see supra notes 99-101 and accompanying text.
threatened, but not pending.\textsuperscript{119} While the Court held that such relief was available,\textsuperscript{120} it included language in the opinion which continued to emphasize the federalism component of Younger, as opposed to only the more narrowly defined doctrine of equity.\textsuperscript{121} Additionally, Rehnquist pointed out in his concurring opinion that filing a federal case prior to violating a state law would not act as a shield to state prosecution.\textsuperscript{122} This would become the majority opinion one year later in Hicks v. Miranda.\textsuperscript{123}

III. REHNQUIST AND THE DOCTRINE OF CIVIL RIGHTS ABSTENTION

A. The Birth of Civil Rights Abstention

Rehnquist's first majority opinion invoking "Our Federalism" came in 1975, and was the first decision to cross the line from Younger abstention to civil rights abstention. In Huffman v. Pursue,

\begin{itemize}
  \item \textsuperscript{119} Steffel had been threatened with arrest under a Georgia criminal trespass law in response to his handbilling activities, protesting American involvement in Vietnam, on an exterior sidewalk of a shopping center. Steffel stopped his handbilling and filed this suit in federal court. \textit{Id.} at 455-56.
  \item \textsuperscript{120} This aspect of the \textit{Steffel} decision was largely eviscerated by the decision in Hicks v. Miranda, which held that a prosecutor could initiate state proceedings against a party even after that party had filed suit in federal court. 422 U.S. 332, 349 (1975); see also O'Shea v. Littleton, 414 U.S. 488, 498-99 (1974) (holding that the mere possibility of prosecution under state law does not create an actual controversy for which relief may be sought).
  \item \textsuperscript{121} 415 U.S. at 460. "Sensitive to principles of equity, comity, and federalism, we recognized in Younger v. Harris ... that federal courts should ordinarily refrain from enjoining ongoing state criminal prosecutions." \textit{Id.}; see also Soifer & Macgill, \textit{supra} note 96, at 1142 (arguing that the decisions advancing the policy of deference to state courts were made possible by the Court's opinion in Younger, rather than its precise holding). It is important to remember that Younger was based specifically on the fact that, under the circumstances of the case, no exceptions to the principles of equity existed, and not that federalism itself barred such relief. The exceptions it listed were not exceptions to "Our Federalism," but were recognized exceptions to traditional equity doctrine. Younger v. Harris, 401 U.S. 37, 54 (1971).
  \item \textsuperscript{122} 415 U.S. at 480. Rehnquist wrote:
    I do not believe that a federal plaintiff in a declaratory judgment action can avoid, by the mere filing of a complaint, the principles so firmly expressed in Samuels. The plaintiff who continues to violate a state statute after the filing of his federal complaint does so both at the risk of state prosecution and at the risk of dismissal of his federal lawsuit. For any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of Samuels.
    \textit{Id.} (emphasis added) (citation omitted).
    This notion was played out in his majority opinion in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). \textit{Doran} is discussed \textit{infra} notes 162-76 and accompanying text.
  \item \textsuperscript{123} 422 U.S. 332 (1975). Hicks is discussed \textit{infra} notes 153-61 and accompanying text.
\end{itemize}
petitioners brought a § 1983 challenge against Ohio's public nuisance law, alleging that its application resulted in a deprivation of constitutional rights under color of law. Pursue, Ltd. was the owner of an adult theater showing pornographic films, and brought the federal suit in response to a state civil proceeding which had declared plaintiff's movies to be obscene and which resulted in the closing of the theater and sale of personal property used in the theater's operation. Rather than appealing the state court decision, Pursue, Ltd. filed the federal action, seeking declaratory and injunctive relief from the state court order. Relying on the "Our Federalism" component of Younger, Rehnquist held that civil proceedings that were "akin to a criminal prosecution" were subject to Younger restrictions, and therefore, the Court was required to abstain.

This decision, which established what Rehnquist termed the "civil counterpart to Younger," was important for many reasons. First, it continued the erosion of the interpretation of Younger as being based on equitable restraint and federalism, to one of a doctrine based wholly on federalism and comity concerns. Second, it introduced the "state's interest" analysis which has become a central test in determining the circumstances under which civil rights abstention may be applied. Third, the Huffman decision prohibits a

125. Id. at 598. The statute provided that a place exhibiting obscene films is a nuisance requiring closure of the establishment for up to one year, and sale of the establishment's personal property used in furtherance of creating the nuisance. Id. at 595-97.
126. Id. at 595-98.
127. Id. at 598.
128. See supra text accompanying notes 106, 109, 121. Mitchum, Gibson, and Steffel all interpreted Younger as being based on the concerns of comity and federalism. Those decisions, however, did not completely discount the principles of equity, upon which Younger was also founded. While Rehnquist did mention the equity portion of the Younger decision, he did so in questioning its precedential value in the case at bar.
129. 420 U.S. at 604.
130. Id. at 611.
131. See Barry Friedman, A Revisionist Theory of Abstention, 88 Mich. L. Rev. 530 (1989). "In Huffman v. Pursue, Ltd., then-Justice Rehnquist, writing for the majority, divorced the equity rationale from the Younger abstention doctrine...." Id. at 556 n.118 (citation omitted); see also infra note 137.
132. 420 U.S. at 604; see discussion infra notes 138-45 and accompanying text. Justice Blackmun focused on the relation of the state's interest to the Court's decisions to abstain in his concurring opinion in Trainor v. Hernandez, 431 U.S. 434, 448 (1977) (Blackmun, J., concurring). Blackmun articulated the view that a balancing test was being used by the Court, weighing the federal interest (which he does not specify) against the state interest of vindicating rights in its own courts. Younger and Huffman were cases in which the state's interests (administration of its criminal laws and interest in quasi-criminal state proceedings in which the state was a party) constituted strong enough interests to mandate abstention. Id. at 448.
would-be federal plaintiff from initiating federal court proceedings until all state appellate remedies have been exhausted. Finally, the decision forces potential civil rights plaintiffs to comply with state appellate procedures by decreeing that failure to do so will act as a bar to federal action. These four points, combined with the more important holding that Younger applied to civil cases, distinguish the type of abstention contemplated in Huffman from traditional Younger abstention. Huffman represents a new direction in abstention doctrine that has developed almost exclusively through Rehnquist's opinions into the doctrine of civil rights abstention; a doctrine which encompasses, but is much broader than, Younger abstention.

The transformation of the grounds on which Younger rested has had a significant impact on the expansion of "Our Federalism." In Huffman, Rehnquist stated that Younger was based on "the principles of comity and Federalism." It was important to assert that Younger was based on federalism, because, as Rehnquist admitted, the element of equitable restraint, on which Younger was also founded, could not justify this type of expansion: "Strictly speaking [equity doctrine] is not available to mandate federal restraint in civil cases." In order to apply Younger to civil cases, Rehnquist needed an alternative justification: one consistent with "Our Federalism."

That justification proved to be the "state's interest" test as applied to abstention analysis. The "state's interest" test evaluated the weight of the interest that a state had in prosecuting actions in

133. 420 U.S. at 608. Compare the rule in Huffman with the rule announced in Monroe v. Pape, 365 U.S. 167 (1961), overruled on other grounds by Monell v. Department of Social Servs., 436 U.S. 658 (1978), that § 1983 was enacted to provide a federal remedy in a federal court. While Huffman does not eliminate the possibility of federal review of a federal issue, it does eliminate the opportunity for federal fact-finding. 420 U.S. at 608.

134. 420 U.S. at 611 n.22.

135. Id. at 602.

136. Id. at 604. Rehnquist avoided addressing the conflict between the federalism rationale of Younger abstention, which does not distinguish between state criminal and civil proceedings, and the equity rationale, which is only applicable to state criminal proceedings, by labeling the type of prosecution which occurred in Huffman as being similar to a criminal proceeding, and then speculating that "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." Id.

137. See Sue Davis, Justice Rehnquist and the Constitution 182 (1989) (arguing that Younger's foundations in equity would suggest that the doctrine would be limited to criminal proceedings, and therefore, the distinction made in Huffman that Younger is based on "Our Federalism" is an important one); Soifer & Macgill, supra note 96, at 1178 (arguing that in order to apply abstention in this instance, Rehnquist had to "liberate" "Our Federalism" from its equitable underpinnings).

