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Is Disparity a Problem?

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IS DISPARITY A PROBLEM?

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Sometimes it is hard to capture the whole truth about an area of the law merely by listening attentively to the propositions advanced on either side of the contested issues. In our legal culture, results are what count most, and much time and effort are focused on the normative question of which alternative is the better rule. We pay too little attention to features of a problem that neither party can use to gain an advantage. Advocates, judges, and academic writers all find it convenient to ignore points that do not serve their own ends. When the same awkward facts create difficulties for both sides, they tend to be ignored by everyone, in a sort of implicit pact not to discuss matters with which no one feels comfortable.

So it is in the law of constitutional remedies, where the state and the individual square off on the question whether federal or state courts should adjudicate constitutional challenges to state action. A prominent theme in Supreme Court jurisprudence in recent years is a preference for having this type of case litigated in state rather than federal court. Under the banner of judicial federalism, the Court has laid down an array of rules barring access to federal court for many of these lawsuits.[1] In support of these rules, the

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[1] *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987); Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986); Los Angeles v. Lyons, 461 U.S. 95, 112 (1983); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981); Moore v. Sims, 442 U.S. 415 (1979); Juidice v. Vail, 430 U.S. 327 (1977); Stone v. Powell, 428 U.S. 465 (1976); Rizzo v. Goode, 423 U.S. 362, 379-80 (1976); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971); *cf.* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 21 & n.22 (1983) (declaratory judgment action brought by state agency does not arise under federal law for purposes of district court jurisdiction even though it raises federal questions).

Court and academic defenders of judicial federalism explain that permitting federal jurisdiction would impose heavy burdens on the operation of state judicial processes,[2] and, in any event, it makes little difference where a case is adjudicated because there is substantial parity between state and federal courts.[3] By "parity" I mean that state and federal judges are equally talented and equally sympathetic to constitutional rights. Critics of the Court's rules claim there is a significant gap between the federal and state courts in terms of their competence and their sensitivity to constitutional values,[4] and charge that the Court's judicial federalism doctrine

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[2] *See, e.g.*, *Moore*, 442 U.S. at 427-30 (federal court disruption would prevent the informed evaluation of state policy by state tribunals); *Huffman*, 420 U.S. at 603-04, 608-09 (federal interference prevents the state from performing its function of providing a competent forum to hear constitutional objections to state policies); Steffel v. Thompson, 415 U.S. 452, 462 (1974) (implying that federal intervention into pending state proceedings may result in duplicative legal proceedings, disruption of the state criminal justice system, and reflect negatively on the state court's ability to enforce constitutional principles); *see also* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981) (emphasizing that federal jurisdiction carries with it the implicit message to state courts that they are less capable of handling important decisions, and arguing that this negative impact causes significant long term harm given the large number of federal questions states are required to handle).

[3] *See Huffman*, 420 U.S. at 611; Allen v. McCurry, 449 U.S. 90, 105 (1980) (both cases note that state judges have a constitutional obligation to uphold federal law and express the Court's confidence in the ability of those judges to do so); *see also* Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983) (arguing that parity does exist because state courts are no more hostile to the vindication of federal rights than federal courts); Aldisert, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 821 (1981) (arguing that there exists no evidence that the state courts today are incapable of dealing with federal issues).

[4] *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (examining such factors as technical competence, psychological set, and insulation from majoritarian pressures as reasons for the continued preference of constitutional litigants for a federal trial forum); *see also* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 2 (1980); Zeigler, *Federal Court Reform of State Criminal Justice Systems: A Reassessment of the* Younger *Doctrine from a Modern Perspective*, 19 U.C. DAVIS L. REV. 31, 46-49 (1985); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 175-80 (1985) (discussing the "optimal scope" of federal jurisdiction). Judge Posner, however, could hardly be deemed a critic of the Court's restrictive rules. *See id.* at 191-92; *see also* Monaghan, *Book Review*, 99 HARV. L. REV. 344, 348-52 (1985) (reviewing R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985)); Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1, 2-3, 218 (1968).

gives too little weight to the plaintiff's interest in a federal forum for litigating federal rights.[5]

This article argues that neither side of this debate forthrightly addresses the critical point of conflict between them, because each believes it has more to gain by distorting the allocation issue than by confronting it directly. The root of the problem lies in the Court's ambiguous position on parity. The Court insists that there is parity, but does not specify precisely what it means by parity: does it deem state courts the virtual equals of federal courts, in that the outcome of a suit would be the same in state as in federal court, or does it acknowledge a gap yet consider that gap too small to require a federal forum? Because of this ambiguity, the Court is unable to respond convincingly to its critics. The Court's critics are surely right to insist there is a gap, but wrong in maintaining that this, standing alone, justifies federal jurisdiction. Because the Court and its academic allies never acknowledge the gap, they are not in a position to point out that the federal plaintiff's interest in access to a federal court is merely a quest for a litigating advantage, which rarely attains constitutional stature. At the same time, the Court's ambiguity on parity allows it to avoid admitting that the state's interest in a state forum is often no more elevated, as the state's attorney seeks the very same litigating edge the plaintiff pursues.

Although neither side will admit it, the resolution of the allocation issue is often largely political, in that it turns on a rough value preference as to which party should obtain a forum-related advantage in the underlying substantive litigation. The question posed is whether to favor state court, a forum more likely to be sympathetic to the substantive interests advanced by the state in the litigation on the merits, or whether to give a plaintiff the

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[5] *See, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. at 123-25 (1981) (Brennan, J., dissenting) (arguing that where Congress has granted the federal courts jurisdiction, the court is not free to repudiate it); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977); Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977); Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & Mary L. Rev. 683 (1981); Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978); Nichol, *Backing Into the Future: The Burger Court and the Federal Forum*, 30 KAN. L. REV. 341 (1982).

option of going to federal court, a forum more likely to decide in his favor on the merits. The opinions speak of "the principle of comity" between federal and state courts,[6] the "threat to our federal system" of government posed by federal court challenges to state law,[7] and "the minimization of friction between our federal and state systems of justice."[8] The dissents declare that federal courts are "'the primary and powerful reliances' for vindicating federal rights"[9] and that "wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication . . . ."[10] This rhetoric, deliberately or not, obscures the true nature of the issues. In the judicial federalism cases, we observe lawyers on both sides grasping for nothing more noble than the equivalent of the home court advantage.

Ironically, exposing the political, value-laden character of these issues permits us to identify a subtle but important advantage of our federal system. The availability of two court systems provides an opportunity to take substantive considerations into account in making forum decisions and, consequently, allows the Court or Congress to compromise and accommodate competing interests not only in laying down substantive legal rules, but also in allocating cases between federal and state court. This opportunity is lacking in a simpler legal system comprised of only one hierarchy of courts.

Part I describes aspects of the historical and doctrinal background of judicial federalism. Part II examines the Court's treatment of the parity issue and shows how the Court's ambiguity permits both sides of the debate to avoid revealing their true objectives. Part III demonstrates that some, but not all, of the allocation doctrine can be explained in terms of a conflict between the plaintiff's litigating interest and the state's interest in maintaining the integrity of state judicial processes. A significant body of cases, however, does not fall within this framework. In these cases the Court seems to prefer state court because of, and not

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[6] *FAIR*, 454 U.S. at 105.

[7] Moore v. Sims, 442 U.S. 415, 423 (1979).

[8] Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring)).

[9] Trainor v. Hernandez, 431 U.S. 434, 456 (1977) (Brennan, J., dissenting).

[10] Juidice v. Vail, 430 U.S. 327, 343 (1977) (Brennan, J., dissenting) (quoting Zwickler v. Koota, 389 U.S. 241, 248 (1967)).

in spite of, the lack of parity. Part IV argues that this is a legitimate use of allocation rules, and that the capacity to pursue substantive aims through jurisdictional rules is a strong point of our federal system.

I. The Rise of Judicial Federalism in the Supreme Court

The dual judicial system is as old as the nation. The system represents a vital part of the compromise reached at the 1787 convention between proponents of strong national government and advocates of state power.[11] Their agreement, embodied in article III of the Constitution, provides that there shall be at least one national court, a Supreme Court, with authority ultimately to determine issues of federal law. The Framers left it up to Congress to decide whether to create lower federal courts and, by necessary implication, what jurisdiction to give them and how much adjudication of federal law to leave to the state courts.[12] Until 1875, Congress assigned most federal cases to state courts,[13] and before passage of the fourteenth amendment in 1868 there were few constitutional rights against states.[14] Not until the 1960s did an activist Court begin to read the fourteenth amendment broadly to expand the scope of constitutional protection and to breathe new life into federal remedial statutes passed in the Reconstruction Era.[15] The recognition of new federal rights and remedies soon led to demands for restrictions on federal court power. Since 1970, the Court has been increasingly responsive to this pressure.

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[11] *See* Frank, *Historical Bases of the Federal Judicial System*, 13 Law & Contemp. Probs. 3, 10 (1948); Wells, *Why Professor Redish is Wrong About Abstention*, 19 Ga. L. Rev. 1097, 1126 (1985) (both discussing the dispute at the 1787 convention over the formation of the judiciary and the scope of its authority).

[12] *See, e.g.*, Lockerty v. Phillips, 319 U.S. 182, 187-89 (1943) (Congress may restrict equity jurisdiction over the Emergency Price Control Act to an Emergency Court); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) (Congress may restrict diversity jurisdiction); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812) (federal courts have no jurisdiction to create common-law crimes).

[13] *See* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 35, 37 (3d ed. 1988) [hereinafter Hart & Wechsler].

[14] *See* G. Gunther, Constitutional Law 406-08 (11th ed. 1985).

[15] For an account of these developments, see H. Wechsler, The Nationalization of Civil Liberties and Civil Rights (1968).

A. Constitutional Remedies in the Federal Courts

The starting point for the law of federal constitutional remedies is the eleventh amendment,[16] which the Court long ago construed to prohibit most suits brought by individuals against states.[17] The Court also created exceptions to this immunity, holding that it did not extend to local governments,[18] or to suits brought by the United States[19] or another state.[20] A significant conflict remained between the fourteenth amendment, with its constitutional guarantee against the states, and the eleventh amendment's barrier to suit. The Court worked out an accommodation between them in a line of cases culminating in *Ex Parte Young*.[21] In *Young*, the court held that state officers may be sued for injunctive relief under the fourteenth amendment in spite of the eleventh amendment, explaining that when the officer acts unconstitutionally he is stripped of his representative character for eleventh amendment purposes, even though he remains a state actor for purposes of the fourteenth.

Working within this established eleventh amendment framework, the Warren Court significantly expanded federal remedies for constitutional violations by its constructions of two statutes passed shortly after the Civil War, the Habeas Corpus Act of 1867, and the Civil Rights Act of 1871. Habeas corpus is a remedy for illegal

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[16] U.S. CONST. amend. XI: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." *See generally* P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL STATE RELATIONS 766-81 (1987) (discussing the origins of state sovereign immunity and the eleventh amendment).

[17] *See* Hans v. Louisiana, 134 U.S. 1 (1890) (eleventh amendment bars action against a state by one of its own citizens to recover interest payments from state-issued bonds).

[18] Lincoln County v. Luning, 133 U.S. 529 (1890) (action against county to recover interest payments from county bonds not barred by eleventh amendment).

[19] United States v. Texas, 143 U.S. 621 (1892) (United States can bring an action against state of Texas to determine the boundary between Texas and the Indian Territory).

[20] South Dakota v. North Carolina, 192 U.S. 286 (1904) (state of South Dakota can sue state of North Carolina to enforce a property right held by South Dakota in bonds issued by North Carolina).

[21] 209 U.S. 123 (1908) (state officer may be sued for injunctive relief under fourteenth amendment despite the eleventh amendment); *see also* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).

confinements permitting the petitioner to demand that his jailer provide reasons for his imprisonment and to contest the validity of those reasons before a judge. Early on, the federal habeas was available only for federal prisoners and usually not for detention pursuant to a criminal conviction.[22] The Habeas Corpus Act of 1867 extended this remedy to persons held under state as well as federal authority, and the Court construed the new statute to apply to imprisonment imposed pursuant to criminal conviction.[23] By a process of accretion, the grounds on which judicially imposed confinements could be challenged were gradually expanded to include the legality of the sentence imposed, the constitutionality of the statute under which a person was convicted, and the fundamental fairness of the procedures followed at trial.[24] Finally, in *Brown v. Allen*,[25] a 1952 case, the Court held that any constitutional claim arising from the judicial process leading to conviction was cognizable on habeas.

The Warren Court's principal contribution to the law of habeas corpus was its opinion in *Fay v. Noia*.[26] *Brown* and the cases that preceded it had arrived at the broad cognizability rule by incremental advances, without any guiding theory. The opinion in *Noia* reaffirmed *Brown* and offered an elaborate historical justification for the broad scope of the writ.[27] According to the opinion, habeas had been used since the seventeenth century to challenge a broad range of judicial and executive detentions. On another point *Noia* went beyond *Brown*. Before *Noia*, a person who had not properly presented his claim to the state courts was barred from relief on habeas by the doctrine of procedural default.[28] Suppose, for example, state law demanded a contemporaneous objection to the admission of evidence for the state court to consider the objection.

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[22] *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

[23] *See* H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 743 (1984).

[24] *See id.* at 743-44. *See generally* L. YACKLE, POSTCONVICTION REMEDIES (1981 & 1988 Supp.).

[25] 344 U.S. 443 (1953).

[26] 372 U.S. 391 (1963); *see* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041 (1977).

[27] 372 U.S. at 402-14; *see* HART & WECHSLER, *supra* note 13, at 1487-1504.

[28] *Brown*, 344 U.S. at 482-87 (Reed, J., for the Court on this issue); *see* HART & WECHSLER, *supra* note 13, at 1539-40.

