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Why Professor Redish is Wrong about Abstention

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Most critics of the Supreme Court's abstention doctrines have attacked the substantive merits of rules that channel constitutional litigation away from federal courts and into state courts instead.[1] In a recent article, Martin Redish raises an interesting objection to abstention from a different perspective. He addresses the institutional legitimacy of the rules and contends that whatever their merits, rules like these should be made only by Congress and not the Supreme Court, for they contravene Congress' intent to grant federal courts jurisdiction over constitutional claims against state actors.[2]

Professor Redish is half right but fundamentally mistaken. He is right that the abstention doctrines are instances of judge-made law. Even on this point, however, he does not give careful attention to proving his assertions. The Court has claimed that abstention is an exercise in equitable discretion and not judicial lawmaking.[3] Although this position is indeed untenable, it deserves a point-by-point refutation, and Redish does not provide one.[4] A more basic flaw in the institutional argument against abstention is its reliance on a faulty premise: that Congress is responsible for the modern

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[1] *See, e.g.*, Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977); Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Redish, *The Doctrine of* Younger v. Harris: *Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977). For a defense of abstention, see Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981).

[2] Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

[3] *See, e.g.*, Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-01 (1941).

[4] *See* Redish, *supra* note 2, at 84-90 for his treatment of the issue.

federal cause of action under 42 U.S.C. § 1983 against state actors to redress constitutional violations.[5] Once this premise is accepted, it is easy to show that the abstention rules violate Congress' intent. The problem with the institutional argument is that the statute was never intended to create such a broad cause of action. It was directed at a specific problem, the Ku Klux Klan terror in the South against blacks and their supporters in the aftermath of the Civil War. The Supreme Court did not read it to provide a general federal cause of action until 1961 in *Monroe v. Pape*,[6] and the holding in *Monroe* cannot be credibly defended as the result of a successful search for the intent of the framers of the statute. Abstention is more accurately viewed as a judge-made forum rule for a judge-made cause of action and hence can withstand the attack mounted against it by Professor Redish.

Analysis of the problem cannot stop here, however, for this response to the institutional objection to abstention raises two questions of its own. First, if both the cause of action and abstention are judge-made, then is it possible to defend either of them against the contention that the scope of federal jurisdiction is a matter delegated to Congress in article III of the Constitution? The argument now is not that the Court's decisions contravene the legislative intent of any particular statute, but that, in view of article III, the Court has no business making rules even when no statute addresses an issue. Second, in meeting the article III objection, is it possible to distinguish between the expansive and restrictive rules, and to uphold judge-made rules that broaden federal jurisdiction but not those that restrict it? My answers are yes to the first of these questions and no to the second. Both kinds of rules can be justified in institutional terms as federal common law rules, and I find no persuasive basis for treating the cause of action more favorably in this regard than the restrictive rules.

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[5] 42 U.S.C. § 1983 (1982) provides:

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

Redish's premise is largely implicit, but occasionally rises to the surface. *See, e.g.*, Redish, *supra* note 2, at 71-72, 74, 77, 110-11.

[6] 365 U.S. 167 (1961).

Part I of this article describes the context in which the choice of forum issue arises. Part II discusses the premise that Congress created a general federal cause of action against state actors for constitutional violations, a concept that Professor Redish passes over too quickly, and shows that the cause of action cannot be defended in terms of legislative intent. Part III examines the Court's justifications for abstention more carefully than Redish does, but shares his conclusion that the Court's doctrinal foundations must be abandoned. Part IV proposes that the area be viewed as a kind of federal common law and addresses the article III and other problems this approach presents.

I. Two Kinds of Constitutional Remedies

Constitutional rights may be asserted in litigation either defensively or offensively.[7] The constitution may be invoked as a defense against criminal prosecution or civil liability, as where a journalist relies on the free press clause of the first amendment to preclude liability for libel[8] or a criminal defendant raises the sixth amendment right to counsel to bar a criminal conviction.[9] But suppose someone is beaten by the police or sent to a racially segregated public school. In these cases the constitutional violations do not arise in the course of judicial proceedings against the injured person, and defensive remedies will do him no good.[10] Instead, he may become a plaintiff and employ the Constitution as an offensive weapon to recover damages for the beating[11] or to secure injunctive relief against segregation.[12]

This article addresses a problem that arises in the offensive use of constitutional rights in suits against state officers. The problem relates to the difference between defensive and offensive reme-

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[7] *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1532-33 (1972); Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1111-12 (1969).

[8] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[9] Gideon v. Wainwright, 372 U.S. 335 (1963).

[10] There are instances in which a litigant will not be required to raise his rights defensively even though a civil or criminal proceeding has been, or could be, brought against him, because the state proceeding is deemed inadequate to protect federal rights. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973); Dombrowski v. Pfister, 380 U.S. 479 (1965).

[11] *E.g.*, Bruner v. Dunaway, 684 F.2d 422, 424, 426 (6th Cir. 1982); Roberts v. Marino, 656 F.2d 1112, 1113-14 (5th Cir. 1981).

[12] Green v. County School Bd., 391 U.S. 430 (1968); Brown v. Board of Educ., 347 U.S. 483 (1954).

dies: when someone wishes to assert a constitutional right as a defense, the state criminal or civil suit against him is generally the appropriate forum in which to vindicate the claimed right. Unlike the civil or criminal defendant, the plaintiff with an offensive claim against a state governmental defendant may attempt to select a forum he prefers, which will often be a federal court.[13] Whether he may have his choice of forum is an issue that has generated a complex body of doctrine. The first principle of the law in this area is that the plaintiff cannot count on a federal forum as a matter of constitutional right. Even though his claim arises under the federal Constitution, the settled rule is that Congress is not obliged to provide that a federal claim be litigated in a federal district court.[14] Acting under its power to determine the scope of district court jurisdiction,[15] Congress may and often does remit federal claims to the state courts.[16] Although federal remedies are not constitutionally required, they are often available in practice. The Supreme Court has both expanded the power of federal courts to grant monetary and injunctive relief and, in response to previous expansions, has imposed various restrictions on their authority to hear such cases. The major expansive case is *Monroe v. Pape*,[17] where the Court held that section 1983 creates a cause of action for monetary

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[13] *See* Neuborne, *supra* note 1 (reasons why plaintiffs prefer federal court); *see also* Bator, *supra* note 1 (arguments for state court decisionmaking).

[14] *See, e.g.*, Palmore v. United States, 411 U.S. 389, 400-01 (1973); Lockerty v. Phillips, 319 U.S. 182, 187-89 (1943); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938); Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922); *see also* P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330 (2d ed. 1973) (stating that the Constitution does not give people the right to a proceeding, in the first instance, in a federal court rather than state court) [hereinafter cited as HART & WECHSLER]; Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 65-66 (1923) (examining Senate debate on whether district courts should be established or whether state courts should be given inferior federal jurisdiction).

[15] U.S. CONST. art. III, § 1 provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Court reads this power over the existence of lower federal courts as including power to determine their jurisdiction. Sheldon v. Sill, 49 U.S. (8 How.) 440, 448-49 (1850).

[16] *See, e.g.*, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 103 S. Ct. 2841 (1983); Tax Injunction Act, § 1, 28 U.S.C. § 1341 (1982) (original version at ch. 726, § 1, 50 Stat. 738 (1937)); Johnson Act § 1, 28 U.S.C. § 1342 (1982) (original version at ch. 283, § 1, 48 Stat. 775 (1934)).

[17] 365 U.S. 167 (1961); *see also* Quern v. Jordan, 440 U.S. 332 (1979) (refusing to permit suits against state governments); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (permitting suits against municipal governments).

and injunctive relief for constitutional violations, even if state law also provides a remedy. The most important restrictive rules are the *Pullman*, *Younger*, and *Burford* abstention doctrines, which require dismissal or delay of federal jurisdiction over requests for injunctive relief in certain circumstances. The Court justifies these rules in terms of the inherent powers and limitations of a court of equity.[18]

II. Expanding the Scope of Federal Judicial Power

Any discussion of the Supreme Court's expansion of the power of federal courts must begin with the principal statute authorizing a federal cause of action for constitutional violations. Section 1983 provides:

> Every person who, under color of any statute . . . custom, or usage, of any State . . . subjects . . . any . . . person . . . 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.

The sweeping language of this statute, and its parallel jurisdictional provision,[19] appears to grant a right to recover damages or other appropriate relief in an action brought in federal court to anyone complaining of injury from unconstitutional conduct by a state actor. That is how the Supreme Court read the statute in *Monroe v. Pape*,[20] and that opinion is the basis for the view that access to federal court rests largely on a statutory foundation.

A. Ex parte Young: *The Historical Background of* Monroe

Monroe was not decided until 1960. Before discussing the opinion, it will prove worthwhile to review some earlier developments. Long before *Monroe*, the Court had recognized the inadequacy of defensive remedies to safeguard constitutional rights in many situ-

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[18] *See generally* Hart & Wechsler, *supra* note 14, at 980, 985-1050 (discussing the doctrines of abstention and equitable restraint).

[19] 28 U.S.C. § 1343(3) (1982).

[20] 365 U.S. 167 (1961). *See generally* Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 Nw. U.L. Rev. 277 (1965) (discussing the federal causes of action that can arise under 42 U.S.C. § 1983 after *Monroe v. Pape*).

ations. The doctrine of sovereign immunity from suit, implemented by the eleventh amendment's prohibition of suits against states in federal court was, however, a major obstacle to the development of offensive remedies.[21] The Court's solution, set forth in *Ex parte Young*,[22] was to hold that a suit for injunctive relief against a state officer on constitutional grounds was not a suit against the state for purposes of the eleventh amendment, although the challenged conduct was state action subject to the fourteenth amendment.

