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The Younger Abstention: Primary State Jurisdiction over Law Enforcement

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ARTICLES

THE *YOUNGER* ABSTENTION DOCTRINE: PRIMARY STATE JURISDICTION OVER LAW ENFORCEMENT

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As a teacher of a course on federal courts, I am regularly confronted with the onerous task of explaining the abstention doctrines which in this decade have been given so much attention by the United States Supreme Court. These doctrines are represented by judicial rules that generally require a federal trial court in appropriate circumstances to abstain from exercising subject matter jurisdiction although it clearly has the power to do so. As a result, the particular case is shunted back into a state judicial system for determination. The most confusing of these doctrines is the one arising in major part from *Younger v. Harris*.[1] In short, this case stands for the rule that once a state criminal prosecution has been initiated a federal court may not interfere with that proceeding except under extraordinary circumstances.[2] One result is that a defendant in a state criminal prosecution may not obtain equitable relief in federal court even by showing the likelihood that the state law underlying that proceeding is in violation of the United States Constitution.[3]

Were this explanation the end of it I would have little difficulty in understanding the rule. The Supreme Court has, however, stretched and pulled the *Younger* rule until the various facets of that rule no longer seem logically consistent. Because it is no longer restricted to state criminal proceedings[4] or even to state proceedings initiated prior to the commencement of the federal action,[5] one is presently hard put to achieve a comprehensive perspective of the

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1. 401 U.S. 37 (1971).

2. *See id.* at 46. It is generally considered that equitable relief will be granted only upon a showing of a great and immediate irreparable harm. *Id.* at 45-46..

3. *Id.* at 53-54. Equitable relief will issue only if the statute is in flagrant violation of the United States Constitution. *Id.* at 53; *see* Watson v. Buck, 313 U.S. 387, 402 (1941).

4. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 444 (1977)(civil action for fraudulently receiving welfare payments); Juidice v. Vail, 430 U.S. 327, 338-39 (1977) (civil action involving judicial contempt proceedings); Huffman v. Pursue, Ltd. 420 U.S. 592, 604 (1975) (quasi-criminal proceeding for violation of nuisance statute).

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

doctrine represented by the *Younger* case. The Supreme Court also has failed to define sufficiently the principles underlying *Younger* to provide a tool for predicting future applications. As Justice Rehnquist has remarked, this area is one "through which our decisions have traced a path that may accurately be described as sinuous."[6] My purpose in this article is to analyze the *Younger* rule and the docrine it represents in order to find that thread of logical consistency which ties together its seemingly disparate facets.

CONSTITUTIONAL AND STATUTORY RESTRICTION OF JURISDICTION

A person whose access to federal court is blocked by *Younger* would ordinarily be seeking to avoid the necessity of exhausting state judicial remedies and to obtain a federal trial forum for his federal claims. By application of *Younger*, he is forced to try these federal issues in a state trial court and to exhaust state appellate court remedies.[7] His federal claims then may possibly be heard by the United States Supreme Court through appeal or certiorari.[8]

Although it may seem incongruous today that federal trial courts are divested of jurisdiction over claims under the United States Constitution, initially the federal courts did not possess any jurisdiction to hear constitutional challenges to state action.[9] Federal trial courts were not even granted general federal question jurisdic-

6. Steffel v. Thompson, 415 U.S. 452, 479 (1974) (Rehnquist, J., concurring). This comment was aimed at the problems involved in accommodating declaratory judgment procedure with the needs of federalism. *See id.* at 479 (Rehnquist, J., concurring).

7. Huffman v. Pursue, Ltd., 420 U.S. 592, 608 (1975).

8. *See generally* Comment, *Restriction of Access to Federal Courts: The Growing Role of Equity, Comity, and Federalism*, 50 TEMP. L.Q. 320 (1977). The federal claimant might also seek relief through use of a writ of habeas corpus. Relief from a state criminal prosecution through the issuance of a writ of habeas corpus by a federal court is available only to those in custody who have exhausted all remedies available in the state courts. *See* 28 U.S.C. § 2254(b)(1970).

Also, removal of the state proceeding into federal court is not ordinarily available. Removal of criminal prosecutions commenced in state court is limited to those prosecutions of someone acting as an agent of or under the authority of the United States under the provisions of 28 U.S.C. § 1442, of members of the armed forces of the United States under the provisions of 28 U.S.C. § 1442a, or of someone who is either denied or cannot enforce in state courts federal civil rights or is prosecuted for standing on such rights under the provisions of 28 U.S.C. § 1443. As construed, civil rights removal under section 1443 will not be available unless the defendant shows that the statute under which he is prosecuted "is discriminatory on its face and is clearly in conflict with a federal right relating specifically to racial equality." 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3728, at 700 (1976); *see* Mitchum v. Foster, 407 U.S. 225, 238-39 n.28 (1972).

9. *See generally*, Forrester, *The Nature of a "Federal Question,"* 16 TUL. L. REV. 362 (1942).

tion until 1875[10] when "fear of rivalry with state courts and respect for state sentiment were swept aside by the great impulse of national feeling born of the Civil War."[11] Until that time state courts acted as the basic trial courts for constitutional cases, subject only to ultimate review by the United States Supreme Court. There had been a special grant of federal question jurisdiction in the Ku Klux Klan Act of 1871,[12] but this jurisdiction was of much lesser importance at the time. Section 1 of this Act was the origin of 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3). Section 1983 creates a federal claim against any person who, "under color of state law," deprives another of rights secured under the Constitution or federal law.[13]

Even when the federal trial courts did gain federal question jurisdiction, they were still barred by the eleventh amendment from hearing cases brought against a state.[14] The Supreme Court substantially removed this barrier in a series of cases between 1891 and 1908.[15] This series culminated with the landmark case of *Ex parte Young*[16] in which the Court held that a state official who threatens to commence proceedings in state court, either civil or criminal, to enforce a statute which is unconstitutional may be enjoined by a federal court.[17] The Supreme Court reasoned that since a state does not authorize unconstitutional action, a state official alleged to be acting unconstitutionally cannot be representing the state.[18] Through this logic the eleventh amendment was effectively

10. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875) (current version at 28 U.S.C.A. § 1331 (West Supp. 1978)); *see* Mitchum v. Foster, 407 U.S. 225, 238 n.28 (1972).

11. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 64 (1928).

12. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871).

13. 42 U.S.C. § 1983 (1970) reads:

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

14. U.S. CONST. amend. XI reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although the eleventh amendment expressly prohibits only the extension of federal judicial power to cases brought against the state by a citizen of another state, the Supreme Court applied it to suits against a state by its own citizens. *See* Hans v. Louisiana, 134 U.S. 1, 6 (1890).

15. *See* 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 715-17 (rev. ed. 1935).

16. 209 U.S. 123 (1908).

17. *See id.* at 159-62.

18. *Id.* at 159-60.

removed as a barrier to equitable actions based on the Constitution in federal courts against state officials.

Section 1983, which has become the primary modern vehicle for suits challenging the constitutionality under the fourteenth amendment of state action, was rarely used in the first fifty years after its enactment.[19] Since 1960, however, there has been a dramatic increase in the use of section 1983 for a number of reasons.[20] First, the years following 1960 have been years of intense civil rights activism by Blacks, Mexican-Americans, women, and other groups. The federal courts have been viewed by these groups as a sympathetic governmental authority and, therefore, have been used frequently by those seeking to remove inequalities allegedly enforced by state authorities. During this period, the Supreme Court and Congress were expanding the categories of recognized civil rights and, through reading various portions of the Bill of Rights into the fourteenth amendment, the Supreme Court expanded the number of constitutional rights which restrict state action.[21] Also, in 1961 the Court held that even when state officials acted without authority or in violation of state law, they were still acting "under color of state law" for purposes of section 1983.[22] In 1972, the Supreme Court determined that section 1983 actions, whether asserting "property" or "personal" rights, were based on the special federal question jurisdictional statute, 28 U.S.C. § 1343, and therefore, were not subject to a jurisdictional amount requirement.[23] Also in 1972, the Court held in *Mitchum v. Foster*[24] that section 1983 actions were exceptions to the Anti-Injunction Act[25] and, therefore, in such an

19. Only 19 decisions under section 1983 are noted in United States Code Annotated for its first 65 years. Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1486 n.4 (1969).

20. In fiscal year 1972, approximately 8,000 cases were filed under the general heading of civil rights. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 1 (1974).

21. *See* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3573, at 487 (1975).

22. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961). In so expanding the scope of a section 1983 action the Court held that the existence of a remedy under state law does not bar the federal action. *See id.* at 183. In Monell v. Department of Social Servs., ___ U.S. ___, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), the Court expanded the scope of section 1983 to include actions against municipalities and other local governments. *Monell* overruled *Monroe* only to the extent that *Monroe* excepted these parties from the scope of section 1983. *See id.* at ___, 98 S. Ct. at 2038, 56 L. Ed. 2d at 638-39.

23. Lynch v. Household Fin. Corp., 405 U.S. 538, 542 (1972).

24. 407 U.S. 225 (1972).

25. 28 U.S.C. § 2283 (1970) reads: "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

action a federal court is not barred by that statute from enjoining proceedings in a state court.[26] *Younger,* however, already had established a barrier that robbed this holding of much of its impact.[27]

JUDICIAL RESTRICTION OF JURISDICTION: FROM EQUITABLE RESTRAINT TO *Younger*

As early as 1888, the United States Supreme Court stated that a federal court had no equitable jurisdiction to interfere with the prosecution and punishment of crimes by the states.[28] This theme of equitable restraint and respect for state sovereignty, although discussed in terms of lack of jurisdiction, did not have the effect in practice that was indicated by the language.[29] Until the *Ex parte Young* decision in 1908, the eleventh amendment remained as the primary barrier to injunctions against state criminal prosecutions.[30] After removing the eleventh amendment barrier, the Supreme

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Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." A federal statute prohibiting federal injunction of state court proceedings has been in existence since 1793. Act of March 2, 1793, ch. 22 § 5, 1 Stat. 334 (1793) (current version at 28 U.S.C. § 2283 (1970)); *see* Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 8-9 (1940)(on rehearing).

26. Mitchum v. Foster, 407 U.S. 225, 242-43 (1972).

27. The Court in *Mitchum* decided only that the lower federal court was not deprived of judicial power to enjoin proceedings in state court because of the statute. It did not disturb the federal policy established in *Younger* against federal injunction of state criminal proceedings. Section 1983 was held to be an exception to section 2283 "as expressly authorized by Act of Congress." *Id.* at 242. The Court reasoned that the very purpose of section 1983 was to "interpose the federal courts between the states and the people, as guardians of the people's federal rights" against state action either executive, legislative, or judicial. *Id.* at 242.

