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THE FINAL FRONTIER OF *YOUNGER* ABSTENTION: THE JUDICIARY'S ABDICATION OF THE FEDERAL COURT REMOVAL JURISDICTION STATUTE

DANIEL C. NORRIS*

I. INTRODUCTION

Younger abstention is one of several abstention doctrines that the federal courts have used to refuse to hear cases that properly fall within their jurisdiction. Ever since the humble beginnings of the *Younger* abstention doctrine in 1971,[1] the United States Supreme Court has engaged in a subtle and steady expansion of the scope of

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* J.D. Candidate, May 2004, Florida State University College of Law. I would like to thank Professor Steven Gey for his invaluable insight and expertise in the twisted realm of abstention and my incredible family for their enduring support.

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

the doctrine. While the roots of the doctrine are found in the criminal law context, the Court has steadily moved towards the full application of the doctrine in the civil law context. The Court assured us at each stage of expansion that it would not take the next steps in this progression toward full application of the doctrine across-the-board. Nevertheless, the Court has quietly and subtly transmogrified what was once a limited doctrine of abstention into an immense and impermeable legal construct predicated on dual sovereignty and enforced at the expense of federal law and the Constitution of the United States.

Initial parlays of the *Younger* abstention doctrine into the world of civil law were limited to the context of civil enforcement litigation. However, as Professor Stravitz predicted in the wake of *Pennzoil Co. v. Texaco, Inc.*,[2] I intend to demonstrate in this Comment that the *Younger* abstention doctrine has reached full maturity in the civil law context. I will then discuss the unprecedented impacts of the consummated doctrine.

Part II of this Comment will briefly discuss the history of expansions of the *Younger* abstention doctrine. Part III of this Comment will discuss the final frontier of *Younger* abstention and argue that the Supreme Court has functionally eliminated the limitations that purportedly restrain the doctrine. Part IV of this Comment will examine the impact of the expansion of *Younger* abstention to all civil cases, particularly the effective evisceration of federal court removal jurisdiction. Finally, Part V of this Comment will critique the legal and theoretical foundations of the expansions of *Younger* abstention that facilitated the increasing abdication of federal court removal jurisdiction.

II. A HISTORY OF DANGEROUS EXPANSIONS OF THE *YOUNGER* ABSTENTION DOCTRINE

A. A Doctrine Is Born: The Criminal Law Roots of Younger *Abstention*

In the beginning, there was *Younger v. Harris*.[3] In *Younger*, a federal district court issued an injunction against an ongoing criminal prosecution in California because the prosecution was being conducted under a patently unconstitutional statute.[4] On appeal, the

2. For a discussion of the historical expansions of the *Younger* abstention doctrine in the realm of civil law cases, see Howard B. Stravitz, Younger *Abstention Reaches a Civil Maturity:* Pennzoil Co. v. Texaco, Inc., 57 FORDHAM L. REV. 997 (1989).

3. 401 U.S. at 37.

4. In *Younger*, the federal plaintiff had been charged with violation of the California Criminal Syndicalism Act, CAL. PENAL CODE §§ 11400-11401 (West 1982). However, after indictment of the federal plaintiff in *Younger*, the Supreme Court struck down a virtually

Supreme Court reversed the injunction and engaged in a long discussion of federalism that formed the basis for what is now known as the *Younger* abstention doctrine.[5] In his discussion of *Our Federalism*, Justice Black argued that the related principles of comity and federalism require the federal courts to recognize the independence of state institutions and not interfere with legitimate state functions, even for the purpose of enforcing federal rights.[6] The holding of the case was seemingly limited to abstention on the part of federal courts in deference to pending state criminal prosecutions.[7] However, the theoretical underpinnings of *Our Federalism* were seeded much deeper, and the case laid the groundwork for dramatic expansion in future cases.[8]

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identical criminal syndicalism statute in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Indeed, the Court recounts these facts in the *Younger* opinion. 401 U.S. at 38-41. Nevertheless, the Court refused to interfere with the state court criminal prosecution that was proceeding under a clearly unconstitutional statute.

5. In discussing the related principles of comity and federalism, Justice Black coined the phrase *Our Federalism*:

> [The] reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger, 401 U.S. at 44-45.

6. *Id.*

7. *See id.* at 46-53 (discussing the need for states to be able to prosecute their criminal statutes in good faith and without federal court interference as the justification for abstention).

8. The decision in *Younger* was based on considerations of equity as well as the concerns of comity and federalism. However, the Court's use of the equitable justifications seemed like a mere segue from prior decisions into the far more expansive standards of *Our Federalism*. The Court stressed the overriding importance of this later justification by stating:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an *even more vital consideration*, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the

In addition to the discussion of *Our Federalism*, the Court also justified its holding in *Younger* on principles of equitable restraint.[9] Citing the Anti-Injunction Statute,[10] the Court noted that there has been a longstanding policy against federal court interference with state court proceedings.[11] In addition to interests of comity and federalism, the Court found that the principle of non-interference was justified by inherent limitations in the doctrine of equity.[12] Under the doctrine of equity, courts in equity should not act to restrain another court if "the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[13] However, despite the Court's discussion of restraint for courts sitting in equity, it was clear that the ruling was substantially predicated on federalism grounds.[14] Indeed, later cases would forsake the equity analysis because the abstention doctrine could only properly be expanded under the Court's federalism justifications.

While the scope of *Younger* abstention was seemingly limited to pending state criminal proceedings, the Court quickly dispelled any notion that the scope of the doctrine would remain that limited in *Huffman v. Pursue, Ltd.*[15] The *Huffman* case was the product of an attempt by a local prosecutor to close a theater that played pornographic films.[16] Under Ohio's public nuisance law, the prosecutor obtained a judgment allowing him to close the theater and seize and

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> States and their institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 44 (emphasis added).

9. *Id.* at 43.

10. The Anti-Injunction Statute imposes an absolute ban on issuance of a federal injunction against a pending state court proceeding in absence of one of several recognized exceptions. 28 U.S.C. § 2283 (2000). However, it is important to note that the Court's decisions in all its *Younger* abstention cases refuse to rely on the Anti-Injunction Statute and adopt the considerations of comity and federalism instead.

There are exceptions to the Anti-Injunction Statute that would allow a federal litigant to circumvent the statute in a number of cases where the Court wants abstention to apply. For example, a federal claim falls within an exception to the statute if it relies on a federal statute that creates a federal right or remedy enforceable in a federal court of equity. Mitchum v. Foster, 407 U.S. 225, 238 (1972). The *Mitchum* Court found that 42 U.S.C. § 1983 claims fall within the exceptions to the Anti-Injunction Act. *Id.* at 242-43. Nevertheless, the Court has been more than willing to apply *Younger* abstention in cases that are brought under § 1983. Consequently, the Court's abstention analysis has never been overly concerned with the operation of the Anti-Injunction Statute.

11. Justice Black stated, "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Younger*, 401 U.S. at 45.

12. *Id.* at 43.

13. *Id.* at 43-44.

14. For a brief discussion of the Court's repudiation of the equitable foundations of the doctrine in favor of the concerns of comity and federalism, see Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1042 (1985).

15. 420 U.S. 592 (1975).

16. *Id.* at 595.

sell the theater's property.[17] In response, the theater owner filed a 42 U.S.C. § 1983 claim to enjoin enforcement of the state court judgment.[18] After the district court granted the injunction, the Supreme Court used *Younger* abstention to reverse the district court on appeal.[19]

While *Huffman* involved a *civil* enforcement case, the Court deftly stated that the state civil proceeding was both "in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials."[20] By virtue of this relationship to state criminal proceedings, the Court used the *Younger* abstention principles to foreclose the district court from hearing a § 1983 claim for an injunction of the state court judgment.[21] As a product of the first Rehnquist opinion applying *Younger*, *Huffman* is the cornerstone for several important developments in the expansion of the *Younger* abstention doctrine. First, *Huffman* represented the first extension of the doctrine into the civil law context. Because *Younger* had relied to some degree on the discussion of restraint in equity, it was not at all clear that the *Younger* doctrine could be properly applied outside criminal law cases. Indeed, Justice Rehnquist himself stated in *Huffman* that "[s]trictly speaking, [the equity doctrine] is not available to mandate federal restraint in civil cases."[22] Nevertheless, the Court was determined to expand the doctrine, and it did so by casting aside the equity justifications and relying solely on the principles of comity and federalism.[23] Furthermore, *Huffman* introduced the "state interest" analysis that became the new limiting factor in defining the boundaries of the doctrine.[24]