This is the holding for which *Ex parte Young* is best known, but it also bears on the present inquiry in another, more direct way. The cause of action the Court recognized was not created by state law or any federal statute. Rather, the Supreme Court asserted the power to expand federal jurisdiction to hear constitutional claims in the absence of a statute creating a federal cause of action.[23] In the intervening years, Congress has enacted some significant limitations on the *Ex parte Young* cause of action,[24] but in most areas the cause of action remained viable right up until *Monroe*. After *Monroe*, the power to imply causes of action from the Constitution was no longer necessary in suits against state officers, but the Court has demonstrated the continuing vitality of this power by employing it in cases against federal officers, where there is still no

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[21] U.S. CONST. amend. XI. The amendment provides that "[t]he 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," but it is held to bar suits by citizens of the state that is sued as well. *See* Hans v. Louisiana, 134 U.S. 1 (1890). *See generally* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972) (critiquing the constitutional bases of the doctrine of sovereign immunity).

[22] 209 U.S. 123 (1908). *See* C. WRIGHT, LAW OF FEDERAL COURTS § 48, at 290 (4th ed. 1983).

[23] *See* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 & n.124 (1954); Hill, *supra* note 7, at 1126-27.

[24] *See* Tax Injunction Act § 1, 28 U.S.C. § 1341 (1982) (original version at ch. 726, § 1, 50 Stat. 738 (1937)); Johnson Act, § 1, 28 U.S.C. § 1342 (1982) (original version at ch. 283, § 1, 48 Stat. 775 (1934)); HART & WECHSLER, *supra* note 14, at 965-79.

I do not mean to suggest that the individual could be left without any effective remedy by a congressional decision to bar federal jurisdiction. The statutes cited here only preclude federal jurisdiction where a state remedy is available. In the absence of a federal remedy, state courts would often be constitutionally obligated to hear these offensive claims. *See* Testa v. Katt, 330 U.S. 386, 389-93 (1947); Ward v. Love County, 253 U.S. 17 (1920); General Oil Co. v. Crain, 209 U.S. 211 (1908) (decided the same day as *Ex parte Young*); HART & WECHSLER, *supra* note 14, at 359-60; Hill, *supra* note 7, at 1160-61; *cf.* 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, 93 (1975) (arguing that federal jurisdiction is constitutionally required in suits against federal officers).

statutory authority for the cause of action. In the leading case, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[25] decided in 1970, the Court implied a cause of action for damages to remedy violations of the fourth amendment prohibition on unreasonable search and seizure. Mr. Justice Harlan's concurring opinion relied on the equity precedents to support the damage remedy on the view that a viable distinction could not be drawn between damages and injunctive relief.[26]

B. Monroe v. Pape: *The Fictional Use of Statutory Construction*

To someone unfamiliar with the complexities of Supreme Court doctrine in this area, the above discussion of *Ex parte Young* will be puzzling. Why was it necessary for the Court to imply a cause of action under the fourteenth amendment when section 1983 was available? The answer is that until *Monroe v. Pape*[27] was decided in 1960, the Civil Rights statute was read narrowly and invoked sparingly. The Reconstruction Congress passed the statute to counteract efforts by southern whites to reassert oppression of blacks. In particular, section 1983 was a response to the passage of statutes that rigidly regulated black behavior and to the failure of southern states to protect blacks against attacks by the Ku Klux Klan and other groups.[28] Until the middle of the twentieth century, it was used primarily to vindicate black voting rights.[29] The statutory "under color of [state law]" requirement was generally construed to require that state law *authorize* the conduct at is-

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[25] 403 U.S. 388 (1971). *See* Chappell v. Wallace, 462 U.S. 296 (1983) (rejecting implied cause of action for military personnel); Carlson v. Green, 446 U.S. 14 (1980) (recognizing a cause of action under the eighth amendment); Davis v. Passman, 442 U.S. 228 (1979) (recognizing a cause of action under the fifth amendment); *see also* Dellinger, *supra* note 7 (discussing the logic and implications of the *Bivens* decision recognizing a cause of action based on the Constitution); Note, *Two Approaches to Determine Whether an Implied Cause of Action Under the Constitution is Necessary: The Changing Scope of the* Bivens *Action*, 19 GA. L. REV. 683 (1985) (discussing the scope of implied constitutional damages actions created by *Bivens*). The primary focus of this article is on remedies against state and local governments and officials, and not on this cause of action against federal officials.

[26] *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 404-06 (1971) (Harlan, J., concurring).

[27] 365 U.S. 167 (1961).

[28] *See* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484-85 (1982); Shapo, *supra* note 20, at 279-81.

[29] *See* Shapo, *supra* note 20, at 282-84.

sue.[30] *Monroe* read "under color of" as meaning that the federal remedy was available whenever the defendant acted in the course of or under the pretense of his official duties. The availability of a state remedy was irrelevant, for "[t]he federal remedy is supplementary to the state remedy."[31] The effect of *Monroe* was to channel constitutional challenges to state action to the federal courts, whether injunctive or monetary relief was requested, and to render unnecessary the implied cause of action recognized in *Ex parte Young*. Coupled with the dramatic increase in the scope of constitutional rights in the 1960's and 1970's, the holding in *Monroe* led to a sharp growth in constitutional litigation in the federal courts.[32]

Monroe is the basis for the Court's claim that Congress has provided access to the federal courts for constitutional challenges to state officers' conduct. Since the holding in *Monroe* is framed as a construction of the statute, this position is unassailable on technical grounds. If the aim is to identify the true source of the federal cause of action, then the persuasive force of this assertion turns on whether or not the Court's construction of the statute actually reflects the intentions of the 1871 Congress that passed it. From this perspective, the statutory view rests on legislative history that is far too ambiguous to support it.

One problem with the statutory interpretation argument concerns the specific issue decided in *Monroe*, the proper construction of "under color of." Most comments by supporters of the bill indicate that they sought to remedy officially sponsored violence against blacks, as well as other harms, such as the Black Codes regulating the conduct of the freedmen.[33] Typical are the remarks of Representative Hoar:

> To authorize the interference of Congress there must be, not

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[30] *See* The Civil Rights Cases, 109 U.S. 3, 16-17 (1883) (dictum); *see also Monroe*, 365 U.S. 167, 212-16, 213 nn.19-20, 214 n.21 (1961) (Frankfurter, J., dissenting) (citing many Supreme Court and lower federal court cases).

[31] *Monroe*, 365 U.S. at 183.

[32] *See* Eisenberg, *supra* note 28, at 523. It is sometimes argued that the increase is itself a justification for restricting the § 1983 cause of action. *See, e.g.*, Parratt v. Taylor, 451 U.S. 527, 554 n.13 (1981) (Powell, J., concurring in the result). But Eisenberg undertook an empirical study which showed that the "burden" on the federal courts is not great. *See* Eisenberg, *supra*, at 523-56.

[33] *See* Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1491-92 (1969); *see also* Monroe v. Pape, 365 U.S. 167, 211-58 (1961) (Frankfurter, J., dissenting) (exhaustive analysis of legislative history).

> merely those imperfections and failures in the administration of law which are attendant upon all civil governments alike, but there must be a clear case of denial of government. We cannot interfere to deal with the incidental evils which attend upon republican government; but we should interfere . . . wherever these evils have attained such a degree as amounts to the destruction, to the overthrow, to the denial to large classes of the people of the blessings of republican government altogether.[34]

Many suggestions of a broader legislative purpose can be found in comments by opponents of the bill, whose motive was to undermine support for it.[35] The *Monroe* Court makes use of several of these comments,[36] in contravention of the Court's general rule that statements by a bill's opponents should receive little weight in construing it.[37]

In view of these considerations, it is not surprising that the *Monroe* Court does not ground its holding solely in the legislative history, but also relies on prior cases decided in other contexts. In *United States v. Classic*[38] and *Screws v. United States*,[39] both of which were applications of criminal statutes included in the same legislation as the civil remedy provided by section 1983, the Court read the "under color of" provision broadly as meaning "under pretense of."[40] The *Monroe* Court reasoned that since this is what "under color of" means in these criminal statutes and since the framers of section 1983 borrowed this language from the earlier legislation, then the language must be construed the same way

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[34] CONG. GLOBE, 42d Cong., 1st Sess. 334 (1871); *see id.* at 481-82 (statements of Rep. Wilson); *id.* at 501 (statements of Sen. Frelinguysen); *id.* at 505-06 (statements of Sen. Pratt); *id.* at 514 (statements of Rep. Poland); *id.* at 577-79 (statements of Sen. Trumball); *id.* at 608 (statements of Sen. Pool); *id.* at app. 68-69 (statements of Rep. Shellabarger); *id.* at app. 153 (statements of Rep. Garfield).

[35] *See* Note, *supra* note 33, at 1491-92.

[36] *See Monroe*, 365 U.S. at 178-80.

[37] *See, e.g.*, NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 66 (1964); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951); *see also* Carlson v. Green, 446 U.S. 14, 40 n.7 (1980) (Rehnquist, J., dissenting) (noting Senator Thurman's views on § 1983 to be an unreliable source of legislative history because he was an opponent of the provision).

[38] 313 U.S. 299 (1941).

[39] 325 U.S. 91 (1945).

[40] *See Screws*, 325 U.S. at 108-13; *Classic*, 313 U.S. at 325-26.

here.[41] As an application of precedent, this reasoning is unimpeachable. As a means of ascertaining legislative intent, it falls short because the Court in *Classic* and *Screws* hardly touched on the legislative history and made no real effort to so justify their holdings.[42]

Beyond the particular ruling in *Monroe*, there is a broader problem with the *Monroe* Court's reading of the statute. The Court acknowledged that the act was directed at a specific problem—the violation of the rights of blacks by the southern states. The Court then denied that the historical context in which it was enacted should influence the construction of its language. More important was the sweeping language with which Congress had addressed the problem:

> Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and over in the debates.[43]

If the aim of statutory construction is to implement the intent of the legislature, the Court's approach plainly is not an effective technique. Rather, a statute should be read in context against the historical background that prompted its enactment.[44] As Professor Eisenberg has explained, such an effort would lead to a significantly different body of rules under the civil rights statutes. Section 1983 would not provide a remedy for rights that were not recognized until many years after its enactment. Rather, it would be directed primarily to protection of the rights of blacks against discriminatory treatment. At the same time, those rights would not be

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[41] *See Monroe*, 365 U.S. at 183-85.

