

# Doctrine of *Younger v. Harris*: Deference in Search of a Rationale

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# THE DOCTRINE OF YOUNGER v. HARRIS: DEFERENCE IN SEARCH OF A RATIONALE

Martin H. Redish†

## INTRODUCTION

*Younger v. Harris*<sup>1</sup> and its companion cases<sup>2</sup> in most instances prohibit a federal court from enjoining an ongoing state criminal proceeding.<sup>3</sup> In the last seven years, the Court has substantially expanded this doctrine's scope,<sup>4</sup> and commentators have expounded endlessly on its implications.<sup>5</sup> Despite these efforts, however, there remains confusion over the theoretical foundations of *Younger* deference. In deciding *Younger*, the Supreme Court did make it clear that it was invoking a type of federalistic deference to state institutions.<sup>6</sup> Indeed, the author of *Younger*, Justice Black,

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<sup>1</sup> 401 U.S. 37 (1971). In light of the enormous amount of scholarship already produced on *Younger* (see sources cited in note 5 *infra*), this Article will not detail either the facts of *Younger* or the historical development of the *Younger* doctrine. Particularly good discussions of these matters are: Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591 (1975); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1274-82 (1977) [hereinafter cited as *Developments in the Law*].

<sup>2</sup> *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

<sup>3</sup> The Court has recently extended the doctrine to civil cases, at least where the state is a party to the action. *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). See notes 80-81, 93-94, and accompanying text *infra*.

<sup>4</sup> See, e.g., *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Steffel v. Thompson*, 415 U.S. 452 (1974).

<sup>5</sup> See, e.g., Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 27 (1976); Geltner, *Some Thoughts on the Limiting of Younger v. Harris*, 32 OHIO ST. L.J. 744 (1971); Kennedy & Schoonover, *Federal Declaratory and Injunctive Relief Under the Burger Court*, 26 SW. L.J. 282 (1972); Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324 (1972); B. Wechsler, *Federal Courts, State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740 (1974); Whitten, *supra* note 1; Comment, *Post-Younger Excesses in the Doctrine of Equitable Restraint: A Critical Analysis*, 1976 DUKE L.J. 523; *Developments in the Law, supra* note 1, at 1274-1330.

<sup>6</sup> The *Younger* Court also based its decision on grounds of equity (401 U.S. at 43-44), presumably independent of federalism concerns. The Court cited the traditional rule "that courts of equity . . . should not act to restrain a criminal prosecution, when the moving

described the analytical basis for federal court restraint—in a manner reminiscent of 1940's radio serial titles—as “Our Federalism.”<sup>7</sup> In Justice Black's words, the concept envisions

a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.<sup>8</sup>

At another point, Justice Black explained the basis for “comity” as

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.<sup>9</sup>

party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.” *Id.* Whether the Court intended the equity branch of the *Younger* decision to play a major role in the doctrine's rationale is unclear. Recently, however, the Court has relegated this concern to the background. For example, in *Trainor v. Hernandez*, 431 U.S. 434 (1977), the Court applied the *Younger* doctrine, even though the case involved no criminal element.

One commentator has recognized the inappropriateness of the Court's reliance on equitable principles:

The various restrictions upon injunctive relief had their origin in the early English chancery practice, when equity and law were considered to be wholly separate systems. . . . [The] widespread consolidation of law and equity courts raises the question whether the functions once served by the ancient chancery principles controlling the issuance of injunctions are still served by the retention of such principles in a merged system.

. . . .  
 . . . [T]he rule that a criminal prosecution will not be enjoined in the absence of a showing of “irreparable injury” is demonstrably unsound in a merged system, at least in so far as it represents an absolute principle restricting the availability of injunctive relief. . . . [W]hen a single court is competent to administer both legal and equitable remedies, it makes little sense to retain a remedial standard that was originally designed to confine a separate court of equity within its proper sphere.

Whitten, *supra* note 1, at 611-13. As Professor Fiss has suggested of a precursor to *Younger* (*Douglas v. City of Jeannette*, 319 U.S. 157 (1943)), *Younger* might “be faulted for its use of doctrines of equity—doctrines forged in the battles of English Chancery—to further views of federalism, a political principle central to American government.” Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1107 (1977).

If the federalism elements of the *Younger* doctrine were to fall, equitable principles alone could probably not continue to sustain it. Therefore this Article proceeds on the assumption that interests of federalism constituted the driving force behind adoption of the *Younger* doctrine.

<sup>7</sup> 401 U.S. at 44.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Thus a fear of unduly impinging upon "state interests" supports, at least in large part, *Younger* and its progeny.

The Court, however, has never satisfactorily delimited the range of state "interests" or state institutions constituting the intended beneficiaries of this considerable federalistic deference. The Court has, at times, specifically considered the nature of state interests deserving protection.<sup>10</sup> But many of these statements, as well as many of the Court's actions in developing and applying the *Younger* doctrine, appear internally inconsistent or contradictory.<sup>11</sup> More important, detailed exposition of the nature and scope of the relevant state interests has been virtually nonexistent. The Court's words rarely go beyond the ambiguous rhetoric of *Younger* itself or the superficial and conclusory assertion that failure to invoke *Younger* deference will jeopardize the viability of a certain state institution or state interest.<sup>12</sup> Although commentators have attempted to elaborate on the proper rationale for *Younger* deference,<sup>13</sup> none has provided a totally satisfying analysis.

A broad deference to state institutions without a firm theoretical foundation delimiting its scope unquestionably does not serve the interests of federalism. Moreover, clarification of the appropriate theoretical rationales for *Younger* deference could drastically alter the current state of the doctrine, and perhaps lead to its substantial rejection. With these considerations in mind, this Article explores the alternative rationales for the deference given to states under the *Younger* doctrine.

## I

### THE BASIS FOR *Younger* DEFERENCE: ALTERNATIVE RATIONALES

In developing the *Younger* doctrine, the Court has suggested four conceivable bases for limiting the injunctive powers of federal courts: (1) the desire to avoid slighting state courts by questioning their competence or willingness to enforce federal constitutional

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<sup>10</sup> See notes 32-44, 58-63, and accompanying text *infra*.

<sup>11</sup> See notes 66-81 and accompanying text *infra*.

<sup>12</sup> The Court's decision last term in *Trainor v. Hernandez*, 431 U.S. 434 (1977), the most recent expansion of *Younger*, epitomizes this problem. In *Trainor*, neither the majority nor the dissent adequately addressed the theoretical implications of their positions. See notes 80-81, 91, and accompanying text *infra*.

<sup>13</sup> See, e.g., Bartels, *supra* note 5, at 62-65; Maraist, *supra* note 5, at 1333-35, 1338-40; Note, *Younger Grows Older: Equitable Abstention in Civil Proceedings*, 50 N.Y.U. L. REV. 870, 874-87 (1975).

rights; (2) the need to prevent interference with the orderly functioning of state judicial processes; (3) the need to avoid federal interference with substantive state legislative policies and goals; and (4) the desire to preserve the discretion of state executive officers in general and state prosecutors in particular.<sup>14</sup> The multifaceted nature of the Court's rationale for its federalistic deference does not necessarily imply either confusion or contradiction in the *Younger* line of decisions. An examination of the doctrine's development, however, demonstrates that the Court's holdings and supporting rationales are often inconsistent or internally flawed.<sup>15</sup> Before undertaking such an examination, we must explore how the Court has, at various stages of the *Younger* doctrine's development, manifested in either language or action its reliance on the four alternative bases of deference.