Under the old rule, if the defendant's lawyer failed to object, then the federal habeas court would not hear the claim either. In *Noia*, the Court relaxed this rule, holding that a procedural default would bar review on habeas only when it was committed for reasons of strategy, and so amounted to a "deliberate bypass" of the state courts.[29] Habeas corpus, which began as a means of challenging illegal confinement without trial, had become a vehicle for federal court review of state criminal convictions.[30]

The Civil Rights Act of 1871 (the "Ku Klux Act") was enacted to protect blacks and their white supporters in the South from Ku Klux Klan terrorism.[31] The statute created new federal crimes to punish terrorism and empowered the President to send federal troops and to suspend the writ of habeas corpus to quell disturbances. Section one, now codified as 42 U.S.C. section 1983, declares that

> Every person who, under color of [state law] . . . subjects . . . any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress.

For a long time, the Supreme Court interpreted "under color of" to mean that an official's conduct was actionable only if state law authorized him to act as he did, a reading which severely limited the utility of the provision as a remedy for constitutional wrongs.[32] *Monroe v. Pape*,[33] a 1961 decision, greatly expanded the scope of this statute. According to *Monroe*, an action was taken "under

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[29] 372 U.S. at 439. The Court further determined that to constitute a procedural default, the deliberate by-pass of state procedure must result from the considered choice of the petitioner, not just his counsel. *Id.*

[30] *See* Yackle, *Explaining Habeas Corpus*, 60 N.Y.U.L. REV. 991 (1985) (arguing that the development of the writ is best explained by viewing habeas as providing a federal forum in which to enforce federal rights that may be unpopular with the states).

[31] *See* Monroe v. Pape, 365 U.S. 167, 180 (1961), *overruled on other grounds*, Monell v. Department of Social Serv., 436 U.S. 658 (1978) (*Monroe* overruled to the extent it held local governments are not "persons" subject to suit under section 1983).

[32] *See* Wells, *supra* note 11, at 1103-04.

[33] 365 U.S. at 167.

color of" state law whenever the defendant acted in the course of, or under the pretense of, his official duties.[34] As a result of this ruling, virtually any constitutional claim against a state officer could be litigated in federal court since that state officer would almost always be acting in the course of or under the pretense of his official duties.

This new remedy complemented the habeas remedy. Habeas provided access to federal court for persons challenging criminal convictions, while section 1983 performed that function for persons seeking damages or injunctive relief. Section 1983 is the remedy chosen by the victim of an illegal search against whom no criminal charges are brought, or by the government employee fired for protected speech, or by a woman alleging sex discrimination by a public agency.

The problem of access to federal court for injunctive relief presents another battleground of judicial federalism and requires further elaboration, for certain kinds of injunctions are subject to special rules. Consider the case where the state prosecutes someone for a crime like subversive advocacy. The criminal defendant may challenge the statute on first amendment grounds, and he may prefer to raise his claim in federal court rather than in the state prosecution. The traditional rule, exemplified by *Douglas v. City of Jeannette*,[35] was that federal courts ordinarily would not enjoin state criminal proceedings. This refusal was viewed as an application of two equitable principles: one, a court of equity would not enjoin a criminal prosecution, and two, a court of equity would not grant relief unless the plaintiff could show irreparable injury and lack of an adequate remedy at law. Unless the state criminal court was biased, or the prosecution was brought in bad faith for the purpose of harassment, the Court would say the individual could adequately vindicate his claims at the state level.[36]

In the 1940s, the Court created two further principles of federal court abstention from granting injunctive relief. In *Railroad Com-*

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[34] *Id.* at 183-87.

[35] 319 U.S. 157 (1943).

[36] *See* Laycock, *Federal Interference With State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 224. This is a judge-made rule. The anti-injunction act, 28 U.S.C. § 2283 (1982), does not apply to actions brought under 42 U.S.C. § 1983 (1982). Mitchum v. Foster, 407 U.S. 225, 242-43 (1972).

mission v. Pullman Co.,[37] the Court held that the federal court should abstain when the resolution of a sensitive federal constitutional issue turned on an unsettled point of state law which might obviate the need to decide the federal issue or significantly alter it. In such a case, the Court directed, lower courts should stay the federal proceedings while the parties requested a clarification of state law from the state courts.[38] In this way, both unnecessary constitutional decisions and erroneous readings of state law by federal judges could be avoided.[39] The second abstention decision, *Burford v. Sun Oil Co.*,[40] ordered federal abstention when commercial enterprises challenge state business regulation. In the typical case, the orders of a state administrative agency are challenged on federal due process grounds, the Court characterizes the dispute as "essentially local,"[41] and maintains that abstention will help avoid the "needless disruption" of state programs.[42] *Burford* abstention does not depend on the presence of a state issue in the case.

In *Dombrowski v. Pfister*,[43] the Warren Court relaxed the *Douglas* restrictions on equitable relief against state proceedings for an important class of cases. *Dombrowski* was a first amendment overbreadth challenge to subversive advocacy laws, brought by persons threatened with prosecutions in Louisiana courts for their civil rights activities.[44] The Court permitted the federal challenge in spite

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[37] 312 U.S. 496 (1941). *See generally* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974).

[38] 312 U.S. at 501.

[39] *Id.* at 500.

[40] 319 U.S. 315 (1943) (suit to enjoin the execution of a state railroad commission order permitting the drilling and operation of certain oil wells). *See generally* Comment, *Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the Burford Doctrine*, 46 U. CHI. L. REV. 971 (1979).

[41] Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 347-48 (1951) (Alabama Public Service Commission decision to discontinue operation of certain intrastate trains was a local problem better suited for state court review).

[42] Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976) (involving a dispute over state legislation governing the allocation of water). For a recent discussion of both *Pullman* and *Burford* abstention, see Davies, Pullman *and* Burford *Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1 (1986) (arguing that both should be applied more sparingly).

[43] 380 U.S. 479 (1965).

[44] The conventional means of challenging a statute on free speech grounds is

of the old equitable restraint doctrine, but without abandoning the forms of the prior law.[45] First, the Court held that on the facts the plaintiffs had made out a good case of bad faith prosecution under the standard rules. Then, the Court went further, declaring that when a statute is attacked for overbreadth, the irreparable injury requirement is met. It is enough that the statute has a chilling effect on the protected speech of others, whose interests cannot be defended merely by allowing this criminal defendant to challenge its application to him.[46]

The statutes were challenged for vagueness as well as overbreadth, so that a plausible case could be made for *Pullman* abstention while the parties sought a definitive reading of state law in the state courts. The Court rejected the state's argument for *Pullman* abstention on the ground that the doctrine was inappropriate when statutes were challenged for vagueness and "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution . . . ."[47] In denying abstention, *Dombrowski* was characteristic of many Supreme Court decisions of the 1960s in which the Court generally resisted the application of the *Pullman* doctrine to civil rights cases.[48]

B. Younger v. Harris *and Its Progeny*

With *Monroe*, *Noia*, and *Dombrowski*, the exercise of federal judicial power reached its furthest frontier. From that point it has

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case-by-case, one fact situation at a time. The premise of the overbreadth doctrine is that this method of review is too slow. Persons wishing to engage in protected speech may be reluctant to do so for fear they will be prosecuted. For this reason, a statute that sweeps too broadly must be struck down on its face pending an acceptable narrowing construction by the state courts. *See* G. GUNTHER, *supra* note 14, at 1148-50; Fiss, *supra* note 5, at 1114; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[45] *See* Fiss, *supra* note 5, at 1103-04, 1107-08, 1112-13, 1116-17 (arguing that the Court accomplished this result by applying the equity principles while "finessing the concept of irreparable injury").

[46] *See Dombrowski*, 380 U.S. at 486-87. After *Dombrowski*, hundreds of suits for injunctive relief were brought in federal courts but most of them failed on the merits. *See* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of* Dombrowski, 48 TEX. L. REV. 535, 606 (1970).

[47] *Dombrowski*, 380 U.S. at 491; *see* Baggett v. Bullitt, 377 U.S. 360, 378 (1964).

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

retreated ever since, as the Court has undertaken to give state courts a more prominent role in constitutional litigation. In a line of cases beginning with *Younger v. Harris*[49] in 1971, the Court contracted access to federal court for constitutional claims and required litigants to pursue their rights in state court. *Younger*, like *Dombrowski*, was a first amendment overbreadth challenge to a subversive advocacy statute, and it is noteworthy for two reasons. First, *Younger* repudiated *Dombrowski*'s holding that overbreadth, and its chilling effect on the protected speech of others, is enough to justify a finding of irreparable injury.[50] Second, the Court's opinion set forth an expansive theory of the role of state courts in the federal system. The Court said that the Framers instituted "a system in which there is sensitivity to the legitimate interests of both State and National Governments . . . ."[51] Accordingly, the main reason why federal courts must defer to state criminal proceedings was not equity. Rather, the "even more vital consideration [is] the notion of 'comity,' " which meant "a proper respect for state functions" and "a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[52]

If a "proper respect for state functions" is the "more vital" reason litigants are required to present constitutional defenses in pending state proceedings, then this rationale may also demand other forms of federal deference to state courts. This has, indeed, proven to be the Court's position. Time and again the Court has invoked *Younger* and quoted its rhetoric to extend the principle of deference to other types of cases. The Court bars federal interference with state civil cases,[53] appellate processes,[54] bar disciplinary proceedings,[55] and administrative actions.[56] The Court

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[49] 401 U.S. 37 (1971).

[50] *Id.* at 50.

[51] *Id.* at 44.

[52] *Id.*

[53] *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987); Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977).

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

[55] Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

[56] Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986).

requires litigants to raise not only defenses but also permissive counterclaims in state court.[57] The Court defers in cases where the federal case was brought shortly before the state prosecution[58] and even where a defendant seeking to engage in a continuing course of conduct cannot protect his putative right to do so in the state criminal prosecution.[59]

The Court's most ambitious extension of *Younger* came in *Fair Assessment in Real Estate Association v. McNary*.[60] *FAIR* was a suit to recover damages for unconstitutional state property taxes. Relying on the "principle of comity," the Court ordered the case dismissed.[61] Justice Rehnquist's opinion quoted extensively from *Younger*, where comity received "its fullest articulation."[62] It is noteworthy in *FAIR* that no injunction was sought, there was no pending state proceeding, and the federal claim was not a defense to some state action. Since none of these factors was present, the holding in *FAIR* may presage more extensive cutbacks on federal judicial power. If "the principle of comity" is strong enough to justify federal restraint here, then there is no apparent reason why it could not be invoked in other damage cases and in ordinary injunction suits.[63] Just as *Younger* eviscerated *Dombrowski*, *FAIR* contains the seeds of a grave threat to *Monroe*.

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[57] Moore v. Sims, 442 U.S. 415, 425-26 n.9 (1979).

[58] Hicks v. Miranda, 422 U.S. 332, 349-50 (1975) (holding that the principles of *Younger* apply where state criminal proceedings against the federal plaintiffs are begun after the federal complaint is filed but before any proceedings of substance have taken place in the federal court); *see also* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 238 (1984) (on the limits of the deference required by *Hicks*).

[59] Doran v. Salem Inn, Inc., 422 U.S. 922, 924-25, 929 (1975); *see* Laycock, *supra* note 36, at 202-19 (arguing that a criminal defense in the state court proceeding is an inadequate alternative to federal review). A bit of explanation is in order here. In *Doran*, the state had enacted a ban on topless dancing at bars. A bar owner violated this law and was arrested. *Younger* required him to litigate his first amendment challenge to the law in state court. But what of his putative right to use topless dancers during the pendency of the state case? Even though the state criminal court could not grant such relief, the Court in *Doran* denied this defendant access to federal court while permitting the federal court to grant interim relief to bar owners who had not violated the law. 422 U.S. at 929-31.

[60] 454 U.S. 100 (1981).

[61] *Id.* at 105.

[62] *Id.* at 111-13.

[63] *See* Braveman, *Fair Assessment and Federal Jurisdiction in Civil Rights Cases*,

The Court has also cut back on the scope of habeas corpus. In *Stone v. Powell*,[64] the Court carved out an important exception to the broad cognizability rule of *Brown v. Allen*,[65] holding that fourth amendment illegal search and seizure claims cannot be raised on habeas if the prisoner has had a full and fair opportunity to assert them in his defense to the state criminal prosecution. In *Francis v. Henderson*[66] and *Wainwright v. Sykes*,[67] the Court overturned the "deliberate bypass" procedural default rule announced in *Noia*. Under the new rule, habeas petitioners who fail to comply with valid state procedures will be denied an opportunity to raise their constitutional claims on habeas even if the failure is due to the lawyer's error rather than strategic reasons. Habeas is available only if the prisoner shows "cause" for failure to follow the rule and "prejudice" resulting from the refusal to consider his claims.[68]

II. THE PARITY ISSUE

What is the foundation for these rules restricting access to federal court for constitutional challenges? The Court explains that federal jurisdiction imposes substantial costs on the operation of state courts and threatens their role in the federal system.[69] More-

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45 U. PITT. L. REV. 351, 366-70 (1984); *see also* Los Angeles v. Lyons, 461 U.S. 95, 112 (1983), where the Court spoke of "the normal principles of equity, comity, and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities." *Lyons* was a request to enjoin the police from using chokeholds and concerned no interference with state judicial processes. *Cf.* Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986) (highly critical examination of some federal courts' practice of abstaining on grounds of administrative convenience).

[64] 428 U.S. 465 (1976).

[65] 344 U.S. 443 (1953).

[66] 425 U.S. 536 (1976).

[67] 433 U.S. 72 (1977).

[68] *See id.* at 84-87. Other recent curbs on federal habeas power include Kuhlmann v. Wilson, 477 U.S. 436 (1986) (limiting successive petitions); Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982) (habeas unavailable in child custody cases outside the criminal context); Rose v. Lundy, 455 U.S. 509 (1982) (all claims in a habeas petition must be exhausted before the federal court will consider any of them); Sumner v. Mata, 449 U.S. 539 (1981) (admonishing district courts generally to defer to state court fact-finding); and Swain v. Pressley, 430 U.S. 372 (1977) (Congress may deny access to article III trial court on habeas in the District of Columbia).