[42] *See Screws*, 325 U.S. at 108-13; *Classic*, 313 U.S. at 325-26 ; *see also Monroe*, 365 U.S. at 216-21 (1961) (Frankfurter, J., dissenting) (discussing the Court's previous construction of § 1983 "under color of" provision in cases where legislative history was not considered).

[43] *Monroe*, 365 U.S. at 183.

[44] *See, e.g.*, United States v. Witkovitch, 353 U.S. 194, 199 (1957); Vermilya-Brown Co. v. Connell, 335 U.S. 377, 386 (1948); Puerto Rico v. Shell Co., 302 U.S. 253, 258 (1937); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-15 (1819); *see also* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947) (To aid in statutory construction, "courts have looked into the background of statutes, the mischief to be checked and the good that was designed"); *cf.* Monaco v. Mississippi, 292 U.S. 313, 322 (1934) ("Behind the words of the constitutional provisions [here, the eleventh amendment] are postulates which limit and control").

limited by many of the rules that now block monetary recovery under section 1983, such as the absolute immunity from damages of legislators, judges, and prosecutors.[45]

For these reasons, an accurate description of *Monroe* would acknowledge that the statutory basis for the holding is fictional. The federal cause of action it creates is judge-made and not statutory law, cut from the same cloth as the Court's earlier holding in *Ex parte Young* and its later line of cases beginning with *Bivens*. The Court's highly selective use of legislative history and disregard of historical context belie the notion that its holding implements legislative intent. A more plausible explanation of the result is that the Court wished to provide better access to federal courts to vindicate the many new federal rights it was recognizing.[46] I do not quarrel at all with the Court's rule as a matter of policy, but only point out that it cannot be persuasively defended as the result of a successful search for the legislative intent of the framers.

III. EQUITABLE RESTRAINTS AND ABSTENTION

There are several rules restricting the power of federal courts to grant injunctions or declaratory relief against unconstitutional state action. Some of these are statutory, like the Johnson Act, prohibiting injunctions against the rate orders of state utility commissions,[47] and the Tax Injunction Act, barring injunctions against collection of state taxes.[48] In both cases the prohibition operates

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[45] *See* Eisenberg, *supra* note 28, at 484-522; *see also* Shapo, *supra* note 20, at 282 ("In stressing the reach of the legislation, . . . it is well that we remember the anarchy and the outrageous crimes which compelled its passage—as well as the Act's roots in the racial problems which prompted the passage of the fourteenth amendment."). For some examples of modern cases that seem to be within the intent of the framers of § 1983, so that judge-made restraints are inappropriate, see Zeigler, *A Reassessment of the* Younger *Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 1025-36.

Another, more radical, attack on the Court's statutory analysis focuses on the dramatic cultural, social, and political changes between 1871 and 1961. It could be argued that it is impossible to determine what the 1871 legislators intended (or would have intended) with respect to social and political conditions they could not have imagined. *See generally* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 218-21 (1980) (discussing constitutional interpretation); Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1020-21 (1981) (discussing the problems with interpretation based on textual language or drafters' intent because of change in social and historical context).

[46] *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 90 (1973); Eisenberg, *supra* note 28, at 486.

[47] 28 U.S.C. § 1342 (1982).

[48] 28 U.S.C. § 1341 (1982).

only if an adequate remedy is available in the state courts. More important than these statutes are the Supreme Court's non-statutory abstention doctrines which are commonly identified by the names of leading cases in their development: *Railroad Commission v. Pullman Co.*,[49] *Younger v. Harris*,[50] and *Burford v. Sun Oil Co.*[51] In each of these areas, the Court dismisses or delays consideration of suits where plaintiffs claim constitutional violations and seek injunctive relief. The Court maintains that these doctrines reflect no breach of the principle that the scope of federal jurisdiction is a matter for Congress. Its position has been that courts of equity traditionally enjoy broad remedial discretion and operate under special limits on their powers and that the abstention doctrines are applications of these equitable rules.[52] This link between equity and the Court's rules was tenuous even in the early abstention cases. As the rules have evolved, the Court has relied less and less on equity and instead has stressed values of federalism as the basis of these doctrines. Accordingly, the abstention doctrines cannot be justified in terms of the inherent powers and limitations of a court of equity. Like *Monroe*, they must be understood as an exercise of judicial power by the Supreme Court, limiting the reach of federal district court jurisdiction.

A. Railroad Commission v. Pullman Co.

The railroad commission had ruled that conductors, rather than

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[49] 312 U.S. 496 (1941).

[50] 401 U.S. 37 (1971); *see also* Douglas v. City of Jeannette, 319 U.S. 157 (1943).

[51] 319 U.S. 315 (1943).

[52] *See Burford*, 319 U.S at 318 ("a matter of sound equitable discretion"); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297-98 (1943) (similar); Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943) (referring to the "discretionary powers" of a court of equity); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941) ("the sound discretion which guides the determination of courts of equity"); *see also* Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100, 120 & n.4 (1981) (Brennan, J., dissenting) (similar); HART & WECHSLER, *supra* note 14, at 980 (observing that "[t]he traditional discretion of the chancellor . . . is the mother of all these [abstention] doctrines"); *id.* at 283-84 (Supp. 1981) (discussing application of equitable rules in abstention cases). An unarticulated but necessary premise for this justification of abstention is that the traditional powers and limits of equity are implicitly recognized in the article III plan. *See* Comment, *Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the* Burford *Doctrine*, 46 U. CHI. L. REV. 971, 990 (1979). The criticisms of the Court's rules in the text that follows do not take issue with this premise or with the premise that courts of equity should operate under special restraints. For an analysis and critique of the latter proposition, see O. FISS, THE CIVIL RIGHTS INJUNCTION (1978).

porters, must be provided on sleeping cars. All conductors were white, while porters were black, and the plaintiffs challenged the rule as a violation of the equal protection clause. In addition, they contended that Texas law did not authorize the commission to make rules on this subject. Without reaching the merits the Court, in an opinion by Justice Frankfurter, rejected the plaintiffs' request for a federal injunction against the rule. Relying on the broad discretion of a court of equity to take into account "public consequences in employing the extraordinary remedy of the injunction," the Court directed the district court to delay its consideration of the case.[53] In the meantime, the parties were to take the issue of the commission's statutory authority to state court.[54] The state law authorization issue could only be definitively resolved in the state courts,[55] and referring it there might also obviate the need to decide the sensitive and difficult (in 1941) equal protection issue.[56] This was the foundation for the *Pullman* abstention doctrine.[57]

Perhaps *Pullman*'s postponement doctrine can be justified without violating the maxim that the jurisdiction of federal courts is a matter for Congress. *Pullman* does not preclude but only delays federal court action.[58] Traditionally, courts of equity have exercised broad discretion to frame a remedy that will accommodate all the interests at stake and that is not responsive solely to the legal rights of the parties.[59] It is reasonable to include within this calculus the public interest in the two specific policies served by *Pullman*: having state law issues decided by state courts and avoiding unnecessary constitutional decisions. The delay is arguably a small price to pay to achieve these goals.[60]

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[53] *Pullman*, 312 U.S. at 500.

[54] *See id.* at 501-02.

[55] *See id.* at 500.

[56] *See id.* at 498.

[57] *See generally* Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974) (discussing the proper application of the *Pullman* abstention doctrine).

[58] *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964).

[59] *See, e.g.*, United States v. Dern, 298 U.S. 352, 359-60 (1933); H. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY § 30, at 78-79 (2d ed. 1948).

[60] When delay is a serious problem, the harm to the plaintiff can often be minimized by granting him a preliminary injunction pending resolution of the state law issues. *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 312 n.18 (1979); Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism*, 63 CORNELL L. REV. 65 (1977).

The *Pullman* doctrine was invoked occasionally in the 1940's and 1950's,[61] fell into disuse during the activist era of the Warren Court,[62] and was revived when the character of the Court began to change in the late 1960's.[63] As the doctrine has developed in recent years, the Court has undermined the equitable justification for it. At least twice it has ordered abstention in cases where only damages and no injunctive relief was requested,[64] a practice that cannot be explained under the equitable discretion rationale of *Pullman*. In these cases, the Court did not even address the problem raised by abstention in a damages case. The Court has also approved of a federal court delaying its consideration of such cases by certifying a state law issue (and not the whole case) to state court.[65] This procedure is analytically quite similar to conventional abstention, except that certification is supposed to be more efficient.[66] As with abstention, the court gives up its jurisdiction over the state issue and postpones jurisdiction of the federal issue without any statutory authority. Here again, the delay cannot be rationalized on equitable principles and the Court has offered no other explanation.

Perhaps the reason why the Court in these cases did not address the issue of how abstention could be justified in the absence of an equitable element is that it considered that issue already resolved by its decision in *Louisiana Power & Light Co. v. City of Thibodaux*.[67] The city sought to exercise eminent domain over

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[61] *See* Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1960); Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815 (1959).

[62] *See* Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

[63] *See* H. FRIENDLY, *supra* note 46, at 92.

[64] Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970); United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962).

[65] Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974); *see also* Clay v. Sun Ins. Office, 363 U.S. 207 (1960) (federal court should first obtain a determination of unresolved state law issues before considering constitutional question).

[66] *See* Kurland, *supra* note 61, at 489-90; Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888 (1971). Some commentators are more skeptical. *E.g.*, Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969). For a discussion of the jurisprudential underpinnings of certification, see LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999 (1985).