28. *In re* Sawyer, 124 U.S. 200, 210 (1888). "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property [and cannot extend to] the prosecution, the punishment, or the pardon of crimes or misdemeanors . . . ." *Id.* at 210. The reason for equitable restraint in the face of a request for injunction of a criminal proceeding "is still more cogent where the respective courts belong one to the state and the other to the Federal System." Harkrader v. Wadley, 172 U.S. 148, 168 (1898). "[T]he Circuit Court . . . sitting in equity, was without jurisdiction to enjoin the institution or prosecution of these criminal proceedings commenced in the state court." Fitts v. McGhee, 172 U.S. 516, 531 (1899).

29. One commentator argues persuasively that *In re Sawyer* paraded the rule as being one prohibiting injunction of criminal prosecutions when, in fact, the exception to that rule was so commonplace it covered the majority of cases. Wechsler, *Federal Courts, State Criminal Law and the First Amendment,* 49 N.Y.U. L. REV. 740, 748-49 (1974).

30. In Fitts v. McGhee, 172 U.S. 516 (1899) the Court stated that the lower federal court was without jurisdiction to prohibit the institution or prosecution of state criminal proceedings. *Id.* at 531-32. Even if the state statute on which the criminal proceedings were based was unconstitutional, the Court reasoned, the citizen could make his defense on that basis in the criminal proceedings. *Id.* at 530. The Court also found that the lower federal court could not, consistent with the eleventh amendment, adjudicate this constitutional issue. *See id.* at 528-29.

Court in *Ex parte Young*, determined that a court of equity may enjoin criminal proceedings if necessary to protect property rights over which the court of equity had prior jurisdiction.[31] The Court limited this rule by noting that a federal court "cannot, of course, interfere in a case where the proceedings were already pending in a state court"[32] because under these circumstances the pending state criminal proceeding provides an adequate remedy at law for any constitutional issue.[33] In *Ex parte Young*, however, a test case would not have been likely considering the prospect of imprisonment of up to five years.[34]

After *Ex parte Young* the doctrine of equitable restraint appears much like virtue—more respected in word than in deed. In one 1927 opinion, the Supreme Court even turned the exception into the rule: "Following the rule frequently announced by this court, that 'equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights to property,' we sustain the jurisdiction of the district court."[35] Whatever the form of these statements, the Supreme Court, more often than not, seemed able to circumvent any supposed lack of equitable power and allow the issuance of injunctions against state criminal prosecutions, at least when the federal action was commenced prior to the state criminal prosecution.[36] The contradiction between the theory and

31. *Ex parte* Young, 209 U.S. 123, 162 (1908). "[I]f there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be *ousted* by the fact that the State had chosen to assert its power . . . by indictment or other criminal proceeding." Davis & Farnum Mfg. Co. v. Los Angeles, 189 U.S. 207, 218 (1903) (emphasis added). For a brief explanation of the rise and fall of the rule restricting injunctions to the protection of property interests, see *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 998-1001 (1965).

32. *Ex parte* Young, 209 U.S. 123, 162 (1908).

33. The rule that equitable relief was available only when the remedy at law was inadequate arose initially because the court of chancery, to survive the jealousy of the common law courts in England, was forced to interfere with those courts only when absolutely necessary. *See* H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 47 (2d ed. 1948).

34. *Ex parte* Young, 209 U.S. 123, 164 (1908).

35. Tyson & Brother v. Banton, 273 U.S. 418, 428 (1927)(citing Packard v. Banton, 264 U.S. 140, 143 (1924)).

36. The Anti-Injunction Act appears to be the reason injunctions were not allowed in already pending criminal proceedings in state court, but it was never treated as the absolute barrier it seems to be. It was in fact viewed only as a general rule of comity. *See* Wells Fargo & Co. v. Taylor, 254 U.S. 175, 183 (1920). In Cline v. Frink Dairy Co., 274 U.S. 445 (1927), the Court, upon noting that the federal plaintiff was the subject of a pending state criminal prosecution, narrowed the lower court's permanent injunction in so far as it restrained proceedings actually pending. *Id.* at 466. The injunction was thereby modified to restrain only future prosecutions after the Court went on to hold that the state anti-trust statute was in

practice of equitable restraint continued without any clear resolution[37] until 1965 when the Supreme Court decided *Dombrowski v. Pfister*.[38] Justice Brennan, speaking for the Court in that case, agreed that ordinarilly "federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework," but when a state statute is facially violative of first amendment rights federal courts must be able to restrain state prosecutions. [39] The special circumstance present when a void statute "chills" first amendment rights was seen as a distinguishing factor in such a case from past cases in which equitable relief was denied.[40] Further, equitable restraint is premised on the assumption that state officials are enforcing criminal law in "good faith."[41] In *Dombrowski* there were allegations that this assumption was not the case since the state officials were enforcing the law "without any hope of ultimate success, but only to discourage appellants' civil rights activities."[42]

Dombrowski redefined the rule of equitable restraint so that federal courts, while ordinarily not allowed to restrain a state criminal prosecution, could do so if the statute, which was the basis of that prosecution, was in the eyes of the federal court facially violative of first amendment rights.[43] If so, then "special circumstances" existed justifying a finding that serious irreparable injury was threatened—the "chilling" of protected rights of free speech.[44] Also, in cases in which bad faith administration of state criminal law was shown, the reason for exercising restraint was not applicable and again the federal court could grant equitable relief.[45] Coming at a time when Blacks were asserting themselves through marches, picketing, and other sorts of protests against discriminatory state laws and offi-

violation of due process. *Id.* at 453. *See also* Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559, 564 (1917).

37. *See generally* Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 785-93 (1974).

38. 380 U.S. 479 (1965).

39. *Id.* at 484.

40. *See id.* at 491.

41. *See id.* at 490.

42. *Id.* at 490.

43. *See id.* at 486. "When the statutes [regarding expression] also have an overbroad sweep . . . . [t]he assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded . . . ." *Id.* at 486.

44. *See id.* at 487.

45. *See id.* at 488-89. Considerations of federalism counsel against interference only with the good faith administration of state law. There is no reason to restrain federal interference with lawless behavior on the part of state officials.

cial attitudes, *Dombrowski* appeared as a sign from the Supreme Court that the federal courts would now take a front line role in bringing about equality under the law. This signal, in turn, brought a substantial increase in federal litigation by those seeking relief from prosecution under state laws that allegedly chilled first amendment rights.[46] This litigation brought the federal courts into more frequent conflict with states' efforts to enforce their criminal law and, as one commentator sees it, "touched off a crisis in federal-state relations."[47] The Supreme Court turned again to the doctrine of equitable restraint in the latter part of 1970 when it heard arguments on six companion cases. On February 23, 1971, the Court decided *Younger v. Harris,*[48] *Samuels v. Mackell,*[49] and their lesser known companions,[50] and in doing so put a brake to the use of federal courts in obtaining equitable relief from state criminal law enforcement.[51]

In *Younger*, John Harris, Jr. had been indicted in a California state court for violation of the California Criminal Syndicalism Act before he filed his complaint in federal court seeking to have Evelle Younger, the District Attorney of Los Angeles County, enjoined from prosecuting him in that state proceeding. As a basis for injunctive relief Harris alleged that the Act inhibited him in the exercise of his first and fourteenth amendment rights. A three-judge district court declared the California Act void for vagueness and overbreadth, and enjoined Younger from further prosecuting Harris.[52] Justice Black, speaking for the Supreme Court in *Younger*, found no basis upon which to justify this injunctive relief.[53] An obvious barrier to the issuance of the injunction in this situation was the Anti-Injunction Act, which prohibits injunctions by federal courts to stay proceedings in a state court; but Justice Black saw a more fundamental reason for barring relief.[54] That reason was "the basic

46. *See* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 580-81 (1970).

47. Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324, 1325 (1972).

48. 401 U.S. 37 (1971).

49. 401 U.S. 66 (1971).

50. Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landy, 401 U.S. 77 (1971).

51. *See generally* Geltner, *Some Thoughts on the Limiting of Younger v. Harris*, 32 OHIO STATE L.J. 744 (1971); Shevin, *Federal Intrusion in State Court Proceedings*, 1972 UTAH L. REV. 3 (1972).

52. Harris v. Younger, 281 F. Supp. 507, 517 (C.D. Cal. 1968), *rev'd*, 401 U.S. 37 (1971).

53. *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

54. *See id.* at 43-44.

doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[55] Justice Black noted that state law enforcement officials should ordinarily be free of such interference since "they are charged with the duty of prosecuting offenders against the laws of the State,"[56] and no one is "immune from prosecution, in good faith, for his alleged criminal acts."[57] He also found specific justification for this doctrine of equitable restraint in the need "to prevent erosion of the role of the jury and [to] avoid duplication of legal proceedings."[58] The solicitude in this case for the role of the jury evidently derives from an assumption that the jury itself has some "right" to determine criminal offenses, since the state court defendant is the one attempting to avoid a jury trial in state court by bringing an equitable action in federal court. To reinforce this basic doctrine of equitable restraint, Justice Black found that the "more vital consideration" of comity requires federal courts to show proper respect for state functions.[59] Comity must also be viewed in light of the ideal of "Our Federalism," which is defined as a system "in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."[60]

With equitable restraint so established as a strong federal policy, Justice Black turned to the facts of the case and found them devoid of any extraordinary circumstances that would justify overriding that policy.[61] First, he held that Harris had an adequate remedy at law since he had the opportunity to raise his constitutional claims in defense of the pending prosecution in state court.[62] Second, he had not alleged or shown that this prosecution was brought in bad faith or as one in a series of repeated prosecutions to which he would be subjected and, therefore, had failed to show that he would suffer

55. *Id.* at 43-44.
56. *Id.* at 45 (quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926)).
57. *Id.* at 46 (quoting Watson v. Buck, 313 U.S. 387, 400 (1941)).
58. *Id.* at 44.
59. *Id.* at 44.
60. *Id.* at 44. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 52A, at 229-36 (3d ed. 1976).
61. Younger v. Harris, 401 U.S. 37, 40-41 (1971).
62. *Id.* at 49.

sufficient irreparable injury if equitable relief were denied.[63] Justice Black distinguished *Dombrowski* as a case in which bad faith prosecution was shown.[64]

In light of the strong policy represented by the doctrine of equitable restraint, an ordinary showing of irreparable injury was insufficient unless it amounted to "both great and immediate" irreparable injury.[65] Neither a showing that Harris would suffer the injury of having to defend himself in the state prosecution nor a showing that the statute was unconstitutional was sufficient to satisfy this higher standard for injunctive relief. Justice Black went on to distinguish that part of *Dombrowski* that established an exception when the state statute was facially violative of first amendment rights as a case in which bad faith prosecution was shown, holding that the "chilling effect" is not by itself sufficient to justify federal equitable relief.[66] To this lone remaining exception of bad faith state prosecution, Justice Black added at the end of the opinion that even when bad faith cannot be shown other "extraordinary circumstances" might exist to justify issuance of a federal injunction.[67] An example would be a state statute that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[68]

With *Younger*, the door that was opened for relief from state prosecutions by *Dombrowski*'s sensitivity for first amendment rights was resoundingly closed, although perhaps not locked. The doctrine of equitable restraint arose from *Younger* as a strong federal policy barring access to federal trial courts for injunctive relief from pending state prosecutions. The companion case of *Samuels v. Mackell*[69] made it clear that when this policy barred injunctive relief, declaratory relief even though less intrusive was also barred because of the same considerations which made injunctive relief

63. *Id.* at 49.