[69] *See, e.g.*, Moore v. Sims, 442 U.S. 415, 427 (1979) (in challenges to complex

over, allowing access to a federal forum adds to the burden on overworked federal judges and produces few if any real benefits, for state courts are competent to adjudicate federal claims and are sensitive to constitutional values.[70] Most of the opinions contain a litany of the problems associated with the exercise of federal judicial power and pay little attention to the plaintiff's claim that a federal court provides a more sympathetic forum than state court for the vindication of federal rights against state governments. When the Court does take note of this argument, it is only to dismiss the plaintiff's entreaties with a sentence or two expressing confidence in the state courts.[71] The Court's whole treatment of the problem can be covered in a few sentences. In *Huffman v. Pursue, Ltd.*, the Court refused "to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities."[72] In *Stone v. Powell*, it was "unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the [state courts]."[73] Later cases merely recall the Court's "emphatic reaffirmation in [*Stone*] of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so."[74] Indeed, the Court has "repeatedly and emphatically" rejected the postulate

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state statutory schemes, the cases traditionally held in favor of absention because of a sensitivity to the state's role in interpreting its own laws and the costs of both federal court interpretation and invalidation of parts of integrated statutory schemes); Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (resort to habeas corpus results in serious intrusions on important values of federalism); Steffel v. Thompson, 415 U.S. 452, 460-61 (1974) (federal intervention in a state proceeding would fail to give effect to the principle that state courts have an equal responsibility to protect constitutional rights).

[70] *See Moore*, 442 U.S. at 430 (the court has repeatedly and emphatically rejected the notion that state courts are not competent to adjudicate federal constitutional claims).

[71] *See* Allen v. McCurry, 449 U.S. 90, 105 (1980); *Moore*, 442 U.S. at 430; *Stone*, 428 U.S. at 493-94 n.35; Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975); *see also* Deakins v. Monaghan, 108 S. Ct. 523, 530 (1988); *Sumner*, 449 U.S. at 549; Schlesinger v. Councilman, 420 U.S. 738, 755-56 (1975); *Steffel*, 415 U.S. at 460-61 (all noting that state courts have a responsibility equal with federal courts to enforce and protect constitutional rights and expressing confidence in their ability to do so); Aldisert, *supra* note 3.

[72] 420 U.S. at 611.

[73] 428 U.S. at 494 n.35.

[74] *Allen*, 449 U.S. at 105.

that state courts are "not competent to adjudicate federal constitutional claims."[75]

Critics of the doctrine must be divided into two groups. On the one hand are the dissenting Justices. Out of sensitivity or decorum, they generally refrain from direct attacks on state judges, and focus instead on the federal courts' statutory authority under section 1983 to hear constitutional challenges.[76] They stress the historic role of federal courts as defenders of federal rights[77] and disagree with the majority over whether the costs of federal jurisdiction are sufficiently great to warrant a restrictive rule in the circumstances of a given case.[78] The dissenting opinions leave quite unclear why any of these reasons should matter to litigants or judges, for, as far as the opinions are concerned, the only issue appears to be the address of the courthouse. To make sense of the sharp differences among the Justices on the allocation issue, it is necessary to turn to the Court's academic critics, who posit a gap between federal and state courts in their treatment of federal claims and who consider this to be a strong, if not conclusive, argument in favor of federal jurisdiction.[79]

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[75] *Moore*, 442 U.S. at 430.

[76] *See, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 119-25 (1981) (Brennan, J., dissenting) (arguing that where Congress has granted the federal courts jurisdiction, the Court may not repudiate it); Juidice v. Vail, 430 U.S. 327, 342 (1977) (Brennan, J., dissenting) (arguing that where Congress has expanded federal judicial power under section 1983, it has imposed a duty on the federal judiciary to give due respect to a plaintiff's choice of a federal forum for litigating his federal constitutional claims).

[77] *See, e.g.*, Trainor v. Hernandez, 431 U.S. 434, 456 (1977) (Brennan, J., dissenting); Huffman v. Pursue, Ltd., 420 U.S. 592, 617 (1975) (Brennan, J., dissenting); *see also FAIR*, 454 U.S. at 119-25 (Brennan, J., dissenting); *Juidice*, 430 U.S. at 342 (Brennan, J., dissenting).

[78] *See, e.g.*, *Moore*, 442 U.S. at 435-43 (Stevens, J., dissenting) (arguing that where litigants did not have the opportunity to raise constitutional claims as a defense in a pending state child custody hearing, federal intervention did not result in duplicative legal proceedings, disruption of the state criminal justice system, or an undermining of state court morale); Francis v. Henderson, 425 U.S. 536, 549-50 (1976) (Brennan, J., dissenting) (minimizing the costs of federal habeas review in the context of state procedural default); Hicks v. Miranda, 422 U.S. 332, 353-57 (1975) (Stewart, J., dissenting) (arguing that the costs of federal intervention are minimal where the state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court).

[79] *See* Neuborne, *supra* note 4, at 1121 (arguing that the small number of

The problem with the terms of this debate is that the Court never fully develops its premise claiming parity of state and federal courts, and its critics are, in turn, never obliged to specify what they mean by a lack of parity. The Court's assertion that state courts are capable and just is essential to a complete explanation of its rules, for no one would suggest that federal jurisdiction should be denied when litigants cannot get a competent and fair hearing in the state courts. Indeed, the Court itself denies application of its restrictive rules when the state tribunal is biased.[80] The critical ambiguity concerns the strength of the assertion. The Court may mean that there is no gap at all, or only a trivial gap. If this is the Court's premise, and if it is valid, then lawyers, judges, and scholars have paid too much attention to this area of the law, for allocation rules would not affect outcomes and nothing fundamental is at stake here.[81]

Alternatively, the Court's premise regarding parity could be taken to mean that the gap is wide enough to influence results but is not, in the Court's judgment, so large as to justify federal jurisdiction. In that event, there is indeed something worth fighting over. Plaintiffs quite naturally will prefer the forum where they have an edge, and so will states' attorneys. What is more, the existence of this plaintiff's interest does not turn on the premise that the gap is so large as to amount to a denial of due process. If it did, the case for broader access to federal court would surely be doomed, as even civil liberties lawyers agree that state courts are not that bad.[82] Instead, what is at issue in a given case is the

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federal judges as compared to the number of state judges results in a maintenance of a higher level of quality); *see also* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 229 (1948) (arguing that where state remedies are too uncertain, slow, or ineffective, original jurisdiction in the federal courts is necessary).

[80] *See, e.g.*, Kugler v. Helfant, 421 U.S. 117, 124 (1975) (stating that *Younger*'s principle of deference can be relaxed if "extrordinary circumstances" render the state court incapable of fairly adjudicating the federal issues); Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (*Younger* did not require dismissal where a state administrative agency's bias rendered it incompetent to adjudicate the issues). *See also* Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention Into Ongoing State Court Proceedings*, 66 N.C.L. REV. 49 (1987).

[81] *Cf.* Kelman, *Trashing*, 36 STAN. L. REV. 293, 319 n.65 (1984) ("the course on federal courts is best seen as the purest of contentless legalist rituals").

[82] *See* Neuborne, *supra* note 4, at 1119-20 (arguing that while state judges are

resolution of a close question of fact or the precise content of a legal rule, such as the validity of a particular search under the fourth amendment, the extent of first amendment limits on state power to curb revolutionary utterances, or the permissible scope of state regulation of religious schools.[83]

The first reading of the Court's premise, that no gap exists, is indefensible. There are marked institutional differences between federal and state courts, and these differences are important to the outcome of litigation in the view of both states' attorneys and civil liberties litigators. Because there are many more state than federal judges, it is harder to maintain a given level of quality in making state judicial appointments. In addition, federal judges are paid more, the selection process for federal judges focuses more on competence and less on patronage, the federal caseload is lower, and federal judges get more help from law clerks. Besides higher competence, federal judges often approach constitutional litigation with a more sympathetic psychological set than state judges. Experienced observers claim that the federal judiciary is an elite and dedicated corps whose members generally seek to live up to a long tradition of the defense of constitutional rights, a tradition and sense of mission that many state courts seem to lack. Federal judges are also insulated from majoritarian pressures by the article III tenure and salary provisions, while many state judges are elected

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less likely to resolve arguable issues in favor of protecting federal constitutional rights, they do not act in bad faith).

[83] *See id.* Accordingly, demonstrations that state courts are constitutionally adequate, *see, e.g.*, Solimine & Walker, *supra* note 3, at 252-53 (empirical study showed no "widespread disregard for the vindication of federal rights in state appellate courts"); R. POSNER, *supra* note 4, at 186-89 (arguing that state courts are competent to protect the federal rights of litigants), are beside the point. If these authors mean to assert the much more ambitious proposition that state courts are not merely constitutionally adequate but reach substantially identical outcomes to federal courts, their evidence and arguments are unpersuasive. *See* Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1337-38; Hellman, *Book Review*, 39 STAN. L. REV. 297, 313-15 (1986) (both casting doubt on the methodology and conclusions of Solimine & Walker).

The examples given in the text are taken from Stone v. Powell, 428 U.S. 465 (1976) (validity of a search under the fourth amendment); Younger v. Harris, 401 U.S. 37 (1971) (first amendment limits on state power to curb revolutionary utterances); and Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986) (permissible scope of state regulation of religious schools).

or appointed for fixed terms. Accordingly, federal judges may be more sympathetic to the counter-majoritarian claims asserted in much constitutional litigation.[84]

While these differences depend on the subjective perceptions of the observer, they are widely shared by experienced lawyers.[85] Moreover, some studies of habeas corpus have shown that federal and state courts will often decide the same case differently, and hence offer empirical support for the inference of disparity. Several years ago, I examined reported habeas corpus cases raising free speech issues over a fifteen year period. Here, federal courts were adjudicating questions previously submitted to state criminal courts, so a direct comparison of the two systems was possible. In about forty percent of the cases, the federal court overturned the state conviction.[86] In his empirical study of both reported and unreported habeas cases in Massachusetts, Professor Shapiro found a sixty percent success rate for challenges to state convictions based on free speech and other substantive grounds.[87]

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[84] This paragraph summarizes the excellent discussion in Neuborne, *supra* note 4, at 1115-28 (discussing contemporary institutional considerations which account for federal forum preference in constitutional litigation). *See also* Cover & Aleinikoff, *supra* note 26, at 1050-52 (stating that state courts are more likely to have a pragmatic, as opposed to utopian, view of constitutional rights in the criminal process because of the institutional role and objectives of state courts); Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 611-17 (1985) (arguing that the tenure and salary guarantees for article III judges protect them from adverse public and governmental sentiment).

Professor Neuborne's article was published a decade ago, before the presidency of Ronald Reagan and the determined effort by his administration to make the federal courts more conservative. And yet Neuborne's analysis remains valid. Litigants with constitutional claims still prefer federal court, and President Reagan's appointments have proved not to be "significantly more conservative than their Republican colleagues" on the bench. Note, *All the President's Men: A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 760, 767 (1987); *see also* Noble, *Not Many Judges Practice What the President Preaches*, New York Times, Nov. 29, 1987, § E, at 4.

[85] *See* Marvell, *supra* note 83, at 1338, 1354-64 (discussing the results of research in which the author gathered lawyers' reasons for forum selection).

[86] Wells, *Habeas Corpus and Freedom of Speech*, 1978 DUKE L.J. 1307, 1324, 1349-51.

[87] Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 331, 340 nn.102-03 (1973); *see also* Wells, *supra* note 86, at 1324 nn.98-99. As Professor Shapiro pointed out, the success rate for habeas petitions based on claimed *procedural* errors is much lower.

Keep in mind that the issue in these allocation cases, precisely stated, is not whether to send cases to federal or state court, but whether to give litigants a choice. The restrictive rules bar access to federal court and require litigants to go to state court. When there is no bar and they have a choice, the vast majority of claimants in constitutional cases prefer federal over state courts.[88] This preference, and the converse preference of states' attorneys for state courts, is perhaps the most persuasive evidence of all that federal court is generally the more favorable forum for litigants with federal claims. Not surprisingly, the Court itself does not dare forthrightly to deny the existence of disparity.

If the strong version of parity must be rejected, then we are left with the more plausible one: there are differences between federal and state courts, but these are not so great as to require sending cases to federal courts. The Court's doctrine is now subject to attack on a ground not permitted by the stronger, if less defensible, premise of virtually absolute parity. Now the plaintiff's litigating interest in a federal forum must be acknowledged, and the Court's rules rest on a judgment that other considerations are more important. Clearly, the question in judicial federalism cases is not whether there is parity, but whether plaintiff or state interests should prevail on allocation issues. In short, there are real interests on both sides, the Court balances them, and the acceptability of the Court's doctrine depends on whether a persuasive case can be made in favor of the lines it draws.

III. Institutional Costs and Judicial Federalism

Problems spawned by federal jurisdiction may be so great, and the correlative advantages of a restrictive rule so plain, that even staunch supporters of federal courts acknowledge the need for limits on access. In other circumstances, these costs are not present or are not important, but the plaintiff's interest in a litigating edge is quite weak because the gap between federal and state courts is not significant. This part of the article identifies aspects of the Court's judicial federalism doctrine that may be justified as the product of a judgment by the Court regarding the costs and ben-

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[88] *See, e.g.*, Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 655 n.72 (1987).

efits of permitting access to federal court. The aim of the inquiry is to point out the limits of the explanatory power of this approach. While it can rationalize some of the traditional rules of judicial federalism, the Court fails to account for many aspects of the doctrine, notably the recent ambitious extensions of the *Younger* principle, which are discussed in Part IV.

A. The Burdens of Federal Jurisdiction

States routinely use their courts as means of carrying out state policies by imposing civil or criminal sanctions on persons subject to state regulation. Defendants in these proceedings may raise federal constitutional defenses to the state's action against them, and they may seek to have their federal questions heard in a federal rather than state court. For example, the defendant may be the object of civil or criminal proceedings for sale of obscene materials and seek to raise a first amendment defense; or he may be charged with possession of cocaine and wish to charge that the state's evidence was obtained in violation of the fourth amendment. His effort to get into federal court may take a variety of forms: a petition for federal habeas corpus relief before or after the state action is completed, a request that the state proceeding be removed to federal court, an application for an injunction to halt the state proceedings, or an action for a declaratory judgment that would invalidate them. Much of the law of judicial federalism, including the *Younger* doctrine and limits on removal and habeas corpus, deal with this general fact pattern.[89].