[67] 360 U.S. 25 (1959).

property held by the power company. The utility said that under Louisiana law cities like Thibodaux could not invoke the power of eminent domain. Although the case did not present a request for any injunctive relief, the Supreme Court approved the district court's decision to abstain, explaining that state law was unsettled and best left to the state courts.[68] Like *Pullman*, the opinion was written by Justice Frankfurter. He met the contention that the absence of an injunction distinguished the case from *Pullman* by pointing out that issues of federalism are just as significant in eminent domain cases as in requests for injunctions. Eminent domain proceedings are "special and peculiar," and are "intimately involved with sovereign prerogative."[69] This was especially true here, for the case concerned "the apportionment of governmental powers between City and State."[70]

The Court's explanation in *Louisiana Power* turns *Pullman*'s inherent equitable power rationale on its head. Under this reasoning, the request for an injunction is not the source of the court's power to abstain, as the Court had maintained in *Pullman*. Rather, the potential for an injunction to intrude unnecessarily on state prerogatives is a policy consideration supporting a decision to invoke the power to decline to exercise jurisdiction. There are other equally compelling reasons to wield that power, like the fact that a case concerns eminent domain and presents unsettled state law issues on municipal authority.[71] When these factors are present, abstention will be appropriate even though no injunction is sought. Equity is no longer the *source* of the court's power to abstain.

Having abandoned the *Pullman* rationale for that power, the Court in *Louisiana Power* offered nothing in its place. Given the Court's public commitment to the traditional view that the scope of federal judicial power is the responsibility of Congress, it is not surprising that the Court would not wish to call attention to its

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[68] *Id.* at 29-30.

[69] *Id.* at 28.

[70] *Id.*

[71] *Compare* County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959) (federal district court should have adjudicated claim instead of abstaining in case where controlling state law was clear and no federal constitutional question was involved) *with Louisiana Power*, 360 U.S. at 31 (Stewart, J., concurring) (distinguished *Allegheny* from *Louisiana Power* based on differences in clarity of controlling state law to be applied in each case). For a recent application of these principles, see Edwards v. Arkansas Power & Light Co., 683 F.2d 1149, 1155-56 (8th Cir. 1982).

assumption of authority here. This judicial lawmaking role differs from *Ex parte Young* and *Monroe* only in that it concerns a contraction and not an expansion of federal jurisdiction. It is not, on this account, any less an exercise of power over the business of the lower federal courts.

B. Younger v. Harris

The *Younger* doctrine requires federal abstention in cases where the plaintiff challenges state law on constitutional grounds and the issue can be litigated in a pending state proceeding. In *Younger*, John Harris was prosecuted in state court under the California Criminal Syndicalism Act, a statute aimed against the advocacy of revolution. He then filed a complaint in federal court seeking to enjoin the state prosecution on the ground that the statute violated freedom of speech. The district court granted the injunction and the Supreme Court reversed. The Court held that the complaint should be dismissed and Harris should be required to raise his first amendment attack as a defense to the state prosecution.[72]

As in the case of *Pullman* abstention, the Court first rationalized the power to decline to exercise jurisdiction as an aspect of the special role of a court of equity. The principle invoked in *Pullman*, equitable discretion over the fashioning of a remedy, was not easily adapted to the *Younger* problem, however, because the Court's object was to dismiss the case outright. Instead, the Court employed the venerable equitable maxim that injunctive relief should not ordinarily be granted against a criminal prosecution,[73] along with another "traditional prerequisite to obtaining an injunction,"[74] the requirement of irreparable injury due to the lack of an adequate remedy at law. Since Harris could present his first amendment claim in the criminal proceeding, the Court dismissed his complaint.[75] These equitable principles have had a long and checkered history in the federal courts.[76] As with the *Pullman* doctrine, the

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[72] Younger v. Harris, 401 U.S. 37, 43-54 (1971). The anti-injunction statute, 28 U.S.C. § 2283, precludes federal injunctions against state proceedings in most circumstances. But the court has held that § 1983 is an exception to that prohibition. Mitchum v. Foster, 407 U.S. 225 (1972).

[73] *Younger*, 401 U.S. at 43-44.

[74] *Id.* at 46.

[75] *Id.* at 49.

[76] *See generally* Laycock, *Federal Interference with State Prosecutions: The Cases*

Court's allegiance to these two equitable notions softened in the 1960's,[77] but the Court vigorously reiterated them in *Younger*, decided in 1971.

Besides these equitable precepts, the *Younger* court emphasized "the more vital consideration" of comity, which meant "a proper respect for state functions," and "a system in which there is sensitivity to the legitimate interests of both State and National Governments."[78] The states' strong interest in enforcing their criminal laws free of federal interference and deciding constitutional defenses in their own courts warranted federal restraint.[79]

In the years since *Younger*, the Court has extended the principle to other contexts, and like the evolution of the *Pullman* doctrine the equitable bases of the *Younger* doctrine have eroded. Federal-state comity has become the sole foundation for *Younger* abstention. Consider the "irreparable injury" or "inadquate remedy at law" requirement for obtaining an injunction.[80] *Younger*'s application of the adequate remedy rule can be defended in some circumstances. When the individual has violated the state law but does not wish to commit the proscibed action again, his rights can be protected as well in a defense to a criminal prosecution as in a federal court injunction suit.[81] In other circumstances this conclusion does not hold. When he seeks to engage in a continuing course of conduct, defense to the criminal prosecution cannot protect his

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Dombrowski *Forgot*, 46 U. CHI. L. REV. 636 (1979) (discussing the correctness of *Dombrowski v. Pfister* and subsequent interpretation); Wechsler, Federal Courts, *State Criminal Law and the First Amendment*, 49 N.Y.U. L. REV. 740 (1974) (extensively tracing the history of federal court interference in state criminal proceedings).

[77] *See* Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965) (creating an exception to the rule of restraint for first amendment overbreadth claims); *see also* Fiss, *supra* note 1, at 1103-17 (discussing the rationales behind the *Dombrowski* decision, its impact on federal injunctive relief, and its vulnerabilities); Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of* Dombrowski, 48 TEX. L. REV. 535 (1970) (discussing the *Dombrowski* doctrine and its scope of relief).

[78] *Younger*, 401 U.S. at 44.

[79] *See id.* at 51-52.

[80] In traditional equity these were two names for the same requirement. The rule was based on the notion that equitable relief should be refused unless the available legal remedies were insufficient to remedy the wrong. *See* Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 224 [hereinafter cited as Laycock, *Federal Interference*]; Laycock, *Injunction and the Irreperable Injury Rule* (Book Review), 57 TEX. L. REV. 1065, 1070-71 (1979) (reviewing O. FISS, THE CIVIL RIGHTS INJUNCTION (1978)).

[81] *See* Laycock, *Federal Interference*, *supra* note 80, at 199.

putative rights while the case is pending, for the criminal court cannot grant a preliminary injunction.[82] Furthermore, even a successful defense will not necessarily protect him against future prosecutions under the same or similar statutes.[83] Yet the Court has refused to permit federal courts to entertain requests for injunctive relief by defendants in criminal cases who propose to engage in a continuing course of conduct.[84]

Likewise the Court has abandoned the other equitable notion espoused in *Younger*. In extending its principle of restraint to many types of civil proceedings, the Court has ceased to rely on equity's reluctance to enjoin a criminal case and has stressed instead *Younger*'s reference to "the more vital consideration" of comity.[85] This development of the comity rationale began with a public nuisance action against a theatre showing pornographic films, a civil action "in aid of and closely related to criminal statutes."[86] It quickly expanded to cover any civil proceeding implicating "important state policies."[87] In addition, the Court has applied its rule to state proceedings filed *after* the federal injunction suit,[88] ignoring the equity rule that legal remedies which become available only

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[82] *Id.* at 202-14.

[83] *Id.* at 214-19. Of course, once the prosecutor loses one case he may give up, but he need not. There are many notable examples of refusals by prosecutors and legislators to stop trying after one defeat. *See* Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 841-42 (1965); Laycock, *Federal Interference*, *supra* note 80, at 199-202.

[84] *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 924-25, 929 (1975) (permitting federal plaintiffs who had not breached the ordinance to pursue interim relief, but denying interim relief to a plaintiff who had violated the ordinance and faced charges in state court). Cases with these characteristics are not uncommon. *See* Laycock, *Federal Interference*, *supra* note 80, at 207.

[85] *E.g.*, Trainor v. Hernandez, 431 U.S. 434, 441, 444 (1977); Juidice v. Vail, 430 U.S. 327, 334 (1977).

[86] Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

[87] Trainor v. Hernandez, 431 U.S. 434, 444 (1977); *see also* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (federal court should abstain in noncriminal judicial proceeding when important state interests are involved and state proceedings afford adequate opportunity to raise constitutional claims); Moore v. Sims, 442 U.S. 415 (1979) (similar); O. FISS, *supra* note 52, at 61-68 (analyzing the doctrine of judicial restraint as developed by case law in the 1940's); Soifer & MacGill, *The* Younger *Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1169-83 (1977) (discussing the expansion of the *Younger* doctrine by *Huffman v. Pursue, Ltd.*).

[88] Hicks v. Miranda, 422 U.S. 332, 349 (1975).

after the equity suit is filed are irrelevant.[89] The Court's attitude toward equity today is illustrated by its opinion in the 1982 case, *Middlesex County Ethics Committee v. Garden State Bar Association.*[90] Holding that *Younger* applies to bar disciplinary proceedings, the Court dropped even the rhetoric of equity from its opinion. Comity alone was enough to justify restraint.[91]

C. Burford *and* Southern Railway

When commercial enterprises seek federal court injunctions against state business regulation on constitutional grounds, they often find their cases dismissed because of an abstention doctrine that traces its origins to the 1943 case of *Burford v. Sun Oil Company.*[92] There are fewer Supreme Court cases here than in *Younger* or *Pullman* abstention; therefore, the precise content of the rule is harder to pin down. Sometimes the proffered justification for dismissal is that the subject matter is of peculiarly local interest.[93] Sometimes the Court declares that federal adjudication

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[89] *See* American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937); Dawson v. Kentucky Distilleries & Warehouse Co., 255 U.S. 288, 296 (1921).