#### A. *Avoiding Affront to the State Courts*

"In the scheme of the Constitution," wrote Professor Henry Hart, state courts "are the primary guarantors of constitutional

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<sup>14</sup> In addition, the *Younger* doctrine may be favored by "those eager to reduce the activities of the federal courts. This approach stresses either the beleaguered, docket-cluttered posture of the federal judiciary today or the relatively low priority—from some unarticulated national viewpoint—of some of the claims raised in *Younger*-type cases." *Developments in the Law, supra* note 1, at 1285 (citing H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 87-91 (1973)). It seems the height of irony, however, to attempt to reduce the backlog in the federal courts by largely removing their authority to hear federal civil rights actions. According to the Supreme Court, one of the central reasons for congressional adoption of the precursor to § 1983 was to interpose the federal courts as a safeguard against state interference with an individual's constitutional rights. *See Preiser v. Rodriguez*, 411 U.S. 475, 513-14 (1973) (dissenting opinion, Brennan, J.); *Mitchum v. Foster*, 407 U.S. 225, 238-42 (1972). *Cf. Steffel v. Thompson*, 415 U.S. 452, 473 (1974) (referring to "the paramount role Congress has assigned to the federal courts to protect constitutional rights"). To reduce overcrowding, it would be more logical to cut back on the diversity jurisdiction of federal courts, where expertise in the development of federal law is wholly irrelevant. *Cf. Shapiro, Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 321-24 (1977) (increased burden of overcrowding on federal courts casts doubt on need for uniform federal diversity jurisdiction).

<sup>15</sup> Professor Fiss has suggested that "at the heart of . . . the progeny of 'Our Federalism' . . . is more than a concern that federal courts should not interfere in state agencies." Fiss, *supra* note 6, at 1159. Professor Fiss speculates "that the overarching spirit of the Burger Court is a hostility toward the activism of judges, not just federal judges. 'Federalism' is but one handle available to the Supreme Court for curbing some of the more ambitious—more idealistic—projects of its own judges." *Id.* at 1160 (footnote omitted). If the Court's doctrine of "Our Federalism" is simply a disguise for the desire to limit judicial power to protect civil liberties, any analysis that takes the Court at its word might be guilty of the grossest naivete. But an analysis that successfully refutes the Court's asserted rationale may at least possess the virtue of exposing the Court's unarticulated rationale.

rights, and in many cases they may be the ultimate ones."<sup>16</sup> The framers specifically declined to require creation of lower federal courts because of the availability of state courts to enforce federal law.<sup>17</sup> Indeed, not until 1875 did Congress provide lower federal courts with a general power to hear cases arising under federal law.<sup>18</sup> Even after establishment of general federal jurisdiction to hear federal cases, concurrent jurisdiction over such cases has, in the Supreme Court's words, "been a common phenomenon."<sup>19</sup> Exclusive federal jurisdiction—either express or implied—is the exception rather than the rule.<sup>20</sup> Moreover, the Supremacy Clause<sup>21</sup> binds state courts to apply relevant federal law. Therefore, state courts determining issues of federal law effectively sit as "federalized" courts, with the same power and responsibility as federal courts to enforce constitutional principles. Thus, federal injunctions of on-going state criminal proceedings could be challenged as aspersions on the ability of state courts to meet the obligations imposed upon them by the Constitution.

The Court often refers to this principle in invoking federal judicial deference. In *Douglas v. City of Jeannette*,<sup>22</sup> an early precursor of *Younger*, Chief Justice Stone noted that "lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the [state] criminal case as in a suit for an injunction."<sup>23</sup> In *Dombrowski v. Pfister*,<sup>24</sup> a 1965 decision considered by many to be a rejection of the deference recognized in *Douglas*,<sup>25</sup> dissenting Justice Harlan criticized the majority for making "the unarticulated assumption that state courts will not be as prone as federal courts to vindicate constitutional rights

<sup>16</sup> Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

<sup>17</sup> See Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 52-56 (1975).

<sup>18</sup> Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (repealed by Judicial Code Act of 1911, ch. 231, § 297, 36 Stat. 1087). Congress first granted general federal-question jurisdiction in 1801 (Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89), but repealed it soon thereafter (Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132). C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 5 (3d ed. 1976).

<sup>19</sup> *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962).

<sup>20</sup> See Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 313-14 (1976).

<sup>21</sup> U.S. CONST. art. VI, cl. 2.

<sup>22</sup> 319 U.S. 157 (1943).

<sup>23</sup> *Id.* at 163.

<sup>24</sup> 380 U.S. 479 (1965).

<sup>25</sup> See, e.g., Fiss, *supra* note 6.

promptly and effectively."<sup>26</sup>

Since *Younger*, the Court has emphasized the need to avoid the "unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the Constitution of the United States.'"<sup>27</sup> Citing this concern, the Court has held that the *Younger* doctrine does not bar declaratory or preliminary injunctive relief against a future, as opposed to a pending, state prosecution.<sup>28</sup> According to the Court, such relief does not impugn the abilities of state judges, since "the relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.'"<sup>29</sup>

### B. *Avoiding Interference with Substantive State Legislative Goals*

Less obvious in the *Younger* line of cases than the desire to avoid impugning the ability of state courts is the Court's interest in avoiding federal interference with substantive state legislative goals and policies. Nevertheless, the Court in *Younger* arguably relied on this basis for deference when it found that comity represented the desire of the federal government "not unduly [to] interfere with the legitimate activities of the States."<sup>30</sup> The Court's statement was markedly broad and in no way limited to the judicial activities of the states.<sup>31</sup>

Stronger support for this rationale developed in *Huffman v. Pursue, Ltd.*,<sup>32</sup> a 1975 decision in which the Court held *Younger* applicable to a nuisance proceeding brought by the state.<sup>33</sup> In finding *Younger's* applicability not limited to purely criminal cases, Jus-

<sup>26</sup> 380 U.S. at 499 (dissenting opinion, Harlan, J.). Justice Harlan added that "[s]uch an assumption should not be indulged in the absence of a showing that such is apt to be so in a given case." *Id.*

<sup>27</sup> *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)). See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975).

<sup>28</sup> *E.g.*, *Steffel v. Thompson*, 415 U.S. 452 (1974) (declaratory relief); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (preliminary injunctive relief). See notes 71-75 *infra*.

<sup>29</sup> *Steffel v. Thompson*, 415 U.S. at 462 (quoting *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 (1972)).

<sup>30</sup> 401 U.S. at 44. See notes 8-9 and accompanying text *supra*.

<sup>31</sup> The Court in *Younger* also spoke of the state's interest in "carrying out the important and necessary task of enforcing [its] laws against socially harmful conduct." 401 U.S. at 51-52.

<sup>32</sup> 420 U.S. 592 (1975).

<sup>33</sup> In *Huffman*, state officials had filed an action under Ohio's public nuisance statute against the operator of a theater showing pornographic films. *Id.* at 595.

tice Rehnquist noted that "[t]he seriousness of federal judicial interference with state civil functions has long been recognized by this Court."<sup>34</sup> He cited the statement of Justice Holmes "that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."<sup>35</sup> Justice Rehnquist reasoned that the same type of deference applied in cases involving judicial, rather than executive, action.<sup>36</sup> The Court emphasized that "while in this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws."<sup>37</sup>

The clearest manifestation of this form of *Younger* deference came last term in *Trainor v. Hernandez*.<sup>38</sup> In *Trainor*, the Illinois Department of Public Aid brought a civil action in state court to recoup welfare payments allegedly obtained through fraud. The Department obtained a writ of attachment pursuant to the Illinois Attachment Act<sup>39</sup> against the defendants' assets without notice or hearing. The Supreme Court held that a federal district court lacked authority under *Younger* to enjoin the attachment.

Noting that *Younger* relied "on cases that declared that courts of equity should give 'scrupulous regard [to] the rightful independence of state governments,'" <sup>40</sup> the *Trainor* Court emphasized that while the state proceeding was wholly civil, "the fact remains that the State was a party to the suit in its role of administering its public-assistance programs."<sup>41</sup> Furthermore, "[b]oth the suit and the accompanying writ of attachment were brought to vindicate important state policies such as safeguarding the fiscal integrity of those programs."<sup>42</sup> The Court found both *Younger* and *Huffman*

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<sup>34</sup> *Id.* at 603.