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17. *Id.* at 598.
18. *Id.* at 598-99.
19. *Id.* at 592.
20. *Id.* at 604.
21. *Id.* at 592.
22. *Id.* at 604. In deciding *Huffman*, Rehnquist specifically pressed the federalism rationale of *Younger* because that rationale is equally applicable to both criminal and civil proceedings. Rehnquist avoided the equity rationale of *Younger*, because "[s]trictly speaking, this element of *Younger* is not available to mandate federal restraint in civil cases." *Id.* Because the federalism rationale is the only one that truly applies to civil cases, Rehnquist emphasized that rationale so that the doctrine could be expanded beyond the criminal law context. *Id.*
23. *Id.*
24. *Id.* In analyzing the issue of federal judicial restraint, Justice Rehnquist pointed to an opinion by Justice Holmes that counseled federal courts to restrain from issuing injunctions against officers of the state. *Id.* at 603 (citing Mass. State Grange v. Benton, 272 U.S. 525 (1926)). While the Holmes opinion discussed a "bill seeking an injunction against state executive officers, rather than against state judicial proceedings," Rehnquist argued that the relevant considerations of federalism counsel more heavily toward federal restraint in the context of judicial proceedings since:

> [I]nterference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional ob-

While the court cast aside the equity justifications for the *Younger* abstention doctrine, the fact remained that *Younger* was primarily being applied in cases that sought equitable relief from the federal court. It was not until much later that the Court would consider the full application of *Younger* to actions *at law*. However, even before the decision in *Huffman*, the Court expanded the scope of *Younger* abstention beyond cases that merely sought injunctive relief. In *Samuels v. Mackell*,[25] the Court extended the *Younger* decision to cases seeking declaratory relief as well as those seeking injunctive relief.[26] The *Samuels* Court held that the basic policy against federal interference with a state court criminal prosecution would be frustrated as much by a declaratory judgment as it would by an injunction.[27] The scope of the *Younger* abstention doctrine remained limited to cases seeking declaratory or injunctive relief until the Court's watershed opinion in *Fair Assessment in Real Estate Ass'n v. McNary*.[28]

B. The Younger *Exceptions: Do They Really Exist?*

Implicit in the *Younger* opinion is the fact that a federal court may act to enjoin a state court proceeding when certain extraordinary circumstances exist that call for equitable relief.[29] These exceptions are predicated on traditional considerations of equity jurisprudence.[30] While the Court has definitively abandoned the equitable justifications for *Younger*, the exceptions to the doctrine that arise in equity arguably survived. However, it has been widely observed that the Court has effectively narrowed these exceptions to the point of mak-

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> jections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles.

Id. at 604 (internal citations omitted). This language represents the effective birth of the state interest analysis.

25. 401 U.S. 66 (1971). *Samuels* involved a challenge to a New York criminal anarchy statute which made advocating the overthrow of the government by violence or any unlawful means a felony punishable by up to 10 years imprisonment and/or a $5,000 fine. The state court defendants were charged with voluntarily organizing a group for the purpose of advocating the violent overthrow of the State of New York. Samuels v. Mackell, 288 F. Supp. 348, 350 (S.D.N.Y. 1968), *aff'd*, 401 U.S. 66 (1971).

26. 401 U.S. at 73.

27. *Id.*

28. 454 U.S. 100 (1981). *Fair Assessment* represented the first case in which the court expanded the doctrine of abstention to an action for damages. As of 1981, *Younger* abstention was no longer limited to claims seeking merely injunctive or declaratory relief.

29. Younger v. Harris, 401 U.S. 37, 53-54 (1971). For a good discussion of the equitable exceptions to *Younger* and their limited practical role, see Brian Stagner, *Avoiding Abstention: The* Younger *Exceptions*, 29 TEX. TECH L. REV. 137 (1998).

30. All three of the equitable exceptions are taken from language in the *Younger* opinion that is derived from its discussion of equitable justifications for restraint. *See generally Younger*, 401 U.S. at 37.

ing them virtually non-existent.[31] Several commentators have written extensively about these exceptions.[32] Therefore, I will only engage in a limited review of the important considerations.

There are three principal exceptions to the *Younger* abstention doctrine. The first is the *bad faith and harassment* exception. In *Younger v. Harris*, the Court "specifically mentioned bad faith and harassment as the kind of extraordinary circumstances that would justify federal intervention" into the state proceeding.[33] The Court stated that injunctive relief would be available if the state prosecution was brought in bad faith and to harass the criminal defendant.[34] The Court has generally defined bad faith and harassment as a prosecution that has been brought without a reasonable expectation of obtaining a valid conviction.[35] In line with the Court's opinion in *Dombrowski v. Pfister*,[36] a litigant seeking to invoke this exception must show a "combination of impermissible motive, multiple prosecutions, and improbability of success."[37] Hence, this is a virtually impossible standard to satisfy. Since the *Younger* decision, the Court has *never* invoked the exception to find state action constituting a bad faith prosecution.[38] In fact, the Court has specifically declined to use the exception on several different occasions.[39] Moreover, litigants that have tried to invoke the exception in lower courts have had little

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31. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498 (1977) (concluding that the showings under the various exceptions are "probably impossible to make"); James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1084 n.197 (1994) (describing the exceptions as "relatively unimportant" and "inconsistent with a properly conceived abstention doctrine"); Stagner, *supra* note 29, at 141 (describing the *Younger* exceptions as an "escape hatch that rarely opens"); C. Keith Wingate, *The Bad Faith-Harassment Exception to the* Younger *Doctrine: Exploring the Empty Universe*, 5 REV. LITIG. 123, 124 (1986) (stating that recognition of the bad-faith exception "has been limited to a virtually empty universe").

32. *See, e.g.*, sources cited *supra* note 31.

33. Stagner, *supra* note 29, at 141.

34. *Younger*, 401 U.S. at 48-50.

35. *Id.* at 48.

36. 380 U.S. 479 (1965).

37. Stagner, *supra* note 29, at 157. *See Dombrowski*, 380 U.S. at 479. While ruling on other grounds, the *Dombrowski* Court believed that a valid claim of bad faith was evident under the facts because threats to enforce the statute against the defendants were "not made with any expectation of securing valid convictions, but [as] part of a plan to employ arrests, seizures, and threats of prosecution" to harass the defendants and deprive them of constitutionally protected rights. *Id.* at 482.

38. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 13.4, at 751 (2d ed. 1994).

39. *See, e.g.*, Juidice v. Vail, 430 U.S. 327, 338 (1977) (refusing to find bad faith and further restricting its scope by stating, "[the bad faith] exception may not be utilized unless it is alleged and proved that [the judges] are enforcing the contempt procedures in bad faith or are motivated by a desire to harass"); Hicks v. Miranda, 422 U.S. 332, 350-51 (1975) (refusing to acknowledge bad faith because the plaintiffs failed to show that faulty warrants were either knowingly relied on by prosecutors or knowingly issued by judges).

success.[40] Consequently, many commentators have essentially argued that the exception does not really exist at all.[41]

The second *Younger* exception is the *patently unconstitutional* exception.[42] Indeed, Justice Black stated, "[t]here may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment."[43] To illustrate his point, Justice Black stated that, "[i]t is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[44] However, history showed that it is virtually impossible to imagine a statute that could satisfy an exception as prohibitive and narrowly construed as this one. There is not a single instance in which the Court has invoked the patently unconstitutional exception to justify federal intervention.[45] In fact, in *Trainor v. Hernandez*, the Court found the applicable statute to be patently unconstitutional.[46] However, the Court again refused to apply the exception because the statute was not literally unconstitutional "in every clause, sentence and paragraph."[47] As Justice Stevens noted in his dissent, the patently unconstitutional exception would be "unavailable whenever a statute has a legitimate title, or a legitimate severability clause, or some other equally innocuous provision."[48] Accordingly, the Court's interpretation of the exception has utterly eviscerated it of meaning and rendered it a mere showpiece.[49]

The third and final *Younger* exception is one predicated on the lack of an adequate state forum.[50] Unlike the prior two exceptions, the Court has actually used this final exception in practice.[51] In *Gibson v. Berryhill*,[52] the Court stated that federal intervention is appropriate under this exception if the state courts are biased and unable to be trusted on a particular issue.[53] In *Gibson*, the Court found that

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40. Stagner, *supra* note 29, at 148.
41. *Id.* at 157; Brennan, *supra* note 31, at 498; Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103, 1115 (1977).
42. Younger v. Harris, 401 U.S. 37, 53-54 (1971).
43. *Id.* at 53.
44. *Id.* at 53-54 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).
45. *See* CHEMERINSKY, *supra* note 38, § 13.4, at 753.
46. 431 U.S. 434 (1977).
47. *Id.* at 447 (quoting *Watson*, 313 U.S. at 402).
48. *Id.* at 463 (Stevens, J., dissenting).
49. *Id.* (concluding that the majority eliminated the patently unconstitutional exception).
50. Stagner, *supra* note 29, at 163.
51. *Id.* at 164-65.
52. 411 U.S. 564 (1973).
53. *Id.* at 578-80.

a board of optometrists was incapable of fairly adjudicating the dispute before it because every member had a financial stake in the outcome.[54] However, the Court has been far more restrictive in its rulings in other cases,[55] especially cases that involve the state judiciary.[56] Indeed, even when bias can be shown, the litigant must also demonstrate that as a function of systematic bias, recusal provisions are either unavailable or ineffective.[57] In sum, the opportunities to invoke an equitable exception to *Younger* abstention are rare.