In these cases federal interference in a matter pending before the state courts generates several costs. These include: (1) disruption of state proceedings; (2) duplication of judicial effort; (3) demoralization of state judges; (4) removal of state issues from state court where they can receive an authoritative adjudication; (5) undermining the finality of state judgments; and (6) undermining the integrity of state procedural rules. The first three of these costs arise when the federal issue may be raised in a pending state

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[89] *See, e.g.*, Younger v. Harris, 401 U.S. 37, 38-39 (1971) (appellee, indicted in state court, filed a complaint in federal court requesting an injunction of the state proceedings on grounds that the statute under which he was indicted violated his first and fourteenth amendment rights).

proceeding, but the litigant seeks to bypass the state court in favor of federal adjudication. The federal case, if permitted to go forward and disrupt that state proceeding, may unnecessarily expend judicial resources by duplicating the state court litigation, and federal relief granted even before the state court can act may demoralize state judges, who are given the implicit message that this matter is too important to be left in their care.[90]

In addition, state courts have an interest in adjudicating the state issues that may accompany a federal constitutional challenge to state action. Often the federal issues make up only a part of such a lawsuit. In that case, the construction and application of state civil and criminal laws, and fact-finding incident to this process, are equally or more important to resolution of the suit.[91] Litigating these state law issues is a traditional and appropriate task of the state court. Sometimes the nature of the federal issue itself depends on the resolution of some state law question, as where an ambiguous state statute is challenged on constitutional grounds.[92] Only the state court can give the statute an authoritative construction in such a case,[93] and the state court may be able to construe the statute so as to achieve many of the state's aims without offending the constitution.[94]

These are real costs of federal interference, and they provide persuasive support for many of the Court's restrictive rules. Certainly there are differences between state and federal courts, and these differences may affect outcomes.[95] The plaintiff therefore has a strong interest in access to the more sympathetic federal court. Even so, the Court can fairly conclude that the benefits to plaintiffs of broad access to federal courts are outweighed by the burdens on state courts. In keeping with this judgment, the rules

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[90] *See* Steffel v. Thompson, 415 U.S. 452, 460-62 (1974).

[91] *See* Moore v. Sims, 442 U.S. 415, 427 (1979) (noting a sensitivity in the abstention cases to the state's important role in interpreting its own laws).

[92] *See* Field, *supra* note 37, at 1084-1101 (discussing instances in which allowing state courts to decide state issues is a proper purpose for abstention).

[93] *See, e.g.*, C. WRIGHT, LAW OF FEDERAL COURTS, 747 n.64 (4th ed. 1983).

[94] *See Moore*, 442 U.S. at 429-30 (most constitutional challenges present the opportunity for the state tribunal to construe the statute in such a way as to obviate the constitutional problem while mediating federal constitutional concerns and state interests).

[95] *See supra* text accompanying note 84.

require state criminal defendants to exhaust their state trial and appellate remedies and to present their federal claims to the state courts before seeking federal relief on habeas corpus.[96] The Court bars removal of criminal cases from state to federal court except in very narrow circumstances,[97] and the *Younger* doctrine precludes federal injunctive relief against pending state proceedings.[98] These rules allow state courts to apply state criminal law unhindered by federal interference and to construe state law in light of constitutional objections. Furthermore, the preference for state court construction of state law is not limited to situations where there is a state enforcement action. Sometimes litigants wish to challenge state executive action on both federal and state grounds. The Court has devised the *Pullman* abstention doctrine to permit state courts to resolve the state issues even when there is no ongoing state proceeding.[99]

Notice that these rules affect only the timing of federal adjudication.[100] Their justification rests on a judgment that the plain-

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[96] 28 U.S.C. § 2254(b), (c) (1982); *see, e.g.*, Picard v. Connor, 404 U.S. 270 (1971) (federal habeas corpus petition properly dismissed since the state remedies had not been exhausted).

[97] *See* 28 U.S.C. § 1443 (1982), as construed in Georgia v. Rachel, 384 U.S. 780 (1966) (section 1443 permits removal of state trespass prosecution where defendants show that they cannot enforce their federal rights in state court) and City of Greenwood v. Peacock, 384 U.S. 808 (1966) (section 1443 permits removal only where defendant shows that his federal rights would inevitably be denied by the very act of bringing him to trial in state court); *see also* Bator, *supra* note 2, at 611-12 & n.19 (noting several reasons why the right to removal has been so limited, including the unnecessary burden removal would put on federal courts by implicating them "in the task of enforcing state criminal and administrative regulation, even in cases where the federal . . . issue is . . . minor and separable").

[98] *See* Younger v. Harris, 401 U.S. 37 (1971); *see also* Whitten, *Federal Declaratory and Injunctive Interference With State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C.L. REV. 591 (1975) (examining the legitimacy of the Court's regulation of the discretionary remedies of injunction and declaratory judgments in state criminal actions).

[99] Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); *see also* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (*Pullman* abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law").

[100] It should be noted, however, that compliance with the standards laid down in Sumner v. Mata, 449 U.S. 539 (1981), will often lead federal courts to accept state court findings of fact. *See* cases cited *supra*, note 68. So it is not quite accurate to say that habeas only affects timing.

tiff's interest in a federal forum for initial decision of the dispute is too weak to prevail in view of the costs that premature federal jurisdiction impose on state judicial institutions.[101] The litigant with a federal claim is made to pay a price, in the form of delay, in order that the state obtain the benefits of initial state court decision-making. But he is not barred from federal court altogether. Once the state proceeding is completed, the interference costs of federal jurisdiction are diminished and the plaintiff's interest in a federal forum receives more attention. The *Pullman* doctrine permits him to return to federal court with his federal issues after the state court has resolved the state issues,[102] and the state criminal defendant can proceed to federal district court on habeas corpus once he has exhausted state remedies.[103]

Timing rules are not the only components of traditional judicial federalism. There are two other important rules that often bar federal adjudication altogether: collateral estoppel and procedural default. Collateral estoppel, applied in section 1983 litigation under *Allen v. McCurry*,[104] bars relitigation of issues already determined in the state proceeding. Since collateral estoppel does not apply in habeas,[105] the primary practical effect of *Allen* is to deny federal adjudication to persons who have been defendants in state civil proceedings governed by *Younger*.[106] The *Younger* rule against in-

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[101] *See Colorado River Water Conservation Dist.*, 424 U.S. at 812-13; Steffel v. Thompson, 415 U.S. 452, 462 (1974); Stefanelli v. Minard, 342 U.S. 117, 120-25 (1951).

[102] *See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16 (1964). In addition, the delay costs can sometimes be shifted to the state by awarding the federal plaintiff a preliminary injunction while the case is before the state courts. *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).

[103] Picard v. Connor, 404 U.S. 270, 275 (1971); *see also* Wooley v. Maynard, 430 U.S. 705, 709-12 (1977) (permitting federal injunctive relief before exhaustion of state appellate remedies in some circumstances).

[104] 449 U.S. 90 (1979).

[105] *See* Allen v. McCurry, 449 U.S. 90, 98 n.12 (1980) (noting that this traditional exception to res judicata derives from the unique purpose of habeas corpus—to release the applicant from unlawful imprisonment); Preiser v. Rodriguez, 411 U.S. 475, 497 (1973).

[106] Since fourth amendment claims may not be raised on habeas if the state criminal courts have provided a full and fair opportunity to litigate them, Stone v. Powell, 428 U.S. 465 (1976), the issue preclusion rule of *Allen* prohibits federal

terference with a pending state proceeding denies such persons access to federal court while the state case is pending, and collateral estoppel prevents federal relitigation after the state proceeding. Procedural default, whether applied liberally as in *Fay v. Noia*,[107] or strictly as in *Wainwright v. Sykes*,[108] precludes a habeas petitioner from raising a claim he did not properly present to the state courts. Both collateral estoppel and procedural default bar federal adjudication of constitutional claims. Yet the policy bases of the rules are quite different from one another. Collateral estoppel "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication."[109] The aim of procedural default rules, on the other hand, is to force litigants and their lawyers to respect valid state procedural rules. As we have seen, the state has a strong interest in reviewing federal claims in its own courts in an orderly and economical fashion.[110] These interests are threatened if a litigant can withhold his federal claims from state courts, or present them when it is too late to correct the alleged error, and then have a federal habeas court hear the claims anyway.[111]

B. The Plaintiff's Interest in a Federal Forum

One effect of the Court's ambiguous response to the parity issue is a failure to pay adequate attention to the plaintiff's interest in a federal forum. Since the Court never openly admits to any gap

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district court consideration of some criminal cases as well. Indeed, *Allen* itself was such a case. The federal plaintiff sought an exception from collateral estoppel based on the unavailability of habeas for his fourth amendment claim, but the court turned him down. 449 U.S. at 102-05 (finding no constitutional right to a federal forum for federal issues).

[107] 372 U.S. 391 (1963) (barring federal habeas consideration of constitutional issues only when the petitioner deliberately bypasses the state courts for strategic reasons).

[108] 433 U.S. 72 (1977) (requiring that the petitioner show "cause" for the default in order to present the constitutional issue on habeas); *see also* Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478, 487-88 (1986).

[109] *Allen*, 449 U.S. at 94.

[110] *See supra* text accompanying notes 90-94.

[111] *See Murray*, 477 U.S. at 487 (noting that "these considerable costs do not disappear when the default stems from counsel's ignorance or inadvertence rather than from a deliberate decision . . . to withhold a claim").

at all between federal and state courts, it never acknowledges any substantial reason for individuals with claims against state actors to prefer federal over state courts.[112] Yet the Court tacitly recognizes such an interest by its refusal to extend its restrictive rules further than it does. Large areas remain in which claimants can gain access to federal court in spite of the Court's judicial federalism decisions. Under *Monroe v. Pape*,[113] most persons seeking damages or injunctive relief who are not subject to state proceedings need not exhaust their state remedies before bringing a federal court action.[114] Persons convicted of crimes in state court must exhaust state remedies, but then they are usually permitted to challenge their convictions on constitutional grounds in a federal habeas corpus proceeding where collateral estoppel does not bar relitigation.[115]

Since the Court has not even identified the plaintiff's interest, it has not explicitly considered the possibility that his interest varies in strength from one context to another, and that allocation rules should reflect these differences. Yet an examination of the plaintiff's interest reveals variations in its force, and some of the Court's rules seem implicitly to take account of the variations. The plaintiff's interest in a federal forum is a result of the gap between federal and state courts,[116] which makes a federal forum more likely to rule for the claimant. The wider the disparity, the stronger will be the plaintiff's interest. There is good reason to think the gap is larger in some areas than in others, for its size depends on the strength of the substantive claim, and some constitutional claims are generally stronger than others. If the plaintiff's substantive claim is weak, so that it would likely be turned down in any

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[112] *See, e.g.*, Moore v. Sims, 442 U.S. 415, 430 (1979) "The price exacted in terms of comity [by allowing federal adjudication of issues that could be raised as permissive counterclaims in state proceedings] would only be outweighed if state courts were not competent to adjudicate federal constitutional claims—a postulate we have repeatedly and emphatically rejected."

[113] 365 U.S. 167 (1961).

[114] *See* Patsy v. Board of Regents, 457 U.S. 496 (1982) (section 1983 plaintiff need not exhaust state administrative remedies before seeking relief).

[115] *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 497 (1973) (stating that principles of res judicata are not "wholly applicable" to habeas corpus proceedings although they have been held fully applicable to section 1983 claims).

[116] *See supra* text accompanying notes 84-88.

forum, then the forum choice will not matter much. On the other hand, when the substantive claim is stronger, a noticeable gap may appear between federal and state courts, only to disappear again when the claim is so strong that any court would grant it, no matter what the court's psychological set.

The closing of the gap as the plaintiff's claim grows weaker may explain the *Burford* abstention doctrine. Recall that the Court applies this restrictive rule in cases where businesses challenge state regulation on fourteenth amendment due process or equal protection grounds,[117] as where one participant in an oil field challenges the award of a permit to a newcomer,[118] or where a common carrier seeks to terminate service to a small town and is turned down by state authorities.[119] Sometimes state law claims accompany the federal issues, but the effect of abstention is that the whole case must be tried in state court. At times the Court justifies abstention in these cases by characterizing the subject matter of the lawsuit as "essentially local."[120] In other cases, the Court says abstention is necessary to avoid federal disruption of state programs.[121] Neither of these rationales, however, distinguishes cases falling within the *Burford* doctrine from those outside it. The local nature of public education does not bar federal desegregation orders,[122] and every federal injunction disrupts some state program, yet there is no general prohibition on them outside the context of business regulation.[123]

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[117] *See supra* text accompanying notes 40-42.

[118] Burford v. Sun Oil Co., 319 U.S. 315 (1943).

[119] Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951).

[120] *Id.* at 347-48 (balancing the railroad's loss from the continued operation of certain intrastate trains and the public need for this service represents a local problem better suited for state court review).

[121] *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976) (noting the potential of federal review to disrupt "state efforts to establish a coherent policy with respect to a matter of substantial public concern").

[122] *See* McNeese v. Board of Educ., 373 U.S. 668, 674 (1963) (fourteenth amendment desegregation claims involve a right that is federal in origin and nature with no underlying issue of state law that is controlling). For examples of cases when it does suit the Court's purposes to treat public education as a peculiarly local matter, see Ingraham v. Wright, 430 U.S. 651, 680-83 (1977) (rejecting challenge to Florida law that authorized corporal punishment in schools); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40-44 (1973) (rejecting challenge to local property taxation scheme for financing public schools).