<sup>35</sup> *Id.* (quoting *Massachusetts State Grange v. Benton*, 272 U.S. 525, 527 (1926)).

<sup>36</sup> *Id.* at 604.

<sup>37</sup> *Id.* at 604-05. Justice Rehnquist "apparently saw in *Younger* a broad policy of deference to important state functions that applies whenever state officials have instituted proceedings in state court." *Developments in the Law*, *supra* note 1, at 1308.

<sup>38</sup> 431 U.S. 434 (1977). *Trainor* represents the furthest extension to date of *Younger* deference. In *Huffman*, the Court abandoned rigid adherence to the limitation of *Younger* to criminal cases, but emphasized the quasi-criminal nature of the nuisance statute. 420 U.S. at 604-05. *Trainor* contains no such quasi-criminal element.

<sup>39</sup> ILL. REV. STAT. ch. 11, §§ 1-44 (1975 & Supp. 1976).

<sup>40</sup> 431 U.S. at 441.

<sup>41</sup> *Id.* at 444.

<sup>42</sup> *Id.*

broad enough to apply to a civil proceeding "brought by the State in its sovereign capacity."<sup>43</sup> Most significantly, the Court noted that "in the case before us the state statute was invalidated and a federal injunction prohibited state officers from using or enforcing the attachment statute for any purpose. The eviscerating impact on many state enforcement actions is readily apparent."<sup>44</sup>

C. *Avoiding Interference with the Exercise of Discretion by State Executive Officers*

In *Younger* the Court expressed concern that issuance of federal declaratory or injunctive relief would impede the proper performance of a state executive officer's duties: "Ordinarily, there should be no interference with [state] officers [empowered to institute criminal actions]; primarily, they are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done."<sup>45</sup>

In *Rizzo v. Goode*,<sup>46</sup> the most controversial extension of *Younger*, the Court expressed even broader concern for preserving state executive discretion. The district court in *Rizzo* found that the Philadelphia Police had engaged in a pattern of unconstitutional conduct and that the police disciplinary system had failed to deter such conduct.<sup>47</sup> As a result, the court granted wide-ranging equitable relief, revising the structure of the police disciplinary system.<sup>48</sup> In reversing, the Supreme Court relied on three independent bases: (1) the named plaintiffs lacked standing to bring the action;<sup>49</sup> (2) the district court incorrectly concluded that the failure of police superiors to rectify the alleged unconstitutional conduct constituted a civil rights violation;<sup>50</sup> and (3) "important considerations of federalism"<sup>51</sup> weighed against the relief granted below. In discussing the third basis for its decision, the Court invoked *Younger* principles. Noting that "the principles of equity, comity, and federalism"<sup>52</sup> had been held to restrain a federal court from enjoin-

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 445-46.

<sup>45</sup> 401 U.S. at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926)).

<sup>46</sup> 423 U.S. 362 (1976).

<sup>47</sup> *COPPAR v. Rizzo*, 357 F. Supp. 1289, 1318 (E.D. Pa. 1973), *aff'd sub nom. Rizzo v. Goode*, 506 F.2d 542 (3d Cir. 1974), *rev'd*, 423 U.S. 362 (1976).

<sup>48</sup> *Id.* at 1322.

<sup>49</sup> 423 U.S. at 371-73.

<sup>50</sup> *Id.* at 373-77.

<sup>51</sup> *Id.* at 378.

<sup>52</sup> *Id.* at 379 (quoting *Mitchum v. Foster*, 407 U.S. 225, 243 (1972)).

ing on-going state proceedings, the Court concluded: "We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as petitioners here."<sup>53</sup>

The fear of insulting state courts played no role in *Rizzo*; there was no relevant pending or prospective state judicial action. Rather, the desire to avoid federal judicial interference with the discretionary operation of state and local executive agents prompted application of the *Younger* doctrine. Such deference presumably would also extend to such institutions as state prisons, schools, and mental hospitals.<sup>54</sup>

In these situations the basis for federal judicial deference derives as much from a concern for preventing interference with the exercise of executive expertise as from principles of federalism. In addition to relying on the *Younger* line of cases, the *Rizzo* Court found support in "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'"<sup>55</sup> The federal judiciary has long expressed this respect for governmental expertise in its review of coordinate federal branches.<sup>56</sup> Perhaps the *Rizzo* Court believed that the presence of both federalism and expertise factors reinforced each other in mandating a hands-off approach.<sup>57</sup>

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<sup>53</sup> *Id.* at 380.

<sup>54</sup> Courts have traditionally applied what was known as the "hands-off" doctrine in reviewing the activities of these institutions. The result was virtually equivalent to a broad reading of *Rizzo*; in the context of prisons, it "precludes an examination of even the allegations of a complaint and thus prevents a determination of whether the prisoner has presented a claim warranting relief." Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 507 (1963). Recently, however, the Supreme Court has, in varying degrees, reviewed the constitutionality of the activities of state and local public institutions. See, e.g., *Procunier v. Martinez*, 416 U.S. 396 (1974) (prisons); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (schools).

<sup>55</sup> 423 U.S. at 378-79 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)).

<sup>56</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

<sup>57</sup> The Court in *Rizzo* failed to discuss the future role of state courts in the review of state executive discretion. It is well established that state courts have concurrent jurisdiction with federal courts in § 1983 actions. See, e.g., *Long v. District of Columbia*, 469 F.2d 927, 937 (D.C. Cir. 1972) (Wilkey, J.) (supplemental opinion denying rehearing). Furthermore, a grant of concurrent jurisdiction may generally be presumed where a federal statute does not expressly provide otherwise. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962); *Claffin v. Houseman*, 93 U.S. 130, 136 (1876). The Court did not make clear whether the judicial deference required of federal courts applied as well to the state judiciary. Clearly the future development of the *Rizzo* standard will depend upon whether

D. *Avoiding Interference with the Orderly Operation of State Judicial Processes*

The fourth suggested basis for *Younger* deference is essentially a combination of the previous three. Reluctance to interfere with the orderly functioning of state judicial processes may emanate from a desire not to impede enforcement of the state's laws or substantive policies.<sup>58</sup> It may also reflect a desire neither to interfere with the discretion of state executive officers nor to disparage the competence of state judges.<sup>59</sup>

In another sense, the desire to avoid disrupting state judicial processes can be viewed as an independent basis for federal deference. The state retains an independent interest in not having its judicial process grind to a halt while the federal courts decide constitutional questions. States may also legitimately seek to avoid conducting duplicative proceedings resulting from simultaneous litigation of the same case in state and federal courts.<sup>60</sup> The Court recognized both interests in two decisions handed down last term, *Judice v. Vail*<sup>61</sup> and *Trainor v. Hernandez*.<sup>62</sup> In *Judice*, the Court applied *Younger* to restrict federal judicial power to enjoin a state court's use of its civil contempt power. Speaking for the Court, Justice Rehnquist stated:

A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest. . . . The contempt power lies at the core of the administration of a State's judicial system . . . .<sup>63</sup>

In *Trainor*, the Court emphasized that allowing a federal court to enjoin the state's attachment of the defendant's assets would subject

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its holding rested primarily on federalism concerns or stemmed from the desire to accommodate executive expertise regardless of the forum.

<sup>58</sup> See *Developments in the Law*, *supra* note 1, at 1283 (referring to "independent, a priori value in permitting the smooth and unimpeded operation of the collection of procedures that make up the normal course of criminal justice"). See also Note, *supra* note 13, at 878 (discussing "the state's interests in the integrity and continuity of its judicial processes").