138. 420 U.S. at 604-05.
its own courts. As noted in Younger, states have a strong interest in trying criminal cases in state courts, hence federal intervention should be kept to a minimum. Under the Huffman state interest analysis, courts may determine whether or not a state has an interest in trying a civil matter in state court that is as compelling as its interest in criminal prosecution. If the interest rises to the level of interest in a criminal action, then principles of "Our Federalism" will apply, and abstention is required. This represents a subtle shift in focus from what in Younger was deference to state courts based on traditional equity notions to deference based on the nature of the state's interest in a particular claim. If, indeed, this is the situation (and from subsequent decisions, it does appear to be the case that a state's interest in the pending litigation is determinative), then it seems to follow that a state would have an equally compelling interest in litigating §1983 actions in state court. By the very nature of the statute, §1983 actions implicate state agents or statutes, and certainly states have an interest in what happens to its employees or laws. Under the "state interest" test of Huffman, "Our Federalism" would suggest that federal courts be required to abstain from hearing §1983 cases in their courts, despite the fact that §1983 is exempt from the Anti-Injunction Act. While this result may seem exaggerated, it is not foreclosed by Huffman. Despite equating Ohio's interest in trying nuisance law violators with prosecuting criminals, Rehnquist does not elaborate on how he arrived at that conclusion. No test is enunciated explaining how a court might determine the importance of a particular state interest. The result in Huffman suggests that a judicially created doctrine of abstention has taken precedent over express statutory language to the contrary. "Our Federalism" has trumped our nation's statutes.

Perhaps Rehnquist did not elaborate on the analysis required to determine the importance of a particular state's interest because as a practical matter, the issue in most cases is moot. Under Huffman, a fed-

139. Id. at 605.
141. 420 U.S. at 604-05.
142. 401 U.S. at 43-44.
143. In cases such as Steffel, where the state's interest was more attenuated by the fact that there was no pending state litigation, abstention was not granted. Steffel v. Thompson, 415 U.S. 452 (1974); see also Trainor v. Hernandez, 431 U.S. 434, 449 (1977) (Blackmun, J., concurring). For decisions in which Rehnquist has considered the state's interest important, see cases discussed infra notes 186-205, 246-74, 284-92 and accompanying text.
144. Mitchum v. Foster, 407 U.S. 225, 242-43 (1972); see supra text accompanying note 103.
145. See Soifer & Macgill, supra note 96, at 1185 (suggesting that the Court in making such determinations is limited only by such rules as the Court cares to devise).
eral plaintiff in a situation like Pursue, Ltd.'s is required not only to litigate in state court, but also to exhaust state remedies prior to filing a federal action.\footnote{146} The decision in effect, requires federal court judges to dismiss (as opposed to stay) any claim filed by a party to a pending state court action, be it civil or criminal in nature.\footnote{147} Dismissal also will occur in the event that a state court defendant fails to properly comply with state procedures.\footnote{148} A judge, therefore, does not necessarily need to go through the "state's interest" analysis in order to abstain. She can merely resort to exhaustion to dismiss the federal plaintiff.

The Huffman Court's successful expansion of Younger to civil proceedings has been the most significant expansion of abstention to date.\footnote{149} Once abstention was found to apply in civil matters, all that remained to be determined was the extent to which it would be applied. With Rehnquist leading the way, the Court embarked quickly to expand abstention in civil rights cases. While the Court continued (and continues) to refer to abstention in these cases as Younger abstention, or increasingly Younger-Huffman abstention,\footnote{150} it has been applying a doctrine that bears little resemblance to Younger. One by one, the elements that were originally required before Younger could

\footnote{146} Huffman v. Pursue, Ltd., 420 U.S. 592, 608 (1975) ("[W]e believe that a necessary concomitant of Younger is that a party in appellee's [Pursue, Ltd.] posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in Younger."). But see Patsy v. Board of Regents, 457 U.S. 496 (1982) (holding that a § 1983 plaintiff is generally entitled to a federal forum, and therefore, need not exhaust state judicial or administrative remedies before suing in federal court). Patsy is discussed supra notes 62-65 and accompanying text. Patsy, however, is limited by Parratt v. Taylor, 451 U.S. 527 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986), which held that when a § 1983 plaintiff claims a deprivation of property without due process of law, the existence of state provided post-deprivation remedies constitutes due process. Parratt is discussed infra notes 227-44 and accompanying text. In such cases, a potential § 1983 plaintiff must pursue state remedies.

\footnote{147} Exhaustion means that a criminal defendant in state court will never see a district court, absent a Younger exception. Under Younger abstention, a claim is dismissed, and not stayed; therefore, a state court defendant may not "reserve" federal claims for federal adjudication. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-18 (1963) (holding that where a federal court has stayed a proceeding in deference to a concurrent state court proceeding, a party may, by express motion, reserve federal claims for determination by a federal court). The defendant would have to present all claims, making them subject to res judicata, even if he could file an action in district court. However, because the case will already have been decided by the Supreme Court by way of a denied appeal (which is on the merits) or an actual decision, he will be unable to do so.

\footnote{148} 420 U.S. at 611 n.22. This prevents a state court litigant from accessing federal court by simply failing to appeal the state court decision.

\footnote{149} Soifer & Macgill, supra note 96, at 1174 n.149, 1192.

\footnote{150} See cases cited supra note 12.
be applied have been removed. Civil rights abstention began with the removal of the criminal proceeding requirement in *Huffman*, and has steadily evolved from that case.

*Younger*, however, has continued to be the reference point both for scholars and the courts in discussing abstention.\(^{151}\) This Comment shifts the focus from whether or not the post-*Younger* cases have been "permissible" or "impermissible" extensions of that doctrine\(^{152}\) to an argument that civil rights abstention is a separate and distinct branch of abstention, aimed not at deference to state courts, but at relieving the courts of "unwanted" civil rights claims. Civil rights abstention is characterized by three elements: (1) the reliance on "Our Federalism" to expand the scope of abstention; (2) the removal of the *Younger* restrictions limiting the use of abstention; and (3) the limitation on the right of access to federal court. The presence of all three elements distinguish civil rights abstention from *Younger* abstention. *Younger* abstention relied on equity jurisprudence and prior case law to establish the parameters of abstention whereas civil rights abstention relies on "Our Federalism" to justify the application of abstention.

B. The Expansion of Civil Rights Abstention

1. Removing Restrictions: The Application of Civil Rights Abstention to Non-Pending Proceedings. The three elements of civil rights abstention are easily identifiable in *Hicks v Miranda*,\(^{153}\) a case decided just one month after the *Huffman* decision. In *Hicks*, Justice White, writing for a majority which included Rehnquist, applied *Younger* abstention to criminal proceedings which were not pending

\(^{151}\) In the six opinions on abstention written by Rehnquist, and the four additional opinions on abstention, the Court refers to *Younger* as the basis for abstaining. See supra note 5. Commentators writing on these opinions have noted the enormous changes in the application of *Younger*, but continue to characterize the extensions as expansions of *Younger*, and not a separate and distinct doctrine. See supra note 13 and accompanying text.

\(^{152}\) Take for example this title: *The Ultimate Expansion of the Younger Doctrine*: Pennzoil Co. v. Texaco, Inc., cited supra note 12. The point is that after a certain threshold, a doctrine can become so indistinguishable from that on which it was based as to constitute a new doctrine. When the Court relied on "Our Federalism" to the exclusion of equity, *Younger* abstention became civil rights abstention.

\(^{153}\) 422 U.S. 332 (1975). Vincent Miranda was the owner of an adult theater whose employees had been indicted on criminal obscenity charges in California state court. Miranda, who had not been named in the action, filed suit in federal court on November 29, 1973, alleging that the obscenity statute was unconstitutional, and asking for injunctive relief for return of the films which had been declared obscene in state court. On January 15, 1974, one day after completion of service on the federal complaint, the state prosecutors amended the state claim to include Miranda as a defendant. *Id.* at 335-40.
at the time that the federal action was initiated.\textsuperscript{154} The Court found that federal petitioners who were not parties to a state suit at the time the complaint was filed, but who were subsequently implicated in a state criminal proceeding, were required to proceed as defendants in state court.\textsuperscript{155} The Court characterized the rule in \textit{Younger} as one "designed to 'permit state courts to try state cases free from interference by federal courts,'"\textsuperscript{156} and went on to say that no other "case in this Court has held that for \textit{Younger v. Harris} to apply, the state criminal proceedings must be pending on the day the federal case is filed."\textsuperscript{157} White found that a federal action filed by a state-court non-party who had a "substantial stake" in the state litigation constituted interference with a state court proceeding and as such mandated \textit{Younger} abstention.\textsuperscript{158} In effect, this rule provides the state prosecutor a "reverse removal" power to defeat the plaintiff's choice of a federal forum simply by adding him to (or initiating) an action against him in state court prior to any "proceedings of substance on the merits" in federal court.\textsuperscript{159} This aspect of the decision has been criticized as creating a "race to the court house"—a race that the federal petitioner can not win.\textsuperscript{160}