[90] 457 U.S. 423 (1982).

[91] *Id.* at 431-32. The Supreme Court has not yet decided whether *Younger* applies to cases where only damages are sought and not an injunction or declaratory judgment. *See* Juidice v. Vail, 430 U.S. 327, 339 n.16 (1977) (expressly leaving the issue open). If the Court took seriously the equitable basis for *Younger*, this issue could only be decided against the application of abstention. Some lower federal courts have invoked *Younger* in damage cases, *e.g.*, Martin v. Merola, 532 F.2d 191, 195 (2d Cir. 1976); Guerro v. Mulhearn, 498 F.2d 1249, 1253 (1st Cir. 1974). Others have achieved the same result by staying the federal case for damages until completion of the state proceeding, *e.g.*, Giulini v. Blessing, 654 F.2d 189, 193-94 (2d Cir. 1981); Obeda v. Connecticut Bd. of Registration, 570 F. Supp. 1007, 1014-15 (D. Conn. 1983). Coupled with the rule that a federal plaintiff in a § 1983 case will be collaterally estopped by a prior state court adjudication against him, Allen v. McCurry, 449 U.S. 90 (1980), this procedure will have the same effect as outright dismissal of the federal suit. In both cases, the federal plaintiff will usually be bound by the findings of the state court.

[92] 319 U.S. 315 (1943). *See generally* Comment, *supra* note 52 (discussing the proper application of the *Burford* abstention doctrine).

[93] *See* Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 347 (1951) (dismissal on basis of abstention doctrine valid because regulation of automobile insurance rates was area of intensely local interest); *see also* Allstate Ins. Co. v. Sabbagh, 603 F.2d 228, 233 (1st Cir. 1979); Simmons v. Jones, 478 F.2d 321, 328 (5th Cir. 1973) ("as a matter of comity, the district court should have afforded the Georgia courts the opportunity to rectify alleged deviations from the requirements of Georgia law regarding the selection of travese [sic] jurors"), *modified*, 519 F.2d 52 (5th Cir. 1975).

would unnecessarily disrupt important state programs.[94] I have argued elsewhere that neither of these rationales is convincing, and that the key to understanding this doctrine lies in its application almost exclusively to business regulation cases. In contemporary constitutional law there are few restrictions on state regulation of business. If there are significant problems with the regulation, they are likely to be state law issues best decided by state courts.[95] Federal judges may even suspect that the federal suit is primarily a tactical move to delay or otherwise interfere with the enforcement of the state law.

For present purposes the issue of just what the rationale is can be left unresolved. The important question here is whether *Burford* abstention can be justified as an inherent power or limitation of a court of equity. To address this issue we first must briefly examine the opinions in the two leading cases, *Burford* and *Alabama Public Service Commission v. Southern Railway.*[96] The *Burford* case was decided shortly after *Pullman.* Sun Oil Co. sought an injunction, primarily on state law grounds, against an order of the Texas Railroad Commission permitting Burford to drill oil wells. Its grievance was that less oil would be available to Sun if Burford were allowed to drill. The Court noted that the case presented hard problems in the application of state law and relied on *Pullman* for the proposition that in such circumstances a federal court should stay its hand. Because these issues were best resolved in the state courts, it ordered that the complaint be dismissed.[97] In *Southern Railway,* decided seven years later, Southern Railway wanted to discontinue service to small Alabama towns, but the Commission refused to permit it to do so. The railroad brought suit in federal court, claiming that the denial amounted to a deprivation of its property without due process of law and seeking to enjoin the enforcement of the Commission's ruling. Unlike *Burford,* then, the prominent issue in the case arose under the Constitution, not state law, and the Court could not rely at all on *Pull-*

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[94] *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976); *see also* Allstate Ins. Co. v. Sabbagh, 603 F.2d 228, 233-34 (1st Cir. 1979) ("in a very real sense federal court intervention would disrupt the [state's] regulatory scheme").

[95] *See* Wells, *The Role of Comity in the Law of Federal Courts,* 60 N.C.L. REV. 59, 77 (1981).

[96] 341 U.S. 341 (1951).

[97] *Burford,* 319 U.S. at 332-34.

man. Yet the Court dismissed the case, characterizing the issue as an "essentially local problem."[98] It ruled that in such a case, "the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court."[99]

The Court in these cases defends abstention by relying on *Pullman*'s holding that the public interest should be taken into account in framing an equitable decree. In *Pullman*, the Court invoked the federalist policy favoring state courts deciding state law, coupled with its own institutional interest in avoiding constitutional decisions, to defend its postponement of the exercise of federal jurisdiction. In *Burford* the Court relied on *Pullman* to hold that the state law issue there should be decided in state court.[100] But unlike *Pullman*, no hard federal constitutional issue was before the Court in *Burford*, and the Court dismissed the case outright rather than delaying the exercise of federal jurisdiction. The public interest was invoked not to fashion a creative remedy that accommodates the plaintiff's interest in a federal forum and the institutional concerns, but to deny a federal remedy altogether. In *Southern Railway* the "public interest" cited by the Court is nothing more than an assertion that the case concerned matters of peculiarly local interest,[101] even though the plaintiff made a federal constitutional claim. Again, the Court used the public interest rationale to dismiss the case.[102]

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[98] *Southern Ry.*, 341 U.S. at 347.

[99] *Id.* at 350.

[100] *See Burford*, 319 U.S. at 332.

[101] *See Southern Ry.*, 341 U.S. at 350.

[102] The Court also briefly mentioned the availability of state remedies for the plaintiffs' claims, *see id.* at 349; *Burford*, 319 U.S. at 333-34, apparently referring to the rule that equitable relief will be granted only when the legal remedy is inadequate, *see supra* note 80. The problem with this equitable rationale, and perhaps the reason the Court did not fully develop it, is that in federal equity practice the legal remedy ordinarily had to be available on the law side of the federal court to preclude equitable relief. *See Southern Ry.*, 341 U.S. at 359 (Frankfurter, J., dissenting); *see also* AFL v. Watson, 327 U.S. 582, 594 & n.9 (1946) (adequacy of remedy at law is determined by character of relief afforded by federal courts); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24, 29 (1934) ("As the statutory remedy, if it be treated as an action at law, would lie only in the state court and is not cognizable by the federal courts, either as an original action or by removal, its existence cannot oust federal equity jurisdiction."); H. McCLINTOCK, *supra* note 59, § 43, at 104. The application of this equity rule can also be attacked from another angle. If it were applied consistently, it would justify *Burford* abstention in many other cases, such as school desegregation, where the Court has vigorously denied any role for *Burford*. *See* McNeese v. Board of Educ., 373 U.S. 668, 674 (1963). The Court's selective use of the adequate remedy principle strongly

In these cases, the Court carries the public interest maxim far beyond *Pullman* to serve values of federalism.[103] The state interest in a state forum might well deserve the respect the Court accords it, but again, the substantive merit of the Court's rule is not my concern here. The point is that the *Burford* doctrine cannot be justified in terms of the inherent powers and limitations of a court of equity, even in its earliest cases. *Kaiser Steel Corp. v. W.S. Ranch Co.*,[104] decided in 1967, is the most recent illustration of that point. This case involved a dispute about water rights in New Mexico. Abstention was warranted, the Court said, because the state law relating to water rights was "one of vital concern in the arid state of New Mexico, where water is one of the most valuable natural resources," and because the issue was "a truly novel one."[105] As in recent *Younger* cases, the Court did not even invoke the rhetoric of equity, much less the substance.

D. Fair Assessment in Real Estate Association v. McNary

By the end of the 1970's the Court had extended the abstention doctrines far beyond their origins in the inherent powers of a court of equity. They could adequately be explained only as exercises of non-statutory, non-equitable judicial power to make rules governing the exercise of federal jurisdiction. Yet the Supreme Court had never explicitly claimed such a power, doing most of its work under cover of equity rhetoric. In 1981 the Court abandoned this stance. *Fair Assessment in Real Estate Association v. McNary*[106] was an action under section 1983 to recover damages, but not injunctive or declaratory relief, for illegally collected state property taxes. The plaintiffs alleged that their property had been assessed at a higher rate than other property in violation of the equal protection clause. The Court conceded that the suit was properly brought under section 1983, but decided that "the principle of

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suggests that the Court does not take it seriously, but merely manipulates it to achieve the result the Court seeks.

[103] *See Southern Ry.*, 341 U.S. at 359-62 (1950) (Frankfurter, J., dissenting); *Burford*, 319 U.S. at 338 (1943) (Frankfurter, J., dissenting).

[104] 391 U.S. 593 (1968).

[105] *Id.* at 594. The plaintiff sought both damages and an injunction against a claimed trespass, *id.* at 593, but the Court's reasoning does not turn on the fact that an injunction was requested.

[106] 454 U.S. 100 (1981).

comity" required dismissal.[107]

Some historical background will help in understanding the problem presented by the case and the Court's response to it. Ever since the fourteenth amendment exposed state action to constitutional strictures, taxpayers have sought to challenge state taxes in federal court. These efforts have generally been unsuccessful, for both Congress and the Supreme Court have shown special solicitude for the state's interest in freedom from federal court interference in their systems of taxation.[108] In earlier attacks on state taxation, plaintiffs had sought injunctions and the Court had often denied a federal forum, relying on the equitable factors discussed earlier: discretion to take account of the public interest in framing a remedy and the adequate remedy at law principle.[109] Under this regime, many plaintiffs were denied a federal forum. Some cases got past the equitable barriers, however, usually because the federal court did not think the particular state remedy available was an adequate one.[110]

Against this background, in 1937 Congress enacted the Tax Injunction Act which denied federal jurisdiction over such suits if a "plain, speedy and efficient remedy" is available in state court.[111] Whether the intention and effect of this statute were to codify the equitable rule, or to make the standard for federal relief more stringent, is a mooted point even today.[112] Also in the 1930's, Congress enacted the Declaratory Judgment Act,[113] and lawyers naturally tried to avoid the statutory bar of the Tax Injunction Act by bringing declaratory judgment actions instead. In *Great Lakes*

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[107] *Id.* at 105.