<sup>59</sup> Recently, the Court has recognized that some of these same interests dictate federal judicial restraint in certain noncriminal cases as well. See *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977).

<sup>60</sup> See, e.g., *id.* at 445.

<sup>61</sup> 430 U.S. 327 (1977).

<sup>62</sup> 431 U.S. 434 (1977).

<sup>63</sup> 430 U.S. at 335. The Court also noted that federal judicial interference might reflect negatively on the abilities of state judges. *Id.* at 336.

the state to the burdens of litigating simultaneously in state and federal courts.<sup>64</sup> Principles of federalism, the Court held, dictated that the state judicial process progress to its conclusion free from federal interference.<sup>65</sup>

## II

### THE ALTERNATIVE BASES FOR *Younger* DEFERENCE: A STUDY IN CONFUSION AND CONTRADICTION

The existence of more than one theoretical rationale for *Younger* deference does not necessarily give rise to confusion or inconsistency; each rationale may simply supplement the other three. On numerous occasions, however, the Court's actions, seemingly logical outgrowths of one basis for deference, have collided with one or more of the alternative rationales.

The earliest inconsistency appeared in *Younger* itself, where the Court recognized that the threat of extraordinary irreparable injury could justify departure from the doctrine of federal judicial restraint.<sup>66</sup> The Court recognized two situations in which such a threat would permit a federal court to enjoin an on-going state criminal proceeding: (1) where the prosecution is brought in bad faith or designed to harass the defendant;<sup>67</sup> and (2) where the statute under which the prosecution is brought 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."<sup>68</sup> The first of the two represents a limitation on deference to state prosecutors: Although a prosecutor may have discretion to enforce the state's criminal laws as he or she deems fit, the prosecutor abuses that discretion when no realistic hope of conviction exists and prosecution amounts to harassment of the defendant. The second situation constitutes an exception to deference to substantive legislative goals: The state lacks discretion to attain goals that are

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<sup>64</sup> 431 U.S. at 445.

<sup>65</sup> *Id.* at 446.

<sup>66</sup> 401 U.S. at 46. The Court noted that, "in view of the fundamental policy against federal interference with state criminal prosecutions, even irreparable injury is insufficient unless it is 'both great and immediate.'" *Id.* (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)).

<sup>67</sup> *See id.* at 49, 53-54. The Court found that the appellee had "failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." *Id.* at 54.

<sup>68</sup> *Id.* at 53-54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)).

“flagrantly and patently” unconstitutional. Both of these exceptions, however, subvert another of the four justifications for deference: the reluctance to impugn the abilities or motives of state courts. If a significant basis for federal judicial restraint is the traditional competence of state courts to enforce constitutional rights, state courts should be equally competent to recognize and dismiss prosecutions brought in bad faith.<sup>69</sup> Similarly, state courts should be able to recognize the invalidity of the state law when the challenged statute is flagrantly unconstitutional,<sup>70</sup> if in no other circumstance.

Examination of the Court's decisions in *Steffel v. Thompson*<sup>71</sup> and *Doran v. Salem Inn, Inc.*<sup>72</sup> reveals further inconsistencies among proposed rationales for *Younger* deference. Reasoning that the principles of *Younger* have little applicability in the absence of an on-going judicial proceeding, these two decisions authorized declaratory and preliminary injunctive relief,<sup>73</sup> respectively, against

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<sup>69</sup> It has been argued that “[s]ince the harm [lies] in the fact of a bad-faith prosecution rather than its outcome, a criminal defense [is] an inadequate remedy.” Fiss, *supra* note 6, at 1114. However, the relevance of the prosecutor's motive to the adequacy of the criminal-defense remedy is difficult to understand. In certain cases, the very fact of prosecution, rather than the ultimate conviction, gives rise to a first amendment violation, because the indictment itself may unduly chill the exercise of the right of free expression. But the motivation of the prosecutor is logically irrelevant in determining the existence of the chilling effect. Even a good-faith prosecution may result in a chill if the prosecutor is overzealous in the performance of his duties. Conversely, where the defendant did not contemplate a plan of continuous conduct, only the ultimate conviction might infringe first amendment rights, even if the prosecution is instigated in bad faith.

<sup>70</sup> While the Court in *Younger* recognized the existence of these exceptions, subsequent decisions have generally given them an extremely narrow construction. For post-*Younger* interpretations of the bad-faith exception, see *Johnson v. McNary*, 414 F. Supp. 684 (E.D. Miss. 1975); *Luongo v. Wenzel*, 404 F. Supp. 874 (E.D.N.Y. 1975); *Stewart v. Dameron*, 345 F. Supp. 1086 (M.D. La. 1972). *Cf.* Fiss, *supra* note 6, at 1115 (referring to “the enormous evidentiary difficulty faced by a litigant in proving” bad faith).

Last term, in *Trainor v. Hernandez*, 431 U.S. 434 (1977), the Court substantially undermined the “patently unconstitutional” exception. *See id.* at 463 (dissenting opinion, Stevens, J.).

<sup>71</sup> 415 U.S. 452 (1974).

<sup>72</sup> 422 U.S. 922 (1975).

<sup>73</sup> *Doran* is limited by its facts to preliminary injunctive relief. The Court has yet to determine whether permanent as well as preliminary injunctive relief may be issued against a threatened state prosecution. However, Justice Rehnquist, speaking for the Court in *Doran*, apparently drew a distinction between the invasion of state interests caused by permanent injunctive relief on the one hand and declaratory relief on the other:

At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary. But prior to final judgment there is no established declaratory remedy comparable to a preliminary injunction; unless preliminary relief is available upon a proper showing, plaintiffs in some situations may suffer unnecessary and substantial irreparable harm.

future criminal prosecutions, even absent one of the *Younger* exceptions. In *Steffel* the Court reasoned that the "principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding,'"<sup>74</sup> since interference with a threatened prosecution would not "result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention . . . be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles."<sup>75</sup>

The reasoning of *Steffel*, however, clashes with two possible bases for *Younger* deference: the desire to avoid federal judicial interference with state prosecutorial discretion and the fear of impeding accomplishment of substantive state legislative goals. Empowering federal courts to issue declaratory or injunctive relief against a planned prosecution offends prosecutorial discretion to the same extent as permitting federal injunctions against on-going prosecutions;<sup>76</sup> in both instances, a federal court tells the prosecutor "when and how"<sup>77</sup>—and indeed if—he is to bring a prosecution. Moreover, *Steffel* disregards the desire, often expressed in the *Younger* line of cases,<sup>78</sup> to reduce federal judicial interference with the achievement of state substantive policies. It is irrelevant whether accomplishment of these policies is undermined by halting a prosecution about to be brought or one that is already in motion.

The majority and dissenting opinions in both *Huffman* and *Trainor* have led to further confusion over the role played in *Younger* by the desire to avoid affronting state courts. Both cases

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*Id.* at 931. This distinction is somewhat puzzling, in light of the Court's earlier statement in *Samuels v. Mackell*, 401 U.S. 66 (1971), that "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid." *Id.* at 72.

<sup>74</sup> 415 U.S. at 462 (quoting *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 (1972)).

<sup>75</sup> *Id.*

<sup>76</sup> Justice Stewart has suggested that the Court's decision in *Hicks v. Miranda*, 422 U.S. 332 (1975), "trivializes" the *Steffel* doctrine. *Id.* at 353 (dissenting opinion, Stewart, J.). In *Hicks* the Court held that, in a declaratory action, if a state prosecution is filed before "proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force." *Id.* at 349. *Hicks* did undermine the value of *Steffel* to federal plaintiffs, since a state prosecutor may now respond to a federal declaratory action with a state-court indictment. However, *Doran* allows plaintiffs in certain federal declaratory actions to obtain a temporary restraining order, thus preventing the state prosecutor from avoiding the federal action.