\textsuperscript{154} Id. at 349.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 349 (quoting \textit{Younger v. Harris}, 401 U.S. 37, 43 (1971)). The Court in this instance has quoted language from the decision out of context. The quotation in \textit{Younger} is: "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." \textit{Younger v. Harris}, 401 U.S. 37, 43 (1971). The \textit{Younger} Court used this sentence as an introduction to a discussion of the Anti-Injunction Act (an act which does not apply to § 1983 actions), which itself was, according to the Court, based in part on notions of "Our Federalism." Stated more accurately, it is "Our Federalism" which effectuates the goals of non-interference. As for the "rule" in \textit{Younger}, the holding of the case rested on the fact that under the circumstances of the case, the factors necessary under \textit{equity jurisprudence} militating federal intervention were absent. See discussion \textit{supra} note 91.
\textsuperscript{157} 422 U.S. at 349. Indeed, the \textit{Younger} Court left this issue open saying: "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. at 41.
\textsuperscript{158} 422 U.S. at 348-49. The "substantial stake" in the state litigation was manifested by: (1) intertwined interests with the state court defendants; and (2) an interest in recovering property. \textit{Id.} The decision dealt only with criminal proceedings, and did not consider whether or not abstention would be applicable in the case of a state civil proceeding brought after a federal action has been filed. Under \textit{Huffman}, however, it seems likely that if the civil proceeding is "akin to a criminal proceeding," \textit{Hicks} would apply. \textit{Huffman v. Pursue, Ltd.}, 420 U.S. 592, 604 (1975).
\textsuperscript{159} 422 U.S. at 349.
\textsuperscript{160} In his dissent in \textit{Hicks}, Justice Stewart criticized the majority both for creating the race, and allowing the state to always win: There is, to be sure, something unseemly about having the applicability of \textit{Younger} doctrine turn solely on the outcome of a race to the courthouse. The rule the Court adopts today, however, does not eliminate that race; it merely
With regard to civil rights abstention, *Hicks* touches on all three elements of the doctrine. The Court relied on the principles of "Our Federalism" to justify application of abstention to parties who were not parties to the state case.\(^\text{161}\) The Court also removed the formerly recognized *Younger* requirement that the state court action be pending. These two elements, the use of "Our Federalism" and removal of *Younger* restrictions, combine to create the third element, a denial of access to the federal courts. *Hicks* effectively denies a party who alleges an injury under § 1983, but who is not a party to any state action, the right to a federal forum for redress of his injuries. *Younger* abstention did not contemplate action against parties not already subject to a state action. In order to reach the result in *Hicks*, the Court had to apply principles of federalism to the circumstances. The Court, however, failed to apply the equity analysis portion of *Younger*, a case that applied only to pending state criminal proceedings. This failure stems from the fact that in *Huffman*, Rehnquist divorced the idea of equity from federalism as set forth in *Younger*, leaving the less restricted notion of "Our Federalism" available to extend abstention.

Rehnquist relied on the *Hicks* analysis just one week later in writing the majority opinion in *Doran v. Salem Inn, Inc.*\(^\text{162}\) In *Doran*, three operators of bars featuring topless dancing brought a federal action to enjoin enforcement of a newly enacted local ordinance prohibiting such entertainment.\(^\text{163}\) Up until the filing of the federal action, all three operators had been in compliance with the local law.\(^\text{164}\) The day after the federal suit was filed, however, one of the operators resumed the topless entertainment, and, as a result,

\[\text{id. at 354 (Stewart, J., dissenting); see also Soifer & Macgill, supra note 96, at 1192-94 (characterizing the Hicks decision as unsupported and cavalier); Gerald P. Lopez, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L.J. 1603, 1704-05 (1989) (asserting that Hicks allows the lawyer for the opposing party to defeat federal jurisdiction); Mark P. Henriques, Note, Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws, 76 Va. L. Rev. 1057, 1066-67 (1990) (arguing that Hicks defeats protection afforded in Steffel). But see Althouse, supra note 14, at 1000 (characterizing critics of Hicks as viewing the allocation of the enforcement of federal rights as a power struggle rather than a cooperative effort); Calvin R. Massey, Abstention and the Constitutional Limits of the Judicial Power of the United States, 1991 B.Y.U. L. Rev. 811, 836-37 (1991) (arguing that criticism of Hicks on the basis that it violates the traditional notion that a federal action could not be ousted by a state filing is misplaced).}\n
\(^\text{161. 422 U.S. at 349.}\)

\(^\text{162. 422 U.S. 922 (1975).}\)

\(^\text{163. Id. at 924.}\)

\(^\text{164. Id. at 925.}\)
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was indicted under the challenged local statute.\(^{166}\) Relying on reasoning developed in *Hicks* that a federal plaintiff could be required to litigate in state court, Rehnquist found that the district court should have abstained with respect to the one operator who had resumed activities.\(^{166}\) The district court had determined that the two operators who had maintained compliance were entitled to injunctive relief, and that it would be “anomalous” not to grant relief to the third.\(^{167}\) The appellate court rejected the argument that abstention should be applied to all three operators, citing a desire to avoid conflicting litigation in state and federal courts, and on grounds of judicial efficiency.\(^{168}\) Rehnquist held that neither of those concerns could overcome the principles of federalism, which counseled abstention.\(^{169}\) He wrote:

> [W]e are faced with the necessity of determining whether the holdings of *Younger*, *Steffel*, and *Samuels v. Mackell* must give way before such interests in efficient judicial administration as were relied upon by the Court of Appeals. We think that the interest of avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism in this particular area of the law.\(^{170}\)

By applying federalism in this way, Rehnquist was actually defeating one of the purposes of *Younger*. Duplicative litigation is squarely one of the evils *Younger* was meant to redress.\(^{171}\) “Our Federalism” was now taking on a life of its own—free from *Younger* restrictions, free from equity constraints.

*Doran* relied on the *Hicks* analysis to hold that a federal plaintiff could be “removed” from federal court. Rehnquist, however, was forced to contend with White’s argument in *Hicks*, that similar parties, with intertwined interests, could be considered together for purposes of *Younger* abstention.\(^{172}\) In *Doran*, the similarity of parties argument failed to keep all of the federal plaintiffs in federal court. Rehnquist acknowledged that “[w]hile there plainly may be some

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165. Id.
166. Id. at 929.
168. 422 U.S. at 927-28.
169. Id. at 928.
170. Id. at 927-28 (citations omitted). It is not clear from the text of the opinion what Rehnquist was referring to by “this particular area of the law.” If he is referring to the cases cited in that paragraph, then he is talking about civil rights law, and seems to indicate that in other areas, abstention may not be appropriate under otherwise similar circumstances.
circumstances in which legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any one of them, this is not such a case ...." 173 This statement, however, does not answer the question of why the parties were not considered to be sufficiently similar. Indeed, many of the characteristics that White found compelling in Hicks 174 were also present in Doran, such as intertwined interests of the parties, representation by the same counsel, and a substantial stake in the outcome. 175 Rehnquist dismissed the "similarity" argument with the contention that because the three operators in Doran were "unrelated in terms of ownership, control, and management," each could be considered separately. 176

In the development of civil rights abstention, Doran stands for much of what Hicks had previously established. It removes the pendancy requirement for state proceedings established in Younger, and it expands federalism to a point where it can be used to actually defeat certain goals of the Younger decision. Consequently, the Court limits the § 1343 right of access to federal courts, by denying a federal forum to a party who has properly invoked such a forum.

2. Enlarging the Abstention Arena: The Application of Abstention to Executive or Agency Action. Rehnquist wrote for the Court again one year later in Rizzo v. Goode. 177 In Rizzo, a group of community organizations brought a § 1983 claim against the Mayor of Philadelphia, alleging a pattern of police misconduct and mistreatment of minority citizens of the city. 178 The Court concluded that no "case or controversy" existed, and therefore, it had no jurisdiction over the case. 179 Because this case was dismissed for lack of jurisdiction, it is not technically an abstention decision. The case, however, is important to the development of civil rights abstention. Rehnquist

173. 422 U.S. at 928. It is hard to imagine that the Court would approve of the results of a decision that two or more parties like those in Doran are sufficiently related so as to be treated similarly for purposes of abstention. For example, if party A is a defendant in a state suit to which party B is not and both are plaintiffs in a federal civil rights action, then a decision by a federal court to abstain that applied to both would require party B to either bring a civil suit based on federal law in state court, or hope for a favorable resolution of the federal issue in A's criminal case. In the alternative, if the similarity of the parties defeated abstention, both parties would be allowed to proceed in federal court. This result seems unlikely, as it would violate the principles of non-interference with state functions by possibly immunizing federal plaintiffs from state criminal action.