[108] *See id.* at 102-03; HART & WECHSLER, *supra* note 14, at 978-79.

[109] *See, e.g.*, Matthews v. Rodgers, 284 U.S. 521, 525-26 (1932).

[110] *See, e.g.*, Grosjean v. American Press Co., 297 U.S. 233, 240, 242 (1936).

[111] Ch. 726, § 1, 50 Stat. 738 (1937) (current version at 28 U.S.C. § 1341 (1982)).

[112] *Compare* Note, *Jurisdiction to Enforce Federal Statutes Regulating State Taxation: The Eleventh Amendment-Section 1341 Imbroglio*, 70 YALE L.J. 636, 643 (1961) (stating that the statute's use of "plain, speedy, and efficient remedy" evidenced an intent to limit the availability of injunctive relief) *and* Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 HARV. L. REV. 780, 784-85 (1946) (discussing the difference between the statute's use of "efficient" as the test of a state remedy, and subsequent cases' use of "adequate" as the test) *with* HART & WECHSLER, *supra* note 14, at 979 (discussing Supreme Court cases that appear to use the terms "plain, speedy and efficient remedy" interchangeably with "adequate remedy" terms used in prior equity doctrine).

[113] Ch. 512, 48 Stat. 955 (1934) (current version at 28 U.S.C. §§ 2201-02 (1982)).

Dredge & Dry Dock Co. v. Huffman,[114] the Court ruled that the equitable considerations underlying the injunction cases also justified a bar against declaratory relief. Because this kind of declaratory judgment action was "essentially an equitable cause of action," the district court should deny relief under the settled law in injunction cases.[115] Having decided the case on equitable grounds, the Court did not have to decide whether the statute barred a declaratory judgment.[116]

In *McNary*, the plaintiffs tried to escape both the statute and *Great Lakes* by eschewing any effort to prevent collection of the taxes. Instead, they sued to recover damages after paying them. Of course, a ruling in their favor would necessarily require a determination that the tax scheme was unconstitutional. For this reason, the Court held that such suits should be dismissed if a remedy is available in the state courts.[117] As in *Great Lakes*, the Court reached this conclusion without deciding whether the Tax Injunction Act so mandates.[118] Unlike *Great Lakes*, the Court did not rely on the equitable principle established in the old injunction cases. Rather, it invoked "the principle of comity."[119] The Court explained that this principle antedated the statute and retained its vitality after the statute was enacted.[120] It was the basis for the earlier equitable decisions, but its application was not limited to actions for injunctive relief.[121] The Court also emphasized that the principle was not limited to tax cases by quoting extensively from *Younger*, where comity received "[i]ts fullest articulation."[122]

It is important to note that the Court could have fit the case into its old equity rhetoric but chose not to. The basis for *Great Lakes* was that a declaratory judgment would have virtually the same effect on state taxation as an injunction.[123] As the Court noted in *McNary*, the resolution of the damages case would often bring

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[114] 319 U.S. 293 (1943).

[115] *Id.* at 300.

[116] *Id.* at 299, 301-02.

[117] *McNary*, 454 U.S. at 113-16.

[118] *Id.* at 107.

[119] *See id.* at 107, 110, 111, 113, 116.

[120] *See id.* at 107-10.

[121] *See id.* at 111.

[122] *Id.* at 111-12.

[123] *See Great Lakes*, 319 U.S. at 300.

about the same consequences.[124] The Court could have said that the equitable principle, already extended beyond injunction suits by *Great Lakes*, could appropriately be applied in other cases where federal adjudication would have consequences similar to an injunction. By taking this approach, the Court could have continued to maintain the appearance that its restrictive rules are aspects of the inherent powers and limitations of a court of equity. Instead, the Court made a deliberate choice to rely on comity alone. It treated *Great Lakes* not as a case where the equitable principle was extended beyond injunction cases, but as one in which comity was applied beyond the injunction context.[125]

The Court makes this shift from equity to comity without any fanfare, and indeed, it does not reflect any substantive shift in the reasons behind the rule of restraint. Nevertheless, *McNary* is significant because the Court finally abandons the rhetoric of equity and openly embraces comity as its ground of decision. This frank assertion of a judicial role in making jurisdictional decisions is the culmination of the movement that began covertly in *Pullman*. With the *Pullman*, *Younger*, and *Burford* doctrines firmly in place, the Court felt bold enough to remove the facade of equity and openly acknowledge its power over the exercise of federal jurisdiction.[126]

IV. A Common Law of Federal Jurisdiction: Some Problems and Suggested Solutions

If the Court's rules cannot be explained as statutory construc-

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[124] *See McNary*, 454 U.S. at 113.

[125] *See id.* at 111. With comity wholly severed from its ties with equity, the Court now has at hand a doctrinal tool that it can employ to allocate other kinds of damage actions to state courts. An example might be constitutional tort suits arising from physical and dignitary harm committed by government officers, like beatings or false imprisonment or defamation. The Court has been hesitant to recognize a constitutional tort action in such cases, for fear of intruding too far into the domain of state tort law. *See* Parratt v. Taylor, 451 U.S. 527, 544 (1981); Paul v. Davis, 424 U.S. 693, 698-701 (1976). In the future the Court might attempt to compromise the state and individual interests here by acknowledging a constitutional right to recover damages for egregious governmental behavior and providing that, under the "principle of comity," the cases must be litigated in state courts. *Cf. Parratt*, 451 U.S. at 542-43 (a suit for negligent deprivation of property by a state official cannot be brought in federal court if a state remedy is available because then deprivation is not without due process of law).

[126] *See generally* L. Fuller, Legal Fictions 70 (1967) (fictions are discarded when new doctrine has been assimilated).

tion and equitable discretion, then they must either be justified as constitutional law or as a kind of federal common law. With respect to the expansive doctrine of *Ex parte Young* and *Monroe*, constitutional stature is ruled out by the body of law, dating back to 1789, that permits Congress to restrict federal jurisdiction over constitutional and other federal issues.[127] Accordingly, the cause of action in federal court for relief on constitutional grounds, first recognized for injunctions in *Ex parte Young* and then expanded to embrace damages in *Monroe*, must be viewed as a federal common law rule.[128] Before *McNary*, the Court never had to confront this question in the restrictive context because it nearly always maintained that its rules were aspects of the inherent powers and limitations of a court of equity. The issue is squarely presented by the *McNary* opinion, but the Court does not address it there either. Since the Court in *McNary* and the earlier abstention cases admits that the cases are properly brought under section 1983 and then dismisses anyway, one could infer that the principle of comity must be a constitutional limit on Congress' power. It is axiomatic that only the Constitution, and not common law, can override a federal statute.[129]

A significant objection to this conclusion is that the Court never characterizes its holding in *McNary* as a constitutional decision and never identifies a source for its abstention rule in the text of the Constitution or in any constitutionally based precedents. There is no indication at all that the Court intended constitutional status for the principle of comity. It would be very odd, and perhaps even irresponsible, for the Court to announce a new constitutional doctrine without identifying it as such or providing a foundation for it in constitutional precedents and principles. At the same time, there are other, less radical interpretations of the case. If my earlier conclusion is accepted, that the section 1983 cause of action is

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[127] *See supra* notes 14-16 and accompanying text.

[128] This is not the only subject on which the Court has made common-law rules of federal jurisdiction. Three other areas are its "prudential" limits on standing to sue, *see, e.g.*, Warth v. Seldin, 422 U.S. 490, 500-01 (1975), its "discretionary" limits on federal jurisdiction over pendent state claims, *see, e.g.*, Aldinger v. Howard, 427 U.S. 1, 13-16 (1976), and its rules regarding habeas corpus relief, *see, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 78-81 (1977).

[129] Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 UCLA L. REV. 1301, 1304-06 (1978). Professor Tushnet argues that since the *Younger* doctrine is not of statutory origin, it must be a constitutional limit on federal judicial power. He seems to overlook the possibility that *Younger* is a common-law rule.

itself essentially common law, then the problem vanishes. The *McNary* principle of comity can be viewed as a common law gloss on a common-law remedy. Of course, the Court may be unwilling to declare bluntly that the cause of action for constitutional tort is common law, even though that is the most accurate characterization of it. In that event, the Court could note the great breadth and lack of specificity in the language of the statute and point out (as it did in *McNary*) that the common-law principle of comity has a long history in the relationships between federal and state courts, beginning before passage of section 1983.[130] Then the Court could employ comity to limit the statute's reach by invoking the precept that the statute must not be construed in a vacuum,[131] but rather "against the background of a large body of standing law on matters of substance, remedy, and jurisdiction."[132] Unless and until the Court indicates otherwise, either of these approaches seems a better working premise than the sterile logic underlying the constitutional reading of the case.

A. Federal Common Law and the Access Issue

If the Court's rules must be explained in common law terms, then a question arises regarding their legitimacy. Since the federal courts lack a general power to make common law, the exercise of such a power requires special justification.[133] The Court has managed to evade this issue by rationalizing its decisions as equity or statutory construction. Once the Court's doctrine is recognized for what it is, as a collection of fictions, it becomes necessary to face squarely the problem of whether the Court should make common law in this area. The issue has two parts. The first is whether a

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[130] *See* Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 338-44 (1978). In *McNary* itself, the Court began the opinion by noting that the specific policy against federal court interference with state taxing started "even before the enactment of § 1983." 454 U.S. at 102.

[131] *See supra* note 44.