<sup>77</sup> As the Court stated in *Fenner v. Boykin*, 271 U.S. 240 (1926), and reaffirmed in *Younger* (401 U.S. at 45), state prosecutors "are charged with the duty of prosecuting offenders against the laws of the State and must decide when and how this is to be done." 271 U.S. at 243-44.

<sup>78</sup> See notes 30-44 and accompanying text *supra*.

concerned the degree to which *Younger* should apply to non-criminal cases. If, as Justice Brennan suggested in *Steffel*, the applicability of *Younger* is to turn primarily on the degree of insult to the state judiciary resulting from federal interference with the conduct of state cases,<sup>79</sup> logic would dictate that whether the state action sought to be restrained was criminal in nature is irrelevant.<sup>80</sup> Even if the action were civil, restraint of the state-court action by a federal court would insult the state court by questioning its competence to decide the issues involved. Yet in both *Huffman* and *Trainor*, Justice Brennan, the author of *Steffel*, vigorously dissented from the extension of *Younger* beyond the narrow confines of criminal cases.<sup>81</sup> The majorities in *Huffman* and *Trainor* did not counter the arguments of the dissent by invoking the simple logic described above. While relying partially upon the "insult to state courts" rationale,<sup>82</sup> the majority in neither case limited the theory of decision to that basis of deference. Instead, the Court emphasized the strong substantive state legislative interest and the state's presence as a party to the litigation.<sup>83</sup> The decisions thus leave open the issue of whether *Younger* deference will be applied to a purely private civil case. Yet if, as the Court intimated in *Steffel*, the prime factor favoring application of *Younger* deference is the desire to avoid affronting state courts, the presence of strong state substantive interests in a case would seem to have little relevance.

We are thus left with a contradiction. *Steffel* implies that *Younger* deference will not apply even if the result is interference

<sup>79</sup> 415 U.S. at 462.

<sup>80</sup> One commentator has suggested that

a private civil proceeding would appear to pose fewer problems [of affronting state courts than a criminal proceeding]. It generally is more freewheeling in structure and uncertain in scope; as a result, especially in the period shortly after the filing of the complaint, it is unlikely that a federal decision on an issue will have the directly intrusive quality present in the paradigm fact situation.

*Developments in the Law, supra* note I, at 1313 n.228. This analysis confuses two subtly but significantly different bases for *Younger* deference: the desire to avoid insulting state courts and the desire to avoid interference with the smooth functioning of the state judicial process. While purporting to deal with the former, the statement is directed more towards the latter. The fact that a state civil proceeding is "generally . . . more freewheeling in structure and uncertain in scope" than a criminal proceeding is irrelevant in determining whether federal interference insults the abilities of state courts. Federal relief in a state civil action does not insult the abilities of state judges any less than similar relief in a state criminal prosecution; in both cases, the availability of federal relief might imply that state judges are unwilling or unable to interpret and protect federal rights.

<sup>81</sup> See *Huffman v. Pursue, Ltd.*, 420 U.S. at 613-18; *Trainor v. Hernandez*, 431 U.S. at 455-56.

<sup>82</sup> See 420 U.S. at 604; 431 U.S. at 443-44.

<sup>83</sup> See 420 U.S. at 604-05; 431 U.S. at 444.

with the achievement of state legislative goals, as long as federal judicial action in no way questions the competence of state courts. Yet both the majority and dissenting opinions in *Trainor* intimate that insult to the state judiciary, absent interference with the achievement of state legislative goals, is an insufficient basis for *Younger* deference. This state of theoretical confusion surrounding the *Younger* doctrine necessitates a broad reexamination of the four asserted rationales for *Younger* deference, in an attempt to determine which, if any, justify the wide-ranging federal deference mandated by *Younger* and its progeny.

### III

#### THE ALTERNATIVE BASES FOR *Younger* DEFERENCE: A SLIDING SCALE CRITIQUE AND A SUGGESTED REVISION

None of the four conceivable bases for the *Younger* doctrine clearly stands out as the definitive justification for federal judicial deference. Each is subject to serious criticism, yet certain of the asserted justifications are more compelling in their logic than others. The four justifications effectively break down into two sub-groups: two virtually without merit and two deserving of more careful analysis.

#### A. *Deference to Substantive State Goals and Executive Discretion: A Matter of Definitional Confusion*

The desire to avoid interference with substantive legislative goals and the desire to defer to the discretion of state executive officers should play no role in delimiting the scope of *Younger* deference. This is not to say that these interests should play no role in federal judicial decisionmaking. They are, however, functionally irrelevant to the application of *Younger* deference.

*Younger* deference might appropriately be labeled "procedural" in nature. Except for the comparatively narrow exceptions mentioned in *Younger* itself, deference under the doctrine is total in scope.<sup>84</sup> The federal court makes no decision on the merits of plaintiff's constitutional claims. Instead, the court informs the plaintiff that he has brought his claim to the wrong forum—in

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<sup>84</sup> See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498 (1977) (suggesting that *Younger* "bar[s] the federal courthouse door in the absence of showings probably impossible to make") (footnote omitted). Last term in *Trainor* the Court read one of the exceptions recognized in *Younger* so narrowly as virtually to exclude it. See note 70 *supra*.

effect, that he followed an incorrect procedure in seeking to adjudicate his constitutional claim. Although this may seem obvious to most observers, it is nevertheless vital in restricting the reach of the *Younger* doctrine, and all too often seems to have been forgotten by the Supreme Court.

In its desire to promote the interests of federalism by reducing federal interference with the attainment of state objectives, the Court has incorrectly squeezed a form of "substantive" deference into a wholly procedural doctrine. The federal judiciary should allow state legislatures and executive officers, who presumably know best the unique needs and problems of their locale, some degree of freedom of operation. Moreover, if we are to encourage state governments to act as social "laboratories,"<sup>85</sup> each attempting to meet its own needs in its own way, it makes sense for the federal judiciary to restrain itself, at least to a certain extent, in enforcing federal constitutional limits on state activity. But courts should employ such deference in a "substantive" manner—*i.e.*, in making the constitutional decision on the merits. Thus, when a federal court is asked to restrain or invalidate state legislative or executive conduct, it may properly consider in its constitutional calculus the interests of the state and its officers in controlling their own affairs.<sup>86</sup> But *Younger* deference does not allow for such a calculus, since under *Younger* the federal court makes no decision on the merits at all; it merely concludes that it is an inappropriate forum for such a decision.

Paradoxically, applying *Younger* on the basis of these substantive concerns may dangerously provide more deference than is appropriate, while at the same time insufficiently articulating and protecting the legitimate interests of the states in attaining their goals. The former occurs because *Younger* deference is virtually total in its scope; the court refrains from examining the asserted

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<sup>85</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") (dissenting opinion, Brandeis, J.).

<sup>86</sup> For example, in *Calvin v. Conlisk*, 520 F.2d 1 (7th Cir. 1975), *rev'd*, 424 U.S. 902 (1976), the Seventh Circuit held that a federal court has the power to revise a police disciplinary system, and directed the district court to formulate relief "designed to stop deprivations of constitutional rights without unnecessary encroachment upon local government functions." *Id.* at 7. The court noted that "the framing of equitable relief will be a delicate and difficult process." *Id.* The decision was summarily reversed and remanded by the Supreme Court for reconsideration in light of its decision in *Rizzo*. 424 U.S. at 902.

state legislative goal or exercise of state executive discretion in determining whether it withstands constitutional analysis. This may allow the very body charged with a violation of constitutional rights to sit as the ultimate arbiter of the constitutionality of its actions. If *Rizzo* is to be read for all it is worth,<sup>87</sup> federal courts might afford local police, prison wardens, or directors of mental hospitals the same type of procedural deference afforded the state judiciary under *Younger*, thus freeing them from any federal judicial over-view.