[123] The general propriety of injunctive relief against state action on federal

A more satisfactory explanation for *Burford* abstention begins with the widely acknowledged proposition that business regulation presents few hard constitutional problems.[124] Under the Court's modern approach to the fourteenth amendment, states have broad leeway to regulate businesses as they see fit, and the distinctions they draw in doing so need only be founded upon a rational basis, a test which can almost always be satisfied.[125] Since the federal issues in such a case will in all likelihood be decided against the plaintiff, whether he is in federal or state court, his interest in a federal forum is weak.[126] If plaintiffs insist on trying to get into federal court anyway, their major motive will not be sympathetic consideration of the weak federal claim. It will likely be to obtain resolution of state claims by appending them to the federal case, in the hope that the federal court will look more favorably on them than the state courts would. Or perhaps their aim will be to tie the state down in litigation. No court would respect the latter of these reasons. As for the former, the balance of interests is decidedly in favor of the state when the issues are governed by state law since state courts are sovereign over state law and more expert in applying it.[127]

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constitutional grounds is the premise of *Ex parte* Young, 209 U.S. 123 (1908) and has not been challenged even by the contemporary Court. *Cf.* Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984) (*Young* does not permit federal relief on *state* law grounds).

[124] *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations."); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

[125] *Dukes*, 427 U.S. at 303; *Ferguson*, 372 U.S. at 730.

[126] A corollary of this thesis is that when the constitutional issue is not a due process attack, which will almost certainly fail on the merits, but a claim that federal law preempts a state law, a theory which may be viable, *Burford* abstention should be denied. *See, e.g.*, Arkansas Power & Light Co. v. Missouri Pub. Serv. Comm'n, 829 F.2d 1444, 1450 (8th Cir. 1987) (rejecting abstention in preemption cases).

[127] *See* Moore v. Sims, 442 U.S. 415, 427-30 (1979) (discussing the importance of allowing state tribunals to decide state law issues); Moor v. County of Alameda, 411 U.S. 693, 715-16 (1973) (finding that in cases of pendent jurisdiction where the state issues are difficult, those issues may be dismissed without prejudice

Consider also the possibility that the gap varies over time and may be wider, or perceived to be wider, in one era than another. The differences between state and federal courts were particularly sharp at the turn of the century when economic due process was in the forefront of constitutional litigation. The differences had subsided fifty years later after the Court had largely abandoned the constitutional protection of business.[128] Perhaps it is no accident that the earlier period gave birth to *Ex Parte Young* while the abstention doctrines grew up in the latter. This theme recurs in more recent times. One explanation for the Supreme Court's shift toward state courts since 1970 is that there is less disparity now than twenty-five years ago, so that the plaintiff's interest in a federal forum is weaker now.[129] In the sixties, the Court imposed new federal rights on the states at every term. As that era began, many observers deemed the state law of criminal procedure woefully inadequate, and the Warren Court was determined to reform

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and left for resolution in state court); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16 (1964) (recognizing the state courts' role as the "final expositors of state law"). This reasoning may also help explain Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981). In *FAIR* the Court said a section 1983 action to recover damages for unconstitutional state tax collection could not be maintained in federal court on account of "the principle of comity." *Id.* at 105. The constitutional challenge alleged that the plaintiff's property had been assessed at a higher rate than other property in violation of the equal protection clause. *Id.* at 105-06. The Court's modern doctrine is as accommodating to state tax classifications as it is to business regulation. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973) ("Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."); Hellerstein, *Complementary Taxes as a Defense to Unconstitutional State Tax Discrimination*, 39 TAX LAWYER 405, 428 (1986) (noting that "the states enjoy extremely broad leeway under the equal protection clause in drawing lines for tax purposes"); *cf. FAIR*, 454 U.S. at 107 n.4 (reserving judgment on whether *FAIR* will apply to claims of racial discrimination).

[128] *Compare* Neuborne, *supra* note 4, at 1107-08 *with* Wechsler, *supra* note 79, at 227.

[129] *See* Monaghan, *The Burger Court and "Our Federalism,"* 43 LAW & CONTEMP. PROBS. 39, 49 (Summer 1980) (stating that state trial and appellate courts can no longer be viewed as unresponsive to claims of federal right); Neuborne, *supra* note 4, at 1119 & n.55 (noting that we are not today faced with widespread state judicial refusal to enforce clear federal rights, as was the case in the 1960s in the southern states' reaction to the civil rights movement).

it by constitutionalizing it. Blacks were in the midst of a struggle to overturn oppressive state laws and practices, often relying on the first amendment and the equal protection clause as major weapons. Later in the decade, protests against the war in Vietnam would produce more pressure for constitutional change. State courts were naturally unaccustomed to and suspicious of the new rights and could not be counted on to give them a sympathetic hearing. Many of the expansive federal remedies of that era can be understood as responses to this problem.[130]

Today the divisive events and issues of the sixties are largely behind us, and the pace of federal constitutional change has slowed considerably. State courts are habituated to the new rights, and they are staffed with judges who learned about the new rules in law school and do not consider them such an offensive intrusion on state prerogatives as their fathers did. While there remain variations in the performance of state judiciaries from state to state, it is anachronistic to suppose that Justice is thwarted whenever constitutional issues are left to state courts. Whether or not this sanguine view of the state courts is fully justified remains an open question. What is important to an understanding of the Court's judicial federalism cases is that many of the justices seem to accept it. In *Stone v. Powell*, the Court addressed the plaintiff's argument against parity by acknowledging the "unsympathetic attitude to federal constitutional claims of some state judges in years past," but then declared its unwillingness "to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in [the state courts]."[131]

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[130] *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965); Henry v. Mississippi, 379 U.S. 443 (1965); Fay v. Noia, 372 U.S. 391 (1963); *see also* Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1009-10 (1978) (postulating that the Supreme Court Justices reviewing the 1960s convictions of civil rights demonstrators in the South may have been sympathetic to the demonstrators and distrustful of the southern police officers and courts; thus, their view of the cases was different than in other instances involving "less worthy" causes). *See generally* 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 (1965).

[131] 428 U.S. 465, 493-94 n.35 (1976); *see also* Michigan v. Long, 463 U.S. 1032, 1069-70 (1983) (Stevens, J., dissenting) (noting that the number of requests by state governments for Supreme Court review of state court decisions against them

IV. State Court as the Preferred Forum for Constitutional Adjudication

The Court's evident perception that the gap between federal and state courts has narrowed in recent years helps to explain its willingness to send cases to state court but cannot fully account for its decisions. While the plaintiff's interest may be weaker than it was in the 1960s, both plaintiffs and defendants often think the difference remains wide enough to be worth a jurisdictional struggle. Nor can the rules be understood solely in terms of institutional costs, for the Court has extended the doctrine far beyond the contexts in which those problems arise. The primary vehicle for advancing the restrictive principles has been the rhetoric of *Younger v. Harris*.[132] Recall that the *Younger* decision addressed a rather narrow fact pattern: a request for a federal injunction to halt a pending state proceeding on a ground that could have been raised as a defense to the state proceeding.[133] *Younger* rested on a policy judgment that interference in a pending criminal proceeding would be unduly disruptive of state judicial processes, and that federal consideration of an issue normally presented as a defense in such a proceeding would be insulting and demoralizing to state judges.[134]

In the years since *Younger*, the Court has dropped, one by one, many of the constraints on this deferential principle. The Court began with a modest expansion to state civil suits,[135] but now has extended *Younger* deference to state administrative proceedings as

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has increased dramatically in recent years); *cf.* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976) (both discussing increased protection of individual rights by state courts acting under their state constitutions).

[132] 401 U.S. 37 (1971).

[133] *Id.* at 49.

[134] *See Younger*, 401 U.S. at 44; Steffel v. Thompson, 415 U.S. 452, 460-62 (1974); *see also* Wooley v. Maynard, 430 U.S. 705, 710 (1977); Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975).

[135] *See, e.g.*, Pennzoil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987) (judgment lien proceeding); Moore v. Sims, 442 U.S. 415 (1979) (child custody dispute in the context of a child abuse proceeding); Trainor v. Hernandez, 431 U.S. 434 (1977) (attachment proceeding in the context of a welfare fraud suit); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (nuisance proceeding).

well,[136] even though federal court action here would not interfere with state judicial processes. *Hicks v. Miranda* abandoned the requirement that the state case be pending at the time the federal suit was filed,[137] *Doran v. Salem Inn, Inc.* denied federal interim relief even where the state court could not grant such relief,[138] and *Moore v. Sims* held that the rule of restraint embraced not only defenses but also permissive counterclaims.[139] Under another line of cases, the *Younger* principle may bar equitable relief not only against state adjudication of disputes, but also against the practices of state executive actors like the police.[140] In *Fair Assessment in Real Estate Association v. McNary*, the Court denied access to federal court in a suit to recover damages for an allegedly unconstitutional state tax assessment where no state proceeding was pending or even in the offing and where no injunctive relief was sought.[141] According to the Court, the plaintiff lost because of "the principle of comity," which forbids federal court interference in state taxation, even by way of damage suits after taxes have been collected.[142] Since the Court has never limited the comity principle to tax cases, this reasoning may well portend further restrictions on recovery of damages.[143]

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[136] *See* Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) (state civil rights commission proceeding); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (bar disciplinary proceeding); *see also* University of Tenn. v. Elliott, 478 U.S. 788 (1986) (applying collateral estoppel to administrative fact-finding); *cf.* Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973) (habeas petitioner must exhaust state administrative remedies).

[137] 422 U.S. 332, 349 (1975).

[138] 422 U.S. 922, 924-24, 929 (1975) (permitting federal plaintiffs who had not breached the ordinance to obtain interim relief, but denying such relief to a plaintiff who had violated the ordinance and faced charges in state court); *see also* Laycock, *supra* note 36, at 199-214 (arguing that a criminal defense in a state court proceeding is an inadequate alternative to federal review).

[139] 442 U.S. 415 (1979).

[140] *See* Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (denying injunctive relief against police use of chokeholds); Rizzo v. Goode, 423 U.S. 362, 380 (1976) (denying injunctive relief that would require high city officials to stop officers on the beat from acting unconstitutionally); O'Shea v. Littleton, 414 U.S. 488, 499 (1974) (denying injunctive relief against racial discrimination in law enforcement).

[141] 454 U.S. 100, 116 (1981). For another, narrower, reading of this case, *see supra*, note 127.

[142] 454 U.S. at 111.

[143] *See e.g.*, Martin v. Merola, 532 F.2d 191 (2d Cir. 1976) (abstention in section

A. Beyond Institutional Costs

In many of these cases the Court does not identify any specific harm to the state courts resulting from the exercise of federal jurisdiction. Instead, recalling the expansive rhetoric of its opinion in *Younger v. Harris*, the Court resorts to airy abstractions. Restrictive rules are required by "the principle of comity,"[144] out of "a proper respect for state functions,"[145] in order to combat the "threat to our federal system" posed by federal adjudication of constitutional challenges,[146] or to minimize "the friction between our federal and state systems of justice . . . ."[147] In *Younger*, the reference to "a proper respect for state functions"[148] was linked to the state court's role in administering the state's criminal law, and "the principle of comity" between court systems stood for the proposition that matters properly before the state courts should remain there.[149] The specific state interests threatened in cases like *Younger*, however, disappear or lose much of their force in these extensions beyond the *Younger* context. The institutional costs engendered by federal interference with state court proceedings cannot explain refusal to order relief the state court cannot grant, deference to a state administrative agency, reluctance to enjoin police officers, or refusal to hear a suit for damages where no state proceeding is in sight.

The recent restrictive opinions sometimes do identify various burdens associated with federal jurisdiction. It would be a mistake,

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1983 damages action was proper since it would offend the principle of comity for a federal district court to inquire into plaintiff's ability to secure a fair trial in a pending state criminal protection); *cf.* Suggs v. Brannon, 804 F.2d 274, 280 (4th Cir. 1986); Giulini v. Blessing, 654 F.2d 189, 193-94 (2d Cir. 1981) (both staying the federal damages case until completion of the state proceeding). The Supreme Court has left this issue open. Deakins v. Monaghan, 108 S. Ct. 523, 529 (1988); Tower v. Glover, 467 U.S. 914, 923 (1984).

[144] *FAIR*, 454 U.S. at 111-12 (1981).

[145] Younger v. Harris, 401 U.S. 37, 44 (1970); *see* Huffman v. Pursue, Ltd., 420 U.S. 592, 602 (1975).

[146] Moore v. Sims, 442 U.S. 415, 423 (1979).

[147] Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring)).

[148] 401 U.S. at 44.

[149] *Id.* at 43-44; *see also* Picard v. Connor, 404 U.S. 270, 275 (1971) (discussing the long-settled policy that a state prisoner must normally exhaust available state remedies before a federal court will hear his habeas corpus petition).

however, to view these rulings as contemporary applications of the traditional doctrine concerning institutional costs, for the costs identified in the recent opinions are quite different from the problems addressed by habeas exhaustion, *Pullman* abstention, collateral estoppel, procedural default, and the like. Consider *Hicks v. Miranda*,[150] where a federal suit seeking injunctive relief was filed shortly before the inauguration of a state criminal proceeding. Relying on *Younger*, the Court required federal deference even though the federal suit had interfered with no pending state proceeding. To rule otherwise, the opinion explained, would "trivialize" the *Younger* rule by sanctioning a race to the courthouse on the part of the lawyers.[151] In terms of the state's institutional interests in avoiding federal interference, disruption and insult, however, the issue of who files suit first is critical, for virtually the same institutional interests can be asserted on behalf of a federal court that acquires jurisdiction first.[152] A rule sharply distinguishing between conflict with pending and prospective state proceedings would not "trivialize" *Younger* if the basis for deference were the specific institutional costs associated with interference. The pending/non-pending distinction would be trivial only if *Younger* rested on the more general proposition that state courts should play a major role in adjudicating constitutional challenges to state action.

This theme recurs in *Fair Assessment in Real Estate Association v. McNary*,[153] where the Court said federal suits for damages to remedy unconstitutional state tax assessments would unduly disrupt state tax collection, and hence were forbidden by "the principle of comity." As in *Hicks*, the Court cited *Younger*, where comity had received "its fullest articulation."[154] Yet there is a fundamental

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[150] 422 U.S. 332 (1975).

[151] *Id.* at 349-50.

[152] *See id.* at 353-57 (Stewart, J., dissenting) (arguing that state interference ousts the federal courts from their historic role as the "primary reliance" for vindicating constitutional freedoms and interferes with their legitimate functioning); *cf.* United States v. Gillock, 445 U.S. 360, 373 (1980) ("where important federal interests are at stake . . . comity yields"); Polykoff v. Collins, 816 F.2d 1326, 1332-33 (9th Cir. 1987) (refusing to abstain in favor of state court declaratory judgment action).