174. 422 U.S. at 348-49.
175. 422 U.S. at 928-29.
176. Id.
178. Id. at 366-67.
179. Id. at 371-72.
used the opportunity to extend the application of federalism to state executive officials, in addition to state courts.\textsuperscript{180} He wrote: “[T]he principles of federalism . . . have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments . . . .”\textsuperscript{181} Though unarticulated in the opinion, the holding implies that \textit{Younger} may be applicable to a situation where there is no pending state action whatsoever. Unlike Hicks or Doran, where there was a state proceeding at some point during the course of the federal action, no such action was contemplated by either party in Rizzo.\textsuperscript{182} The Court determined, however, that \textit{Younger} would still apply if it appeared that the federal action would interfere with executive branch functions.\textsuperscript{183} Whereas in \textit{Younger}, “Our Federalism” was used to address the interrelation of the state and federal courts,\textsuperscript{184} Rehnquist expanded federalism beyond that scope to encompass the relationship between the federal courts and state executive officers. Yet, it is these very officials to which § 1983 and § 1343 were meant to apply.\textsuperscript{185} State officials, by the very nature of their positions, seem most likely to engage in the type of action that would deny citizens their constitutional rights. Section 1343 gives such citizens a right to litigate in federal court. But “Our Federalism,” and more specifically, one Justice’s notion of “Our Federalism,” acts to deny the aggrieved his statutory right to proceed in federal court. This is one of the hallmarks of civil rights abstention; it conflicts with the statutory grant of jurisdiction given to civil rights plaintiffs by Congress through § 1343. Rehnquist uses “Our Federalism” to abrogate this grant, and in the process enlarges its scope to encompass state executive officials. The \textit{Younger} requirement of a pending criminal action is ignored, as is the fact that \textit{Younger} applied only to the state judiciary, and not the other branches of government.

\textsuperscript{180.} \textit{Id.} at 380.
\textsuperscript{181.} \textit{Id.}
\textsuperscript{182.} See \textit{id.} at 371.
\textsuperscript{183.} \textit{Id.} at 380. Rehnquist explicitly drew this conclusion in Fair Assessment in Real Estate Ass'n v. Mcnary, 454 U.S. 100, 112 (1981). \textit{Fair Assessment} is discussed \textit{infra} notes 246-74 and accompanying text.
\textsuperscript{184.} It is true that the definition of “Our Federalism” as used in \textit{Younger} did not limit itself to deference for state judicial functions only. As it was applied, however, “Our Federalism” stood for the proposition that federal courts were not to enjoin state courts. \textit{Younger} v. Harris, 401 U.S. 37, 43-44 (1971).
\textsuperscript{185.} See \textit{supra} part I; see also 454 U.S. at 123 n.11 (Brennan, J., concurring) (suggesting that the very reason for the enactment of the Civil Rights Act of 1871 was that there existed at the time “more than a modest distrust” of the ability of state governments to safeguard a citizen’s civil rights).
3. The Development of the State's Interest Test to Defeat Federal Adjudication of Federal Rights. Rehnquist continued the simultaneous expansion of federalism and limitation on access to federal courts in his opinion in *Juidice v. Vail*. In *Juidice*, the state court defendant Vail brought a § 1983 action against a county court justice, alleging that the statutory provisions under which he was being punished were unconstitutional. Vail had been found in contempt of court for failing to pay a judgment debt, and for failing to appear at numerous hearings and proceedings to explain the delinquency. After nine months of dodging court proceedings at various state court levels, Vail was arrested and jailed pursuant to a county court order. Vail then brought the federal action, claiming that the statutes under which the county court had acted violated the Fourteenth Amendment. The federal district court declined to abstain on the basis that *Younger* applied only to criminal proceedings, and that *Huffman* only applied to civil actions which were "closely akin to a criminal proceeding." Rehnquist held, however, that *Younger* and *Huffman* were not to be confined solely to the types of state action present in those cases. His conclusion was based on an interpretation of "comity," as expressed in the *Younger* opinion, as encompassing deference not only to certain judicial proceedings, but to the broader category of "state functions" as well. Based on this reading, Rehnquist found that abstention was applicable to proceedings in which the state had an "important" interest, whether the proceeding was labeled criminal, quasi-criminal, or civil. As in *Huffman*, the Court, without providing a means of evaluation, proclaimed that the state's interest in the contempt proceeding was sufficient to warrant the application of federalism and consequently

187. Id. at 328-29.
188. Id. at 329.
189. Id. at 330.
190. Id.
191. Id. at 333.
192. Id. at 334.
193. Id. "[T]he "more vital consideration" behind the *Younger* doctrine of nonintervention lay not in the fact that the state criminal process was involved but rather in "the notion of 'comity'..."" Id. (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 601 (1975) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971))). While it is true that *Younger* used the terms "state functions" and "state institutions" in discussing comity and "Our Federalism," the Court had not yet applied abstention to instances beyond judicial proceedings. *Rizzo* indicated that the Court was moving in the direction of applying abstention in cases involving state executive and administrative branches, but was decided on other grounds. Despite the broad language, "comity" in *Younger* was discussed in the framework of historical justification for the Anti-Injunction Act. *Younger v. Harris*, 401 U.S. 37, 43 (1971).
194. 430 U.S. at 335.
abstention. Despite the development of a test for determining the state's interest, Rehnquist made it apparent that the state's interest no longer had to rise to the level of its interest in criminal prosecution. According to Rehnquist:

Perhaps [the State's interest in deciding contempt cases] is not quite as important as is the State's interest in the enforcement of its criminal laws or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in Huffman. But we think it is of sufficiently great import to require application of the principles of those cases.

Because Rehnquist and the Court had already divorced equity from comity, it was now possible to argue in favor of a diminished state interest as warranting federal deference. If Younger had been confined to its equity rationale, the Court would not have been able to "weigh" state interests, since abstention would apply only when the state proceeding was a criminal action. The balancing that the Court engaged in focused abstention analysis away from the nature and merits of the petitioner's claim, to a judiciary's assessment of the state's interest in litigating the petitioner's issues in its own state courts. The abstention decision is based on speculation that federal intervention would be "an offense to the State's interest," as opposed to the jurisdictional merits of the claim itself. Section 1343 provides that district courts shall have original jurisdiction of any civil action authorized by law. Neither § 1343 nor its substantive counterpart § 1983 say anything about deference to competing state interests. Yet under Juidice, a judicial determination that an issue is "important" to a state will override § 1343 jurisdiction and remove the federal plaintiff from federal court.

The Juidice opinion did not stop there, however. Rehnquist further delineated civil rights abstention by pointing out that state court defendants need only have the opportunity to present their federal claims in state court for Younger abstention to be applicable. Failure to bring the federal claims bars the state court defendant from challenging in federal court the adequacy of the state forum for hearing such claims. A state court defendant is required, therefore, to bring federal claims for adjudication by the state court, which in turn means that collateral estoppel will bar relitigation of

195. Id. (citations omitted).
196. Id.
197. See supra notes 131, 137.
198. Soifer & Macgill, supra note 96, at 1185-86.
200. The text of § 1343 appears supra note 18.
201. The text of § 1983 appears supra note 18.
202. 430 U.S. at 337.
203. Id.
the issue. While this is the case under traditional Younger abstention, the difference is that now a state court defendant must predict whether or not a federal judge will determine that the state court proceeding is one subject to abstention, and accordingly decide whether or not to bring the federal issue in state court. If the state defendant were to raise the federal issue in state court, and latter bring a federal action for declaratory or injunctive relief from the state action, even if the federal court did not abstain, the federal issue would be subject to collateral estoppel, and the state finding of fact would stand. On the other hand, if the federal issue is not brought, and a federal court abstains, the issue is lost. Under Younger, a state court defendant knew whether or not a federal court would abstain, and therefore, knew whether or not it was proper to raise the federal issue. Even under Huffman, a state defendant could make a determination under the "akin to criminal proceedings" standard. Under Juidice, however, a state defendant does not have such guidance. Federal courts have greater discretion to determine that the state's interest warrants abstention.204 The result is that the state court defendant/federal petitioner has lost the opportunity for a federal finding of fact, which, as Justice Brennan pointed out in his dissent in Juidice, the federal petitioner is entitled.

In terms of civil rights abstention analysis, Juidice used comity and federalism to expand the applicability of abstention beyond the limits of either Younger or Huffman. It announced a more lenient standard by which state interests would be deemed sufficient to warrant abstention. Finally, the opinion disregards Congress' intent as manifested by § 1343 to provide a federal forum to vindicate federal rights.