Alternatively, if *Rizzo* and *Trainor* imply merely that the burden for adjudicating the constitutionality of state legislation and executive acts will fall entirely on the state courts,<sup>88</sup> *Younger* deference has not sufficiently protected the interests it sought to protect, for as already noted, the state courts are as obligated as the federal courts to enforce constitutional rights.<sup>89</sup> Indeed, a central purpose of the *Younger* doctrine is to avoid implying that state judges will not protect constitutional rights as vigorously or as competently as

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<sup>87</sup> Several lower courts have construed *Rizzo* to require only the kind of careful balancing engaged in by the Seventh Circuit in *Calvin*. See, e.g., *Welsch v. Likins*, 550 F.2d 1122, 1131 (8th Cir. 1977) (*Rizzo* "simply emphasized the settled proposition that under our federal system of government the federal courts should be most reluctant to interfere in local governmental affairs and should do so only where the case is clear and the need . . . [is] urgent."). See also *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1069 (7th Cir. 1976). Such an interpretation, however, does not comport with Justice Rehnquist's sweeping language in *Rizzo*. See text accompanying notes 46-57 *supra*.

<sup>88</sup> In such situations there would be no on-going state judicial proceedings; therefore, this interpretation contemplates that plaintiffs would be required to seek their injunctive relief in the first instance in the state courts.

<sup>89</sup> See text accompanying notes 16-21 *supra*.

One distinguished judge has argued that "it must be more acceptable if a state statute is struck down as offending the Federal Constitution by state judges, often elected by the people, than by federal judges owing their appointment to Washington." H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 90 (1973). The logic of such a position, however, is difficult to comprehend. In either case the ultimate result is the same: the state legislative scheme is aborted because of a conflict with the federal Constitution. At any rate, Professor Neuborne has persuasively argued that the notion

that federal district judges, when called upon to enforce the fourteenth amendment against local officials, resemble an alien, occupying army dispatched from Washington to rule over a conquered province . . . must be dispelled. Federal judges are chosen from the geographical area they serve. Generally, they are appointed with the consent and often at the behest of a senator representing the state in which they will sit, frequently after local officials and citizen groups have had the opportunity to make their views on the nominee known. To characterize federal judges as carpetbaggers, unaware of, and insensitive to, local concerns is thus inaccurate and serves to deflect attention from the relative efficacy of state and federal forums in enforcing constitutional norms.

Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1120 (1977) (footnotes omitted).

their federal counterparts.<sup>90</sup> Presumably, then, a state court would invalidate a state legislative scheme or executive action as freely as would a federal court. It therefore provides no justification for federal judicial restraint, for example, that the attachment statute enjoined in *Trainor* was central to Illinois' legislative scheme; federal judicial restraint presumably will result merely in state judicial review of the constitutionality of the procedure. If state courts are equally competent to protect constitutional rights, they should invalidate Illinois' attachment statute as freely as would federal courts. Thus *Younger* deference ultimately provides no protection for state legislative policy.<sup>91</sup>

It may be fully appropriate in deciding the constitutional merits to consider the importance of the attachment scheme to Illinois' legitimate legislative goals. Due process generally involves questions of circumstance and degree. But such substantive deference can logically come into force only when a decision is actually made on the merits; it cannot justify application of the procedural deference described in *Younger*.

#### B. *Deference to State Judges and to the Sanctity of the Judicial Process*

The two remaining rationales—the desire to avoid affronting state courts and the desire to avoid disrupting the orderly workings of the state judicial process—possess greater legitimacy. Since the framing of the Constitution, state judges have been considered competent to enforce and protect federal rights. Thus a strong argument reasons that authorizing a federal court to enjoin a state judicial proceeding reflects negatively on state courts, and thus undermines the framework of cooperative federalism.<sup>92</sup> Moreover, a federal injunction will invariably interfere with the state judicial process pending determination of the federal issue in federal court, resulting in piecemeal state-court litigation.

If we were to stop at this point, we would reject the two rationales considered in the previous section and accept the two

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<sup>90</sup> The realities of the situation, however, may be quite different. See generally Neuborne, *supra* note 89. See also text accompanying notes 103-08 *infra*.

<sup>91</sup> One commentator has suggested that an unwillingness on the part of state courts to invalidate state laws might serve as an independent justification for *Younger* deference. *Developments in the Law*, *supra* note 1, at 1284. Such a suggestion, however, is embarrassingly inconsistent with what is perhaps the primary basis for *Younger* deference—namely, the desire to avoid insulting state judges by questioning their willingness to protect federal rights. Supporters of *Younger* cannot have it both ways.

<sup>92</sup> See text accompanying notes 97-102 *infra*. Stating the argument is in no way intended to suggest that I accept it.

just mentioned. The practical effect of such a conclusion on the scope of the *Younger* doctrine raises significant questions. In one sense, this narrowing of the theoretical rationale for *Younger* deference paradoxically would expand the doctrine's reach. If attainment of state legislative policies no longer provided an appropriate justification for *Younger* deference, whether the state or one of its agencies was a party to the suit would become logically irrelevant. If state courts are competent to adjudicate constitutional issues when the state is a party, they are equally competent to adjudicate them when the state is not a party. Presumably it is as much an affront to take a civil case from the grasp of state courts as it is to take a criminal prosecution.<sup>93</sup> Thus, limiting *Huffman* or *Trainor* to situations where the state is a party would serve no purpose, and *Younger* would be extended to all civil cases in which the defense invokes a right protected by section 1983.<sup>94</sup> In addition, the "bad faith" and "patently unconstitutional" exceptions set out in *Younger* would disappear.<sup>95</sup>

On the other hand, this suggested alteration in the theoretical basis for *Younger* would halt the Supreme Court's dangerous extension of *Younger* to situations where state or local executive action is challenged but there is no pending judicial proceeding. While lower federal courts generally have not read *Rizzo* as broadly as it could be read,<sup>96</sup> the case might still be interpreted to allow state executive officers the same degree of procedural deference as state courts. State courts, however, are historically and constitutionally

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<sup>93</sup> If each of the four rationales independently sufficed to justify invoking *Younger* deference, it would be irrelevant whether courts accepted all four rationales or only the final two. In either event, the fear of insulting state judges would remain a recognized basis, and it would make no difference whether the state was a party to the proceeding. As *Trainor* demonstrates, on occasion the Court has apparently considered the various rationales interdependent. But if one of those interdependent bases were to fall, the Court would likely continue to employ the remaining rationales as independent bases for deference. Rejection of the first two rationales would logically lead to application of the *Younger* doctrine to a wider variety of civil state-court powers traditionally deemed within the domain of federal courts.

<sup>94</sup> If *Younger* were extended to civil cases involving private parties, it is not clear whether the doctrine would still be limited to § 1983 suits or would apply to any asserted basis for federal injunctive relief. In *Vendo Co. v. Lektro-Vend Corp.*, 97 S. Ct. 2881 (1977), the respondent sought a federal injunction against enforcement of a state judgment obtained by a party who had allegedly violated the antitrust laws. The petitioner argued "that principles of equity, comity, and federalism . . . barred the issuance of the injunction." *Id.* at 2886. Because the Court agreed with the petitioner on another basis for relief, it did not reach this issue. *Id.*

<sup>95</sup> See notes 66-70 and accompanying text *supra*.

<sup>96</sup> See note 87 and accompanying text *supra*.

competent to protect constitutional rights; state executive agencies are not.

Beyond this brief speculation, we need not concern ourselves with the effects that might result from a bifurcation of the asserted rationales for *Younger*. For although two of the justifications deserve greater weight than the remaining two, ultimately none of the four asserted bases for *Younger* deference justifies that doctrine's sweeping limitation on federal judicial authority.