[132] Bator, *supra* note 1, at 622 n.49. A corollary of this reasoning is that *McNary* should not be followed in cases where federal jurisdiction is based on a statute that clearly expresses a legislative intent to permit access to federal court. An example is the Railroad Revitalization and Reform Act, which creates an express exception to the Tax Injunction Act for constitutional challenges by railroads to certain state tax assessments. 49 U.S.C. § 11503 (1982). *See* Southern Ry. v. State Bd. of Equalization, 715 F.2d 522, 527-30 (11th Cir. 1983) (upholding federal jurisdiction against a challenge based on *McNary*).

[133] City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).

common law of jurisdiction can be justified under the Court's doctrine regarding the proper scope of federal common law. The second is whether a role for the Court in this particular area can be defended against the objection that article III of the Constitution delegates to Congress exclusive power over the jurisdiction of the lower federal courts.

With respect to the first problem, the starting point for analysis is *Erie Railroad v. Tompkins*,[134] where the Court first held that there is no general federal common law. Later cases have established that federal courts can sometimes make federal common law in spite of *Erie*, but only where there is a strong federal interest in the resolution of an issue.[135] Determining the scope of federal jurisdiction over federal constitutional challenges to state action requires consideration of significant federal as well as state interests; therefore, *Erie* does not seem a serious obstacle to the development of federal common law in this context. The harder question is whether the Court should engage in lawmaking on this subject or should leave the matter entirely to Congress. The leading case on this issue is *City of Milwaukee v. Illinois & Michigan*.[136] The two states sued Milwaukee and other cities in federal court for polluting Lake Michigan. They did not rely on federal statutes for their cause of action, but rather asserted that the federal courts should make a federal common law of water pollution. The Supreme Court agreed that interstate pollution is an area of federal concern and that federal common law is not precluded by *Erie*. It held, however, that Congress had occupied the field of federal regulation by enacting the Water Pollution Control Act Amendments of 1972.[137]

For present purposes, the important aspect of the opinion is the Court's discussion of the circumstances in which the Court should defer to Congress. The Court emphasized that Congress is the preferred federal lawmaker, but said that the federal courts can make federal common law in areas of federal interest "[w]hen Congress

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[134] 304 U.S. 64 (1938).

[135] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); United States v. 93.970 Acres of Land, 360 U.S. 328 (1959); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[136] 451 U.S. 304 (1981).

[137] *Id.* at 317.

has not spoken to a particular issue."[138] The standard for determining whether the federal courts may act is "whether the legislative scheme '[speaks] directly to a question.' "[139] The Court found that Congress, in enacting the 1972 amendments, had indeed "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency."[140] Measured against the *City of Milwaukee* standard, the Court's common-law rules of jurisdiction over constitutional remedies seem defensible. Unlike water pollution, Congress has never passed a comprehensive statute on the matter. It has intervened only sporadically and in narrow areas. Doubtless one of the reasons is that the Court's own activism in the area has handled many of the problems Congress would otherwise have had to confront. In the absence of *Ex parte Young* and *Monroe*, for example, there would have been pressure on Congress to create federal injunctive and damage remedies for the rights granted by the fourteenth amendment and the Court's expansions of those rights in the 1950's and 1960's. Similarly, the Court's development of the abstention doctrines made it unnecessary for Congress to consider such restrictions. The willingness of Congress to let the Court do the work, and to accept the Court's decisions, is hardly an argument against a judicial role. Viewed from the perspective of federal common law, the Court's rules regarding access to a federal forum for constitutional challenges seem defensible.

B. Special Problems Presented by Article III, Section 1

There is, however, a difference between these access rules and other forms of federal common law, and it is a difference that requires further discussion. In any case where the scope of federal common law is at issue, it can be argued that the Constitution assigns the federal lawmaking power to Congress, not to the courts. In the access context, this argument takes on extra force and must be dealt with at some length. Congress' power over the jurisdiction of lower federal courts is not merely one of the long list of legislative powers found in article I of the Constitution. It is derived from article III, section 1, where the Framers specified that the

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[138] *Id.* at 313.
[139] *Id.* at 315.
[140] *Id.* at 317.

judicial power was to be "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[141] The Court has always read this power over the creation of lower federal courts to include authority over the scope of jurisdiction as well.[142] This provision of article III was not an uncontroversial addition to the list of legislative powers specified in article I. It is the result of a hard fought battle between conflicting forces, for the scope of the judicial power was an issue at the convention. It was generally agreed that there should be a Supreme Court to pass final judgment on issues of federal law, but the delegates held sharply divergent views on whether lower federal courts should be created. Opponents feared that they would make "an unnecessary encroachment on the jurisdiction [of the states]," and maintained that appeal to the Supreme Court was enough to serve federal interests.[143] Advocates of lower federal courts believed that uniformity of federal law and protection of federal interests against state prejudices could not be achieved without original jurisdiction in a system of lower federal courts.[144] The two sides ultimately agreed to a compromise under which the power to institute lower federal courts was assigned to Congress.[145] In this way, the states' fears of federal judicial encroachment would be taken into account by the branch of national government composed of representatives from the states and politically responsive to state interests.[146]

Given the nature of this settlement, the Court's longstanding position that Congress can also control the lower federal courts' jurisdiction rests on solid ground. Statements made in the debate on the compromise also support this view,[147] as does the Judiciary Act

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[141] U.S. CONST. art. III, § 1.

[142] *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187-89 (1943); Sheldon v. Sill, 49 U.S. (8 How.) 440 (1850); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812).

[143] 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (June 5) (rev. ed. 1966) (brackets original).

[144] *Id.*

[145] *See id.* at 125; M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 79-80 (1913).

[146] *See* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-59 (1954).

[147] *See, e.g.*, 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 46 (July 18) (rev. ed. 1966) (Sherman stating that he "was willing to give the power to the Legislature but wished them to make use of the State Tribunals whenever it could be done with safety to the general interest"; Mason stating that "many circumstances might arise

of 1789.[148] This statute set up the federal court system and delegated to the new courts some, but far from all, of the jurisdiction permissible under article III.[149] Statutes are not ordinarily good sources of constitutional construction, but this one is an exception, as it was enacted by men who were at the convention or familiar with its work and with the debates in the state ratifying conventions.[150] The claim here is not that Congress' power over jurisdiction is *unlimited.* The limits upon it are the subject of much current debate.[151] What I wish to stress is that the power over federal jurisdiction was assigned to Congress, and not merely as part of a general delegation of legislative authority. Rather, the grant of this power was a deliberate and carefully considered compromise between national and state interests.

If control over federal judicial power resides in Congress, then the Court's expansive rulings in *Ex parte Young* and *Monroe* are vulnerable to an obvious challenge. The aim of the compromise was to furnish a political check on the federal judicial power. The Court subverts this intention when it recognizes federal causes of action unauthorized by Congress.[152] Less obviously, the Court's re-

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not now to be foreseen, which might render such a power absolutely necessary."); *see also* C. WARREN, THE MAKING OF THE CONSTITUTION 539-41 (1937 ed.) (discussing Convention debates over the proper jurisdiction to be granted to the federal courts as compared to state courts).

[148] Ch. XX, 1 Stat. 73.

[149] *See id.* §§ 9-12, 14 *reprinted in* D. CURRIE, FEDERAL COURTS app. C 1013-16 (3rd ed. 1982); *see also* HART & WECHSLER, *supra* note 14, at 33-35 (describing the jurisdiction of the district and circuit courts).

[150] *See* Warren, *supra* note 14, at 65-66. The position taken in the text and in the authorities cited is not universally shared. For opposing viewpoints, see 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 449 (1833); J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 240, 241-43 & n.228, 246-47 (1971). For a response to Goebel, see HART & WECHSLER, *supra* note 14, at 12-13 n.46 (stating that Goebel's argument appears "uncharacteristically thinly supported and unpersuasive").

[151] *See, e.g.*, HART & WECHSLER, *supra* note 14, at 330-65; Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982); SAGER, *The Supreme Court 1980 Term, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); *Symposium: Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV. 893 (1982).

[152] *See* Carlson v. Green, 446 U.S. 14, 34-44 (1980) (Rehnquist, J., dissenting); Monroe v. Pape, 365 U.S. 167, 241-42 (1961) (Frankfurter, J., dissenting). *See generally* City of Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981) (federal lawmaking is ordinarily for Congress).

strictive rules are subject to a similar attack from the other side. For a supporter of federal judicial power, the advantage of the settlement at the convention was that a potentially broad federal judicial power was recognized and left in the hands of a politically responsive national body. The Court's limiting rules betray this side of the compromise.[153]

C. Defending the Court's Rules

Because the Court has not acknowledged that its lawmaking raises this objection, it has not offered any rebuttal. I believe the Court's assertion of power can be defended against the charge of usurpation. The context in which the article III compromise was fashioned differs in two important ways from the present, and these differences undermine the continuing vitality of the historical argument. First, the legal world of the eighteenth century was less complex and less crowded with cases. The Supreme Court could consider every federal issue on appeal, whether or not there were any lower federal courts with jurisdiction to hear them. Perhaps the issue of whether there were to be lower federal courts, and the scope of their jurisdiction, was not so critical, and the conclusions reached should not control the issue today.[154] Professor Eisenberg makes this argument in support of the position that Congress today cannot constitutionally abolish lower federal courts and that there are significant limits on Congress' power to restrict their jurisdiction.[155] My more modest submission is that, even if his conclusions are rejected, his argument on historical context weakens the force of the compromise and may support a judicial role in making jurisdictional rules. Eisenberg's suggestion could not be accepted without ignoring the history and structure of the Constitution and the Supreme Court's case law construing article III. I believe that history, structure, and precedent deserve more respect than Eisenberg is ready to accord them, and his position that Congress' power is severely limited today ought to be rejected. But it does not follow that his arguments have no force or that no

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[153] *See* Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100, 119-25 (1981) (Brennan, J., concurring in the judgment).