[153] 454 U.S. 100, 115-16 (1981).

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

difference between *Younger* and *FAIR*, for *Younger* addressed disruption of the state's judicial processes, while *FAIR* concerned the actions of state executive officers, namely tax collectors. Accordingly, deference in *FAIR* cannot be founded on the institutional costs to the state's judicial system that motivated *Younger*, but must be based on reluctance to allow interference with the work of state executive officers. The Court in *FAIR* stressed the taxation context in which the case arose,[155] and so far it has not extended the *FAIR* rule beyond the tax area.

The Court also invoked *Younger* in *Rizzo v. Goode*[156] and *Los Angeles v. Lyons*[157] to restrict federal injunctions against state law enforcement practices. As in *FAIR*, these cases require deference to state executive officers, here the police, and not to state courts. While the ultimate reach of *FAIR*, *Rizzo*, and *Lyons* is as yet uncertain, their premise is clear enough. The Court is not worried about specific and narrow state interests in the integrity of state judicial processes, as in the earlier judicial federalism cases, for no state judicial processes are threatened. Rather, these cases are based on a desire to see at least some types of constitutional challenges to state action litigated in state rather than federal court.[158]

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[155] *See id.* at 113.

[156] 423 U.S. 362, 379-80 (1976) (denying injunctive relief that would require high city officials to stop officers on the beat from acting unconstitutionally); *see also* O'Shea v. Littleton, 414 U.S. 488, 499 (1974) (denying injunctive relief against racial discrimination in law enforcement); Weinberg, *supra* note 5, at 1194-95 (arguing that in some circumstances, this extension of *Younger* could block all federal judicial challenges to state action); Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U.L. REV. 723, 753-57 (1979) (arguing that the court in *Rizzo* sought to control the extent of federal disrupton of the administration of state and local laws by making it more difficult to prove a constitutional violation); *cf.* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 104 n.13 (1984) (intimating that *Rizzo* might be applied outside the law enforcement context).

[157] 461 U.S. 95, 112 (1983) (denying injunctive relief against police use of chokeholds).

[158] *See also* Moore v. Sims, 442 U.S. 415, 429-30 (1979). Here, the Court identified one basis for abstention as the state interest in adjudicating state law issues and doing so in light of constitutional objections. This interest, of course, is an established basis for *Pullman* abstention under which the federal court delays consideration of the federal questions while the state court hears the state issues. But in *Moore* the Court ordered *Younger* abstention, sending the whole case to

In short, the Court has embarked upon a wholly different and much more ambitious approach to judicial federalism than the interest balancing model that inspires the exhaustion, procedural default, and collateral estoppel rules. The Court no longer relies on any specific harm to state judicial processes as justification for fencing plaintiffs out of federal court. One can easily enough accept that the plaintiff's interest in a federal forum must yield to the state's interest in avoiding interference in its judicial process, especially since many of the rules affect the timing and not the ultimate availability of federal review. In contrast, the new rules often bar access to federal court altogether for persons raising claims under federal law, and they do so without so much as a passing nod to the plaintiff's palpable interest in a federal forum for his constitutional claims against state actors.[159]

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the state court with no return to federal court save the possibility of Supreme Court review. Since the state law in state courts principle can only justify *Pullman* abstention, it cannot be the true ground for the Court's imposition of *Younger* abstention. Nor were there significant institutional costs implicated in the case, for the federal issues were not defenses to the state proceeding but merely matters that might be raised as permissive counterclaims in state court, complicating the state litigation. Accordingly, the real reason behind abstention seems to be the broad proposition that federal constitutional challenges should be adjudicated in state courts.

Also worthy of note is Stone v. Powell, 428 U.S. 465 (1976), where the Court limited access to federal court on habeas corpus for fourth amendment claims. At the time, it seemed possible that *Stone* was the beginning of a general effort to restrict access to federal court for habeas claims, for the Court suggested that habeas should not be permitted unless the petitioner's claim related to his guilt or innocence. *See* 428 U.S. at 491-92 n.31. Three years later, the Court nipped this development in the bud, holding that claims of racial discrimination in grand jury selection could be raised on habeas even though they did not concern the determination of guilt or innocence. Rose v. Mitchell, 443 U.S. 545 (1979). For other recent limits on habeas, *see supra* note 68.

[159] Professor Bator makes another argument for allocating cases to state court in the absence of parity. He starts from the premise that state courts will always have a major role in constitutional litigation because of the institutional costs and political obstacles to using federal courts for state criminal trials and civil enforcement proceedings. Since the state courts will decide these issues, he argues, it is important to see to it that state judges take their task seriously and perform it conscientiously. Any lack of parity must be addressed by seeking to close the gap between federal and state courts. If a state judge is constantly subject to having cases snatched away from him by federal courts and issues relitigated there, then his "inner sense of responsibility" will be subverted. On the other hand, his competence and sensitivity can be improved to the extent he is allowed to make

B. *The Politics of Judicial Federalism*

What explains the difference between the earlier cases and the later ones? The Court has changed its attitude toward and response to the gap between federal and state courts. In the early cases the Court denies federal jurisdiction in spite of the gap, because of the important institutional costs associated with allowing access to a federal forum. In the later cases the Court prefers state adjudication *because of* the lack of parity. For every plaintiff seeking access to federal court in the hope it will be more sympathetic to his claims, a state defendant exists who prefers state court for the same reason. The Court allocates cases to state court because it prefers that any advantage go to the state rather than to the individual with a constitutional claim. The opinions contain no language which proves this proposition. It is instead an inference based on three premises: (1) the inadequacy of the institutional costs rationale, which makes it necessary to search for another explanation of these cases; (2) the absence of parity, which supplies a motive for preferring state courts on substantive grounds; and (3) the general shift toward favoring state substantive interests by the contemporary Court,[160] from which it follows that the Court

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decisions that will stand. The "realization that [he] has been entrusted with a great and important task" will help evoke in him the desired qualities of mind and spirit. Bator, *supra* note 2, at 624-25.

Professor Bator acknowledges that this consideration "does not tell us where particular lines should go." *Id.* at 625. He evidently thinks it should weigh heavily in the balance, for he immediately proceeds to argue that the general test for relitigation on habeas should be whether the litigant has had a "full and fair opportunity" to raise the issues in state court, a test the Court itself has so far applied only to fourth amendment claims. *Id.* at 626.

I have two problems with this reasoning: (1) it would be equally legitimate to give much less weight to the need to improve morale of state judges, and more to the interests of the constitutional claimants who will suffer in the process. *See* Neuborne, *supra* note 4, at 1129-30; and (2) a more fundamental objection may be raised to Bator's proposition that giving state judges more responsibility will result in more sensitivity to constitutional rights. An equally plausible inference from what we know of human nature is that without federal courts keeping an eye on them, state courts would have even less incentive to give constitutional claims their due and the gap would widen. For these reasons, I do not find the morale argument compelling.

[160] *See, e.g.*, United States v. Salerno, 107 S. Ct. 2095 (1987) (upholding pretrial detention against eighth amendment challenge); Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding sodomy statute against fourteenth amendment challenge); Dun

would find it desirable to direct cases to forums sympathetic to those interests and would be likely to take advantage of the opportunity created by disparity between court systems.

The foregoing analysis has exposed the substantive foundations of allocation rules in the *Younger* area, where the Court has pushed the doctrine far beyond the explanatory capacity of institutional costs. The substantive motivation for rules of judicial federalism is not limited to situations where those costs are weak or absent. Even in circumstances where such burdens are present, they are probably not the only basis for restrictive rules. Compare the reluctance of the Warren Court to impose *Pullman* abstention[161] with the renaissance of that doctrine in the 1970s.[162] The likely reason for the change lies in shifting attitudes on the Court regarding the respective roles of federal and state courts. The Court in the 1960s found ways to remove obstacles to federal consideration of constitutional challenges and weakened the *Pullman* doctrine as part of that effort, while the Burger Court sought to make access more burdensome.

A similar contrast may be drawn in connection with collateral estoppel. In *England v. Louisiana State Board of Medical Examiners*,[163] the Warren Court refused to give collateral estoppel effect

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& Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (upholding libel award against first amendment challenge); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding locational restrictions for adult theaters against first amendment challenge); Washington v. Davis, 426 U.S. 229 (1976) (intent to discriminate on the basis of race must be shown in order to make a successful equal protection claim); Paul v. Davis, 424 U.S. 693 (1976) (defamation by state officer is not a deprivation of fourteenth amendment "liberty"); *see also* Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155 (1984) (criticizing the Court for being more concerned with the "budgeting of rights" and "efficient policy through bureaucratic rule" than with the "vindication of justice" and "equal justice under the law"); Stone, *October Term 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 GA. L. REV. 15 (1984) (arguing that the Court has entered an era of aggressive majoritarianism, siding with the government over the individual and surrendering its role as the guardian of constitutional rights).

[161] *See* Note, *supra* note 48, at 604 (arguing that since abstention reflects a reluctance to decide controversial issues of constitutional law, an activist court will view the technique less sympathetically).

[162] *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 92 n.77 (1973) (calling the *Pullman* abstention doctrine a doctrine with "staying power" and noting several cases from the early 1970s applying it).

[163] 375 U.S. 411 (1964).

to judgments of state courts in cases sent to them pursuant to *Pullman* abstention in spite of the federal full faith and credit statute.[164] The Burger Court did not overrule *England*, but it read that statute as obliging federal courts to defer to state court findings in ordinary section 1983 litigation,[165] and, as a matter of federal common law, with no statutory foundation, it gave preclusive effect to findings of fact by state administrative agencies.[166] Once again, the shift may best be explained in terms of a preference that one side or the other receive a litigating edge on substantive issues.[167]

The Court's own analytical framework never requires a defense of this practice or even an admission that this is what takes place. Recall the Court's ambiguous and fragmentary treatment of the parity problem. Since the Court has never openly acknowledged that there is a gap between federal and state courts, it has never confronted the charge that the differences between the court systems lie behind the allocation rules. Even dissenting Justices have been unwilling to broach this delicate subject. Rather than argue for federal jurisdiction based on the plaintiff's interest in a litigating edge, they prefer to resort to their own rhetorical tradition. They have recourse to plenty of language from cases decided in the 1960s and other periods of bold federal judicial activism for the proposition that federal courts should be available for vindi-

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[164] 28 U.S.C. § 1738 (1982).

[165] Allen v. McCurry, 449 U.S. 90 (1980) (section 1983 was not intended to deny the binding effect of state court judgments when the state court gave the parties a full and fair opportunity to litigate federal claims); *see also* Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984) (claim preclusion); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) (section 1738 applies in Title VII cases).

[166] University of Tenn. v. Elliott, 478 U.S. 788 (1986).

[167] Even *Younger* may turn more on the litigating edge than institutional costs. *Younger* was a facial attack against a state statute on first amendment grounds. 401 U.S. at 40. In these circumstances, the resolution of the constitutional issue can dispose of the entire case. So long as the state courts have not yet actually begun work on the case, federal adjudication will rarely cause much disruption of state processes. *Cf.* Whitten, *supra* note 98, at 675-76 (state interest in abstention is virtually the same whether the state proceeding is pending or merely threatened); Zeigler, *supra* note 4, at 66 ("federal court interference with the state judiciary imposes no greater strain on federal-state relations than does interference with the other branches").

cation of federal rights.[168] The result has been opinions and dissents full of stirring language and the development of many new rules of judicial federalism without any discussion of the policy foundation for them.

The Court's academic critics are less respectful than the dissenting Justices. They vigorously assert the existence of a gap between federal and state courts, and insist that the effect, if not the intent, of allocating constitutional challenges to state courts is to diminish the practical value of constitutional rights. Accordingly, they say the expansive judicial federalism rules should be overturned.[169]

The critics' argument may be superficially attractive, but I find it just as ambiguous and fragmentary as the Court's reasoning and ultimately no more persuasive. These critics apparently do not assert that state court adjudication deprives the claimant of a constitutionally adequate hearing.[170] Rather, they believe the Court's rules are unwise and reflect bad judgment.[171] Let us be clear about

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[168] *See, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 125 (1981) (Brennan, J., dissenting); Trainor v. Hernandez, 431 U.S. 434, 456 (1977) (Brennan, J., dissenting); Juidice v. Vail, 430 U.S. 327, 342-43 (1977) (Brennan, J., dissenting); Stone v. Powell, 428 U.S. 465, 530 (1976) (Brennan, J., dissenting); Hicks v. Miranda, 422 U.S. 332, 355-56 (1975) (Stewart, J., dissenting) (all quoting statements from earlier cases regarding the role of the federal courts as the primary guarantors of constitutional rights).

[169] *See, e.g.*, Neuborne, *supra* note 4, at 1105.

[170] *See id.* at 1119. Some authors have proposed that federal courts should always be available for adjudication of constitutional claims, *see, e.g.*, Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143, 161-66 (1982). As Professor Redish acknowledges, the Court has never adopted this position. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 102-05 (1979); Palmore v. United States, 411 U.S. 389, 400-02 (1973); Lockerty v. Phillips, 319 U.S. 182, 187-89 (1943); *see also*, Bator, *Congressional Control over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1032 (1982). It must be stressed that *Younger* and other "fencing out" doctrines rest on the premise that adequate corrective process is available in the state courts. Where this is not so, the Court grants access to federal court. *See* Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention Into Ongoing State Court Proceedings*, 66 N.C.L. REV. 49, 54-72, 78-91 (1987).