### 1. *Avoiding Insult to State Courts*

There are two answers to the argument basing *Younger* deference on the desire to avoid belittling the abilities or good faith of state judges. First, allowing an individual to seek enforcement of his federal rights in federal court does not affront state judges. It is perfectly logical for an individual to address his federal claim to those courts whose fundamental purpose is to enforce federal rights and adjudicate federal law. Affront would result only if an individual who wished to have his federal rights adjudicated in state court could not do so. Second, derogation of state judges may, as a factual matter, be justified.

a. *The "absence of insult" argument.* Ultimately, the theory that allowing federal relief to protect constitutional rights after the filing of a state action impugns the competence of state courts is premised on a fallacy: it disregards the important distinction between *allowing* state courts to adjudicate federal rights and *requiring* litigants to adjudicate those rights in state court. Only the former is necessary to avoid belittling the abilities of state judges.

When Congress grants federal courts exclusive jurisdiction under a particular act, it often implies something negative about state courts. For example, in granting federal courts exclusive jurisdiction over cases arising under the patent and copyright laws,<sup>97</sup> Congress probably was expressing concern over the competence of state courts to adjudicate these issues.<sup>98</sup> When courts infer from congressional silence in the antitrust laws concerning state-court jurisdiction<sup>99</sup> that jurisdiction to hear cases under these laws lies only in federal court,<sup>100</sup> they are again implying that state courts lack the competence to protect and develop these federal

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<sup>97</sup> See 28 U.S.C. § 1338(a) (1970).

<sup>98</sup> Congress might also have been concerned about uniformity of decisions; if so, no insult to state courts was necessarily intended.

<sup>99</sup> See 15 U.S.C. §§ 1-7, 12-27, 44 (1970 & Supp. V 1975).

<sup>100</sup> See cases cited in Redish & Muench, *supra* note 20, at 316 n.26.

rights. If it desired to do so, Congress could eradicate these aspersions on the abilities of state courts by granting them jurisdiction over antitrust and patent cases. This would not require litigants to bring such cases in state court. It would be the height of absurdity to argue that general failure of parties to select state courts casts aspersions on the abilities of state judges. Parties may simply conclude that the most appropriate forum for adjudication of their federal rights is federal court.

In effect, to the extent that it tries to avoid insulting state courts, the *Younger* doctrine makes the mistaken assumption just described: to avoid any such insult, parties must be *required*, rather than merely *permitted*, to have their federal rights adjudicated in state court.<sup>101</sup> By permitting parties to adjudicate constitutional issues in state proceedings, Congress has recognized that state courts are competent to enforce and protect federal rights.<sup>102</sup> It makes no sense to suggest that parties *must* have their federal rights adjudicated in the state forum to avoid insulting state judges. Therefore, allowing federal judicial relief against on-going state actions in order to protect constitutional rights does not necessarily imply a negative statement about state courts.

b. *The "insult deserved" theory.* Harsh reality may justify doubts about the competence of state courts in enforcing federal rights. As the Supreme Court has made clear,<sup>103</sup> congressional mistrust of the state judiciary was the prime force behind adoption of the Civil Rights Act of 1871,<sup>104</sup> the precursor of section 1983. Commentators have long recognized institutional factors that are likely to raise doubts about the abilities of state judges to protect federal rights with the same vigor as their federal counterparts.<sup>105</sup> There

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<sup>101</sup> Difficulties wholly apart from possible insult to state judges may flow from a federal injunction of a state-court action. The leading problem is disruption of the state judicial process. See notes 58-65 and accompanying text *supra*. Such difficulties may independently justify federal judicial restraint. However, the textual discussion simply points out that allowing federal injunctive relief does not necessarily cause any insult to state judges.

<sup>102</sup> The Supreme Court has held that a state court may even decide issues in the exclusive jurisdiction of federal courts if they are presented as a defense to a state cause of action. *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969). Such a result is advisable when the alternative would be disregard of the supremacy of federal law. The findings of state courts in these matters, however, will often not be given collateral estoppel effect. See, e.g., *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir. 1955). Thus, decisions like *Lear* do not depart significantly from the federal judiciary's attitude towards state-court power to develop certain issues of federal law.

<sup>103</sup> See *Mitchum v. Foster*, 407 U.S. 225, 238-42 (1972).

<sup>104</sup> Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1970)).

<sup>105</sup> See, e.g., Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157,

are exceptions, of course, and there is not yet sufficient statistical data to establish conclusively the asserted differences between state and federal courts.<sup>106</sup> Nonetheless, the disparity is sufficiently well-recognized to render the Supreme Court's unwillingness to consider its relevance<sup>107</sup> disingenuous.<sup>108</sup>

No one would dispute the proposition that the interests of federalism are undermined by gratuitous slights of state judges. But federal courts should not avoid such slights at the cost of sacrificing their primary role as enforcers and protectors of federal rights.

## 2. *Avoiding Interference with the State Judicial Process*

Perhaps the strongest justification for *Younger* deference is the recognized need to avoid disrupting the state judicial process. This principle has long served as an essential element of federalism. Virtually from the nation's beginning, the Anti-Injunction Statute<sup>109</sup> has prohibited federal courts from enjoining state judicial proceedings in most circumstances.<sup>110</sup> Justice Black relied in part

158-60 (1953); Neuborne, *supra* note 89, at 1115-16; Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 97-100 (1975). These factors include the floor of competence for federal judges ensured by presidential appointment and Senate confirmation, the increased expertise in expounding federal law that federal judges possess, and the greater hostility towards federal law that state judges harbor.

<sup>106</sup> Neuborne, *supra* note 89, at 1116 n.46. Professor Neuborne notes that although "[n]o comparative study of the relative performance of state and federal courts in the enforcement of constitutional rights appears to exist . . . the impact of state hostility to Supreme Court mandates has been noted." *Id.*

<sup>107</sup> The one significant departure from this policy is the Court's decision in *Mitchum v. Foster*, 407 U.S. 225 (1972). In concluding that § 1983 constituted an "expressly authorized" exception to the Anti-Injunction Statute (28 U.S.C. § 2283 (1970)), the Court relied heavily on extensive legislative history that revealed the framers' widespread mistrust of the state judiciary. 407 U.S. at 238-42. For a critical analysis of the *Mitchum* holding, see Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 733-39 (1977).

<sup>108</sup> The Court is not alone in refusing to reexamine traditional notions concerning the role of state courts in the federal system. Some continue to suggest that the role of state courts today should be measured exclusively by the framers' attitudes. See, e.g., P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 91 (2d ed. Supp. 1977). Much, however, has happened to the philosophy and practical realities of federalism since 1789, and the framers' concept of state-court power is nowhere contained in the body of the Constitution.

<sup>109</sup> Congress enacted the original version pursuant to the Judiciary Act of 1789. Anti-Injunction Statute, ch. 22, § 5, 1 Stat. 333 (1793). The Statute is currently codified at 28 U.S.C. § 2283 (1970).

<sup>110</sup> The Statute provides:

A court of the United States may not grant an injunction to stay proceedings

on the existence and historical development of the Statute to justify adoption of the *Younger* doctrine.<sup>111</sup> The Court's 1972 decision in *Mitchum v. Foster*,<sup>112</sup> however, renders such reliance extremely awkward.