[154] Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 509-13 (1974).

[155] *Id.* at 514.

modifications in the Framers' plan should be considered. My proposal is that the changes between 1787 and the present can support a judicial role in making common law rules that expands the federal courts' jurisdiction. This compromise allows the Supreme Court to expand lower federal court jurisdiction to protect federal rights, while acknowledging the preeminent power of Congress.

The other difference is that the original Constitution contained very few constitutional rights, and significant constitutional limits on state governments did not come until ratification of the civil war amendments.[156] Thus, the decision to allocate to Congress exclusive authority over the scope of federal jurisdiction was made in a context where there were few constitutional rights against government. Giving authority over federal jurisdiction to a majoritarian branch of government was appropriate in the legal world of 1787. To assign Congress exclusive control over federal remedies for constitutional violations, however, is to give a majoritarian branch of government absolute control over the assertion of anti-majoritarian rights. These differences support a judicial role in providing access to federal court, but they do not require us to ignore the Framers' plan altogether. On the contrary, Congress should retain ultimate authority over the scope of federal judicial power. But when Congress has not spoken specifically to an issue, so that there is no clear legislative intent, the Court's common-law approach in *Ex parte Young* and *Monroe* (as I read that case) is appropriate.

D. Against Restrictive Rules: Legislative Inertia and Institutional Roles

These differences in context between 1787 and the present both support common-law expansions, but not limitations of federal judicial power. Professor Eisenberg's argument against continued adherence to the compromise is that the Supreme Court could hear all federal issues in the legal world of the eighteenth century. Constraints on district court jurisdiction, based on that premise, are no longer valid now that the premise does not hold. The irony of as-

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[156] *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (Bill of Rights does not apply to the states); *see also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 460 (10th ed. 1980) (apart from the contract clause, "[t]here were relatively few references to individual rights in the original Constitution").

signing the legislature total control over the vindication of constitutional claims justifies a judicial role in creating those remedies where Congress has not acted, but does not justify restricting remedies provided by Congress.

Is it the case, then, that differences in historical context can justify the common-law expansion of federal constitutional remedies, but not their limitation? Such an argument can be made, but it is more complex than merely noting that the contextual factors themselves support only expansion. That point might be enough if the Court's limiting rules precluded the exercise of federal jurisdiction over statutorily authorized causes of action. In fact, the Court's rules have restricted a cause of action of its own creation: the suit for injunctive relief on constitutional grounds that originated in *Ex parte Young* and the action for damages that began in *Monroe*. Since the limiting rules do not bar any jurisdiction granted by Congress, they do not interfere with the article III compromise at all.

There is, however, another perspective on the issue that may uphold the expansive rules but not the restrictive ones. Suppose we turn from the article III compromise and the differences in historical context between 1787 and the present, and look at the question in political and institutional terms. There are two problems with relying on Congress alone to make rules concerning the federal judicial power over constitutional remedies, one general and one specific. The general problem is the phenomenon of legislative inertia, which accounts for common-law decisionmaking in many areas.[157] The characteristics of a legislative body make it harder to get something changed than to keep things as they are.[158] The more specific problem with relying on Congress alone to address the question of constitutional remedies is that Congress is institutionally unsuited to the task. As Professor Wechsler has pointed out, Congress is not only a majoritarian, politically responsive body; it is also the branch of the national government made up of repre-

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[157] *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 146-62 (1982).

[158] *See* Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 801 (1963) (some problems arise in "highly controversial areas in which lack of action may reflect not lack of interest or activity but equivalence of conflicting pressures," while in other instances, "congressmen are too driven to be able to attend to such matters, save occasionally, and then under the pressure of a special force").

sentatives from the states.[159] In the organization of the Senate, state representation is the paramount value, overcoming even the principle of majority rule.[160] Accordingly, Congress will be especially responsive to state and majoritarian interests,[161] and these are precisely the forces against which many constitutional rights are intended to protect us. Legislative inertia combined with institutional bias make it a daunting task to secure legislation expanding constitutional remedies. There is no such problem when Congress is assigned the role of making rules that limit federal jurisdiction. On the contrary, Congress can be expected to take a sympathetic view of such proposals if there is popular support for them. Institutional bias works against rather than together with legislative inertia.[162] For these reasons it is more appropriate for the Court to expand constitutional remedies by common-law rulings like *Ex parte Young* and *Monroe* than to contract them through *Younger*, *Pullman*, and *Burford* abstention. Even though these doctrines restrict jurisdiction over a cause of action that is itself judge made, they are just the sort of rules that Congress is institutionally suited to make.

This argument is not wholly convincing, however. Its persuasive force rests on the premise that Congress will enact substantially more restrictive than expansive rules, but the historical record does not bear out this prediction. Since the Supreme Court's recognition of a federal injunctive remedy in *Ex parte Young*, Congress has enacted several statutes restricting federal jurisdiction,[163] but only two major restraints have survived the test of time. These are the Johnson Act of 1934, which bars federal injunctions against state utility rate orders,[164] and the Tax Injunction Act of 1937, precluding federal injunctions of state tax collection.[165] If the cause of

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[159] *See* Wechsler, *supra* note 146, at 546-47.

[160] *See id.* at 547-48.

[161] *See id.* at 546, 552, 558; *see also* Chafee, *Safeguarding Fundamental Rights: The Tasks of States and Nation*, 27 GEO. WASH. L. REV. 519, 537 (1959) (each member of Congress "is more concerned with the interests of the political area from which he comes than with the overall purposes of the body in which he sits").

[162] *Cf.* G. CALABRESI, *supra* note 157, at 124-29 (discussing other examples of asymmetry in the interactions between common-law rulings and legislative inertia).

[163] *See* HART & WECHSLER, *supra* note 14, at 962-88.

[164] 28 U.S.C. § 1342 (1982) (original version at ch. 283, § 1, 48 Stat. 775 (1934)). *See* HART & WECHSLER, *supra* note 14, at 976-78.

[165] 28 U.S.C. § 1341 (1982) (original version at ch. 726, § 1, 50 Stat. 738 (1937)). *See* HART

action recognized in *Monroe* is properly understood as one of common law and not statutory origin,[166] then Congress has never enacted a statute granting a general right to recover damages or injunctive relief from state officers or governments for constitutional violations. There are, however, a number of statutes granting federal causes of action in narrowly defined circumstances, or making exceptions to the preclusive rule of the Tax Injunction Act.[167] It appears that legislative inertia is a more powerful force than the political pressure for either expansive or restrictive rules.[168] The upshot is that Congress cannot be relied upon either to protect the individual's interest in constitutional remedies or the competing state interest in limiting federal judicial authority. If expansive rules are permissible, then restrictive ones should be allowed as well.

CONCLUSION

I have made two major points. The first is a rebuttal to Professor Redish's institutional attack on abstention. Viewed realistically, these judge made rules restricting federal jurisdiction are not a judicial usurpation of power, but are part of a common law of federal

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& WECHSLER, *supra* note 14, at 978-79.

[166] *See supra* text at notes 27-46.

[167] *See, e.g.*, 28 U.S.C. § 1362 (1982) (granting district courts original jurisdiction over actions by Indian tribes when such actions arise under the Constitution, laws or treaties of the United States), *construed in* Moe v. Confederate Salish & Kootenai Tribes, 425 U.S. 463, 473 (1976) (permitting Indian tribes to use § 1362 in federal court to enjoin state tax collection in spite of the Tax Injunction Act); 42 U.S.C. § 2000e(a) (1982) (authorizing federal damage suit for state government violations of employment discrimination statute), *reviewed in* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (rejecting eleventh amendment challenge to application of § 2000e(a) to state governments); 49 U.S.C. § 11503 (1982) (exempting from the coverage of the Tax Injunction Act certain challenges by railroads to state property tax assessments), *construed in* Southern Ry. v. State Bd. of Equalization, 715 F.2d 522, 527-30 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1593 (1984); *cf.* Civil Rights Attroney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982) (authorizing awards of attorney's fees to prevailing parties in civil rights cases), *reviewed in* Hutto v. Finney, 437 U.S. 678, 693-700 (1978) (upholding application of § 1988 to state governments in face of eleventh amendment challenge).

[168] The fact that Congress has not chosen to make more restrictions does not decisively demonstrate that legislative inertia is the reason for its lack of activity, so that the Court must take on the task. The explanation may be that competing political considerations have generally been more compelling than state autonomy or that states have not viewed federal court review of state officers' conduct as an especially dire threat to their independence. Even so, the absence of a marked tendency to make more restrictive rules than expansive rules certainly casts doubt on the proposed distinction.

jurisdiction over constitutional remedies. They were initially developed in the 1940's, an era when the federal cause of action to redress constitutional wrongs was founded on the common law principle of *Ex parte Young*.[169] The Court's decision in *Monroe* to base the cause of action on section 1983 and to insist that this approach reflected the intent of the framers does not undermine the institutional legitimacy of abstention because the Court's reading of legislative intent is unpersuasive.[170] My second point is that this common law of jurisdiction over constitutional remedies as a whole is vulnerable to a somewhat different challenge than the one Redish makes against abstention. It can be questioned on the ground that article III assigns to Congress control over the jurisdiction of the federal courts, so that the Court should make no rules regardless of whether Congress has enacted law in the area.[171] Because constitutional rights are at stake, I believe a common-law role for the Court to recognize federal causes of action can be defended and that a corresponding power to make limits on the exercise of jurisdiction must also be allowed.[172]

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[169] *See supra* notes 31 & 52.

[170] *See supra* notes 152-53 and accompanying text.

[171] *See supra* text at notes 127-68. Even if the Court's doctrines can be defended against the usurpation argument, they remain open to attacks on their substantive merit. *See, e.g.*, Field, *supra* note 1; Neuborne, *supra* note 1; Weinberg, *supra* note 1; Note, *supra* note 33, Comment, *supra* note 52.

[172] *See supra* note 132.