[171] *See, e.g.*, Neuborne, *supra* note 4, at 1105-06 (questioning "the propriety of deciding contemporary forum allocation issues under a mistaken assumption of parity"); Nichol, *supra* note 5, at 379 (criticizing the Court's "ostrich-like response" to these problems).

what terms like wisdom and judgment signify in this context. When individuals challenge state action on federal constitutional grounds, the gap between federal and state courts creates an opportunity to favor the litigation interests of one side or the other by assigning the case to one or the other court system.[172] According to the present Court, it is better to favor the state's interest in warding off the attack and pursuing its substantive goals free of constitutional restraints. Judges who more strongly valued the interests of plaintiffs with constitutional claims would favor federal court in more of these cases, as the Court of the 1960s did in cases like *Monroe v. Pape*, *Fay v. Noia*, and *Dombrowski v. Pfister*.[173] The clash between the two approaches is strictly political in that the choice of one rule or another turns on the value preference of the decision maker and not on an independent criterion of validity like a statute or the Constitution. If it is unwise for the Court to decide as it does, the Court's folly amounts to a failure to share the critic's values regarding the importance of seeing to it that plaintiffs raising constitutional claims prevail in close cases where judges could legitimately determine the facts, the law, or the application of law to fact either way.

The position of proponents of broad federal jurisdiction is no more or less respectable than that of the states' attorneys who seek to restrict access to federal court. Both are fighting for a litigating edge, the equivalent of the home field advantage. The cases and the commentary never make this point because the tactical interests of participants on both sides of judicial federalism issues are served by masking the political nature of the choices that must be made. It is more appealing to speak of "the principle of comity"[174] and "respect for state functions,"[175] or to call the federal courts "the primary and powerful reliances for vindicating every right given by the Constitution,"[176] than it is to ask for an

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[172] *See* Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 681-82 (1981) (arguing that the court system's jurisdictional complexity is beneficial since it provides a "battlefield" for playing out "tensions and conflicts of the social order").

[173] *See supra* text accompanying note 130.

[174] Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 105 (1981).

[175] Younger v. Harris, 401 U.S. 37, 44 (1971), *quoted in* Juidice v. Vail, 430 U.S. 327, 334 (1977); *see also* Huffman v. Pursue, Ltd., 420 U.S. 592, 602 (1975).

[176] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 530 (1976) (Brennan, J., dissenting)

allocation rule on the ground that your side will have a better chance to win in one forum than in another.

C. *The Value of Systemic Disparity*

As long as there is an absence of parity, the resolution of allocation issues will often turn significantly on the Court's attitude toward the underlying substantive dispute. The dual judicial system, and the opportunity it provides for struggles over jurisdiction, may seem merely to add a layer of needless complexity to our legal order. After all, substantive state and individual interests are supposed to be taken into account in the course of making substantive doctrine. In this section, I argue that this view is mistaken and that the capacity to consider substantive interests in allocating cases between court systems is a valuable appurtenance to our legal order.

The first step in the argument is to distinguish between the perspective of lawyers, judges, and litigants working within our legal institutions and the perspective of an observer standing outside the system, who has no interest in substantive outcomes and who is able to compare our system with others. While actors within the system will think of these rules in largely political terms, the disinterested observer from without will see that the politics underlying judicial federalism decisions serve an important function in compromising competing interests. He will perceive that the dual judicial network, with its lack of parity, is a valuable accessory to the legal system. By comparison, a simpler system with one hierarchy of courts lacks the versatility of our complex federal system.[177]

With the external point of view as our starting point, consider the task of the Supreme Court and Congress in making rules of federal jurisdiction. Lawmaking consists of identifying, ranking, and compromising competing interests and policies and then im-

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(quoting Zwickler v. Kosta, 389 U.S. 241, 247 (1967)); Hicks v. Miranda, 422 U.S. 332, 355-56 (1975) (Stewart, J., dissenting) (quoting F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1927)).

[177] *Cf.* Cover, *supra* note 172, at 682 ("It is a daring system that permits the tensions and conflicts of the social order to be displayed in the very jurisdictional structure of its courts. It is that view of federalism that we ought to embrace.").

plementing these decisions by legal rules.[178] The lawmaking process can be thought of strictly in terms of substantive doctrine. For example, the Court's efforts to identify and accommodate the conflicting state and individual interests at issue in free speech cases are expressed in the substantive law of the first amendment. The abstract principles of free speech law, however, yield only a partial understanding of how those competing interests are treated in practice. The Realists taught, and virtually everyone now acknowledges, that the rules of procedure employed to adjudicate disputes, as well as the judges, juries and other actors who carry out these commands, have a major impact on how the substantive principles of law operate in practice.[179] This is true in any legal system, simple or complex.

Now notice the opportunity created by a lack of parity in a complex legal system. In carrying out the Supreme Court's substantive constitutional commands, one set of courts will tend to favor the state and the other the individual. In cases where the substantive rule is not clear and the trial court must construe it, or where the substantive rule must be applied to a set of facts, or where the facts themselves are in dispute, the attitudinal difference may prove critical.[180] This difference is why all sides dispute allocation issues so hotly. The Court or Congress can make use of jurisdictional rules as well as substantive ones as a means of carrying out policy judgments and compromising competing interests. The substantive principle on a given point may favor the constitutional values asserted by the individual, while a jurisdictional rule allocating cases to state courts blunts the impact of that principle and hence accommodates the competing state inter-

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[178] *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 11-16 (tent. ed. 1958).

[179] *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 520-21 (1958) (the procedures used to determine the facts of the case are as important as the substantive rule of law to be applied).

[180] With respect to findings of fact in jury trials, I have in mind the nonverbal communication between judge and jury. *See generally* Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985); Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266 (1975) (both discussing the effect of judges' behavior during trial on jury verdicts).

ests rejected in making the substantive principle.[181] Let me stress that this opportunity to use jurisdictional rules to make accommodations of substantive interests, which is lacking in a simple system with only one hierarchy of courts, only exists because of the lack of parity.[182]

The value of this mechanism becomes apparent when the task of ranking and accommodating interests is viewed realistically as a dynamic process ongoing in time and subject to changes in emphasis and direction. The point is not that the Court, confronted by a case that presents a hard clash of values, will compromise

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[181] *Compare* Brandenburg v. Ohio, 395 U.S. 444 (1969) (limiting state authority to curb subversive advocacy) *with* Younger v. Harris, 401 U.S. 37 (1971) (first amendment defense to subversive advocacy prosecution must be raised in state court). *See also* Cover & Aleinikoff, *supra* note 26, at 1048 (habeas corpus invites a dialogue between federal and state courts in defining rights).

[182] This argument rests on the premise that law is "open-textured," so that judges are not always bound by established rules but sometimes exercise discretion to make new rules. *See* H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961). Some scholars contend that this account of what judges do is wrong. They say almost all legal questions have right answers and the judge's job is to find them. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81, 280 (1977); R. Dworkin, *No Right Answer?*, in LAW, MORALITY, AND SOCIETY: SELECTED ESSAYS IN HONOUR OF H.L.A. HART 58 (P.M.S. Hacker & J. Raz eds., 1977). *But see* Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1035-50 (1977); Munzer, *Right Answers, Preexisting Rights, and Fairness*, 11 GA. L. REV. 1055 (1977) (both taking issue with Dworkin). If Dworkin is correct, then perhaps we should assign cases to the courts most likely to arrive at the right answer. Proceeding from this premise, diverse arguments can be made: (1) for federal jurisdiction, because federal courts are more expert at federal law, *see* Neuborne, *supra* note 4, at 1121-24; or (2) for a mixture of federal and state jurisdiction, because bringing different perspectives to bear on the problems helps us get better answers, *see* Bator, *supra* note 2, at 633-34.

I do not think Dworkin's conception of law as a search for right answers compels us to make allocation decisions with the aim of getting more right answers. Only Dworkin's mythical judge, Hercules, will ever be consistently successful at finding the right answer in hard cases. *See* TAKING RIGHTS SERIOUSLY, *supra* at 116-17; Greenawalt, *supra*, at 1043-44. Human judges, state and federal, will inevitably make many mistakes. No matter what the allocation rule, little if anything will be gained in terms of right answers. If it is futile to pursue right answers through allocation decisions, then we may with an easy conscience try to achieve other, less ambitious goals like the accommodation of competing interests.

It is not clear whether Dworkin himself still believes that there is a single right answer to all legal questions. Passages in his most recent book suggest that he does not. See Keating, *Justifying Hercules: Ronald Dworkin and the Rule of Law*, 1987 A.B. FOUND. RES. J. 525, 526, 532-33, 534 (reviewing R. DWORKIN, LAW'S EMPIRE (1986)).

them by formulating a substantive rule in favor of one party and a forum rule for the other. Typically, the Court, in resolving a particular case, keeps substantive and jurisdictional issues quite separate. Over time, however, the Court can subtly modify the content of previous policy choices and value judgments by leaving the abstract rules more or less unchanged and instead altering the distribution of decision-making between federal and state courts. By proceeding in this way, the Court or Congress can, at a very general level, enforce changes in their perception of the proper balance to be drawn between the values underlying competing state and individual claims in constitutional cases, and they can do so without making radical, abrupt, and disruptive changes in constitutional doctrine.

Readers who care deeply about effective enforcement of constitutional rights may view this reasoning as a perverse and sophistic effort to defend the Court's current allocation decisions. On the contrary, the merits of particular jurisdictional rules are not my concern here. Rather, this discussion relates to the structure of the legal system. I maintain that the capacity to use allocation rules for substantive ends is a useful tool whose utility is widely overlooked.

To appreciate its value, one must accept that enforcing constitutional rights is not the only goal worth pursuing. The state's interest in pursuing its objectives free of constitutional impediments is itself a value with constitutional dimensions and is always at war with the individual's claim to hold constitutional rights against state action.[183] And an even more fundamental value, which every healthy legal system strives to realize, is to provide means for compromising and accommodating competing interests without having to make categorical and unqualified choices between them.[184] The single-minded pursuit of any goal, however worthy, engenders habits of mind which are inimical to liberty.[185] For these reasons,

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[183] *See* Bator, *supra* note 2, at 631-34.

[184] *See, e.g.*, LeRoy Fibre Co. v. Chicago, M. & St. P. Ry., 232 U.S. 340, 354 (1914) (Holmes, J., partially concurring) (the whole of "civilized" law depends on differences of degree).

[185] *Cf.* L. HAND, THE SPIRIT OF LIBERTY 190 (3d ed. 1974) ("The spirit of liberty is the spirit which is not too sure that it is right . . . which seeks to understand the minds of other men and women . . . [and] which weighs their interests alongside its own without bias . . . .").

it is worthwhile to incorporate within the legal system features which facilitate subtle compromises of competing interests, thus making crude all-or-nothing decisions less often necessary. Opposition to the strong protection of constitutional values will always exist, and it will always be expressed in the form of restrictions on the substantive scope of constitutional protection. In our system, such opposition can also be expressed through jurisdictional rules that may assign constitutional claims to skeptical forums. Permitting state courts to participate in adjudicating constitutional issues will generally entail a lesser threat to constitutional values than will a direct assault on the rights themselves. Some state courts are quite sensitive to federal rights. If others have not proven as amenable to them, neither have they simply disregarded the Constitution.[186]

It would be ahistorical to contend that this justification for state court jurisdiction motivated the Framers of article III. Their reason for preserving strong state courts was political. The states were jealous of their power and would not yield any more of it than they had to in order to form an effective national government. The idea of compromising competing state and individual substantive interests through jurisdictional rules would not have occurred

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[186] An important premise of the argument presented here relates to the reasons why parity is lacking. There are two distinct causes for the absence of parity: a lack of sympathy for constitutional claims and a lack of competence. *See supra* notes 83-85 and accompanying text. The persuasive force of the argument I have advanced is enhanced to the extent the more important factor is a lack of sympathy. Sympathy toward the state interests that lost out in making a substantive rule is, under my hypothesis, just what the Court seeks when it allocates cases to state courts. A lack of competence, on the other hand, means that the judges will make lots of mistakes, and these may be distributed randomly, causing consternation to litigants on both sides. Civil liberties lawyers say they prefer more competent judges because understanding and accepting their claims often requires a grasp of creative thought and inferential reasoning. Neuborne, *supra* note 4, at 1123-24. If this is so, the errors of the incompetent judge will not be distributed randomly but will be biased against them. As a result, the effect of assigning more cases to state courts will be more mistakes and more of these mistakes will prejudice constitutional claimants than their governmental adversaries. The postulated incompetence of state judges may favor state interests somewhat, but that effect is an unworthy basis on which to make allocation rules. It would be hard to find a judge, legislator, or scholar who would defend an allocation to state courts on the ground that they make more errors and the errors on the whole favor state interests.

to them as there were hardly any substantive restrictions on state power in the original Constitution nor even after adoption of the Bill of Rights.[187]

All the same, the thesis advanced here draws upon two themes deeply rooted in our constitutional history and structure. First, the Framers foresaw the gap that would emerge between federal and state courts and took account of it in drafting article III. Even if there were parity, symbolic value would attach to the presence or absence of a system of federal courts. Yet symbolism alone seems insufficient to account for the fierce struggle over whether to have a federal court system and the resolution of the conflict by leaving the matter up to Congress. Rather, the controversy seems to reflect a shared perception among the Framers that important differences would emerge between federal and state courts, and that these differences may well influence the disposition of cases. Indeed, there is concrete evidence that the Framers forecast a gap between federal and state courts. The Federalists insisted on authorizing federal jurisdiction over cases raising purely state law issues where the parties are citizens of different states. A division of opinion exists over the precise purpose of the diversity jurisdiction. Some say it was intended to protect out-of-staters in general against biased local tribunals, while others maintain its aim was to provide competent and impartial tribunals for creditors and other businessmen.[188] In either case, the doctrine rests on the premise that institutional differences between state and federal courts may affect the outcomes of law suits. In short, disparity between federal and state courts has been a feature of our system from the beginning.

Second, and in another vein, the use of procedural rules to restrain the achievement of substantive ends is a familiar one in the constitutional framework of checks and balances. In our system, power is divided among three branches of the national government, and in a multitude of ways each branch serves as a check on the power of the others. For example, the President appoints

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[187] *See* Barron v. The Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (Bill of Rights does not apply to the states); G. GUNTHER, CONSTITUTIONAL LAW 406 (11th ed. 1985) (noting that "[t]here were relatively few references to individual rights in the original Constitution").