Two months later, in Trainor v. Hernandez,206 the Court again relied on comity and federalism to find that abstention was applicable to a civil suit which was brought by a state, but which could have been brought by a private party.207 In Trainor, the State of Illinois brought an action against Hernandez in state court for recovery of monies allegedly procured illegally by welfare fraud.208 Hernandez

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205. 430 U.S. at 343 (quoting England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964)).
207. Id. at 439-40. Although Rehnquist did not write this opinion, it is an important development in civil rights abstention, embodying many of the same ideas that Rehnquist relied on in extending Younger to civil cases.
208. Id. at 435-36.
filed suit in federal court alleging that the attachment procedures used by the state prior to the filing of the state action deprived him of property without due process of law in violation of the Fourteenth Amendment.\textsuperscript{209} The district court refused to abstain on grounds that the action was one which could have been brought by a private party, and that it was mere happenstance that the case involved the state as a plaintiff in the state action.\textsuperscript{210} Justice White, writing for the majority, disagreed, and applied \textit{Younger} and \textit{Huffman} to the facts, interpreting the "more vital consideration" of comity clause from \textit{Younger}\textsuperscript{211} as standing for a broad non-interference policy toward state courts, independent of any criminal/non-criminal case distinction.\textsuperscript{212} White distilled the notion of "Our Federalism" down to a policy indicating that disruption of state suits, combined with the possible appearance that the federal courts did not have confidence in the ability of state courts to resolve federal issues, would be enough to trigger federal court abstention.\textsuperscript{213} While the court specifically declined to determine whether \textit{Younger} applied to all civil cases,\textsuperscript{214} it did conclude that the principles of \textit{Younger} and \textit{Huffman} taken together were broad enough to prohibit federal court interference with an ongoing civil enforcement action brought by the state in its sovereign capacity.\textsuperscript{215} Essentially, \textit{Trainor} stands for the proposition that you can't fight city hall, at least not in federal court.

\begin{flushright}
209. \textit{Id.} at 438.
210. \textit{Id.} at 444.
212. 431 U.S. at 444.
213. \textit{Id.} at 446. According to White:
[The] disruption of suits by the State in its sovereign capacity, when combined with the negative reflection on the State's ability to adjudicate federal claims that occurs whenever a federal court enjoins a pending state proceeding, leads us to the conclusion that the interests of comity and federalism on which \textit{Younger} and \textit{Samuels} \textit{v. Mackell} primarily rest apply in full force here.
\end{flushright}

\textit{Id.}

White characterizes \textit{Younger} and \textit{Samuels} as resting primarily on comity and federalism. As indicated earlier, the specific holding in \textit{Younger} rested on equity. \textit{Id.}; see text accompanying supra note 91. The same is true of \textit{Samuels}. In \textit{Samuels}, Black explained that "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment." \textit{Samuels} \textit{v. Mackell}, 401 U.S. 68, 73 (1971). The words "comity" and "federalism" do not even appear in the \textit{Samuels} opinion.

214. 431 U.S. at 444 n.8.
215. \textit{Id.} at 444. The Court used the word "ongoing" rather than "pending" in \textit{Trainor}. \textit{Id.} Recall the \textit{Hicks} decision, in which the federal defendant was able to remove the plaintiff from federal court by filing an action against the plaintiff in state court prior to any "proceedings of substance on the merits" in federal court. \textit{Hicks} \textit{v. Miranda}, 422 U.S. 332, 349 (1975). \textit{Hicks} turned on the language of a pending action. Whether a state suit filed after a federal action has been brought could be considered "ongoing" is a different question, and was left unresolved by the \textit{Hicks} Court.
Although Trainor was not authored by Rehnquist, it is an important case in the development of civil rights abstention, as it continued to carve out exceptions to the criminal proceeding requirement of Younger. Whereas Huffman and Juidice decided what degree of interest a state needed to show in order to obtain a dismissal of a federal suit on abstention grounds, Trainor dismisses that inquiry altogether, and states that, absent existing exceptions to federal abstention, whenever the state is acting in its sovereign capacity, abstention is required. The expansion was based on comity and federalism, and at the expense of the civil rights plaintiffs' right to a federal forum.216

4. The Shift in Analysis from the Adequacy of the State Interest to the Adequacy of the State Forum. Rehnquist returned to the forefront of abstention doctrine analysis with his majority opinion in Moore v. Sims.217 Moore involved Texas' procedure for assuming custody of children who appear to be victims of child abuse.218 The Sims' children had been removed from their parents' custody, and held by the state for 42 days without a hearing, at which point the Sims filed the federal action seeking an injunction requiring the return of their children.219 Because there was evidence of confusion at the state level as to how and in what venue to proceed,220 the district court declined to abstain on grounds that there was no single state proceeding in which the Sims would be able to apply for relief on constitutional issues.221 Rehnquist characterized the district court's analysis as "misplaced" and suggested that "the only pertinent inquiry [in abstention analysis] is whether the state proceedings afford an adequate opportunity to raise the constitutional claims [that could be raised in the federal forum]."222 Rehnquist shifted the focus from the nature and merits of the petitioners' claim to the interests of the state. Not only are courts to consider the state's interest in

216. Only in dissent is the right to a federal forum discussed. 431 U.S. at 450 (Brennan, J., dissenting).
218. Id. at 418.
219. Id. at 437-38.
220. Id. at 422-24. Due to the nature of the case (child custody) there were a number of administrative as well as judicial proceedings which Sims was required to pursue. The district court found that abstention was not applicable to non-judicial proceedings, and that it was inappropriate to sever the case for abstention purposes. Id. at 424.
221. Id. Although Rehnquist fails to acknowledge it, there is support for this holding in the Younger decision itself. The Younger Court found that "the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." Younger v. Harris, 401 U.S. 37, 46 (1971).
222. 442 U.S. at 431.
223. Id. at 430.
litigating the matter in state court (as was done in *Huffman, Doran,* and *Juifdice*), but now they are to consider the nature of the state’s forum as well.224

By making the nature of the forum the threshold question, Rehnquist removed abstention analysis one step further from the jurisdictional merits of the claim itself. In *Huffman* and *Juifdice,* rather than deciding the abstention issue on the basis of the claim presented under § 1343, the Court instead looked to the state’s interest in litigating the issue in state court. *Moore* and *Trainor* retreated even further from the “state’s interest” analysis—indicating that perhaps any interest is now sufficient to warrant abstention—to an evaluation of the adequacy of the state forum itself. As long as the state forum allows defendants to raise federal issues, the analysis ends, and abstention applies. The federal plaintiffs’ rights under § 1343 are not even considered.

The reliance on the forum analysis is based on federalism. To allow federal courts to interfere with state courts adjudicating combined state and federal issues would “prevent the informed evolution of state policy by state tribunals. The price extracted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims—a postulate we have repeatedly and emphatically rejected.”225 According to Rehnquist’s opinion in *Moore,* absent certain exceptions to *Younger,* only state forum inadequacy can overcome strict adherence to comity and federalism.

*Moore* advances the doctrine of civil rights abstention by using federalism to shift focus from the federal petitioners claim to the adequacy of the state forum in which it could be litigated. The Court continues to apply *Younger* to an ever widening array of civil suits, now including child custody proceedings. Further, as Justice Ste-
vens pointed out in dissent, the decision deprived the federal petitioners the federal forum to which they were entitled.226

5. The Further Removal of Abstention Restrictions: Abstention in Favor of a Nonexistent State Suit. The right to initiate claims in federal courts was limited again by Rehnquist in the 1981 decision in Parratt v. Taylor.227 Parratt was not decided on abstention grounds, but is an important case in a study of the development of Rehnquist's jurisprudence of limiting civil rights litigants access to federal court. The case involved a state prisoner's challenge against prison officials for unlawful deprivation of property.228 Taylor had ordered through the mail and paid for a hobby kit which, because of mishandling by prison officials, he never received.229 After unsuccessfully pursuing the matter through the prison's grievance procedure,230 Taylor brought this action under § 1983, alleging deprivation of property without due process of law.231 While the Court acknowledged that negligent deprivation of property constituted a claim under § 1983,232 Rehnquist held that Taylor had failed to properly allege a violation of the due process clause, and therefore, was not entitled to relief.233 The Court concluded that Taylor was required to initiate an action in state court under state law in order to

226. 442 U.S. at 435 (Stevens, J., dissenting). As Stevens explained: Younger abstention in these circumstances does not merely deprive the plaintiffs of their right to initiate new claims in the forum of their choice. Far more seriously, it deprives them of any relief at all. For this state forum could not and did not afford plaintiffs the sufficient opportunity to vindicate their constitutional rights that is not only a predicate to a Younger dismissal, but also their entitlement under the Constitution. Id. at 440-41.


228. Id. at 529.

229. Id. at 529-30.

230. Id. at 556 (Marshall, J., concurring in part and dissenting in part). The majority, for whatever reasons, did not include this piece of information in its discussion of the events leading up to the suit.