C. The Expansion: Removing Limitations One at a Time

A mere month after the decision in *Huffman*, the Court went back to work on removing the doctrine's restrictions. In *Hicks v. Miranda*,[58] the Court decided to apply *Younger* to a criminal proceeding that was not pending at the time the federal action was filed.[59] The Court determined that abstention is appropriate even when a state proceeding is not pending at the time the federal suit is initiated, as long as a proceeding is initiated in state court prior to any hearings of substance on the merits in federal court.[60] Writing for the majority, Justice White stated that no case under *Younger* had required that a state criminal proceeding be pending on the day that the federal action is filed.[61] The effect of this ruling is to create a *reverse removal* power for the state to defeat the plaintiff's choice of the

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54. *Id.* at 579.

55. *See, e.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 435-37 (1982) (finding that the state bar was not an inadequate forum for raising first amendment objections to state bar disciplinary rules because the record did not indicate that the bar committee would have refused to hear a first amendment challenge to its disciplinary rules).

56. *See* Kugler v. Helfant, 421 U.S. 117, 125-29 (1975) (arguing that the availability of recusal provisions in New Jersey courts substantially undermines any claim of bias surrounding the judiciary).

57. *See* Brooks v. N.H. Supreme Court, 80 F.3d 633, 640 (1st Cir. 1996) (stating that the "biased" exception to the *Younger* abstention doctrine is inapposite if an aggrieved party fails to employ available procedures for the recusal of biased judges).

58. 422 U.S. 332 (1975). Vincent Miranda owned an adult theater. His employees had been indicted on criminal obscenity charges in California state court. Miranda, who had not been named in the action, filed suit in federal court on November 29, 1973. In the federal claim, he alleged that the obscenity statute was unconstitutional, and he asked for injunctive relief for return of the films that were declared obscene in state court. On January 15, 1974, a mere day after the completion of service on the federal complaint, the state prosecutors amended the state claim to include Miranda as a defendant. *Id.* at 335-40.

59. *Id.*

60. *Id.* at 349.

61. *Id.* Actually, the *Younger* Court refused to address the purported requirement of an ongoing state proceeding, specifically reserving the question for later: "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." Younger v. Harris, 401 U.S. 37, 41 (1971).

federal forum.[62] Accordingly, the abstention doctrine does not apply when a federal claim is initiated first and proceeds to the merits without an intervening state proceeding. The practical effect of this is to give the federal plaintiff an incentive to "race to the courthouse" as a means of circumventing the harsh rule in *Younger*.[63] To put it another way, a person may only avail himself of his right to a federal forum if his attorney is smart enough and athletic enough to beat the state in a footrace to the district court. However, as Justice Stewart articulated in his dissent, the race is carefully set up so that the state will always win.[64]

While the dangers inherent in the *Huffman* and *Miranda* rulings were seemingly limited by the narrow application of *Younger* to civil cases that are "in aid of and closely related to criminal statutes,"[65] it was obvious even to the dissenters in *Huffman* that the dangerous precedent set on that day would soon expand well beyond the scope of the facts of that case.[66] Indeed, in *Juidice v. Vail*,[67] the Court unequivocally stated that the scope of the *Younger* abstention doctrine was not limited to criminal or quasi-criminal cases.[68] The early rulings under the *Younger* abstention doctrine were limited to the criminal law because the state's interest in executing cases in state court free from federal interference is the strongest in the criminal law context.[69] However, the Court in *Juidice* stated that *Younger* abstention applies *anytime* that a federal court is asked to interfere with a pending state proceeding that implicates a state interest, re-

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62. *See* Bryce M. Baird, Comment, *Federal Court Abstention in Civil Rights Cases: Chief Justice Rehnquist and the New Doctrine of Civil Rights Abstention*, 42 BUFF. L. REV. 501, 531 (1994) (arguing that the effect of the *Hicks* ruling was to create a "reverse removal" power that would allow the state to defeat the plaintiff's choice of a federal forum by simply initiating an action in state court that would be owed deference before the federal court initiated proceedings on the merits).

63. In *Hicks*, Justice Stewart discussed the practical operation of the *Younger* doctrine in his dissent:

> There is, to be sure, something unseemly about having the applicability of the *Younger* doctrine turn solely on the outcome of a race to the courthouse. The rule the Court adopts today, however, does not eliminate that race; it merely permits the State to leave the mark later, run a shorter course, and arrive first at the finish line.

Hicks, 422 U.S. at 354 (Stewart, J., dissenting).

64. *See id.*

65. Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

66. *Id.* at 613 (Brennan, J., dissenting) ("I dissent. The treatment of the state *civil* proceeding as one 'in aid of and closely related to criminal statutes' is obviously only the first step toward extending to state *civil* proceedings generally the holding of *Younger v. Harris* . . . ."). *Id.* (quoting the majority opinion).

67. 430 U.S. 327 (1977).

68. *Id.* at 334.

69. *See id.* at 335 (finding that the state's interest in its contempt procedures was sufficient to warrant abstention despite the fact that "it is not quite as important as is the State's interest in the enforcement of its criminal laws . . . or even its interest in the maintenance of a quasi-criminal proceeding").

gardless of whether the case is criminal or civil.[70] *Juidice* was a civil case for debt collection between two private parties.[71] While the litigation was still pending in state court, one of the parties filed a § 1983 claim in federal court challenging the constitutionality of the state court's contempt procedures.[72] Even though the case was purely a civil case, the Court found that the state has a clear interest in the execution of its contempt procedures and that the district court should have abstained by virtue of its impact on the state court proceeding.[73] Accordingly, the Court expanded the scope of the doctrine by signaling its willingness to find an important state interest in civil law cases. In fact, the court found an important state interest in *Juidice* even though the state was not a party to the litigation.[74]

Of course, prosecution of any state civil law that serves some state interest implicates an important state interest. Therefore, virtually any civil case in which the state is seeking to enforce a civil law or ordinance falls within the scope of the *Younger* abstention doctrine. Accordingly, a party seeking to use 42 U.S.C. § 1983 to vindicate a federal right that is threatened in a state proceeding would be unable to do so by virtue of *Younger* abstention.[75] It is this very development that Justice Brennan foresaw in the *Huffman* dissent[76] and repudiated with disgust in the *Juidice* dissent.[77] Furthermore, the impacts

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70. *See id.* at 335-36 (finding that the state's interest in its contempt procedures warranted abstention regardless of whether the process leading to the finding of contempt of court is labeled civil, quasi-criminal, or criminal).

71. *Id.* at 329-30.

72. *Id.* at 330.

73. *Id.* at 335-36.

74. *Id.*

75. *See* Baird, *supra* note 62. It should be noted that the sweeping effect that *Younger* abstention has on § 1983 claims represents a judicial abdication of federal jurisdiction every bit as disturbing and irresponsible as the one discussed in this Comment. Indeed, the effect of *Younger* abstention on civil rights litigation has been so sweeping that Mr. Baird renamed the entire area of abstention cases as "Civil Rights Abstention." *Id.* Since scholarship has already been devoted to the issue, I will not take the time to review the effects of *Younger* abstention on § 1983. However, claims brought under § 1983 properly invoke the congressionally mandated jurisdiction of the federal courts. Consequently, any reader wishing to appreciate the full scope of the judiciary's abdication of its federal jurisdiction should also review the effects of abstention in the context of § 1983.

76. In *Huffman*, Justice Brennan argued in a vigorous dissent that extending *Younger* to § 1983 claims would directly contravene with the congressional purpose of that statute:

> Even if the extension of *Younger v. Harris* to pending state civil proceedings can be appropriate in any case, and I do not think it can be, it is plainly improper in the case of an action by a federal plaintiff, as in this case, grounded upon 42 U.S.C. § 1983. That statute serves a particular congressional objective long recognized and enforced by the Court. Today's extension will defeat that objective.

Huffman v. Pursue, Ltd., 420 U.S. 592, 616 (1975) (Brennan, J., dissenting).

77. With the continued erosion of access to federal courts in § 1983 cases, Justice Brennan blasted the Court's application of abstention principles to § 1983 claims:

> In requiring the District Court to eject the federal plaintiff from the federal courthouse and to force him to seek vindication of his federal rights in pending state proceedings, the Court effectively cripples the congressional scheme enacted

of *Juidice* are even more sweeping than the apparent prohibition of 42 U.S.C. § 1983 claims for injunctive relief against a state actor. Indeed, the Court applied *Younger* in *Juidice* even though the litigation was solely between two private litigants. Therefore, the *Juidice* case opened the scope of the *Younger* abstention doctrine to virtually any civil case that requests injunctive relief that would impact a state interest, even if the state was not a party to the litigation.[78] In fact, the Supreme Court relied almost exclusively on *Juidice* in cementing the role of *Younger* in wholly private litigation in *Pennzoil Co. v. Texaco, Inc*.[79]

While the *Juidice* case implicitly recognized that the scope of the *Younger* abstention doctrine was in fact immense, many of the expansions implicit in the ruling were not explicitly recognized until later. Two months after *Juidice*, the Court affirmed its civil application of *Younger* in *Trainor v. Hernandez*.[80] In *Trainor*, an Illinois state agency sought the return of public assistance funds alleged to have been fraudulently obtained by the defendant.[81] The agency also instituted an attachment proceeding to freeze the defendant's credit union account.[82] Rather than responding to the underlying state litigation, the defendant filed a § 1983 claim in federal district court, alleging that the Illinois attachment statute deprived the debtors of their property without due process of law.[83] Admittedly, this case was in the civil enforcement context where the state was a party, but it did not involve an attack on the underlying state proceeding. Instead, it merely raised a collateral challenge to the constitutionality of the attachment statute.[84] Nevertheless, the Supreme Court saw fit

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> in § 1983. The crystal clarity of the congressional decision and purpose in adopting § 1983, and the unbroken line of this Court's cases enforcing that decision, expose *Huffman* and today's decision as deliberate and conscious floutings of a decision Congress was constitutionally empowered to make. It stands the § 1983 remedy on its head to deny the § 1983 plaintiff access to the federal forum *because* of the pendency of state civil proceedings where Congress intended that the district court should entertain his suit *without regard* to the pendency of the state suit. Rather than furthering principles of comity and our federalism, forced federal abdication in this context undercuts one of the chief values of federalism—the protection and vindication of important and overriding federal civil rights, which Congress, in § 1983 and the Judiciary Act of 1875, ordained should be a primary responsibility of the federal courts.