64. *Id.* at 50.

65. *Id.* at 46.

66. *See id.* at 50.

> We recognize that there are some statements in the *Dombrowski* opinion that would seem to support this argument [when a statute is facially violative of the first amendment]. But, as we have already seen, such statements were unnecessary to the decision of that case, because the Court found that the plaintiffs had alleged a basis for equitable relief under the long-established standards [of bad faith prosecution].

Id. at 50.

67. *See id.* at 53-54.

68. *Id.* at 53-54 (quoting Watson v. Buck, 313 U.S. 387 (1941)).

69. 401 U.S. 66 (1971).

inappropriate.[70] The Court, again speaking through Justice Black, found that declaratory relief would have virtually the same impact on state prosecutions as an injunction because of the res judicata effect of the declaration.[71]

Under the rule of *Younger* and its companion cases, the federal courts are prohibited from granting either injunctive or declaratory relief to relieve a defendant in a state prosecution begun prior to the filing of a complaint with the federal court.[72] The theory underlying the rule is that because of the presence of the pending state proceeding the defendant has the opportunity to present his constitutional claims to the state court and, therefore, has an adequate remedy at law. A showing of irreparable injury, which by necessary implication is also a showing of inadequate remedy,[73] can only be made by proof that the prosecution was brought in bad faith or was brought as one in a series of prosecutions which considered together show bad faith on the part of the prosecutorial officials.[74] In the absence of this showing the defendant may obtain federal equitable relief only if he can convince the federal court that the state statute used as a basis for the prosecution is flagrantly and patently violative of express constitutional prohibitions in every part or that other "extraordinary circumstances" exist.[75]

The old doctrine of equitable restraint restricted equity jurisdiction on the premise that equity existed only to protect property rights; and since criminal prosecutions affected only personal rights, equity was irrelevant to the administration of criminal law.[76] After *Ex parte Young*, however, the Court's emphasis shifted from concern for the conceptual limitations of equity to consideration of the needs of state law enforcement in the exercise of equitable

70. *See id.* at 72-73.

71. *Id.* at 72.

72. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 41 (1971); Samuels v. Mackell, 401 U.S. 66, 68-69 (1971); Boyle v. Landy, 401 U.S. 77, 81 (1971). *See generally*, Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEXAS L. REV. 1141 (1977).

73. This point is developed more fully in later textual analysis of the *Younger* progeny. In short, the Court assumes the adequacy of state court proceedings unless the federal plaintiff cannot present his federal claims or cannot receive a fair and competent hearing. In this sense, bad faith prosecution or harassment becomes only one way of showing the inadequacy of the state court proceeding.

74. *See* Younger v. Harris, 401 U.S. 37, 49 (1971).

75. *See id.* at 53.

76. *See Developments in the Law-Injunctions*, 78 HARV. L. REV. 994, 1024 (1965). "Injury to property, whether actual or prospective, is the foundation on which the jurisdiction [of an equity court] rests. The court has no jurisdiction in matters criminal or merely immoral, which do not affect any right to property." *In re* Sawyer, 124 U.S. 200, 213 (1888).

discretion.[77] In *Younger* equitable restraint was transformed by "Our Federalism" into a rule prohibiting federal equitable interference with state prosecutions and leaving no room for federal court discretion. In other words, *Younger* shifted the emphasis from equitable restraint to restraint. Additionally, as shown by the extensions of *Younger*, the generalized rationale for equitable restraint does not limit the growth of *Younger*. *Younger* is a discrete doctrine with a rationale more complex and compelling than that of the old, now subdued, doctrine of equitable restraint.

To understand and to be able to predict the future application of the *Younger* rule, one must understand the interests served by that rule. Weighing against the *Younger* rule is the federal interest in protecting constitutional rights. Federal courts are seen as having special sensitivity and sympathy for, as well as expertise in dealing with these federal rights. This interest in protecting constitutional guarantees is disserved, however, only if one begins with the assumption that not only are the federal courts the primary guardians of the Constitution but that they are the only competent guardians.[78] This assumption is justified to some degree because federal judges enjoy life tenure while most state judges are subject to the popular political process. Life tenure protects federal judges in their determination of constitutional issues, which may often require impartial consideration of positions that are contrary to the strongly-held attitudes of the majority of people. State judges, because of their vulnerability to removal, must in these circumstances show courage in the face of the majority will just to remain impartial. Assumptions about their impartiality may well be unjustified when these cases are also highly controversial. This argument, however, directly supports only an exception for those cases rather than a general assumption that state courts are unable to provide an adequate forum for the trial of constitutional issues. The Supreme Court has refused to assume the incompetency of state courts in deciding constitutional issues, clearly holding that unless distinct evidence of bad faith is shown state courts are to be considered as competent as federal courts to try constitutional issues.[79] Related to

77. *See* Fenner v. Boykin, 271 U.S. 240, 243 (1926).

78. "That is what's meant by federal judicial primacy: the belief that federal courts have the primary responsibility for protecting federal rights because it is in those courts, and not the state courts, where federal rights are most likely to be vindicated—not always, but more often than not . . . ." Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740, 893 (1974).

79. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

this interest is the provision of free access to federal courts for the trial of federal issues.[80] This interest of the individual litigant clearly has been undercut by *Younger* and the Court has noted the deficiency of any presumption that everyone has a right to a federal trial of every federal issue.[81] When *Younger* applies, the individual has a state forum for determination of his federal claims; and this forum is assumed to be competent for that task, especially since there is always the opportunity to seek a hearing before the United States Supreme Court.

On the other side of the scale are several interests in favor of the *Younger* rule of nonintervention. *Younger* protects a state's ability to control the interpretation and application of its law. Additionally, since the effect of *Younger* is to require the individual to make his constitutional defenses in state court, the state court is thereby given the first opportunity to narrowly interpret the challenged statute in order to remove any constitutional deficiencies. These interests, although constituting part of the justification for the *Younger* rule, are also relevant to a decision by a federal court to abstain under the authority of *Railroad Commission v. Pullman Co.*[82] *Pullman* abstention is more clearly based on a decision to serve these interests in addition to the federal interest of avoiding unnecessary adjudication of substantial constitutional issues.[83] *Pullman* abstention generally is required when a case in federal court involves a substantial constitutional issue which may be obviated by the determination of an unclear issue of state law.[84] If the federal court orders abstention in this situation, it will retain jurisdiction over the case but send the parties to state court in order to secure a definitive opinion on the unclear issue of state law.[85] As a general rule, the parties must institute the action in state court although they can return to the federal court if necessary for trial on the

80. *See* 28 U.S.C.A. § 1331(a) (West Supp. 1978). *See generally* Forrester, *The Nature of a Federal Question*, 16 TUL. L. REV. 362 (1942).

81. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 605-06 (1975). "But quite apart from appellee's right to appeal [to the United States Supreme Court] had it remained in state court, we conclude that it should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which . . . is quite costly in terms of the interests which *Younger* seeks to protect." *Id.* at 605-06.

82. 312 U.S. 496, 501 (1941).

83. *See id.* at 501. *See generally* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

84. *See* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 991 (2d ed. 1973).

85. *Id.* at 1005-06.

federal issues.[86] The effect of *Younger* abstention is quite different since the federal court under *Younger* may not retain jurisdiction unless the extraordinary circumstances allowing equitable relief are shown.[87]

A significant factor for application of *Younger* abstention is the existence of a state action against the federal plaintiff.[88] There is no such requirement for abstention under *Pullman.*[89] A pending proceeding may have some significance for *Pullman* abstention in that it alleviates some of the delay and added expense to the litigants resulting from abstention, but this fact is not a key element in motivating a court to order *Pullman* abstention.[90] The decision in *Younger* turned on the existence of a pending state criminal prosecution against the person seeking relief in federal court. Justice Black saw these circumstances as implicating the principles of equitable restraint, comity, and federalism which counsel against intervention by federal courts.[91] The Court in subsequent opinions, however, has applied *Younger* when the pending state proceeding was civil[92] rather than criminal and when the state proceeding was not pending at the time the federal action was commenced.[93] It is this expanded application of *Younger* which makes the mechanics of the rule so hard to understand and which throws the interests underlying the rule out of focus.

EXPANSION OF *Younger* PROTECTION TO STATE CIVIL PROCEEDINGS

In *Huffman v. Pursue, Ltd.*[94] the Supreme Court decided that *Younger* was applicable to a case in which the state was seeking a

86. The party seeking to return to federal court must not only present the state issues to the appropriate state court but present them in light of the constitutional issues raised. *See* Government & Civic Employees Organizing Comm., CIO v. Windsor, 353 U.S. 364, 366 (1957). In order to preserve those constitutional issues for federal adjudication and avoid res judicata, the party must inform the state that the federal claims are being presented only in compliance with *Windsor* and are to be ultimately decided in federal court. *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 421 (1964).

87. *See* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1043 (2d ed. 1973).

88. *See* Younger v. Harris, 401 U.S. 37, 41 (1971).

89. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1971).

90. *See* Askew v. Hargrave, 401 U.S. 476, 478 (1971).

91. *See* Younger v. Harris, 401 U.S. 37, 43-44 (1971).

92. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 444 (1978)(civil action for fraudulently receiving welfare payments); Juidice v. Vail, 430 U.S. 327, 338-39 (1977)(civil action involving judicial contempt proceeding); Huffman v. Pursue, Ltd., 420 U.S. 592, 607 (1975)(quasi-criminal civil action).

93. *See* Hicks v. Miranda, 422 U.S. 332, 338 (1975).