In *Mitchum* the Court held that section 1983 is an "expressly authorized" exception to the Statute's prohibitions.<sup>113</sup> Thus the Court apparently determined that Congress believed the need for federal judicial enforcement of federal civil rights was so compelling that it justified a departure from the traditional policy of avoiding disruption of the state judicial process. But *Mitchum* does more than render *Younger's* reliance upon the Anti-Injunction Statute anomalous. In a sense, it directly undermines this final justification for *Younger* deference. If the purpose of the Anti-Injunction Statute is to preserve the sanctity of the state judicial process, and if, as the Court concluded, the Statute does not apply to civil rights suits, the sanctity of the state judicial process, according to Congress, is insufficient to overcome the need for federal protection of federal civil rights. The issue requires more detailed analysis, however, since *Mitchum* is itself a questionable decision.<sup>114</sup> Moreover, neither the Court nor Congress has ever attempted to carefully balance the interest in the integrity of the state judicial process against the need for federal judicial protection of federal rights.

In what way does federal equitable relief interfere with the integrity of the state judicial process? In one sense the answer is obvious: state courts are forced to halt their proceedings while the federal issue is litigated in federal court. This may cause piecemeal litigation in state court and unduly delay enforcement of state law.

Although the threat to state judicial processes should not be overestimated, there is a potential for significant disruption if the federal courts freely enjoin on-going state proceedings any time they conclude that a constitutional right has or has probably been violated. Taken to its extreme, such a policy would produce absurd results. For example, federal courts might issue injunctions every time they conclude that state courts improperly admitted evidence seized in violation of the fourth amendment's prohibition against

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in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.  
28 U.S.C. § 2283 (1970).

<sup>111</sup> *Younger v. Harris*, 401 U.S. at 43.

<sup>112</sup> 407 U.S. 225 (1972).

<sup>113</sup> *Id.* at 243.

<sup>114</sup> See Redish, *supra* note 107, at 733-39.

unreasonable searches and seizures. But the mere possibility that federal injunctive relief would unduly disrupt state proceedings under certain circumstances does not imply that the broad deference called for in *Younger* is appropriate in all cases. Rather, federal courts should balance, on a case-by-case basis, the danger of disruption to state proceedings against the strength of the individual's need for immediate review by a federal tribunal. In applying such a balancing process,<sup>115</sup> federal courts should invariably conclude that some rulings, even at a constitutional level, (1) have the potential for substantial disruption of the state judicial process; (2) are likely familiar to state courts; and (3) may ultimately be reviewed by a federal court on a post-trial petition for habeas corpus.<sup>116</sup> Federal relief would thus be limited to cases involving (1) a first amendment issue, with all its attendant "imponderables and contingencies";<sup>117</sup> (2) an issue not likely to arise in the majority of state

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<sup>115</sup> I have suggested elsewhere a broad balancing of competing factors to determine whether a federal court should exercise its discretion to enjoin a state proceeding under the "in aid of its jurisdiction" exception to the Anti-Injunction Statute. *Id.* at 753-60. This balancing process would apply in any situation where a federal court has jurisdiction over a case. I am now suggesting a further refinement of the process, to be applied exclusively to civil rights suits under § 1983.

<sup>116</sup> See 28 U.S.C. § 2554 (1970). *But see* *Stone v. Powell*, 428 U.S. 465 (1976) (denying federal habeas corpus relief based on evidentiary ruling where state court provided full hearing on fourth amendment claim).

<sup>117</sup> *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). *Younger* held that a "chilling effect" on first amendment interests does not by itself justify federal injunctive relief. 401 U.S. at 50. But this does not make the chilling effect any less real. Indeed, the suggested exception to *Younger* should not be limited to situations where the individual federal plaintiff is merely contemplating future action. If an individual has already completed whatever action he or she planned to take, there is no danger of "chilling" that individual's first amendment interests. But others, who are still contemplating action, might be chilled by the knowledge that the only protection for their first amendment rights would be a defense to a state prosecution. Such individuals would not have standing to litigate in a pending federal lawsuit involving another party (*see id.* at 42), but a decision in such a case might still affect the exercise of their free-speech rights.

In cases involving first amendment challenges to statutory restrictions on free speech, courts have held that under certain circumstances a litigant will be allowed to challenge a statute as overbroad, even though a narrowly drawn statute could constitutionally prohibit that litigant's speech. *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972).

[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

*Id.* at 521 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)) (citations omitted). In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court limited this doctrine to cases of "pure" speech, but still recognized that in certain instances "[l]itigants . . . are permitted to

criminal prosecutions (thus avoiding a potentially widespread impingement upon the state judicial process); or (3) an important or recurring issue that could not subsequently be reviewed by petition for habeas corpus (thus allowing federal relief in civil cases).<sup>118</sup> A case-by-case balancing process, with its inherent uncertainties, could conceivably cause a dramatic increase in the number of frivolous attempts to obtain federal relief. But a federal court would not be required to issue a temporary restraining order against the state action, and a state court would not have to stay itself pending determination of the federal case. Thus nothing would be gained by a hopeless attempt to obtain federal relief. Swift disposal of frivolous claims by federal courts would discourage attempts to take advantage of the uncertainties involved in the balancing process.

### CONCLUSION

If one believes that there is no functionally significant difference between federal-court and state-court adjudication of federal rights, not even the slightest disruption of the state judicial process is ever justified. But not even the *Younger* Court reached this conclusion. *Younger* "balanced" competing federal and state interests by recognizing that federal judicial intervention is warranted (1) when the prosecution is brought in bad faith or is intended to harass; and (2) when the prosecution is under a "flagrantly and patently" unconstitutional statute.<sup>119</sup> A proper understanding of

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challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 612. The rule in *Gooding* protects the interests of those not parties to the case whose constitutionally protected speech might be chilled by allowing the overbroad statute to stand. I suggest that similar considerations are relevant in delimiting the scope of *Younger* deference.

The reason for singling out free-expression cases is not, as one commentator has suggested, because of the "solar position" of the first amendment right of free expression. See B. Wechsler, *supra* note 5, at 838. Rather, first amendment rights by their nature cannot be effectively protected either in a defense to a state criminal or civil action or in a post-conviction federal habeas corpus action.

<sup>118</sup> The Supreme Court has recently prohibited federal courts from reviewing state-court fourth amendment rulings on petitions for habeas corpus where the state court has given the defendant a full hearing on the constitutional issue. *Stone v. Powell*, 428 U.S. 465, 493-94 (1976). Of course, this does not cause such rulings to fall within the third category described in text—justifying injunctive relief—since the Court's point was simply that a federal court should not make an inquiry at any time. The fact that *Stone* concerned a habeas petition, rather than an injunctive action, was irrelevant to the Court's reasoning.

<sup>119</sup> 401 U.S. at 53-54.

the legitimate interests on both sides of the equation dictates striking the balance in a different manner.<sup>120</sup>

The attraction of a balancing analysis in evaluating petitions for federal intervention in state proceedings depends largely on one's view of the roles to be played by federal and state courts in enforcing federal rights. If one believes, as I do,<sup>121</sup> that modern realities and principles of federalism dictate a presumption that an individual should be able to vindicate his federal rights in federal court—a presumption rebuttable only in extreme circumstances—the balancing process suggested here offers the most reasonable approach. It affords an individual the opportunity to vindicate federal rights in federal court except where it would result in extreme disruption of state judicial proceedings.

Even if one rejects a balancing process in favor of full retention of the *Younger* doctrine, this Article suggests the need for a reexamination of the theoretical rationales underlying *Younger* deference. This reexamination should result in a reordering of the federalistic values recognized by the Supreme Court as the bases of the doctrine and a rejection of those bases demonstrated to be inappropriate. If it proceeds in this manner, the Court will have established a firmer foundation for the cooperative judicial federalism so fundamental to the nation's constitutional scheme.

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<sup>120</sup> The exception recognized by *Younger* for multiple prosecutions intended to harass does seem to make sense. In such a situation, a defense to a single criminal prosecution cannot provide an adequate remedy.

<sup>121</sup> See Redish, *supra* note 107, at 755-57; Redish & Woods, *supra* note 105, at 69-70, 102.