Juidice, 430 U.S. at 343-44 (Brennan, J., dissenting).

78. *See* Stravitz, *supra* note 2, at 1010-11 (arguing that the Supreme Court agreed with abstention because of the state's interest in its contempt procedures despite the fact that the litigation was between two purely private parties).

79. *See* 481 U.S. 1, 12-14 (1987).

80. 431 U.S. 434 (1977).

81. *Id.* at 435-36.

82. *Id.* at 436-37.

83. *Id.* at 438.

84. *Id.*

to refuse the case on *Younger* abstention grounds.[85] Again, the Court signaled its willingness to extend the *Younger* abstention doctrine to any state proceeding that implicated an important state interest. More importantly, the Court signaled that *Younger* abstention can be applied even when the claim for an injunction in the federal court does not directly impact the underlying state proceeding. This was yet another important predicate for the Court's ruling in *Pennzoil Co. v. Texaco, Inc*.[86]

The next notable extension of the *Younger* abstention doctrine came in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*.[87] In this case, the New Jersey bar brought a state bar disciplinary proceeding against one of its members.[88] In response, the attorney filed an action in federal court claiming that the state disciplinary rules violated the First Amendment.[89] At the time, the rules for disciplining attorneys did not specifically provide for constitutional challenges to the disciplinary process.[90] Consequently, the attorney felt that he must address his claim in federal court. However, New Jersey's interest in licensing and disciplining its attorneys is clearly sufficient to trigger the state interest requirement for *Younger* abstention.[91] The only pertinent issue was whether the administrative body of the state bar provided sufficient opportunity to raise federal constitutional objections. Continuing the presumption in favor of finding an adequate opportunity first articulated in *Moore v. Sims*,[92] the Court held that there was no reason to believe that the local committee of the state bar would refuse to hear a First Amendment challenge to the disciplinary rules.[93] Therefore, the Court made it

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85. *Id.* at 447.

86. *See* Pennzoil v. Texaco, Inc., 481 U.S. 1, 12-14 (1987) (relying on *Trainor v. Hernandez* to determine that federal court challenges to various state procedures merit abstention so long as they "relate" to an actual state proceeding).

87. 457 U.S. 423 (1982).

88. *Id.* at 427-28.

89. *Id.* at 429.

90. *Id.* at 430 n.8.

91. *Id.* at 434. In finding that attorney licensing and disciplining procedures are of paramount state interest, the Court stated:

> The State of New Jersey has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. States traditionally have exercised extensive control over the professional conduct of attorneys. . . . The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice. The State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance.

Id. (citations omitted).

92. 442 U.S. 415, 425-26 (1979).

93. The Court found that there was an adequate opportunity to raise constitutional challenges in the state committee by stating:

clear that a federal district court must abstain under *Younger* even if the only pending state proceeding is an administrative proceeding.[94] This initial parlay into the realm of abstention for administrative proceedings was cemented by the Court in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*[95] The Court also made it clear that one of the exceptions to *Younger*, predicated on the lack of sufficient opportunity to bring federal claims in the state proceeding, is more illusory than real.[96] Again, this is a dangerous expansion of the scope of this doctrine.

Together, these cases form the doctrinal predicate for the final frontier of *Younger* abstention. While the doctrine began as an innocent directive to abstain from requests to enjoin pending state criminal prosecutions, it was subtly transformed into a vastly prohibitive doctrine of abstention that applies to criminal, quasi-criminal, and civil enforcement cases. Yet, the expansion of this doctrine did not end there. Indeed, the final frontier of the *Younger* abstention doctrine lies in its application to virtually all pending state litigation.

III. THE FINAL FRONTIER OF *YOUNGER* ABSTENTION

A. The Pennzoil *Litigation: An Abdication of the Important State Interest Limitation*

The final frontier of *Younger* abstention begins with the Court's infamous decision in *Pennzoil Co. v. Texaco, Inc.*[97] In this case, competing tender offers for the Getty Oil Company prompted Pennzoil to sue Texaco for tortious interference in a Texas state court.[98] As a result of the lawsuit, Pennzoil was awarded a judgment for over $11 billion.[99] However, Texas law permitted Pennzoil to execute the

> [The federal plaintiff] contends that there was no opportunity in the state disciplinary proceedings to raise his federal constitutional challenge to the disciplinary rules. Yet [he] failed to respond to the complaint filed by the local Ethics Committee and failed even to *attempt* to raise any federal constitutional challenge in the state proceedings. Under New Jersey's procedure, its Ethics Committees constantly are called upon to interpret the state disciplinary rules. [Plaintiff] points to nothing existing at the time the complaint was brought by the local Committee to indicate that the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees.

Middlesex County, 457 U.S. at 435.

94. *See* Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986); *Middlesex County*, 457 U.S. at 434, 435; *Cf.* New Orleans Pub. Serv., Inc. v. City of New Orleans, 491 U.S. 350 (1989) (holding that *Younger* only applies to administrative proceedings that are "judicial" in nature).

95. 477 U.S. at 619.

96. *See generally* Stagner, *supra* note 29.

97. 481 U.S. 1 (1987).

98. *Id.* at 4.

99. *Id.*

judgment pending appeal unless Texaco filed a supersedeas bond in the amount of the judgment.[100] Texaco could not post the required bond, so it filed a § 1983 action in federal court challenging the constitutionality of the Texas bond requirement on due process grounds.[101] This case, like *Juidice v. Vail*,[102] involved a lawsuit between two private parties. Furthermore, like *Trainor v. Hernandez*,[103] the federal claim did not challenge the underlying state claim. Instead, Texaco's § 1983 claim merely raised a challenge to the Texas bond requirement because it effectively functioned as an absolute bar of its right to appeal.[104] However, despite the Court's reliance on *Juidice*, the Texaco claim did not quite fall within the prior *Younger* case law. In *Juidice*, the Court found a substantial state interest because the claim challenged the state court's contempt procedures.[105] If the federal court had intervened, the ruling would have affected the ability of all the state courts to enforce their judgments through contempt procedures.[106] However, the Texaco claim challenged a bond requirement in Texas that operated merely as a procedural insurance mechanism for the litigant that prevailed at the trial court level.[107] As Justice Brennan stated in his concurring opinion, "the interest in enforcing the bond and lien requirement is privately held by Pennzoil, not by the State of Texas."[108] Indeed, the State of Texas filed an amicus curiae brief to inform the Court that the state had no interest in the outcome of the case.[109] Moreover, the state's interest in the bond requirement is seemingly no different than its interest in the rules of court, evidence, or any other procedural matter. Never-

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100. *Id.* at 4-5.

101. *Id.* at 7.

102. 430 U.S. 327 (1977).

103. 431 U.S. 434 (1977).

104. Discussing the effect that the bond requirement might have on Texaco, the Court observed:

> Even before the trial court entered judgment, the jury's verdict cast a serious cloud on Texaco's financial situation. The amount of the bond required by Rule 364(b) would have been more than $13 billion. It is clear that Texaco would not have been able to post such a bond. Accordingly, the business and financial community concluded that Pennzoil would be able, under the lien and bond provisions of Texas law, to commence enforcement of any judgment entered on the verdict before Texaco's appeals had been resolved.

Pennzoil, 481 U.S. at 5 (citations and quotations omitted).

105. 430 U.S. at 335.

106. *Id.* at 335-36.

107. *See infra* note 108 and accompanying text.

108. *Pennzoil*, 481 U.S. at 20 (Brennan, J., concurring).