94. 420 U.S. 592 (1975).

civil remedy.[95] The Court held that federal equitable relief was prohibited when the civil proceeding was instituted by state officials and was a proceeding that was "both in aid of and closely related to criminal statutes."[96] The purpose of the state civil public nuisance action pending in *Huffman* was to prevent the dissemination of obscene material, which was also the purpose of the state's criminal obscenity laws.[97] Because of this close relation federal court interference was deemed inappropriate because of the same considerations that apply when the state proceeding is purely criminal.[98] Justice Stewart, concurring in *Younger*, had noted that the classification of conduct as criminal indicated the importance ascribed by the state to the prevention of that conduct and thereby evidenced the importance of the interest involved in a criminal prosecution.[99] In *Huffman* the Court found that the state interest involved was sufficiently important for application of *Younger* by concluding that it was the same interest promoted in related state criminal laws[100] and by assuming the state interest is always sufficiently important for *Younger* purposes when advanced through a state criminal prosecution.[101] In this fashion the state interest promoted in the civil proceeding was found sufficiently important to call forth the protective shield of *Younger*.[102]

Consideration of a particular state interest promoted by the substantive litigation in state court was novel since *Younger* had not previously been keyed to any such distinction. Analysis of the relative importance of federal and state interests to determine which court takes jurisdiction was one method by which the Supreme Court in *Dombrowski* decided in favor of a federal forum. In that case, at least one basis for the decision was the belief that first amendment rights were so important that when a federal court found a state criminal statute facially violative of the first amendment it could give equitable relief from prosecution under that statute.[103] *Younger* clearly overruled that branch of *Dombrowski* and the approach on which it was based.[104] Further, the importance of the

95. *See id.* at 594.
96. *Id.* at 604.
97. *Id.* at 604.
98. *Id.* at 604.
99. *See* 401 U.S. 37, 55 n.2 (1971) (Stewart, J., concurring).
100. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).
101. *Id.* at 604.
102. *Id.* at 604.
103. Dombrowski v. Pfister, 380 U.S. 479, 489 (1965).
104. Younger v. Harris, 401 U.S. 37, 50 (1971).

substantive interest promoted in a state civil proceeding cannot be determined in a vacuum. As the Court has noted in another context, "[o]ne cannot meaningfully ask how important something is without first asking 'important for what purpose?' "[105] Importance of a state interest can, therefore, be determined only in light of the stated aims of *Younger*; but a state interest in prohibiting the dissemination of obscene material has no relevance itself to the aims of *Younger*. Whether that prohibition is a sufficiently important state interest for *Younger* purposes cannot therefore be determined in relation to promoting respect for state functions and serving the needs of federalism. The presence of the state as a party to the state civil proceeding does, however, seem clearly relevant to those aims. If comity is required, it should certainly be required when the state itself seeks redress, criminal or civil, in its own courts for violation of its own law. State courts would also seem the place where sensitivity for the legitimate functions of the state was highest. If the Court is only concerned with the importance of a particular interest in the eyes of the state, then it can be assumed that this test is satisfied whenever the representatives of the state decide the interest is so important that it requires legal action for its protection.

In *Juidice v. Vail*[106] the Court seemingly abandoned the quasi-criminal analysis of *Huffman*,[107] but continued its concern with the importance of the state interest as a key factor in applying *Younger*.[108] The *Vail* case had been brought in federal court by judgment debtors in New York who had failed to comply with subpoenas requiring them to attend depositions at which they were to give information relevant to the satisfaction of the judgments against them. The debtors' failure to comply with these subpoenas resulted in the institution of statutory contempt procedures against them.

105. Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965). In holding that a state statute requiring in hand service of process was not applicable in a diversity case the Supreme Court reasoned that the importance of the state rule for *Erie* purposes can be considered only in light of the twin aims of *Erie*, which are discouragement of forum-shopping and avoidance of inequitable administration of the laws. The lower court had failed to relate that question to the purposes of the *Erie* doctrine and had framed the "inquiry in terms of how 'important' [the statute] is to the State." *Id.* at 468 n.9.

106. 430 U.S. 327 (1977).

107. *Id.* at 334. The Court held that *Younger* and *Huffman* were not restricted to similar types of state actions. *Id.* at 334. The Court in a footnote postponed the question whether *Young* applied to all civil litigation. *Id.* at 336 n.13.

108. *Id.* at 335. The state's interest in the contempt process is "[p]erhaps . . . not quite as important as is the State's interest in the enforcement of its criminal laws . . . [b]ut we think it is sufficiently great import as to require application of the principles of [*Younger*] . . . ." *Id.* at 335.

They brought the federal action seeking to enjoin the use of these statutory contempt procedures by New York judges, who were named as defendants. The Supreme Court concluded that the "contempt power lies at the core of the administration of a State's judicial system" and that federal interference would be every bit as great as with a criminal proceeding.[109] Justice Brennan, in dissent, pointed out that a significant distinction between *Vail* and *Huffman* was that the underlying state suit in *Vail* was between purely private parties.[110] He believed that remitting the constitutional issues to the state court in this situation would actually undermine state interests since the constitutionality of the statute would be left to the abilities and resources of a private party who may not have the same motivation as the state in sustaining it.[111] In contrast, a federal court action brought under section 1983 must name the state officials and directly question the validity of the statute.[112] Even though the state in *Vail* was not a party to the main action in state court, it was represented in the contempt proceedings and in the federal proceeding by the state judges who were attempting to enforce state law against the judgment debtors.[113]

The *Vail* opinion is incomplete, however, because the Court did not question the ability of those state judges to provide an impartial forum for the adjudication of the constitutional issues. In state court the state judges would be acting as representatives of the state in enforcing state contempt laws and would also be expected to provide an impartial tribunal for the constitutional issues raised by that enforcement. In *Gibson v. Berryhill*[114] the Supreme Court held that a lower federal court need not defer under *Younger* to a state tribunal that was incompetent by reason of bias to adjudicate the constitutional issues before it.[115] One can reasonably conclude

109. *Id.* at 335-36.

110. *Id.* at 344 (Brennan, J., dissenting).

111. *See id.* at 345 (Brennan, J., dissenting).

112. *Id.* at 346 (Brennan, J., dissenting).

113. *See id.* at 335-36 n.12. The state judges could be considered as representatives of the authority of the state because of the nature of the proceedings. Although available for use in private litigation, contempt proceedings could be initiated only by judges as representatives of the state when acting to vindicate the "regular operation of [the state's] judicial system." *See id.* at 335-36 n.12. "[A]n injunction against state court judges, preventing them from exercising state-authorized judicial process vital to the administration of justice, implicates the federalism and comity strand of the *Younger* doctrine much more severely than would an injunction here preventing private litigants from pursuing their quiet title actions in state court." Johnson v. Kelly, 583 F.2d 1242, 1249 (3d Cir. 1978).

114. 411 U.S. 564 (1973).

115. *See id.* at 577. In *Gibson* optometrists employed by Lee Optical sought a federal injunction to halt proceedings then pending against them before the Alabama Board of

from this decision that had the federal plaintiffs in *Vail* shown bias on the part of the state tribunal, they would have rebutted the presumption that they were "accorded . . . an opportunity to *fairly* pursue their constitutional claims in the ongoing state proceedings."[116]

Justice Stevens, concurring in *Vail,* disagreed with the majority's application of *Younger* because in *Vail* the debtors had challenged the contempt procedure itself as a violation of due process.[117] When such a claim is made, Justice Stevens reasoned, the federal plaintiffs have directly challenged the adequacy of their remedy in state court and since *Younger* is premised on the adequacy of this remedy, the Supreme Court must permit the determination of that constitutional issue in federal court.[118] The Court, however, believed that it was "abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceeding [and that] [n]o more is required to invoke *Younger* abstention."[119] Implicit in the majority opinion is the reply that adequacy of the remedy in state court is presumed as long as the debtors had the opportunity to present their constitutional defenses and as long as there was no showing of extraordinary circumstances. The divergence between Justice Stevens' argument that a due process challenge to the state procedure itself requires a federal court determination of the adequacy of the state remedy and the main thrust of *Younger* is that *Younger* requires the resolution of all doubts in favor of the state proceeding. Realistically, allowing avoidance of *Younger* even temporarily on the basis of every due process challenge to the state proceeding itself would open the door to frequent federal court dis-

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Optometry on charges of unprofessional conduct. A three-judge federal court held that the board was biased and could not provide the federal plaintiff a fair and impartial hearing in conformity with due process of law. The district court based its conclusion on two grounds. First, the board was hearing charges against these optometrists that were substantially similar to charges the board had brought in state court against their employer, Lee Optical. The board, therefore, was too involved in the prosecution of the case to be a fair and impartial adjudicative body for those charges and any constitutional defenses asserted. Second, the board was composed solely of optometrists engaged in private practice and the revocation of the licenses of employed optometrists would remove nearly half of the licensed optometrists in Alabama, thereby resulting in financial benefit to the members of the board. *Id.* at 568-71. The Supreme Court affirmed only on the second ground. While stating that arguably the lower court was correct on both counts, the Court noted the divergent views among federal courts toward the degree of involvement by the adjudicative body in the prosecution of a state law and what degree amounted to bias. *See id.* at 579 n.17.

116. Juidice v. Vail, 430 U.S. 327, 337 (1977) (emphasis added).

117. *Id.* at 340-41 (Stevens, J., concurring).

118. *Id.* at 340-41 (Stevens, J., concurring).

119. *Id.* at 337 (emphasis supplied by the Court).

ruption of state law enforcement litigation. The opportunity to halt a state proceeding by virtue of a properly worded due process challenge filed in federal court would be a beacon to conscientious counsel seeking to provide the best representation to a state court defendant. Baseless as well as sound due process claims would necessitate interruption of state proceedings while federal courts determined these claims. This frequent interruption and delay is precisely what the *Younger* rule was formulated to prevent. Justice Stevens' proposed rule would provide an escape from *Younger* similar in scope to that of *Dombrowski*—substituting due process for free speech. Presuming the adequacy of the remedy in state court as long as there is an opportunity to present federal defenses before a competent state tribunal precludes a rush to the federal courthouse. Therefore, as an initial barrier *Younger* may be avoided only when the federal plaintiff can rebut this presumption with proof that a particular state tribunal is clearly imcompetent to decide his constitutional claims. Further, the types of incompetency recognized as exceptions to *Younger* are those which would strongly support the inference that the state tribunal was guilty of more than error or mistake or even a conservative preference for state law. The inference necessary for escape from *Younger* is that something other than reasoned adjudication will control the determination of the federal issues in state court.