[188] *See* LOW & JEFFRIES, *supra* note 16, at 425-26.

judges and can veto legislation; the Congress must approve judicial appointments, may impeach the President, and controls the courts' jurisdiction; and the Court is empowered to strike down actions of the President or Congress on constitutional grounds. The aim of these arrangements is not to achieve the efficient implementation of any set of political goals but to promote the accommodation of competing substantive values by placing obstacles in the way of any program, however laudable it may be.[189] As Paul Freund recently observed, "[t]he Constitution is no country for inflexible absolutes or single-premised logic."[190] When Congress and the Supreme Court allocate individual rights cases to a state court because that forum may be unsympathetic to the substantive goals plaintiffs seek to gain, they do not betray our constitutional tradition.

The arguments advanced here on behalf of the value of a dual judicial system, and the legitimacy of allocation rules based on substance, will doubtless fail to persuade some readers. The analysis remains valuable all the same, for it reveals a serious flaw in the opinion-writing strategy of Justices who dissent from the Court's judicial federalism doctrine. Perhaps out of regard for the sensibilities of state judges, they have declined to insist that there is a gap and that real interests of the plaintiff are harmed by restrictive rules. As a result, their arguments lack vigor. Their objections would be more compelling if they frankly acknowledged the divergence between state and federal courts and brought out into the open the heavy political component of allocation decisions. If nothing else, this roughhouse style would force the Court openly to defend its rules and, therefore, could work as a brake on the overuse of these rules to serve substantive ends. To the extent lawyers, judges, and citizens think the Court is merely applying "the principle of comity,"[191] pursuing the "minimization of fric-

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[189] *See generally*, THE FEDERALIST No. 10 (J. Madison) (arguing in favor of the republican form of government to control factions).

[190] Freund, *What They Said, What They Read*, N.Y. Times, Mar. 15, 1987, § 7 (Book Review), at 3 (reviewing THE FOUNDERS' CONSTITUTION (P. Kurland & R. Lerner eds.)); *see* THE FEDERALIST Nos. 47, 51 (J. Madison) (discussing the separation of powers).

[191] Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 105 (1981).

tion,"[192] and meeting a "threat to our federal system,"[193] the freer is the Court's hand to pursue substantive ends in the guise of jurisdictional rules. The better the Court's constituencies understand the true nature of what it does in these cases, the more vulnerable it is to criticism and the more thoughtful it may be in deciding whether to use jurisdictional principles in this way.

D. The Future of Ex Parte Young *and* Monroe v. Pape

The proposition that the Court considers substance in making allocation decisions is a powerful and neglected explanatory tool, but it by no means solves all of the difficulties in the area. In particular, the problem of accounting for the survival of *Monroe v. Pape*[194] and *Ex Parte Young*[195] remains. As noted in Part I, *Ex Parte Young* recognized a federal cause of action for injunctive relief against allegedly unconstitutional state action. *Monroe v. Pape* supplied a statutory basis for this cause of action by its construction of the Civil Rights Act of 1871, the statute now codified at 42 U.S.C. section 1983. If decisions by the Court favor state substantive interests in making allocation decisions, then why has it not overruled these two important cases which still grant access to federal court for many constitutional claims?[196]

If there were some other convincing explanation of the judicial federalism decisions that better accounted for this important dichotomy, then the failure of the allocation-based-on-substance model to explain the dichotomy would cast serious doubt on its validity. But no other convincing explanation exists. Apart from the rules based on institutional costs, where the problems raised by federal interference with state processes permit the Court to differentiate narrow categories of cases from the general run of constitutional challenges, I know of no principled justification for the coexistence of *Monroe* and the expansive judicial federalism decisions.

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[192] Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

[193] Moore v. Sims, 442 U.S. 415, 423 (1979).

[194] 365 U.S. 167 (1961).

[195] 209 U.S. 123 (1908).

[196] *Monroe* has been overruled, but only to the extent it held local governments not amenable to suit under section 1983. *See* Monell v. Department of Social Serv., 436 U.S. 658 (1978).

The Court used to distinguish between *Monroe* and *Younger* on the ground that the *Younger* plaintiff requested an injunction against state proceedings, and hence these suits brought into play equitable principles, notably the rule that a court of equity will not act if there is an adequate remedy in the state proceeding.[197] The Court has now abandoned this equitable basis for the rules by pushing the deferential doctrine into areas where that explanation is unavailable.[198] The Court now invokes comity instead,[199] which brings us back to where we started, still trying to identify the reasons that lurk behind "the principle of comity" and to figure out why comity applies to some constitutional challenges and not to others.

Another tack is to give up the attempt to find a general justification for treating these cases differently than *Monroe* and instead search for ways to distinguish them one case at a time. The rule in *Hicks v. Miranda*,[200] dismissing the federal suit if a state case is filed soon afterward, can be viewed as a way of avoiding the unseemliness of a race to the courthouse. Cases extending *Younger* to administrative proceedings in state court reflect a judgment that these are closely analogous to judicial proceedings.[201] The cases where the principle of deference is applied to state executive action, like *Rizzo v. Goode*[202] and *Los Angeles*

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[197] *See* Kugler v. Helfant, 421 U.S. 117, 124 (1975); Younger v. Harris, 401 U.S. 37, 43-44 (1971); Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943) (all stating that courts of equity should conform to this principle except in cases that call for intervention to prevent irreparable injury); *see also* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 120 & n.2 (1981) (Brennan, J., dissenting) (arguing that principles of comity only have a role when a federal court is asked to exercise its equitable powers).

[198] *See* Wells, *supra* note 11, at 1112-15 (discussing the erosion of the equitable basis of the *Younger* doctrine); Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 84-90 (1984) (asserting that equitable arguments fail to support either *Younger* or *Pullman* abstention).

[199] *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (refusing to interfere with ongoing bar disciplinary proceedings within the jurisdiction of the state supreme court); *FAIR*, 454 U.S. at 105.

[200] 422 U.S. 332 (1975).

[201] *See* Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 627 (1986); *Middlesex County Ethics Comm.*, 457 U.S. at 432-37 (both noting that the federal plaintiff would have an adequate opportunity to raise his constitutional claim in the state administrative proceedings).

[202] 423 U.S. 362, 379-80 (1976) (denying injunctive relief that would require city officials to stop officers on the beat from acting unconstitutionally).

v. Lyons,[203] arise in circumstances where the plaintiff's standing to obtain injunctive relief is subject to debate.[204] *Fair Assessment in Real Estate Association v. McNary*, denying federal jurisdiction over an action for damages, draws on a long history of federal reluctance to interfere in state tax matters.[205]

One problem with this approach to the cases is that many of the specific alternative rationales offered are themselves unconvincing. The decision in *Hicks* does not avoid a race to the courthouse,[206] and powerful arguments can be made in favor of the plaintiff's standing in *Lyons*.[207] From the point of view of comity between courts, no amount of analogizing can erase the fundamental difference between deference to a state court and deference to a state agency. The history of federal deference in matters of state taxation had, before *FAIR*, always been limited to denial of injunctive and declaratory relief that would interfere with tax collection and had not been applied to prevent damage suits to get back payments already made.[208]

Another, and more fundamental, difficulty with this approach is that viewing each case in isolation ignores the important theme running through them: in resolving the particular problem presented by each case, the Court's preference for state courts is a key consideration. Once again we return to the problem of explaining why the Court asserts that preference in these cases but stops short of overruling *Monroe* and *Young*.

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[203] 461 U.S. 95, 112 (1983) (denying injunctive relief against police using chokeholds).

[204] *See Rizzo*, 423 U.S. at 371-73 (article III "case or controversy" requirement lacking since the federal plaintiffs had no personal stake in the outcome of overhauling police disciplinary procedures); *Lyons*, 461 U.S. at 101-10 (respondent failed to sufficiently demonstrate standing on grounds he was likely to suffer future injury from police use of chokeholds). In *Rizzo* the Court also stressed that the officers against whom relief was sought were not shown to have committed any constitutional violations. 423 U.S. at 373-77.

[205] 454 U.S. 100, 114-15 (1981) (noting that federal interference could have such a chilling effect that the collection of state taxes might be suspended altogether).

[206] *See* 422 U.S. 332, 354 (1975) (Stewart, J., dissenting). As Justice Stewart explains, *Hicks* permits the state "to leave the mark later, run a shorter course, and arrive first at the finish line."

[207] *See* Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 10-59 (1984).

[208] *See* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 119-22, 126-32 (1981) (Brennan, J., dissenting).

It seems necessary to admit that the distinction is arbitrary and to look for an explanation unburdened by principle. Two possibilities come to mind. The first proceeds from the premise that the majority responsible for the judicial federalism rules is not monolithic. While some of the Justices likely view these cases as a prelude to a frontal assault on *Monroe* and *Young*,[209] others are less ambitious and less Machiavellian. These judges would like to respect both the state and individual interests in these cases, but they see no way to do so without drawing arbitrary lines between groups of cases that are fundamentally similar.[210] For them, the important feature of the judicial federalism cases is that each takes only a small and plausible step. Although the rules of deference have been pushed beyond the limits which their initial institutional costs rationale can support, judges who pay closer attention to the broad outlines of federal jurisdiction than to the nuances of doctrinal change can feel comfortable with many of them. These judges are, however, equally committed to the regime of *Young* and *Monroe*. When the need arises, they reject efforts to undermine those decisions.[211] The result is a body of doctrine with two lines of cases whose premises are incompatible but under which each of the competing interests is permitted to prevail some of the time in a pragmatic compromise.

The other explanation adds a dynamic element to the first. It would hold that the present frontier between the cases that expand federal jurisdiction and those that restrict it is merely a stage in a larger historical movement. In this view, the future lies with that portion of the Court's current majority which would further re-

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[209] Among current members of the Court, only the Chief Justice can confidently be placed in this category. *See* City of Columbus v. Leonard, 443 U.S. 905, 908 n.2 (1979) (Rehnquist, J., dissenting to denial of certiorari). But keep in mind that he is a persuasive man.

[210] *See* Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59, 73-75, 78-81, 85-86 (1981); *see also* Field, *supra* note 5, at 684-87 (discussing the confusion in federal jurisdictional rules). *Cf.* Blasi, *The Rootless Activism of the Burger Court*, in THE BURGER COURT: THE COUNTERREVOLUTION THAT WASN'T at 216 (1983) (in substantive areas the Court often makes arbitrary compromises between competing interests).

[211] *See supra* note 209; *see also* Moore v. City of East Cleveland, 431 U.S. 494, 497 n.5 (1977); Patsy v. Board of Regents, 457 U.S. 496 (1982) (both rejecting arguments that federal plaintiffs should be required to exhaust state remedies).

strict access to federal court. The recent growth of judicial federalism through the medium of the *Younger* doctrine will, in the long run, prove to be the foundation for dismantling the federal remedies recognized in *Young* and *Monroe*.[212] To see how far the process has already advanced, one must notice not only the judicial federalism cases, but also recent eleventh amendment decisions limiting federal judicial power[213] and new standing requirements restricting entry into the federal courts.[214]

I do not know which of these accounts is a more accurate prediction of future developments. But one point is quite clear. The issue here is not one that turns on subtle distinctions between cases. The issue is a matter of fundamental values. Whether the process of restricting federal judicial power continues may depend on such fortuities as which Justices leave the Court first and who wins the next presidential election.

CONCLUSION

Although the Court refuses to say so, nearly everyone else would agree that there are differences in the performance of state and federal courts. As between the two, state courts are more likely

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[212] *See, e.g.*, Fiss, *supra* note 5, at 1142 (commenting that *Monroe* "may soon be but a formal vestige of another era"); Nichol, *An Activism of Ambivalence*, 98 HARV. L. REV. 315, 319-22 (1984) (arguing that the Burger Court "indirectly narrowed constitutional protections by limiting the procedures available to vindicate them"); *cf.* Durchslag, *supra* note 156 (criticizing the court's emphasis on federalism and proposing compromises between values of federalism and individual rights).

[213] *See* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (eleventh amendment forbids injunctions against state action on state law grounds); Edelman v. Jordan, 415 U.S. 651 (1974) (limiting the scope of injunctive relief available under *Young*); *see also* Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984).

[214] *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984); Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982); Warth v. Seldin, 422 U.S. 490, 505 (1975); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976). *Valley Forge* makes it harder for someone who has not suffered a discrete injury to challenge official action. The other cited cases require plaintiffs to show causal connection between the challenged action and the plaintiff's condition, in order to establish standing. *See generally* Nichol, *Standing on the Constitution: The Supreme Court and Valley Forge*, 61 N.C.L. REV. 798 (1983); Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635 (1985).

to decide close questions in constitutional cases in favor of the state, while federal courts will more often decide them in favor of the individual asserting a constitutional claim. For this reason, both sides will view the resolution of the allocation question as an opportunity to gain a litigating edge over the opponent in the underlying litigation on the merits. Some of the rules distributing cases to state courts may be based on institutional costs unconnected to this oblique substantive struggle, but many of them can best be explained as decisions by the Court to favor the state's litigating interests. While there are a great many kinds of constitutional cases involving individual rights, they all have a common theme. The state asserts a substantive interest in regulating conduct or pursuing some other goal free of constitutional constraints, and the plaintiff seeks to limit state prerogatives in the name of constitutional values. The judicial federalism cases manifest a general preference on the part of the Court for the state interest in achieving its program quite apart from the specifics of any given constitutional question on the merits.

None of this appears in the opinions. In them we find only rhetorical flourishes like the "principle of comity" and warnings of "a threat to our federal system of government" resulting from the exercise of federal court power. Why is the Court unwilling to admit the substantive foundation of many of its judicial federalism cases? Perhaps the majority considers it unseemly to make allocation rules for the purpose of favoring state substantive interests. Perhaps it is reluctant to acknowledge that it takes account of the sporting aspects of litigation. Or perhaps the Court, here as elsewhere, prefers to pretend to be a mere adjudicator and does not wish to advertise its political role as a lawmaker promoting some values over others. In fact, I find nothing illegitimate about these rules, although I do not share the value choice that underlies them and hope to see them overturned someday. The capacity to make allocation decisions based on such considerations is a valuable feature of our legal order that permits us to compromise competing interests through jurisdictional rules as well as substantive ones, a technique unavailable to simpler legal systems.