109. The State of Texas represented to the court of appeals that it "has no interest in the outcome of the state-court adjudication underlying this cause," except in its fair adjudication. Brief for Intervenor-Appellant at 2, Pennzoil Co. v. Texaco, Inc., 784 F.2d 1133, 1150 (2d Cir. 1986) (Nos. 86-7046, 86-7052).

theless, the Court found that the bond requirement involved a state interest sufficient to trigger *Younger* abstention.[110]

Pennzoil was not an accident. The Court unanimously concluded that Texaco was not entitled to relief.[111] However, the opinion split five ways in six different opinions, and five votes held that *Younger* abstention applied.[112] The *Pennzoil* litigation was a high profile case with enormous financial stakes. Despite Justice Marshall's warning that big money cases are stigmatized from the outset as bad law,[113] the *Pennzoil* case is one of tremendous doctrinal significance. First, if the Court wanted to avoid *Younger*, there was plenty of opportunity for the majority to join in one of the opinions that was issued on other grounds.[114] Instead, the Court took *Younger* abstention head on and used it as a staging point for yet another tremendous expansion of the doctrine.

All previous applications of *Younger* were predicated on the issue of federalism and the need to avoid friction between the state and federal court systems. However, the state interest requirement was virtually eliminated by this ruling.[115] The Texaco claim did not impact the state proceeding or remove it from the state court system. Instead, it merely challenged a post-judgment bond requirement that would have prevented Texaco from appealing its case in state court.[116] As Justice Stevens astutely observed in his concurring opinion, the Court in its previous civil applications of *Younger* has "invariably required that the State have a *substantive* interest in the ongoing proceeding, an interest that goes beyond its interest as adjudicator of wholly private disputes."[117] However, Justice Stevens quite accurately noted that the majority's opinion in *Pennzoil* abdicates this critical limitation and "cuts the *Younger* doctrine adrift" from its inherent doctrinal moorings.[118] The state's interest amounted to nothing more than the interest of state courts in remaining free from federal judicial intrusion.[119] Consequently, the ruling in *Pennzoil* opened the doors of *Younger* abstention to purely civil cases between purely

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110. *Pennzoil*, 481 U.S. at 11.
111. *Id.* at 2-3.
112. *Id.*
113. *Id.* at 26 (Marshall, J., concurring).
114. All nine justices concluded that Texaco was not entitled to relief. If the majority did not want to render an opinion under *Younger*, those justices could have signed onto one of the concurring opinions that was issued on separate grounds. This fact should not be overlooked in examining the doctrinal significance of this case.
115. For a good discussion of the impact of *Pennzoil* on the state interest test, see Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of* Pennzoil v. Texaco, 63 N.Y.U. L. REV. 1051 (1988).
116. *See supra* text accompanying note 104.
117. *Pennzoil*, 481 U.S. at 30 n.2 (Stevens, J., concurring).
118. *Id.*
119. *Id.* at 20-21 (Brennan, J., concurring).

private litigants, regardless of whether there is a discernible state interest involved. The only limitation on the doctrine that remains is the purported refusal to apply *Younger* to civil cases for damages. However, even this limitation is a facade.

B. Civil Claims for Damages: Does Younger *Abstention Go This Far?*

From the beginning, *Younger* abstention had its roots in the realm of equity.[120] In its early cases, the Supreme Court used the general reluctance of our courts to use their equitable powers as a means of justifying abstention from demands for injunctive relief against state court proceedings. Even as the Court rejected the reliance on equitable principles and pushed the concept of *Our Federalism*,[121] the application of *Younger* abstention was limited to cases that requested equitable relief.[122] Admittedly, the Court also applied *Younger* abstention to cases that asked for declaratory relief.[123] However, the Court was reluctant to fully extend the doctrine of abstention to civil cases for damages.[124] Nevertheless, the abstention doctrine was eventually applied to civil claims for damages as well.

1. Applying Abstention to Civil Claims for Damages: The Genesis of the Stay Versus Dismissal Distinction

In *Fair Assessment in Real Estate Ass'n v. McNary*,[125] the Court took its first steps into the final frontier of *Younger* abstention. *Fair Assessment* represented the first case in which the Court applied abstention to cases contemplating damages as opposed to simply declaratory or injunctive relief. The plaintiffs brought a § 1983 challenge to the local government's system of property tax evaluations.[126] The claim raised purported violations of the equal protection and due process clauses of the Fourteenth Amendment.[127] Justice Rehnquist opined that the § 1983 claim would have interfered with the state function of collecting taxes, and therefore, the district court should

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120. Younger v. Harris, 401 U.S. 37, 43-44 (1971). In *Quackenbush v. Allstate Ins. Co.*, the Court agreed with the Ninth Circuit in stating that "it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it 'is asked to employ its historic powers as a court of equity.'" 517 U.S. 706, 717 (1996) (quoting Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) (Brennan, J., concurring)).

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

122. While the Court applied *Younger* to declaratory actions, Samuels v. Mackell, 401 U.S. 66 (1971), that were technically actions *at law*, the Court did not apply *Younger* to any other kind of case *at law* until its watershed opinion in *Fair Assessment*, 454 U.S. at 100.

123. *Samuels*, 401 U.S. at 66.

124. *Cf. Fair Assessment*, 454 U.S. at 100 (applying abstention to a civil claim for damages, but only because the award of damages would have had an effect similar to an injunction).

125. *Id.*

126. *Id.* at 106.

127. *Id.*

have abstained from hearing the case.[128] While the claim sought only monetary relief, the Court found that a favorable ruling would have impacted the operation of the tax scheme in much the same way as an injunction.[129] Consequently, the Court made it clear that even mere claims for damages are not immune from abstention.

In *Deakins v. Monaghan*,[130] targets of a state grand jury investigation filed a § 1983 suit claiming that their federal constitutional rights had been violated in the execution of a search warrant and three grand jury subpoenas.[131] The claim sought injunctive relief as well as damages.[132] By the time the case made it to the Supreme Court, the claims for injunctive relief had become moot.[133] After dismissing the issue regarding the equitable claims on mootness grounds, the Court determined that the issue of abstention on the civil claim for damages was irrelevant because both parties had agreed to seek a stay of the damages claim after the remand.[134] In light of this fact, the majority refused to rule definitively on the application of *Younger* to federal cases that seek solely monetary relief.[135] However, Justices White and O'Connor filed an extensive concurring opinion which argued that the Court should readily apply *Younger* abstention to permit a stay of civil claims for monetary relief.[136] Indeed, Justice White stated that a plurality of circuits now apply the *Younger* doctrine to damages claims like the one at issue in *Deakins*.[137] Therefore, *Deakins* made it clear that the Court was simply waiting for an opportune time to formally announce its decision to apply *Younger* abstention to civil claims for damages.

In *Quackenbush v. Allstate Insurance Co.*, the Court finally addressed the application of abstention to federal suits seeking solely monetary relief.[138] The Court clearly held that in cases seeking relief

128. *Id.* at 113-14.
129. *Id.*
130. 484 U.S. 193 (1988).
131. *Id.* at 196-97.
132. *Id.*
133. *Id.* at 199.
134. *Id.* at 202.
135. *Id.* at 202 n.6.
136. *Id.* at 209-10 (White, J., concurring).
137. *Id.* at 208 (citing Mann v. Jett, 781 F.2d 1448, 1449 (9th Cir. 1986); Doby v. Strength, 758 F.2d 1405, 1406 (11th Cir. 1985); Parkhurst v. State, 641 F.2d 775, 777 (10th Cir. 1981); Landrigan v. Warwick, 628 F.2d 736, 743 (1st Cir. 1980); McCurry v. Allen, 606 F.2d 795, 799 (8th Cir. 1979)). *Contra* Thomas v. Tex. State Bd. of Med. Exam'rs, 807 F.2d 453, 457 (5th Cir. 1987); Carras v. Williams, 807 F.2d 1286, 1291-92 (6th Cir. 1986).
138. 517 U.S. 706 (1996). The *Quackenbush* case involved the application of *Burford* abstention to claims for damages to determine that a federal district court may stay a claim for damages. While this case does not explicitly create precedent in the context of *Younger* abstention, the Court has increasingly refused to categorize abstention claims by stating that, "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex [set] of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes."

that is equitable or discretionary in nature, federal courts have the power to decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to state court.[139] However, while the Court has held that a federal court may stay an action for damages on abstention principles, it has never held that "those principles support the outright dismissal or remand of damages actions."[140] Accordingly, the Court found that abstention applies to civil actions for damages, but its application to cases seeking solely monetary relief is limited to a stay of the action pending adjudication of the state law claims in the state court.[141]

2. Operation of the Res Judicata Doctrine in Abstention Cases: Is There Really a Distinction Between Stays and Dismissals?

While the Court's opinion in *Quackenbush* seems to put careful and important limitations on the abstention doctrines, the reality is that the distinction between a stay and a dismissal has no practical value to a litigant seeking to exercise his or her right to a federal forum. Going back to Justices White and O'Connor's concurring opinion in *Deakins*,[142] Justice White made an important observation regarding the effect of res judicata principles on situations where there is concurrent jurisdiction.[143] Justice White stated that it is impera-

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Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 n.9 (1987). Moreover, numerous scholars have argued that the Court is moving towards a merger of the various abstention doctrines. Georgene M. Vairo, *Making* Younger *Civil: The Consequences of Federal Court Deference to State Court Proceedings*, 58 FORDHAM L. REV. 173, 212 (1989) (arguing that the Supreme Court has come very close to merging its tests for the various abstention doctrines and that the similarities so outweigh the differences that one test for abstention should be adopted); Stephen Jon Moss, Comment, Pennzoil*: A Merger of Federal Abstention*, 13 OKLA. CITY U. L. REV. 607 (1988) (arguing that the *Pennzoil* case effectively merged the *Pullman* and *Younger* abstention doctrines). Consequently, the Court's decision to stay claims for damages under *Burford* abstention is almost certainly an indication of the treatment that damages claims will receive in the context of *Younger* abstention.