Slightly more than two months after *Vail* was decided the Court again took up the issue of the application of *Younger* to state civil proceedings in *Trainor v. Hernandez.*[120] In this case the Illinois Department of Public Aid (IDPA) filed a civil suit in state court seeking the return of welfare payments from Juan and Maria Hernandez, who had allegedly concealed assets while receiving assistance. Fraudulent concealment of assets for the purpose of receiving welfare was also a crime under Illinois law. The IDPA caused the issuance of a writ of attachment freezing money belonging to the defendants deposited in a credit union. After receiving notice of the suit and the attachment and before they filed an answer to either the suit or the attachment, the defendants filed suit in federal court alleging that the Illinois Attachment Act was unconstitutional in that it deprived them of property without the prior notice required by due process. A three-judge district court refused to dismiss the federal suit under *Younger,* distinguishing *Huffman* on the ground that the state statute challenged in that case gave an exclusive right

120. 431 U.S. 434, 444 (1977).

of action to the state whereas in *Trainor* the Attachment Act provided a remedy to any litigant and it was "mere happenstance" that the state of Illinois was using the remedy.[121] The Supreme Court, in a decision to which Justices Stewart, Brennan, Marshall, and Stevens dissented, brushed aside this distinction noting only that the state was, in fact, a party to an action brought to "vindicate important state policies" and held *Younger* applicable.[122] The particular state interest safeguarded by the IDPA suit was the public assistance programs which, although not as important as the state's interest in enforcement of its criminal laws, was deemed important enough for *Younger* protection.[123] The Court also saw as significant the state's option of vindicating these interests through a criminal proceeding but did not base its decision on whether the state process was civil, criminal, or quasi-criminal.[124]

Justice Blackmun, as the swing vote, wrote a concurring opinion in which he pointed out that he agreed with application of *Younger* because the state was a party in its sovereign capacity and was seeking to enforce a substantial state interest.[125] He also thought it significant that the state had the option of proceeding either civilly or criminally against the state defendants,[126] and he concluded that it was reasonable to distinguish between the state as creditor and a private party as creditor in regard to the attachment procedures because the "benefits of the recovery of fraudulently obtained funds are enjoyed by all the taxpayers of the State."[127] The Court, however, remanded the case so the district court could determine whether the state defendants had an opportunity to present their

121. Hernandez v. Danaher, 405 F. Supp. 757, 760 (N.D. Ill. 1975), *rev'd sub nom.* Trainor v. Hernandez, 431 U.S. 434 (1977).

122. Trainor v. Hernandez, 431 U.S. 434, 444 (1977).

123. *Id.* at 444. The Court continues comparing apples and oranges by relating a particular substantive state interest, the fiscal integrity of its public assistance programs, to the state's interest generally in criminal proceedings. "[T]he principles of *Younger* and *Huffman* are broad enough to apply to interference by a federal court with an ongoing civil enforcement action such as this, *brought by the State in its sovereign capacity.*" *Id.* at 444 (emphasis added).

124. *Id.* at 444.

125. *Id.* at 448-49.

126. *Id.* at 449.

127. *Id.* at 450 (Blackmun, J., concurring). He also attempted to show that a state's interest has insufficient "importance" for *Younger* purposes if a state court action has not been initiated. In such circumstances, Steffel v. Thompson, 415 U.S. 452 (1974), held that declaratory relief could be considered in federal court. Trainor v. Hernandez, 431 U.S. 434, 449 (1977). This argument supports the previously discussed conclusion that a state's interest should be considered sufficient for *Younger* purposes if the state brings suit in state court to protect that interest.

federal consitutional claims in the pending state proceeding.[128]

Justice Stevens, in dissent, reasoned among other things that the due process challenge to the state procedure should be sufficient to avoid application of *Younger*.[129] Justice Brennan, also in dissent, noted that restraint of the attachment procedures would not stop the state from proceeding to judgment in the main state court action and, therefore, would not hinder the state from vindicating its interests in its courts.[130] He concluded that the Court's proposition that the "interest of the State in continuing to use an unconstitutional attachment mechanism to insure payment of a liability not yet established brings into play 'in full force' 'all the interests of comity and federalism' present in a state criminal prosecution [was] simply wrong" since the relief granted in no way "interfered with or prevented" the state proceeding.[131]

Two significant factual differences between *Trainor* and the relevant precedents caused the Court difficulty. First, as noted by the three-judge district court the Illinois Attachment Act is not a public law in the sense that only the state acting as representative of the public interest may enforce it.[132] Second, the injunction dissolving the attachment did not necessarily halt the state from proceeding to recover a judgment on the merits.[133] An explanation of the Court's decision lies in an analogy to a line of cases beginning with *Stefanelli v. Minard*.[134] In *Stefanelli* the Court established the rule that federal courts will ordinarily not enjoin the use of illegally obtained evidence in state prosecutions.[135] Upholding the refusal of the lower federal court to hear a complaint seeking an injunction against the use of illegally obtained evidence in a state criminal trial, Justice Frankfurter based the opinion on the doctrine of equitable restraint.[136] He reasoned that "[i]f the federal equity power must refrain from staying State prosecutions outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene

128. Trainor v. Hernandez, 431 U.S. 434, 447-48 (1977).

129. *Id.* at 466-67, 469-70 (Stevens, J., dissenting).

130. *Id.* at 454 (Brennan, J., dissenting).

131. *Id.* at 454 (Brennan, J., dissenting).

132. Hernandez v. Danaher, 405 F. Supp. 757, 760 (N.D. Ill. 1975), *rev'd sub nom.* Trainor v. Hernandez, 431 U.S. 434 (1977).

133. Trainor v. Hernandez, 431 U.S. 434, 450 (1977) (Brennan, J., dissenting).

134. 342 U.S. 117 (1951).

135. *Id.* at 120; *see, e.g.*, Bokulich v. Jury Comm'n, 394 U.S. 97, 98 (1969); Cleary v. Bolger, 371 U.S. 392, 396 (1963); Wilson v. Schnettler, 365 U.S. 381, 385 (1961).

136. *See* Stefanelli v. Minard, 342 U.S. 117, 120 (1951).

piecemeal to try collateral issues."[137] To do otherwise, he concluded, would invite frequent interruption of state court proceedings through the use of a vast array of procedural due process challenges.[138] The collateral challenge made in federal court would ordinarily disrupt the main state court proceeding; therefore, allowing these challenges just because they related to collateral issues would still frustrate the policies reflected by the equitable restraint doctrine. In *Perez v. Ledesma*,[139] a companion case to *Younger*, the Supreme Court reversed the order of a three-judge district court suppressing evidence that was to be used in a state criminal trial.[140] The Court noted that this lower court order would "effectively stifle" the state proceeding.[141] In *Trainor*, however, no such restraint of the main judicial proceeding would occur since the state court could proceed to trial on the merits regardless of the federal court action regarding the Attachment Act. On the other hand, the collection of that judgment and the achievement of the state's purpose in bringing the suit would certainly be hindered by the federal court's dissolution of the attachment. In one sense the judgment is really only one step in the enforcement of the state law; the last and most important step is collecting the money wrongfully paid the Hernandez family.

In interpreting the words "proceedings in a State Court" contained in an earlier version of the Anti-Injunction Act, the Supreme Court stated that this language encompasses "all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process . . . [including] any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective."[142] It can certainly be said that the dissolution of the attachment reduces the possibility of collecting any fraudulently paid welfare money and thereby does hinder the state in making any judgment effective.

In *Huffman v. Pursue, Ltd.*[143] the lessee of a theatre had been made a defendant to a civil nuisance suit brought by state officials in a state court which entered a judgment closing the theatre for one year.[144] The state court judgment was entered prior to the filing

137. *Id.* at 123.
138. *See id.* at 123.
139. 401 U.S. 82 (1971).
140. *Id.* at 84.
141. *Id.* at 84.
142. Hill v. Martin, 296 U.S. 393, 403 (1935).
143. 420 U.S. 592 (1975).
144. *Id.* at 595-96.

of the federal complaint that resulted in a federal injunction restricting the enforcement of that judgment.[145] The federal plaintiff argued, in part, that *Younger* did not apply since the pending state proceeding had terminated when the judgment was entered. The Supreme Court found that an intrusion after judgment was even more disruptive and offensive to the state because it had already gone to the trouble of obtaining the judgment.[146] The effect of deciding that a "pending state proceeding" ended when a final judgment was entered would blunt the effect of a state court judgment —a result *Younger* cannot allow. *Younger* protection would truly be illusory if the state was left unprotected just at the moment it was about to realize something from its efforts. In a similar fashion, failure to protect the state attachment proceedings allows the state to proceed but only to acquire what may well be a worthless judgment.[147]

One of the greatest barriers to understanding *Younger* abstention is the failure to realize that the question of the constitutionality of a state statute is irrelevant for *Younger* purposes. Justice Brennan, dissenting in *Trainor,* saw as unacceptable the expansion of *Younger* to protect an unconstitutional attachment proceeding.[148] The Court, however, proceeded to its ultimate conclusion without considering the merits of the constitutional issue.[149] Justice Brennan as a consistent dissenter to the application of *Younger*[150] finds unacceptable the proposition that under *Younger* a state court action is allowed to proceed on the basis of what may appear to a federal judge to be an unconstitutional statute. His position ultimately is based on his view of federal courts as the "primary guardians of constitutional rights."[151] The majority of the Court, however, has clearly indicated that when *Younger* applies the interests which support providing a federal trial forum to vindicate constitutional

145. *Id.* at 598.

146. *Id.* at 608-09.

147. Wooley v. Maynard, 430 U.S. 705 (1977) is not to the contrary. In that case the Supreme Court distinguished *Huffman* because Mr. Maynard did not seek to have his record expunged or to annul any effects of his previous convictions. *See id.* at 710-11. In *Huffman* the lessee of the theatre was trying to have the federal court restrain the enforcement of the state court judgment. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 592 (1975).

148. *See* Trainor v. Hernandez, 431 U.S. 434, 458-60 (1977) (Brennan, J., concurring in part, dissenting in part).

149. *See id.* at 446-47.

150. *See, e.g.,* Juidice v. Vail, 430 U.S. 328, 341 (1977) (Brennan, J., dissenting); Huffman v. Pursue, Ltd., 420 U.S. 592, 613 (1975) (Brennan, J., dissenting); Younger v. Harris, 401 U.S. 37, 58 (1971) (Brennan, J., dissenting).