231. Id. at 530.

232. Id. at 535-37. The Court engaged in a discussion of the constitutionality of post-deprivation remedies. While acknowledging the Fuentes v. Shevin, 407 U.S. 67 (1972), line of cases requiring pre-deprivation hearings, Rehnquist cited eight cases which purported to show that post-deprivation remedies could be considered adequate when "quick action" was required, or a meaningful hearing was impractical. Id. at 538-39 (citations omitted). Of those eight, five required quick action so as to avoid financial crisis or food emergency. One of the cases involved a challenge to a World War II emergency measure. One has been questioned as to its continuing validity in subsequent Supreme Court cases. One was a memorandum decision. The most recent case was from 1950, and five of the cases were from 1930 or earlier. Id.

233. Id. at 543.
redress the deprivation.\textsuperscript{234} Absent an attempt at vindicating his rights in state court, a plaintiff could not allege a violation of due process rights.\textsuperscript{235} A plaintiff could be required to proceed under a state cause of action despite the fact that certain remedies may be different or even wholly unavailable in the state forum.\textsuperscript{236} The Court did not abstain in this case. Instead, the Court forced a federal petitioner to initiate an action in state court on the grounds that due process is not violated if the party alleging injury has not attempted to utilize all of the state remedies available for redress of that injury.\textsuperscript{237} This holding violates two of the most important tenets of access to federal courts in civil rights matters. First, it vitiates the principle that the existence of a state remedy will not bar a jurisdictionally sound suit from being brought in federal court.\textsuperscript{238} Second, it eviscerates the "no exhaustion" rule of \textit{Patsy v. Board of Regents}, announced one year later,\textsuperscript{239} by requiring the plaintiff to initiate a state court proceeding, which, once begun, \textit{is} subject to exhaustion.\textsuperscript{240}

One can easily see the relevance of the \textit{Parratt} decision to abstention doctrine. While not abstention, \textit{Parratt} continues the type of analysis that has marked the development of civil rights abstention. Rehnquist invokes Supreme Court jurisdictional policy to defeat what would otherwise be a proper federal claim. He illustrates the point with surprising candor:

\begin{quote}
In the best of all possible worlds, the District Court's... statement that respondent's loss should not go without redress would be an admirable provision to be contained in a code which governed the administration of justice in a civil-law jurisdiction. For better or for worse, however, our traditions arise from the common law of case-by-case reasoning and the
\end{quote}

\textsuperscript{234} \textit{Id.} at 544.

\textsuperscript{235} \textit{Id.} It is not clear as to whether \textit{Parratt} applies to all deprivations, including life and liberty, or just to deprivations of property. \textit{See id.} at 545 (Blackmun, J., concurring) (arguing that \textit{Parratt} does not apply in situations involving life or liberty).

\textsuperscript{236} \textit{Id.} at 543-44. In the instant case, the punitive damages that the plaintiff was seeking in federal court were not available in the state forum. \textit{Id.} at 544.

\textsuperscript{237} The majority recognized that this kind of injury could be redressed under \textsection 1983. \textit{Id.} The Court simply determined that if you don't try in the first instance to utilize state remedies, you can't challenge them later. \textit{Id.} at 543-44.

\textsuperscript{238} Monroe v. Pape, 365 U.S. 167 (1961), \textit{overruled on other grounds by Monell v. Department of Social Servs.}, 436 U.S. 658 (1978). Writing for the majority in \textit{Monroe}, Justice Douglas stated: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." \textit{Id.} at 183. Oddly, Rehnquist himself quoted this language only months later in \textit{Fair Assessment in Real Estate Ass'n v. McNary}, 454 U.S. 100, 104 (1981). \textit{See discussion of Fair Assessment infra notes 246-74 and accompanying text.}

\textsuperscript{239} 457 U.S. 496 (1982); \textit{see supra} notes 62-65 and accompanying text.

\textsuperscript{240} \textit{See supra} notes 146-48 and accompanying text.
While the United States may not constitute a "civil-law jurisdiction," there is, in fact, a provision in a code which governs the administration of justice in federal civil law. It is the United States Code, Volume 28, § 1343, and it was promulgated in accordance with Congress' Article III power under the United States Constitution.\textsuperscript{242} As Part I of this Comment has pointed out, § 1343 was meant to guarantee access to federal courts in civil rights cases.\textsuperscript{243} It was enacted in order to change the traditional relationships between state and federal courts.\textsuperscript{244} Rehnquist's attempt to frame the resolution of all jurisdictional matters as turning on common law is misplaced. While Congress has undoubtedly left the courts to make many of their own policy decisions, where Congress has enacted law on the subject of jurisdiction, judicial discretion is to be subordinated to the legislative will.\textsuperscript{245} The Court's, and more specifically Rehnquist's, penchant for deciding jurisdictional questions on the basis of precedent is the reason that a doctrine like civil rights abstention or even Younger abstention can exist and be exercised despite laws to the contrary. Rehnquist's statement above at best reflects misjudgment as to the resolution of jurisdictional questions, and at worst, indicates an unjustified transgression of authority in violation of the Constitution.

IV. THE CULMINATION OF CIVIL RIGHTS ABSTENTION DEVELOPMENT: FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION V. MCNARY

Nowhere is Rehnquist's predilection for resolving jurisdictional questions in accordance with "tradition" rather than statutory law more evident than in the case of Fair Assessment in Real Estate Association v. McNary.\textsuperscript{246} Fair Assessment is a watershed opinion on

\begin{itemize}
  \item 451 U.S. at 531.
  \item Article III, § 2 of the United States' Constitution provides in relevant part that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as Congress shall make." U.S. CONST. art. III, § 2, cl. 2.
  \item See discussion infra part I.A.
  \item Mitchum v. Foster, 407 U.S. 225, 240 (1972).
  \item It is a fundamental constitutional concept that the judicial authority of the United States courts is derived from the federal constitution and laws made thereunder. See Karcher v. May, 484 U.S. 72, 77 (1987) ("The power of federal courts to hear and decide cases is defined by Article III of the Constitution and by the federal statutes enacted thereunder."). Under the Constitution, Congress retains the power of determining how judicial authority will be allocated, and the courts are not free to disregard or evade the limits Congress places on federal court jurisdiction. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850).
  \item 454 U.S. 100 (1981).
\end{itemize}
the subject of abstention, employing almost every major development in the doctrine since the Younger decision almost 10 years earlier. *Fair Assessment* also extended abstention to cases contemplated damages as opposed to simply declaratory or injunctive relief. The case involved a §1983 challenge to a local government's system of property tax evaluations, which according to the plaintiffs, resulted in unequally assessed properties in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The association of local taxpayers objected to the tax assessor's practice of taxing new or newly renovated properties at higher rates than older properties. Additionally, the plaintiffs alleged that those taxpayers who had successfully challenged previous assessments were targeted for reassessment in the following year at a higher rate. The lower courts had found that the Tax Injunction Act barred the federal court from hearing the suit, a position adopted by the four concurring justices in *Fair Assessment*. Rehn-

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247. *Id.* at 106.
248. *Id.*
249. *Id.* Compare the facts in *Fair Assessment* to those of Wooley v. Maynard, 430 U.S. 705 (1977). In Wooley, a Jehovah's Witness brought a federal action for injunctive relief against enforcement of a state law which made it a criminal offense to obscure any letter or number of a state automobile license plate. Maynard had been repeatedly arrested for covering the motto "Live Free or Die" which appeared on the plates, and had served 15 days in jail and paid numerous small fines. Maynard objected to the motto on religious grounds, and brought the federal action at a time when no state action was pending. 430 U.S. at 707-08. The Supreme Court declined to abstain, citing that the numerous prosecutions when combined with the threat of future prosecution constituted an exceptional circumstance capable of overcoming federalism objections. *Id.* at 712. Although taxpayers in *Fair Assessment* were subject to repeated property tax increases, the Court dismissed the suit. 454 U.S. at 105-07. Is the Court affording greater deference to administrative actions such as tax collections than it is to state judicial proceedings? The argument in *Fair Assessment* that the relief contemplated would unduly interfere with state action was not persuasive in Wooley. Does the Court display more deference to civil matters such as tax actions than to criminal proceedings? The Court in *Fair Assessment* abstained on grounds that the plaintiffs should have pursued state civil remedies. The Wooley Court, however, declined to abstain even though Maynard had refused to raise his federal rights or exhaust his state appellate remedies.

Why did the Court abstain in *Fair Assessment* and not Wooley? Perhaps the Wooley Court was more sympathetic to the merits of that case and felt they should be reached. Perhaps the fact that Maynard was subject to repeated fines and confinement altered the analysis, whereas the plaintiffs in *Fair Assessment* were not subject to such egregious measures. In any event, the discrepancy indicates the uncertainty of result that has marked the "continuous refashioning of 'Our Federalism.'" WRIGHT ET AL., supra note 4, §4255, at 266.