In fact, the Court has already signaled its intent to use the stay as the appropriate action in damages claims that fall within *Younger*. In *Deakins v. Monaghan*, Justices White and O'Connor filed an extensive concurring opinion in which they argued that the Court should readily apply *Younger* abstention to permit a stay of civil claims for monetary relief. 484 U.S. at 209-10 (White, J., concurring). The Court only declined to do so in that case because the damages claim had become moot. Therefore, the Court will almost certainly apply *Younger* to civil claims for damages to permit a stay, just as it did with *Burford* abstention in *Quackenbush*.

Finally, *Burford* abstention is also an area of abstention where the Court's decision to permit stays in civil claims for damages will substantially undermine the operation of the removal jurisdiction statute. *See* discussion *infra* Part IV, pp. 218-21. For an excellent discussion of the effects of the *Quackenbush* opinion on diversity jurisdiction in general, see Lewis Yelin, Note, Burford *Abstention in Actions for Damages*, 99 COLUM. L. REV. 1871 (1999).

139. *Quackenbush*, 517 U.S. at 718.
140. *Id.* at 721.
141. *Id.*
142. 484 U.S. at 205 (White, J., concurring).
143. *Id.* at 208 (White, J., concurring).

tive that the federal claim be stayed until the adjudication of the state law claim is complete because any determinations made by the district court while the state court proceeding was ongoing would be binding on the state court because of res judicata principles.[144] However, the countervailing problem apparently escaped Justice White, as he clearly failed to consider the effect that res judicata principles would have on the ability of the district court to hear the claims that it has retained after the completion of the state court litigation.

As a function of this type of duplicative litigation, the district court will frequently be barred from hearing the stayed claim because of the doctrine of collateral estoppel or *issue preclusion*. In addition to issue preclusion, the preclusive effects of concurrent state court litigation may arise from the doctrine of res judicata *claim preclusion*. In general, most scholars and courts generically refer to these combined doctrines as the res judicata doctrine.[145] However, the preclusive effects of prior litigation are frequently analyzed under two distinct concepts of preclusion. Collateral estoppel or *issue preclusion* bars the relitigation of a matter that has already been decided.[146] Res judicata *claim preclusion* bars the litigation of a claim that *could* have been brought in earlier litigation.[147] "In order to bar a later suit under the doctrine of res judicata, an adjudication must involve (1) the same 'claim' as the later suit, (2) have reached a final judgment on the merits, and (3) involve the same parties or their privies."[148] While there are various articulations of a standard for determining what constitutes identical *claims* for res judicata purposes, the Ninth Circuit standard is instructive. The Ninth Circuit analyzes the similarity of claims using the following criteria:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.[149]

In virtually all abstention cases, the claims in federal court will be virtually identical to the state claims under this kind of standard. Because abstention issues are usually limited to resolving the conflict inherent in concurrent jurisdiction, the parties, facts, and claims

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144. *Id.*

145. *See* RESTATEMENT (SECOND) OF JUDGMENTS, ch. 3, introductory cmt. (1982); 18 CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 4402 (1981). The doctrine is codified at 28 U.S.C. § 1738 (2003).

146. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

147. *See id.* § 24.

148. Nordhorn v. Ladish Co., 9 F.3d 1402, 1404 (9th Cir. 1993).

149. *Id.* at 1405.

will be the same in federal court as they are in state court. Consequently, federal claims that are stayed for abstention reasons, pending adjudication of claims under state law or claims for injunctive relief in state court, will frequently be subject to the preclusive effects of the res judicata doctrine.

In fact, in the context of abstention, a proceeding that is stayed in federal court may be litigated anyway in the state court litigation, effectively barring the district court from revisiting the state determination. First, we know in the removal context that the state court plaintiff preferred the state court forum. Therefore, if the district court remands the state claims and stays the federal ones, the state court plaintiff will probably reassert the federal claims in state court after the remand. Second, the joinder rules that are in effect in some states require litigants to bring their state and federal claims at the same time.[150] Moreover, as the Court has previously observed in its own abstention rulings, the state court judge is unlikely to refuse to hear the federal claims on the grounds that he or she is purportedly incompetent to adjudicate them fairly. Consequently, a litigant's federal claims may be heard as part of the underlying state proceeding and the federal district court will be prohibited from revisiting those determinations by virtue of the doctrine of collateral estoppel, known as *issue preclusion*.[151] In addition to issue preclusion, res judicata *claim preclusion* acts to bar the litigation of any claim that could have been litigated in earlier litigation.[152] Therefore, if a litigant fails to raise the stayed claim in state court, he or she will still be barred from litigating that claim in federal court because of the doctrine of res judicata.[153]

Multiple claims in the abstention context usually involve state and federal claims that arise from the same nucleus of facts or two claims that merely request different kinds of relief. Therefore, even if the state court litigant refuses to raise the federal claim or the damages claim at the state court level, all the factual and legal determinations regarding the common nucleus of facts will be binding on the

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150. *See* Cogdell v. Hosp. Ctr. at Orange, 560 A.2d 1169 (N.J. 1989). Moreover, while most states do not require mandatory joinder, they still emphasize the fact that res judicata claim preclusion will bar a claim that is not brought, effectively creating a mandatory joinder rule. *See, e.g.*, Parsons Mobile Prods., Inc. v. Remmert, 531 P.2d 435 (Kan. 1975) (refusing to interpret joinder rule as mandatory, but noting that doctrine of res judicata requires that all grounds or theories for a cause of action be asserted or else barred in all future litigation); Sommers Estates Co. v. City of New Berlin, 554 N.W.2d 683 (Wis. Ct. App. 1996) (holding that while joinder of claims is not mandatory, doctrine of res judicata claim preclusion bars later assertion of claims that could have been litigated in the original litigation).

151. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

152. *Id.* § 24.

153. *Id.*

district court's hearings by virtue of claim preclusion.[154] Because multiple claims in the abstention context are usually indistinguishable on a factual level, the state court judgment will almost always be outcome determinative with respect to any subsequent proceeding in federal court. Therefore, claim preclusion will effectively bar the defendant's right to have the case heard in federal court by binding the district court to all the state court's determinations on the same issues.[155] It should also be noted that the state court plaintiff in abstention cases preferred the state forum. Consequently, if the district court stays some of the claims in federal court, the state court plaintiff can usually amend the pleadings in state court to reassert the federal claim in state court and the case would proceed to a judgment on the federal claim and bind the district court to the determination. In lieu of all that, issue preclusion may also bar the stayed claim from being heard at all.[156] Therefore, in the vast majority of cases, the act of staying a claim for abstention reasons is functionally no different than a dismissal or remand because of the doctrines of res judicata and collateral estoppel.[157]

3. *The* Quackenbush *Opinion: Observations on the Effect of the Res Judicata Doctrine on Claims That Have Been Stayed on Abstention Grounds*

It is relevant to engage in a review of the remarkable contradiction in the *Quackenbush* opinion. Before reaching the issue of abstention, the Court had to determine if a stay order could be immediately reviewed.[158] The Court noted that the general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated."[159] Consequently, a party normally cannot appeal an order of the district court unless it is a final order.[160] However, the Court has recognized a narrow class of collateral orders that do not meet the requirements for finality, but are immediately appealable "because they conclusively determine a disputed question that is completely separate from the merits [and is] effectively unreviewable on [an] appeal from a final judgment."[161] In applying this standard to the facts in *Quackenbush*, the Court deter-

154. *Id.* § 27.
155. *Id.*
156. *Id.*
157. For a good discussion of the claim preclusive effects of these doctrines in the *Burford* abstention context, see Yelin, *supra* note 138, at 1900-05.
158. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996).
159. *Id.* (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994)).
160. 28 U.S.C. § 1291 (2000).
161. *Quackenbush*, 517 U.S. at 712 (citations and quotations omitted).

mined that an abstention-based stay order readily met all these criteria.[162] Particularly, the Supreme Court stated:

> [s]uch orders could not be reviewed on appeal from a final judgment in the federal action because the district court would be bound, as a matter of *res judicata*, to honor the state court's judgment; and that unlike other stay orders, which might readily be reconsidered by the district court, abstention-based stay orders of this ilk are "conclusive" because they are the *practical equivalent of an order dismissing the case*.[163]

While the order at issue in *Quackenbush* was a remand order, the Court determined that the remand order was, in all relevant respects, indistinguishable from the abstention-based stay order that the Court found to be appealable in prior cases.[164] Therefore, the Court concluded that it had jurisdiction to hear an immediate appeal of the remand order.[165]

After determining that an abstention-based stay order or remand order would be immediately appealable, the Court applied the abstention doctrine to determine if the remand order was appropriate.[166] However, as noted above, the Court found that in the context of civil claims for damages, the abstention doctrines have only supported a stay of the federal action and not an outright dismissal or remand of the case to state court.[167] Therefore, the Court found that the appropriate action under the abstention doctrine would have been to issue a stay.[168] This conclusion is hard to believe when, a mere several paragraphs prior, the Court had determined that the operation of the res judicata doctrine would cause a stay order to function as the "*practical equivalent of an order dismissing the case*."[169] Therefore, the Court's decision to only allow stay orders and not the outright dismissal or remand of cases in civil actions for damages does not create a limitation on the *Younger* abstention doctrine that has much practical value.