151. Perez v. Ledesma, 401 U.S. 82, 104 (1971) (Brennan, J., concurring in part, dissenting in part).

rights are secondary to the interests of the state in controlling the enforcement of its law in its own courts.[152] An exception exists, however, when the challenged state statute is not simply unconstitutional but in addition is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[153] The district court in *Trainor* held that a number, but not all, of the sections of the challenged state statute were "on [their] face patently violative of the due process clause of the Fourteenth Amendment to the United States Constitution."[154] The Supreme Court thought this was not the "flagrantly and patently" finding required.[155] Justice Stevens, dissenting, reasoned that the Court must mean that every section of a statute must be "flagrantly and patently" unconstitutional before the exception to *Younger* would apply.[156] If this is so, he concluded "this treatment preserves an illusion of flexibility in the application of a *Younger*- type abstention, but it actually eliminates one of the exceptions from the doctrine."[157]

No explanation is given by the Court for its holding in *Trainor* on this point, but it can be argued that the district court's finding was defective primarily because it was made before the state court had an opportunity to act on the constitutional challenge.[158] The state was thereby deprived of an opportunity to set its house in order by striking down the statute. The premise underlying *Younger* is that "ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights";[159] and, therefore, the accused must at least initially present his federal claims in the state court proceeding. If it is to be presumed that the state court provides a fair and sufficient forum for constitutional issues, then the state court must also be trusted to

152. *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

153. *Id.* at 53-54 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

154. Hernandez v. Danaher, 405 F. Supp. 757, 762 (N.D. Ill. 1975), *rev'd sub nom.* Trainor v. Hernandez, 431 U.S. 434 (1977).

155. *See* Trainor v. Hernandez, 431 U.S. 434, 446-47 (1977). The Court held that even if a "flagrantly and patently" finding was made, it would not be warranted under recent case law. *Id.* at 447.

156. *Id.* at 463 (Stevens, J., dissenting).

157. *Id.* at 463 (Stevens, J., dissenting).

158. *Id.* at 441. "The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, *unless it plainly appears that* this course *would not* afford adequate protection." *Id.* at 441 (quoting Younger v. Harris, 401 U.S. 37, 45 (1971)) (emphasis added).

159. *Id.* at 441 (quoting Kugler v. Helfant, 421 U.S. 117, 124 (1975)).

act appropriately even when prosecutions are initiated on flagrantly and patently unconstitutional statutes. If a state court has an opportunity to consider a constitutional challenge to such a state statute and fails to strike any part of the proceedings based on that statute, the federal court need no longer indulge in the presumption that the state court provides a fair and sufficient forum for vindication of federal constitutional rights.[160] In *Mitchum v. Foster*[161] the Court, in considering the purpose for enacting the predecessor to section 1983, concluded that it was clearly intended to enforce the prohibitions of the fourteenth amendment against state action either executive, legislative, or *judicial.*[162] The proponents of that original federal legislation had noted that state courts were being used to injure individuals either because they were "powerless to stop deprivations or [because they were] in league with those bent upon abrogation of federally protected rights."[163] In a case in which compelling evidence is provided to show that a state judge is either powerless to stop constitutional violations, as in *Dombrowski,*[164] or is assisting in those violations which would be the justifiable conclusion if he failed to strike proceedings on a flagrantly and patently unconstitutional statute, a federal court should be able to provide relief. Therefore, in cases in which *Younger* would ordinarily apply, the flagrantly unconstitutional exception should be available but only after the state court has had the opportunity to consider the matter. Allowing the exception to apply in this manner is consistent both with the insistence of the Court in *Vail* that no more than the opportunity to present one's federal claims in the state proceedings is required to invoke *Younger* and with the presumption that the state court will provide a fair and competent tribunal for the adjudication of constitutional issues.

There remains the question why the Supreme Court has formulated a presumption which divests federal courts of constitutional and statutory subject matter jurisdiction. In *Younger*, Justice Black

160. Younger v. Harris, 401 U.S. 37, 44 (1971).

161. 407 U.S. 225 (1972).

162. *Id.* at 240.

163. *Id.* at 240.

164. In *Dombrowski,* even though a state judge quashed the initial arrest warrants and ordered the suppression of evidence seized by state officials in an illegal raid, the officials continued to threaten the federal plaintiffs with prosecution and to make announcements that the plaintiff's organization was a subversive or Communist front group and that members of such groups must either register with the state or face prosecution. These actions by state officials frightened off new members and contributors and paralyzed operations of the organization. *See* Dombrowski v. Pfister, 380 U.S. 479, 487-89 (1965).

in referring to the doctrine of equitable restraint admitted that "[t]he precise reasons for this longstanding public policy . . . have never been specifically identified but the primary sources . . . are plain."[165] These sources were identified as the sensitivity for state criminal processes, the notion of comity, and "Our Federalism."[166] Since *Younger*, however, abstention has been expanded to protect state civil proceedings,[167] so the sensitivity for state criminal processes is no longer determinative. Further, *Pullman* abstention[168] rather than *Younger* seems more consistent with comity and federalism since it works toward cooperation between the sovereigns.

To clarify the distinct interests served by *Younger*, the factors which necessarily call for the rule's application must be identified. The rule is no longer limited to situations in which the state seeks a criminal remedy but is clearly keyed to the involvement of state courts.[169] For the most part, the Court's opinions support the conclusion that the state in its sovereign capacity must be a party to the state court litigation.[170] What strongly indicates that *Younger* will probably not apply in cases between purely private litigants in state court is the severe effect of application of that rule. Unlike *Pullman* abstention, *Younger* requires the federal court to relinquish jurisdiction—to leave to a state court the determination of issues of federal law. Also, as is pointed out in *Hicks v. Miranda*,[171] an otherwise protected state court proceeding instituted subsequent to the federal action ousts the federal court of jurisdiction.[172] One effect of this holding is that the party relying upon state law is given the discretion to divest a federal court of existing jurisdiction by filing suit in state court. There is no reason apparent in the notions of federalism and comity that a party who only represents private interests should be given such remarkable power.[173] Protecting all litigation in state

165. Younger v. Harris, 401 U.S. 37, 43 (1971).

166. *Id.* at 43-44.

167. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 444 (1978) (civil action for fraudently receiving welfare payments); Juidice v. Vail, 430 U.S. 327, 338-39 (1977) (civil action involving judicial contempt proceeding); Huffman v. Pursue, Ltd., 420 U.S. 592, 607 (1975) (quasi-criminal civil action).

168. See notes 83-87 *supra* and accompanying text.

169. *See* Trainor v. Hernandez, 431 U.S. 434, 444 (1977); Juidice v. Vail, 430 U.S. 327, 338-39 (1977).

170. *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 449 (1977); Juidice v. Vail, 430 U.S. 327, 334 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

171. 422 U.S. 332 (1975).

172. *Id.* at 349.

173. Sensitivity for the criminal process would not of course, be relevant to state court proceedings brought by a private party. In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court

court regardless of the presence of the state strongly supports the inference that *Younger* is really derived from that "blind deference to 'State Rights' " which Justice Black refused to accept as part of the concept of "Our Federalism."[174] It therefore seems more reasonable to conclude that *Younger* is not applicable to cases in which the state is not a party to the challenged state court proceedings.[175]

EXTENSION OF *Younger* PROTECTION TO SUBSEQUENT STATE PROCEEDINGS

The Supreme Court stated in *Younger* that it was not determining what a federal court must do in the absence of a pending state prosecution.[176] Subsequently, in *Steffel v. Thompson,*[177] the Court seemed to so restrict *Younger* by holding that its standards need not be met in order for a federal court to enter a declaratory judgment when no state prosecution was pending.[178] In *Steffel* no showing of bad faith enforcement or other extraordinary circumstances had been made by the federal plaintiff,[179] but he had been warned by police that he would be arrested for criminal trespass if he did not stop handing out handbills on an exterior sidewalk of a shopping center. Steffel left the shopping center to avoid arrest and then filed suit requesting declaratory and injunctive relief. He subsequently abandoned his request for injunctive relief on appeal so that only the question of declaratory relief was before the Supreme Court.[180] The parties stipulated that if Steffel had returned and refused upon request to stop handbilling, a warrant would have been sworn out

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reasoned that *Younger* did not apply to prevent the federal court from giving injunctive relief from a "summary extrajudicial process of prejudgment seizure of property." *Id.* at 71 n.3. The state court plaintiff, Firestone Tire and Rubber Co., had obtained a writ of replevin simultaneously with the filing in small claims court of suit on the underlying debt. The Court's ground for distinguishing *Younger* seems clearly inconsistent with *Trainor.* The absence of the state as a party would serve as a basis for distinguishing the two cases. *See* Marshall v. Chase Manhattan Bank (Nat'l Ass'n), 558 F.2d 680, 684 (2d Cir. 1977).

174. Younger v. Harris, 401 U.S. 37, 44 (1971). Justice Blackmun quotes Justice Black's language in his concurring opinion in *Trainor. See* Trainor v. Hernandez, 431 U.S. 434, 448 (1977) (Blackmun, J., concurring).

175. *See, e.g.*, Johnson v. Kelly, 583 F.2d 1242, 1249 (3d Cir. 1978); Diaz v. Stathis, 576 F.2d 9, 11 (1st Cir. 1978); Marshall v. Chase Manhattan Bank (Nat'l Ass'n), 558 F.2d 680, 684 (2d Cir. 1977). *But see* Lamb Enterprises, Inc. v. Kiroff, 1052, 1058-59 (6th Cir. 1977); Louisville Area Inter-Faith Comm. for United Farm Workers v. Nottingham Liquors, Ltd., 542 F.2d 652, 654-55 (6th Cir. 1976).

176. Younger v. Harris, 401 U.S. 37, 41 (1971).

177. 415 U.S. 454 (1974).

178. *Id.* at 462.

179. *Id.* at 456-57.

180. *Id.* at 456.

and he might have been arrested and charged with criminal trespass. The Court found that under these circumstances Steffel need not first expose himself to actual arrest in order to obtain a determination of his first and fourteenth amendment right to protest in this manner.[181] Justice Brennan, speaking for the Court, noted that a "refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity . . . ."[182] He reasoned that when no state proceeding is pending federal intervention does not disrupt the administration of the state criminal justice system, especially when federal relief is only provided through the less abrasive remedy of declaratory judgment.[183]

At this point one would assume that *Younger* applies only if the state prosecution is initiated prior to the filing of the federal complaint. In other words whichever court, state or federal, takes jurisdiction first is the one which controls the subsequent litigation. Slightly more than a year after *Steffel*, however, the Supreme Court stated in *Hicks v. Miranda*[184] that "[n]either *Steffel v. Thompson* . . . nor any other case in this Court has held that for *Younger v. Harris* to apply, the state criminal proceedings must be pending on the day the federal case is filed."[185] In what was an alternative but perhaps the most significant basis for its decision, the Court held that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court, the principles of *Younger v. Harris* should apply in full force."[186] In *Hicks* the plaintiff, a theatre owner, had filed a complaint in federal court seeking an injunction against the enforcement of the California obscenity statute and an injunction ordering the return of all copies of the film "Deep Throat" seized by California law enforcement officials. The plaintiff had sought and been denied a temporary restraining order, and after service of his federal complaint he

181. *See id.* at 459.