250. 454 U.S. at 102. The Tax Injunction Act provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341 (1988).
251. Justice Brennan, joined by Justices Marshall, Stevens and O'Connor, concurred
quist's majority, however, specifically declined to decide the case on the basis of that act, preferring instead to hold that the principle of comity barred a federal court from granting relief in this instance.\footnote{252} Because the Tax Injunction Act, Rehnquist wrote, "reflect[s] the fundamental principle of comity between federal courts and state governments that is essential to "Our Federalism,"\footnote{253} the case could be decided on those considerations alone. This marked the first time that Rehnquist acknowledged legislative history in an opinion dealing with abstention.\footnote{254} Significantly though, the history discussed was not that of § 1343, but of § 1341, the Tax Injunction Act.\footnote{255} While Rehnquist was prepared to accept legislative history as supporting his notion of "Our Federalism," he apparently was not, and has not been, able to acknowledge the entire body of legislative history and statutory language to the contrary.

\textit{Fair Assessment} is important for more than just Rehnquist's treatment of legislative history. The opinion embodies every major post-\textit{Younger} development in the use of federalism and comity to justify federal court abstention. Applying the dicta from \textit{Rizzo v. Goode}\footnote{256} and \textit{Gibson v. Berryhill}\footnote{257} that federal courts should defer not only to state courts, but to other state judicial proceedings as well,\footnote{258} the Court held that because the federal action would have interfered with the state function of collecting taxes, federal courts should not have intervened.\footnote{259} Relying on \textit{Huffman},\footnote{260} \textit{Juidice},\footnote{261} and \textit{Trainor},\footnote{262} the Court was able to apply abstention to a civil case.\footnote{263} The \textit{Hicks-Doran} holdings that abstention may apply even where

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\footnote{252}{\textit{Id.} at 105, 107, 116.}
\footnote{253}{\textit{Id.} at 103.}
\footnote{255}{Rather than cite directly to the legislative history of either § 1343 or § 1983, Rehnquist cited the \textit{Monroe} line of cases as construing § 1983 to authorize immediate access to federal court for plaintiffs alleging a violation of constitutional rights. 454 U.S. at 104.}
\footnote{256}{423 U.S. 362, 380 (1976).}
\footnote{257}{411 U.S. 564, 577 (1973).}
\footnote{258}{454 U.S. at 112-13.}
\footnote{259}{\textit{Id.} at 113-14. Although a federal suit might interfere with tax collection, it is not clear how a state action would be less disruptive. A finding of unconstitutionality in either state or federal court would affect tax collection equally.}
\footnote{260}{\textit{Huffman v. Pursue, Ltd.}, 420 U.S. 592, 604 (1975).}
\footnote{261}{\textit{Juidice v. Vail}, 430 U.S. 327, 335 (1977).}
\footnote{262}{\textit{Trainor v. Hernandez}, 431 U.S. 434, 439 (1977).}
\footnote{263}{454 U.S. at 112.}
there is no pending state proceeding\textsuperscript{264} allowed the Court to justify abstention in a situation where there was no state action filed by any party at any time.\textsuperscript{265} Finally, the Court incorporated its holding in \textit{Parratt v. Taylor}\textsuperscript{266} to find that federal plaintiffs can be required to pursue state remedies to redress injuries, which except for the application of federalism, could be vindicated in federal courts.\textsuperscript{267}

In addition to incorporating the holdings from previous abstention cases, Rehnquist extended the doctrine to apply to federal damages actions, in addition to actions seeking injunctions (proscribed by \textit{Younger}) or declaratory relief (proscribed by \textit{Samuels}). Rehnquist reasoned that any damages recovered by the plaintiffs in the instant case would have required a finding that the local assessment scheme was unconstitutional, which in turn would interfere or end that system of collecting taxes.\textsuperscript{268} Thus, the same considerations of comity and deference which militate against injunctions and declaratory relief applied here, where the interference resulting from a finding of unconstitutionality would upset state functions in the same way that the other types of relief would.\textsuperscript{269} The effect of the decision is to deny a civil rights plaintiff access to court if he is seeking any of three remedies: an injunction, declaratory relief, or an award of damages.

There are some interesting comparisons that may be drawn between \textit{Fair Assessment} and the \textit{Younger} decision, which was rendered almost ten years earlier. In \textit{Younger}, the Court had two options on which it could have based its decision: equity or federalism. Justice Black chose to rely on an equity analysis to hold that abstention was warranted.\textsuperscript{270} In \textit{Fair Assessment}, the Court also had two options: the Tax Injunction Act or comity and federalism. Rehnquist opted for comity and federalism, rather than the statute which explicitly barred that type of action. In \textit{Younger}, “Our Federalism” was used to buttress an opinion based on the recognized policy of equitable restraint. In \textit{Fair Assessment}, however, federalism became

\begin{itemize}
\item 265. 454 U.S. at 112-13.
\item 266. 451 U.S. 527, 544 (1981), \textit{overruled on other grounds by} Daniels v. Williams, 474 U.S. 327 (1986).
\item 267. 454 U.S. at 116.
\item 268. \textit{Id.} at 115. This conclusion, however, is not certain. As Professor Braveman points out, the \textit{Fair Assessment} plaintiffs sought damages from the individual officials, and not from the state. Furthermore, the plaintiffs would have been required to prove bad faith on the part of those officials, meaning that a judgment against those defendants would not implicate the state’s scheme for collecting taxes, or any state funds. Braveman, \textit{supra} note 13, at 359.
\item 269. 454 U.S. at 115-16.
\item 270. \textit{See} Younger v. Harris, 401 U.S. 37, 56 (1971) (Stewart, J., concurring).
\end{itemize}
the primary tenet on which the Court based its decision, outweighing even an available statutory proscription on hearing such a case. Even though these two cases utilized federalism in differing degrees, the two opinions do show a willingness on the part of the Court to decide jurisdictional issues in accordance with its own judicially created policies, and without regard to congressional mandates.\textsuperscript{271}

Another comparison lies in the Court's treatment of permissible and impermissible "chilling effects" that resulted from the decision in each case. In Younger, the Court concluded that a "chilling effect" on First Amendment rights by a state would not in and of itself justify federal intervention in state matters.\textsuperscript{272} In Fair Assessment, however, Rehnquist found that the "chilling effect" on state activity that would result from an adverse federal ruling in the case could not be permitted, as it would effectively prevent local officials from doing their jobs, and consequently suspend the entire state function under attack in federal court.\textsuperscript{273} So while the Court is willing to allow states, acting in the course of regulating speech, to inhibit the exercise of First Amendment rights\textsuperscript{274} action by citizens that would inhibit the carrying on of state functions will not receive the same protection.

In terms of civil rights abstention, Rehnquist has used the Fair Assessment decision to expand the scope of federalism to require abstention where a civil rights plaintiff is seeking damages as opposed to injunctive or declaratory relief. The decision removes the Younger-Samuels limitation on abstention doctrine which limited abstention to cases involving declaratory or injunctive relief. And while Rehnquist finally recognized the existence of § 1343, and case law supporting the right of access to federal court, he still refused to allow the petitioners to exercise that Congressionally authorized right.

V. FINE TUNING CIVIL RIGHTS ABSTENTION DOCTRINE: FINDING MORE WAYS TO ABSTAIN

A. Abstention in Favor of State Administrative Proceedings

Since the Fair Assessment decision, the Court has continued to defer to what has become a growing body of "compelling" state interests other than criminal and quasi-criminal enforcement actions. In

\textsuperscript{271} In his concurrence, Justice Stewart pointed out that the Younger Court's holding was based on policy grounds and declined to consider the applicability of the Anti-Injunction Act, 28 U.S.C. § 2283 (1988), with respect to the facts of the case. \textit{Id.} (Stewart, J., concurring).

\textsuperscript{272} \textit{Id.} at 50.

\textsuperscript{273} 454 U.S. at 115.