4. The Exception to Claim Preclusion in Pullman *Abstention: Is There an Exception in the Context of* Younger *Abstention?*

There is also a question regarding the applicability of res judicata or collateral estoppel to claims that have been specifically reserved

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162. *Id.* at 713-14.
163. *Id.* (emphasis added) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 (1983)).
164. *Id.* at 714.
165. *Id.* at 715.
166. *Id.* at 716.
167. *Id.* at 721.
168. *Id.* at 719.
169. *Id.* at 713 (emphasis added).

by the federal court through a stay that was issued pending the outcome of a state court proceeding. In *England v. Louisiana State Board of Medical Examiners*,[170] the Supreme Court held that after a federal court decision to abstain on *Pullman* abstention grounds, the litigant could refuse to bring his or her federal claims in a state court proceeding and reserve them for later adjudication in federal court.[171] In other words, the failure to bring a claim in state court would not have a preclusive effect on subsequent litigation in federal court. While the Supreme Court has not addressed the application of *England* to other types of abstention claims, the Second Circuit clearly held in *Temple of the Lost Sheep, Inc. v. Abrams*[172] that the *England* case does not apply outside the *Pullman* abstention context.[173] Indeed, *England* held that by deferring to state courts on *Pullman* abstention grounds, a federal court may not relieve itself of the jurisdictional duty it faced in the first place.[174] However, the *Abrams* court stated that *Younger* abstention gives rise to an entirely different set of considerations because it involves two pending proceedings and conflicting jurisdictional duties.[175] The situation is not one of merely postponing federal jurisdiction as in *Pullman*, but rather it is one that contemplates the outright dismissal of the federal suit and presentation of both the federal and state claims in the state tribunal.[176] While *Abrams* involved a stay order and not a dismissal, the court clearly held that a stay order does not prevent the preclusive effects of the res judicata doctrine.[177] A stay order issued in the *Younger* abstention context fully anticipates that the state court will likely determine virtually every issue of fact and law that is relevant to the federal claim.[178] Moreover, those determinations will have a preclusive effect on any subsequent proceeding in federal court.[179] Therefore, as the Supreme Court noted in *Quackenbush*, an abstention-

170. 375 U.S. 411 (1964).
171. *Id.* at 421-22.
172. 930 F.2d 178 (2d Cir. 1991).
173. *Id.* at 182-83.
174. *See* 375 U.S. at 432 (Douglas, J., concurring).
175. 930 F.2d at 182; *see also* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. 7, § 3, at 1043 (2d ed. 1973) (stating that *Younger* abstention involves totally different considerations than the ones the *England* Court relied on to create an exception to the res judicata doctrine for *Pullman* abstention).
176. HART & WECHSLER, *supra* note 175, at 1043; s*ee also* Yelin, *supra* note 138, at 1900-05 (questioning the application of the *England* case outside the *Pullman* abstention context and arguing that an exception to the claim preclusive effects of prior litigation in the *Burford* abstention context would undermine the federalism rationale for abstention).
177. *See* 930 F.2d at 184; *see also* Aquatherm Indus., Inc. v. Fla. Power & Light Co., 84 F.3d 1388 (11th Cir. 1996) (applying the preclusive effects of the res judicata doctrine to a case that had been stayed in federal district court).
178. *See Abrams*, 930 F.2d at 183-84.
179. *Id.*

based stay order is functionally indistinguishable from an order dismissing the case.[180]

In sum, the Supreme Court has removed virtually all of the remaining restrictions on the *Younger* abstention doctrine. Specifically, the final frontier of *Younger* abstention is defined by the Court's abdication of the state interest test and the application of *Younger* abstention to civil claims for damages. Accordingly, the doctrine applies to virtually all pending litigation in state court, even pending litigation that is civil in nature and seeks exclusively monetary relief. Because the state interest limitation was effectively abandoned as well, the final frontier of *Younger* abstention is a reality.

IV. IMPACT OF THE FULLY-EXPANDED DOCTRINE

A. Reviewing the Foundation for Applying Younger *to Removal Jurisdiction*

The *Younger* abstention doctrine has dramatically undermined the normal operation of the federal removal jurisdiction statute. It is important to review the determinations made above that are critical to the validity of this finding. In the beginning, the *Younger* doctrine had no effect on removal jurisdiction because it was a doctrine limited to the criminal law context.[181] With the decision in *Juidice v. Vail*,[182] the Court unequivocally established the doctrine's application to civil proceedings.[183] The doctrine also had several exceptions arising from its equitable roots that would potentially limit its impact on federal removal jurisdiction.[184] However, as discussed above, the inherent scope of these exceptions was very limited, and the Court further limited their practical application to the point of nullifying their ability to function as exceptions to the doctrine.[185]

As the doctrine evolved, a new factor arose as the principal limitation on the scope of the doctrine. After rejecting the equitable foundations of the doctrine in favor of *Our Federalism*,[186] the Court used the *state interest* test instead of the equitable exceptions as the principle limitation on the doctrine.[187] However, the decision in *Pennzoil*[188] demonstrates the illusory nature of the state interest test and makes it clear that virtually anything can be used as a means of justifying

180. 517 U.S. 702, 713 (1996).
181. *See* Younger v. Harris, 401 U.S. 37 (1971).
182. 430 U.S. 327 (1977).
183. *Id.* at 334.
184. *See* Stagner, *supra* note 29.
185. *Id.*
186. Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).
187. *Id.*
188. 481 U.S. 1 (1987).

abstention.[189] Of course, there is no question that a claim that relies upon a state statute would be sufficient to apply *Younger*. However, even a state's interest in developing its common law would be more substantial than the state interest involved in *Pennzoil.* Consequently, seemingly any claim brought in state court that would in some way relate to the state's common law in areas such as property, torts, contracts, or others would justify abstention. Here, one can only begin to imagine the sheer number of cases that would meet this criteria and merit abstention. Nevertheless, we should not get ahead of ourselves.

B. The Ongoing State Proceeding Requirement

There are several reasons why *Younger* abstention has not received great attention in the context of removal jurisdiction. The principal reason for this is the ongoing state proceeding requirement.[190] A plurality of lower courts have adopted a three-prong preliminary test to determine whether *Younger* abstention applies in a given case.[191] The test states that *Younger* abstention is only appropriate in cases in which (1) there is an ongoing state judicial proceeding, (2) the proceeding implicates important state interests, and (3) there is an adequate opportunity to present the federal claims in the state proceeding.[192] The state interest test in the second prong is still applied, but the discussion in Part III demonstrates the illusory nature of this requirement. The third prong represents one of the surviving exceptions to *Younger*, but the discussion in Part II demonstrates that its application has been substantially mitigated by the Court. However, the first prong is an issue that remains unclear in

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189. *See id.*; *see also* Althouse, *supra* note 115.

190. The Supreme Court has never actually held that there must be an ongoing state proceeding for *Younger* abstention to apply. Indeed, the *Younger* Court specifically reserved the question for a later time. Younger v. Harris, 401 U.S. 37, 41 (1971); *see also supra* text accompanying note 61. Moreover, in *Hicks v. Miranda*, Justice White stated that no other "case in this Court has held that for *Younger v. Harris* to apply, the state criminal proceeding must be pending on the day the federal case is filed." 422 U.S. 332, 349 (1975). Consequently, while most *Younger* cases arise in the context of an ongoing state proceeding, the Court has specifically refused to make the ongoing state proceeding issue a rigid requirement for the doctrine's application.

191. Lower courts in a number of circuits have adopted a three-prong test that is extracted from parts of the Supreme Court's decision in *Middlesex.* Green v. City of Tucson, 255 F.3d 1086 (9th Cir. 2001); J.B. *ex rel.* Hart v. Valdez, 186 F.3d 1280 (10th Cir. 1999); Lutz v. Calme, 1999 WL 1045163 (6th Cir. 1999) (unpublished opinion); Brooks v. N.H. Supreme Court, 80 F.3d 633 (1st Cir. 1996); Employers Res. Mgmt. Co. v. Shannon, 65 F.3d 1126 (4th Cir. 1995); Trust & Inv. Advisers, Inc. v. Hogsett, 43 F.3d 290 (7th Cir. 1994); Developmental Servs. of Sullivan County, Inc. v. N.H. Dep't of Health and Human Servs., 1999 WL 813863 (D.N.H. 1999); Kim-Stan, Inc. v. Dep't of Waste Mgmt., 732 F. Supp. 646 (E.D. Va. 1990); City of Chesapeake v. Sutton Enter., Inc., 138 F.R.D. 468 (E.D. Va. 1990); Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988).