182. *Id.* at 462. Justice Blackmun reasoned in *Trainor* that the state's interest is less important for *Younger* purposes if the state has only threatened and not initiated state prosecution as in *Steffel*. Trainor v. Hernandez, 431 U.S. 434, 449 (Blackmun, J., concurring). *See generally* Kanowitz, *Deciding Federal Law Issues in Civil Proceedings: State Versus Federal Trial Courts*, 3 HASTINGS CONST. L.Q. 141 (1976).

183. Steffel v. Thompson, 415 U.S. 452, 463 (1974).

184. 422 U.S. 332 (1975).

185. *Id.* at 349.

186. *Id.* at 349.

was added as a defendant to state criminal proceedings already pending against his employees.

The Court provided no precise definition of "proceedings of substance on the merits" in federal court; but it is clear that if a state prosecution is initiated prior to that point, any federal equitable relief must satisfy *Younger* standards. The mere fact the plaintiff files his federal complaint before the state prosecution is initiated no longer has any significance. To allow such a race to the courthouse to have determinative effect would, in the words of the Court, "trivialize the principles of *Younger v. Harris.*"[187] As a consequence of *Hicks*, state law enforcement officials retain discretion, unhindered by federal equity until "proceedings of substance on the merits" in federal court, to decide whether they wish to prosecute in state court or to allow the case to remain in federal court.[188]

One commentator has suggested that the phrase substantial proceedings on the merits has reference to the judicial investment of the federal court, not to the investment of the parties.[189] Investment by the parties in pretrial discovery, which would not involve the federal court, would therefore not satisfy a requirement of substantial proceedings by the federal court. Generally, dismissal of the federal action after discovery would not disadvantage the parties and would not constitute a waste of limited federal judicial resources.[190] Considering the thrust of the Court's opinion in *Hicks*, it is reasonable to assume that the discretion there given to state officials is not to be divested except for strong reasons.[191] The federal court should be able, however, at least by the time of trial, to assume that the state officials either cannot or will not initiate a

187. *Id.* at 350.

188. *See* Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 480 (1977). The protection provided state law enforcement efforts through application of *Younger* can be waived if the state voluntarily submits to a federal forum. *See id.* at 480.

189. *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 161 (1975). "If the central concern underlying the Court's rule in *Hicks* is the federal court's investment in the case before it, then substantiality alone should be the test." *Id.* at 161 n.62.

190. *See id.* at 161 n.62. Discovery under the federal rules is for the most part accomplished without the assistance of the district judge unless one party refuses to comply.

191. The decision itself does away with the technical matter of which court took jurisdiction first. From the time of *Ex parte Young* there had existed the "curiously illogical situation, that if a state officer succeeds in initiating his criminal proceedings in a state court to enforce an alleged unconstitutional state law, he cannot be enjoined or interfered with by the federal court; but if he can be caught on the immediate verge of initiating such action, he may be so enjoined." Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 375 (1930). *Hicks* put an end to this distinction since the state interest for *Younger* purposes was just as important in the latter situation as in the former. *See* Hicks v. Miranda, 422 U.S. 332, 349 (1975).

state proceeding. The Supreme Court has held that a state may waive the protection it would otherwise have under *Younger*[192] and, in addition, when its failure to take action or to notify the federal court of action contemplated causes the federal court to rely on an assumed choice of the federal forum, the state should be estopped from asserting its *Younger* rights. Read in this fashion, the "substantive proceedings" rule of *Hicks* protects the state's discretion while requiring proper respect for the federal courts.

Except in those cases when the trial on the merits is consolidated with the hearing on a preliminary injunction, neither the court's action on an application for a temporary restraining order nor for a preliminary injunction should amount to substantial proceedings on the merits. A hearing on the application for a preliminary injunction can include admission of evidence that becomes part of the record on trial,[193] but the hearing can also occur very early in the federal proceedings. It would also seem to trivialize *Younger* principles if the race to the federal courthouse was replaced by a race to the hearing on a preliminary injunction. At this point the state officials may not be properly prepared to initiate their state court action and a designation at this early point, without more, as "substantial proceedings" might hinder the wise exercise of their *Hicks* discretion. If this conclusion is sound, the federal plaintiff is not protected by reaching the preliminary injunction hearing, since the state officials would not then be estopped from subsequently bringing a state court action. Therefore, the federal court cannot issue a preliminary injunction that interferes with this choice of the state officials unless *Younger* standards are satisfied. Because the state officials have not waived or been estopped from exercising their *Hicks* discretion, a federal court cannot have power to divest them of that discretion unless *Younger*'s extraordinary circumstances are shown.

Six days after deciding *Hicks,* the Court decided *Doran v. Salem Inn, Inc.*[194] In *Doran* operators of three topless bars in the town of North Hempstead, New York, brought a federal action challenging the constitutionality of a local ordinance making it unlawful to have topless waitresses, barmaids, and entertainers in bars and sought injunctive and declaratory relief against its enforcement. Initially all three complied with the new ordinance; but the day after their complaint was filed one of the three, M & L Restaurant, Inc., (M &

192. Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 480 (1977).
193. *See* FED. R. CIV. P. 65 (a) (2).
194. 422 U.S. 922 (1975).

L) resumed topless dancing at its establishment and state prosecution was immediately instituted against it. The Supreme Court determined that the state prosecution against M & L had begun while the federal proceedings were still in an "embryonic stage and no contested matter had been decided."[195] M & L, therefore, was subject to *Younger* in its attempt to obtain federal injunctive and declaratory relief.[196] The Court went on to hold that the preliminary injunction issued in favor of the other bar owners was not subject to *Younger*.[197] Since no declaratory remedy comparable to a preliminary injunction exists, the Court reasoned that without the availability of preliminary injunctive relief these plaintiffs may suffer "unnecessary and substantial irreparable harm."[198] Since *Younger* did not apply to these plaintiffs, the injunction could be granted upon a showing that in its absence the plaintiffs would suffer irreparable injury and that the plaintiffs were likely to prevail on the merits.[199] The Court indicated that a federal court must also consider the interests of the state since the injunction would prohibit state law enforcement activities; which result "seriously impairs the state's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*."[200] The standard for granting this injunctive relief, however, was identified as the traditional standard.[201] Further, the standard of appellate review for that decision was "simply whether the issuance of the injunction . . . constituted an abuse of discretion."[202] The plaintiffs had alleged that if they were forced to continue compliance with the ordinance and were not given injunctive relief they would suffer substantial loss of business and perhaps bankruptcy. The Court found that "[c]ertainly the latter type of injury sufficiently meets the standards for granting interim relief . . . ."[203] These plaintiffs, unlike M & L, were seeking purely prospective relief in that they did not ask for federal relief from a pending or presently threatened state prosecution. They had not violated the ordinance and were seeking a preliminary federal determination of their constitutional challenge so that pending the out-

195. *Id.* at 929.
196. *Id.* at 929.
197. *Id.* at 930.
198. *Id.* at 931.
199. *Id.* at 931.
200. *Id.* at 931.
201. *Id.* at 931.
202. *Id.* at 931-32.
203. *Id.* at 932.

come of the federal action they could provide topless entertainment in their bars. Unlike M & L, they had not chosen to violate the ordinance but were attempting through a lawful procedure to achieve their purpose.

Like the plaintiff bar owners who were not barred by *Younger*, M & L was also seeking, at least in part, prospective relief, but its complaint was dismissed. At first glance, it would appear that M & L's claim should have been retained so far as it sought an injunction against future prosecution for future actions.[204] While *Hicks* requires dismissal of any claim for injunctive relief from a pending state prosecution and *Samuels* requires dismissal of a claim for declaratory relief, neither case mandates total dismissal as suffered by M & L.[205] The answer evidently lies in the concern over M & L's unlawful behavior. M & L "[h]aving violated the ordinance, rather than awaiting the normal development of its federal lawsuit, . . . cannot now be heard to complain that its constitutional contentions are being resolved in a state court."[206] By its own actions M & L caused the initiation of the state court action and thereby negated the force of the *Steffel* justification for providing a federal forum.[207]

Doran stands for the proposition that when a federal court is asked to grant preliminary injunctive relief to restrain future state prosectutions for the future conduct of the federal plaintiffs, *Younger* does *not* apply. As noted earlier the effect of *Hicks* would be nullified if a federal court could, without satisfying *Younger* standards, issue a preliminary injunction against a threatened state prosecution for past violation of state public law. If the federal plaintiff has not violated state law, state officials theoretically have no power to prosecute him regardless of what the federal courts may do. *Younger* applies, therefore, whenever federal preliminary injunctive relief is sought to protect the federal plaintiff from a pending or future state prosecution for his *past* conduct, but does not apply when that relief is sought for his future conduct. Justice Brennan referred to this distinction in *Steffel v. Thompson:*[208]

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204. The Supreme Court had in early cases decided that the grant of a purely prospective injunction in this situation was within the power of the federal court. *See* Cline v. Frink Dairy Co., 274 U.S. 445, 451-52 (1927); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559, 567-68 (1917).

205. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 166-67 (1975).

206. Doran v. Salem Inn, Inc., 422 U.S. 922, 929 (1975).

207. One commentator argues that by violating the state law prior to a federal adjudication M & L waived its rights to a federal forum. *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 167-68 (1975). This concept would arise because of the interest of both federal and state governments in discouraging violations of law.

208. 415 U.S. 452 (1974).

> We note that, in those cases where injunctive relief has been sought to restrain an imminent, but not yet pending, prosecution *for past conduct*, sufficient injury has not been found to warrant injunctive relief . . . . There is some question, however, whether a showing of irreparable injury might be made in a case where, although no prosecution is pending or impending, an individual demonstrates that he will be required to forgo constitutionally protected activity in order to avoid arrest.[209]

The federal court may proceed with a declaratory judgment action even if the plaintiff has violated state law without meeting the obstacle of *Younger* unless a state prosecution is initiated prior to a point of substantial proceedings on the merits in federal court. The declaratory judgment proceeding in no way frustrates the discretion given state prosecutors by *Hicks* until a judgment is entered, and this judgment should certainly be a point of substantial proceedings on the merits. Unlike M & L in the *Doran* case, a federal plaintiff seeking only declaratory relief under these circumstances would not have a forum for presenting his constitutional challenges.