\textsuperscript{274} 401 U.S. at 51 (Stewart, J., concurring).
Middlesex Ethics Committee v. Garden State Bar Association, 275 Justice White, writing for the Court, found that abstention applied in the case of a federal constitutional challenge to state disciplinary proceedings where federal issues could be raised in the state forum. 276 The Court set forth a three-part test to evaluate whether or not abstention was justified under the facts. First, it was necessary to determine if the disciplinary proceedings constituted an “ongoing state judicial proceeding.” 277 Second, the Court considered the question of whether or not the proceedings implicated important state interests. 278 Third, the Court determined whether or not the state forum provided an adequate opportunity to raise constitutional claims. 279 The Court concluded that the disciplinary proceedings did constitute an ongoing state proceeding, that the state did have a substantial interest in trying the case, and that the state forum was adequate for purposes of hearing federal claims. 280 In evaluating the state’s interest, the Court found that the objective of “purification of the bar” had significant ramifications in protecting both the public and the integrity of the profession. 281 The Court, however, continued by saying that the fact that a state agency was named as a defendant in the case demonstrated the state’s interest in resolving the issue in its own state courts. 282 It is not clear whether or not the Court intended to make the standard for a valid state interest turn on the mere happenstance that the state has been named in a suit. Whatever the Court’s intention, the decision renewed the state’s interest analysis originally employed in Huffman. The Court stated: “The importance of the state interest in the pending state judicial proceedings and in the federal case calls Younger abstention into play.” 283 Younger however never anticipated a balancing of interests. Younger abstention was based on equity jurisprudence which counseled deference to state courts in certain cases. The exceptions to abstention discussed in that case were not the result of any diminished state interest in the case, but would occur when there was a recognizable defect in the forum, or the state procedure. The impor-

276. Id. at 435. The case involved an attorney who had been charged with violating two provisions of the Model Code of Professional Responsibility. Rather than defending against the charges in the local disciplinary proceedings, the attorney filed an action in federal court challenging the constitutionality of the rules under which he was being tried as violative of the First Amendment. Id. at 429.
277. Id. at 432.
278. Id.
279. Id.
280. Id. at 434.
281. Id.
282. Id.
283. Id. at 435.
tance of the state's interest doesn't call Younger into play, it calls the doctrine of civil rights abstention into play.

Middlesex invokes "Our Federalism" to justify the application of abstention to administrative proceedings which are civil in nature, and are not akin to criminal trials. The Court transforms the Younger doctrine from one based on equity to one based on the interest of a state in pursuing particular interests in its own forums. While Middlesex does not involve a § 1983 challenge, it does involve an attempt, thwarted by the Supreme Court, to vindicate a constitutional right in a federal forum.

Rehnquist's most recent opinion on the abstention doctrine came in Ohio Civil Rights Commission v. Dayton Christian Schools. The case involved a federal action by the Dayton Christian Schools to enjoin a state administrative action against the private school district. The Dayton Board of Directors had fired Linda Hoskinson for not following the "biblical chain of command" in resolving a dispute with the school. Hoskinson complained to the Ohio Civil Rights Commission, which after numerous attempts at persuading Dayton to settle the dispute, brought administrative proceedings against the school for the purpose of determining if, in fact, Dayton had violated Ohio's anti-discrimination law. Dayton, in turn, filed the federal action, alleging that the imposition of sanctions against the school would violate the religion clauses of the First Amendment of the Constitution. Though the lower courts did not reach the abstention issue, Rehnquist found "that the District Court should have abstained from adjudicating this case under Younger v. Harris and later cases." He then embarked on a capsule summary of the development of abstention from the Younger decision to Huffman, Gibson, Middlesex, and others to support the
conclusion that abstention could apply to an administrative agency conducting an investigation to determine if state law had been violated. Because the agency allowed parties to raise constitutional claims, Dayton could be forced to adjudicate them in the administrative hearings, rather than attempt to vindicate their constitutional claims in the federal forum of their choice. However, Rehnquist went further, adding that even if the commission did not have the authority to hear constitutional claims, the agency had the discretion to "construe its own statutory mandate in the light of federal constitutional principles." According to Rehnquist's opinion, even if the state forum is not adequate to hear federal claims, a federal petitioner may still be required to bring constitutional claims to that inadequate forum, and allow the state agency the opportunity to determine for itself how it may construe its duty in light of federal constitutional principles. An agency that purports to follow federal constitutional provisions may hear such issues even if its own state law has declined to give the agency such authority. Furthermore, because of the *Middlesex* decision, even if the agency may not hear constitutional claims, the fact that they may be brought in a subsequent judicial proceeding will satisfy the requirement of an adequate state forum.

The new element to civil rights abstention added by *Dayton* is the idea that an administrative proceeding may be considered to be adequate for abstention purposes provided that the agency running the proceeding construes its state statutory mandate in light of the Federal Constitution. There is no precedent for this idea in the *Younger-Huffman* line of cases. Further, the basis of this position is not clear from the opinion. The explanation appears to lie in the result: state agencies will have more autonomy, and will be less likely to be subject to federal intervention. In short, the concerns of federalism counselling deference to state courts also counsel deference to state administrative proceedings, and go further by allowing state agents to define the scope of those proceedings so as to avoid federal intervention. As with all of the civil rights abstention cases, *Dayton* serves to keep civil rights litigants out of federal court, and unable to exercise § 1343 privileges.

**B. Abstention When Private Parties Implicate State Interests**

The most recent opinion in the development of civil rights abstention was written by Justice Powell, in which Rehnquist joined.

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290. Id.
291. Id.
292. Id. at 629 (citing *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 436 (1982)).
In *Pennzoil, Co. v. Texaco, Inc.*, the Court ruled that *Younger* abstention was applicable to cases in which the state was not a party. *Pennzoil* involved Texaco's challenge to the application of a Texas law requiring a judgment debtor to post a bond in the amount of the judgment in order to suspend execution of that judgment pending appeal. Texaco brought suit in federal court claiming that because enforcement of the judgment would fall to state officials, the state law that required, without exception, the posting of a bond constituted a denial under color of law of Texaco's right to appeal the judgment in state court. The lower courts refused to abstain under *Younger*, noting that the state's interest in this litigation differed from those cases where the Supreme Court had found abstention to be applicable. The Supreme Court, however, held that the "principles of federalism enunciated in *Younger v. Harris*" warranted abstention. Justice Powell found that the "importance to the States of enforcing the orders and judgments of their courts" was similar to interests in *Juidice*, in adjudicating contempt proceedings, and therefore, that interest was subject to federal deference. The Court came to this conclusion despite the fact that the State of Texas had expressly represented to the Court of Appeals that it "ha[d] no interest in the outcome of the state-court adjudication underlying this cause," except in its fair adjudication. The Court however managed to impute a compelling state interest that would counsel the propriety of an abstention decision in a suit involving two private parties. Compare this rule with that of *Younger*, on which the Court purported to base its decision. *Younger* relied on equity; the state's interest was not considered independently, but in the context of traditional equity jurisprudence. It was not the interest that counseled abstention, but the existence of a body of law which supported a tradition of non-interference in such cases. The creation and development of the state's interest test in the cases following *Huffman* distinguish civil rights abstention from *Younger* abstention. *Pennzoil*'s contribution to the doctrine of civil rights ab-

294. *Id.* at 5. Because of the substantial amount of the judgment award, the required bond would have amounted to over 13 billion dollars. *Id.*
295. *Id.* at 8-9. The district court determined that the application of the bond provision combined with a Texas lien provision would effectively deny Texaco the right to appeal. *Id.* at 7.
296. *Id.* at 9.
297. *Id.* at 10.
298. *Id.* at 13.
299. *Id.* at 19 (Brennan, J., concurring) (quoting Brief of the State of Texas, Intervenor-Appellant at 2, Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986) (Nos. 86-7046, 86-7052)).
stention is the notion that abstention may be appropriate even when a state is not party to an action. The abstention decision forces the federal petitioner to litigate federal claims in state court, despite § 1343's guarantee of access.

**CONCLUSION**

Through his opinions, Chief Justice Rehnquist has expanded the applicability of federalism and comity as defined in *Younger* to create a new doctrine of civil rights abstention that is distinct from the *Younger* doctrine. Despite the continued characterization of federal deference to state courts as being based on *Younger*, these cases are actually applying civil rights abstention which differs from *Younger* in three ways. First, civil rights abstention is based solely on federalism and comity, whereas *Younger* was based on equity, and only reinforced by "Our Federalism." Second, civil rights abstention is not limited by the conditions of *Younger*, such as a pending state criminal suit. Civil rights abstention applies to civil actions, actions brought subsequent to the filing of the federal action, administrative actions, and even when there is no state action planned by any party to the suit. Finally, civil rights abstention denies the Congresionally guaranteed right of access to federal court as codified in § 1983 and § 1343 of the United States Code. These provisions were intended to guarantee access to federal courts in civil rights cases. Civil rights abstention doctrine violates those provisions by denying petitioners the ability to utilize that guarantee. Rather than just an exercise in semantics, the purpose of this Comment is to change the focus of abstention analysis from how the Court's decisions have violated *Younger*, to how the opinions have violated this country's guarantee of access to federal courts. Courts, after all, are not charged with upholding *Younger*; they are, however, charged with upholding the law.