In addition, a permanent injunction if purely prospective in effect may also be issued under the circumstances of *Wooley v. Maynard*[210] to restrain state law enforcement. In *Wooley*, Mr. Maynard, a Jehovah's Witness, early in 1974 had begun covering up the New Hampshire state motto, "Live Free or Die," which was embossed on his auto license plates. A New Hampshire statute made it a misdemeanor to knowingly obscure the figures or letters on any license plate and the motto consisted of "letters." As a consequence of obscuring the motto, Maynard was subjected to three successive prosecutions within a span of five weeks. He was found guilty in all three cases and was ultimately sentenced to a total of fifteen days in jail, which he served. The Supreme Court found that the threat of repeated, future prosecutions for the exercise of what Maynard believed to be his first amendment rights and the effect of that threat on his ability to carry out the normal tasks of living in a society dependent on the automobile was sufficient to justify permanent injunctive relief.[211] Even though the Court used language that sounded as if "exceptional circumstances" of the *Younger* kind might be necessary, the facts and holding of the case show clearly that *Younger* was not applied.[212] The Court, although not as clearly

209. *Id.* at 463 n.12 (emphasis supplied by the Court).
210. 430 U.S. 705, 713 (1977).
211. *Id.* at 712.
212. *See id.* at 711-12. Allowing federal equitable relief was based on the need to free

as in *Doran*, established the traditional standard for permanent injunctive relief for cases in which no state prosecution was pending. It also found that no state prosecution was pending for *Younger* purposes because Maynard had served his entire sentence from the three convictions and was seeking no federal relief from the effects of those convictions.[213] The relief he sought was purely prospective in that he sought relief from future prosecutions for future conduct he claimed was constitutionally protected.

Under the holdings in *Doran* and *Wooley* one can assume with regard to purely prospective relief that the federal courts possess equitable discretion under the traditional standard to grant injunctive relief. The traditional standard, however, requires the Court to consider the interests of both the federal plaintiff and defendant. In doing so, the Court would ordinarily give greater weight to the interests of the federal defendant if he is a representative of a state. The Supreme Court in *Wooley* may be seen as stating only what through experience would be the case. In other words, generally a federal court will not enjoin the enforcement by a state of its law. This inaction is because the state's interests are especially weighty and not because the court lacks discretion under *Younger* to grant injunctive relief. *Younger* removes this discretion only if the federal proceedings would hinder or interfere with the efforts of state officials to prosecute the federal plaintiff for a past violation of state law.

THE RATIONALE OF *Younger*

There are close parallels between the state interests implicated by criminal prosecutions and those implicated in the civil proceedings given *Younger* protection. First, the state civil proceedings protected in *Huffman, Vail,* and *Trainor* all included representatives of the state.[214] Second, these cases all dealt with federal court interference with the enforcement of a state law against one who had

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the Maynards "from prosecutions for future violations of the same statutes." *Id.* at 711. These were not "prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction" that would justify a finding of bad faith or harassment. Perez v. Ledesma, 401 U.S. 82, 85 (1971). The state officials of New Hampshire were obtaining convictions, and no doubt existed about the guilt of Mr. Maynard. The only question was the constitutionality of the state's statute and the Court, although holding it unconstitutional, did not see it as flagrantly and patently unconstitutional. *See* Wooley v. Maynard, 430 U.S. 705, 714-17 (1977).

213. *Id.* at 708.

214. *See* Trainor v. Hernandez, 431 U.S. 434, 449 (1977); Juidice v. Vail, 430 U.S. 327, 334 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

already violated or disobeyed that law. In *Huffman* the state was seeking to enforce a statute which gave it an exclusive right of action against one alleged to have repeatedly shown "obscene" motion pictures.[215] In *Vail* only the state could enforce contempt procedures against those alleged to have totally failed to comply with orders of the state court.[216] In *Trainor* the underlying suit was one for recovery of public assistance payments made to persons alleged to have fraudently concealed assets to qualify for assistance.[217] Third, as with criminal prosecutions, the state was acting in its sovereign capacity as a direct representative and protector of the public interest in enforcing a law only it could enforce.

These three characteristics would not be present in purely private litigation or in civil litigation in which the defendants were not "violators" of the law. For instance, a state court proceeding in which the state sought to exercise its power of eminent domain would not include the second characteristic.[218] It is certainly arguable that in this case the considerations prompting application of *Younger* are not present since interference by a federal court implicates none of the dangers for the state's ability to regulate its people through law. Although the state is present, it is not enforcing the law in the sense most people understand that language and, therefore, the state court process does not implicate the state's sovereignty in the same sense that the word is used in *Younger*. Justice Blackmun approached this point in a different manner by emphasizing that in *Trainor* the option of the state to proceed either civilly or criminally demonstrated a common underlying state interest.[219] He reasoned that the applicability of *Younger* abstention should not be justified solely on a basis of the kind of remedy sought by the state.[220] Rather, the state must be allowed prosecutorial discretion including the right to opt for a civil rather than a criminal remedy.[221]

The main thrust of *Younger*, therefore, is toward allowing unhindered control by the states over the enforcement of their laws. This control is perceived by the Supreme Court to be a necessary element of sovereignty.[222] A government without this ultimate power over its

215. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

216. *See* Juidice v. Vail, 430 U.S. 327, 335 (1977).

217. *See* Trainor v. Hernandez, 431 U.S. 434, 435 (1977).

218. The federal court could, however, decide that *Pullman* abstention was required. *See* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959).

219. *See* Trainor v. Hernandez, 431 U.S. 434, 449 (1977) (Blackmun, J., concurring).

220. *See id.* at 449-50 (Blackmun, J., concurring).

221. *See id.* at 449-50 (Blackmun, J., concurring).

222. *See* Younger v. Harris, 401 U.S. 37, 53 (1971).

citizenry is more an agency of a higher authority than a sovereign. The Court, however, cannot provide the state courts with a preexisting exclusive jurisdiction to punish violations of state law because prosecutors might choose to not bring suit. A person might then be left in the *Steffel* dilemma of forcing a criminal prosecution by further violation of law or of forgoing constitutional activity,[223] and the Court cannot reasonably encourage either result.

The *Hicks* decision traces a middle path by granting state courts primary jurisdiction over all issues raised by an alleged violation of state law.[224] State jurisdiction, if exercised, ousts the federal court of its secondary jurisdiction;[225] but if not, then the federal court can adjudicate the issues.[226] In this way the Supreme Court has provided protection for state prosecutorial discretion without subjecting the federal plaintiff to the *Steffel* dilemma since a forum will always be available.[227] The choice of forum under *Younger*, however, is given to the state, not to someone who has allegedly violated state law.

To maintain the sovereign authority of the states necessary for carrying out their law enforcement responsibilities, the Supreme Court has established the strong presumption that a state court chosen as the forum by state officials for adjudication of state issues is also an adequate forum for adjudication of all federal issues. Under this presumption the state need only show that the federal plaintiff had the opportunity to assert his federal defenses in state court. If there was no opportunity, then the federal court may provide a forum for those issues since the state court by definition does not provide a forum at all. In *Gerstein v. Pugh*[228] the Supreme Court held that *Younger* did not prevent issuance of a federal court order requiring the provision of a hearing on probable cause to those arrested and charged on information in Florida.[229] The reason for not applying *Younger* was the inability of a prisoner to challenge the legality of pretrial detention in his criminal prosecution.[230] Also, the federal court orders did not prejudice the conduct of the trial on the merits.[231]

223. *See* Steffel v. Thompson, 415 U.S. 452, 463 (1974).

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

225. Younger v. Harris, 401 U.S. 37, 43 (1971); *see* Hicks v. Miranda, 422 U.S. 332, 349 (1975).

226. *See* Steffel v. Thompson, 415 U.S. 452, 462 (1974).

227. *See id.* at 462.

228. 420 U.S. 103 (1975).

229. *See id.* at 108 n.9.

230. *See id.* at 108 n.9.

231. *See id.* at 108 n.9.

Once the opportunity to present federal defenses in state court exists, the presumption of adequacy applies, and a party can escape the primary jurisdiction of the state court only by a clear showing that the particular state tribunal is inadequate.[232] Inadequacy is shown if the state court is clearly biased, is clearly unable to protect the constitutional rights of the defendant against the bad faith enforcement efforts of prosecutorial officials, or is clearly in league with those seeking to deny defendant's constitutional rights.[233] Inadequacy is not shown by disagreement on a constitutional issue between a state and a federal court: this disagreement is only significant when the federal judge can find that reasonable people could not find the challenged state statute constitutional. Further, the federal court cannot even enter upon any such consideration until the state court has had the opportunity to cure any flagrant and patent constitutional defects in state law.

CONCLUDING REMARKS

Younger arises from the assumption that the states must and should have the primary responsibility for controlling society through law. In order to fulfill this responsibility they must have the freedom to control the whole of their law enforcement processes. *Younger* provided freedom from federal court interference with pending state criminal prosecutions. By foreclosing discussion of the substantive issues in federal court, the Court dissolved any discretion the federal courts might have exercised to even temporarily delay state prosecutions. With *Huffman* and *Hicks* the Court fleshed out the *Younger* protection so that the states now enjoy prosecutorial discretion. Should a serious constitutional challenge arise, the Supreme Court can review and thereby control the states' law enforcement process. The shift in federal court authority from the district courts to the Supreme Court substantially reduces the frequency of interference with state prosecutions and thereby reduces irritation between federal and state systems.

Younger is characterized by its relative inflexibility. Exceptions are allowed only for certain extraordinary cases that would seemingly result only from the breakdown of a state's legal institutions. Absolutes, however, are and should be rare in the law so I can foresee more flexibility once the Court becomes more confident

232. *See* Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

233. See notes 114-119 *supra* and accompanying text.

with its new doctrine. This flexibility may well occur whenever the federal litigant can show he did not knowingly violate state law. The *Doran* case evidences the sympathy of the Court for those who come into federal court with clean hands. Persons who lawfully seek an adjudication of their constitutional rights should not be denied their choice of a federal forum. To fulfill the promise of *Doran* the Court should, however, also reconsider its restrictive standing requirements so that these do not, in effect, promote unlawful behavior even as a matter of strategy.

One can legitimately say that the heart of the *Younger* doctrine is the fundamental need for caution on the part of federal courts in their dealings with state law enforcement. Less fundamental, however, is the perceived need for absolute protection for state processes. This part of *Younger* more likely arises from the mood of this decade in the same way *Dombrowski* was a product of the sixties.