192. *See* cases cited *supra* note 191.

the context of removal jurisdiction. Some scholars and lower courts have articulated the position that removal of the state proceeding to federal court eliminates the problem of duplicative litigation and prevents the operation of the *Younger* doctrine because of the lack of an ongoing state proceeding.[193] The Supreme Court has not explicitly stated whether *Younger* applies in situations where all the matters of state concern have been removed to the federal court. However, there is substantial reason to believe that the practical effects of removal will not defeat the application of *Younger* abstention.

In the absence of guidance from the Supreme Court, there is no clear indication that *Younger* does not apply to cases that have been removed.[194] Indeed, both the Fourth Circuit and the Sixth Circuit have readily applied *Younger* to cases that were removed.[195] Technically speaking, the act of removal halts the concurrent proceeding in state court.[196] However, as the district court stated in *City of Chesapeake v. Sutton Enterprises, Inc.*, this argument exalts form over substance.[197] The state court proceeding is no longer ongoing only because of its removal.[198] Indeed, but for the defendant's removal, there would still be a state claim in need of deference.[199] Moreover, the ongoing proceeding requirement is readily satisfied because a state proceeding is by definition ongoing when a notice for removal is filed. Furthermore, the Court has held that the ongoing state proceeding requirement is satisfied anytime that state proceedings are initiated "before any proceeding of substance on the merits have taken place in the federal court."[200] Again, by definition, any case that is removed

193. One commentator has argued that the act of removing a case to federal court defeats the application of *Younger* abstention because there is no longer an ongoing state proceeding. Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989). In addition, a couple of circuit courts have held that the act of removal defeats the ongoing state proceeding requirement in the context of *Colorado River* abstention. *See In re* Burns & Wilcox, Ltd., 54 F.3d 475, 477-78 (8th Cir. 1995); Noonan South, Inc. v. County of Volusia, 841 F.2d 380, 382 (11th Cir. 1988). Finally, there are some isolated district courts that have claimed that removal frustrates the operation of *Younger* abstention. *See* Levin v. Tiber Holding Co., 1999 WL 649002 (S.D.N.Y. 1999); Int'l Eateries of Am., Inc. v. Bd. of County Comm'rs, 838 F. Supp. 580, 582 (S.D. Fla. 1993).

194. No circuit court of appeals has specifically held that *Younger* does not apply to cases that have been removed to federal court. However, there are a couple of circuit courts that have specifically applied *Younger* to cases despite the fact that the state court proceeding had been removed. *See Employers Res. Mgmt.*, 65 F.3d at 1134-35; *Lutz*, 1999 WL 1045163, at *1 (unpublished opinion).

195. *Employers Res. Mgmt.*, 65 F.3d at 1134-35; *Lutz*, 1999 WL 1045163, at *1 (unpublished opinion).

196. 28 U.S.C. § 1446(d) (2003).

197. 138 F.R.D. 468, 474 (E.D. Va. 1990).

198. *Id.*

199. *Id.*

200. Hicks v. Miranda, 422 U.S. 332, 349 (1975); *see also* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (holding that an indictment that began in state court the day after the federal court action was filed should still be given deference under the doctrine of *Younger* abstention).

from state court to federal court will have been initiated in state court prior to a hearing on the merits in federal court. Consequently, a proceeding is considered to be ongoing in state court for abstention purposes regardless of its removal to federal court.

While many courts have required that there be an ongoing state proceeding as a prerequisite for the application of *Younger* abstention, the Supreme Court's rulings have made it clear that the issue of ongoing state proceedings is a loose standard, if in fact it exists at all. As noted in Part II, the Court has already applied *Younger* abstention to a case in which there was no ongoing state proceeding.[201] Indeed, in *Hicks v. Miranda*, Justice White clearly stated that no other "case in this Court has held that for *Younger v. Harris* to apply, the state criminal proceedings must be pending on the day the federal case is filed."[202] As long as a state court action begins prior to any "proceedings of substance on the merits," *Younger* abstention will be readily applied.[203] The Court affirmed this rejection of a strict ongoing state proceeding requirement in *Doran v. Salem Inn, Inc*.[204] Therefore, there is substantial reason to believe that the ongoing state proceeding requirement is not actually a requirement at all for *Younger* abstention.[205] However, to the extent that it is still a consideration, it is certainly clear that it is not a rigid standard that will be analyzed in a formulaic way. Because removal frustrates a legitimate state forum, the need for abstention seems clear under the Court's decisions.

It should also be noted that other abstention doctrines are applied regardless of the presence of a pending state proceeding.[206] Under *Burford* abstention, a federal court abstains from hearing any case where there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or when the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[207] The Court has never required that there be an ongoing state proceeding as a prerequisite for

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201. *Hicks*, 422 U.S. at 332.
202. *Id.* at 349.
203. *Id.*
204. *Doran*, 422 U.S. at 922.
205. Baird, *supra* note 62, at 533.
206. *See* Int'l Eateries of Am., Inc. v. Bd. of County Comm'rs, 838 F. Supp. 580, 582 (S.D. Fla. 1993) (holding that lack of a concurrent state proceeding prevented *Younger* and *Colorado River* abstention, but that *Burford* and *Pullman* abstention did not require an ongoing state proceeding); Navajo Life Ins. Co. by Gallinger v. Fidelity & Deposit Co., 807 F. Supp. 1485, 1488-90 (D. Ariz. 1992).
207. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).

the application of *Burford* abstention.[208] This is important for two reasons. First, there are a number of cases that can be removed on diversity grounds that fall squarely within *Burford* and would merit abstention even if there was no concurrent state proceeding involved. Second, the Court has increasingly refused to categorize abstention claims by stating that, "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex set of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes."[209] Indeed, as some scholars have commented, the Court is slowly moving toward a merger of all the various abstention doctrines.[210] The result could well be the elimination of the pending state proceeding requirement. In the beginning, the Court emphasized abstention in the context of parallel proceedings because the requested remedy usually called for an injunction of the state proceeding.[211] However, as the Court has abandoned the equitable justifications for the doctrine, it has articulated a desire to avoid friction with the state on any level, not just friction in the realm of equity.[212] Therefore, any case that impacts a state prerogative is likely to merit abstention, regardless of the presence of a contemporaneous proceeding in state court.

Despite any future developments that may occur in the realm of abstention, the fact remains that the ongoing state proceeding requirement is still considered by the courts. Nevertheless, the countless expansions of this doctrine demonstrate that this circuitous and technical argument will almost certainly fail to win the hearts of a Court that has consistently reduced the rights of state court litigants to seek a federal forum. Consequently, *Younger* abstention almost certainly applies to cases in the removal jurisdiction context.

C. Removal Jurisdiction on Federal Question Grounds

Younger abstention will not apply to every case that is removed on federal question grounds. To remove a case on federal question grounds, the claim in the state proceeding must *arise* under the laws

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208. *See Int'l Eateries*, 838 F. Supp. at 582 (holding that lack of a concurrent state proceeding prevented *Younger* and *Colorado River* abstention, but that *Burford* and *Pullman* abstention did not require an ongoing state proceeding); *Navajo Life*, 807 F. Supp. at 1488-90.

209. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 12 n.9 (1987).

210. *See* Vairo, *supra* note 138, at 212 (arguing that the Supreme Court has come very close to merging its tests for the various abstention doctrines and that the similarities so outweigh the differences that one test for abstention should be adopted); Moss, *supra* note 138 (arguing that the *Pennzoil* case effectively merged the *Pullman* and *Younger* abstention doctrines).

211. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).

212. *See* discussion *supra* note 8.

or Constitution of the United States.[213] A federal defense or counterclaim is an insufficient basis for removing a case to federal court on federal question grounds.[214] However, a case will not merit abstention unless there is some discernible state interest or state law implicated by the proceeding.[215] While the state interest test has been substantially mitigated,[216] there has to at least be a superficial state interest to trigger abstention. If a claim is predicated solely on federal law, there will be limited circumstances in which a state interest will be implicated. However, if the claim relies on both federal law and state law or if a federal claim also has a supplementary state law claim, the entire claim can be removed to federal court. The result in that case would depend upon the kind of relief that was being sought in the federal court. Indeed, there remains a distinction between cases seeking injunctive or discretionary relief and cases seeking solely monetary relief.[217]

Early on, the *Younger* doctrine was used in situations where the federal court was being asked to enjoin a state proceeding.[218] To this day, a claim seeking injunctive relief that merits abstention will be dismissed or remanded by the district court.[219] Admittedly, the doctrine was expanded to claims seeking declaratory relief early in its development.[220] However, prior to *Quackenbush*, the question of whether *Younger* applied to claims seeking solely monetary relief had not yet been fully analyzed.[221] As mentioned earlier, the Court first applied *Younger* abstention to a claim seeking monetary relief in

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213. 28 U.S.C. § 1441 (2003).

214. *E.g.*, Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 829-831 (2002) (stating that federal question jurisdiction only exists when a federal question appears on the face of the *plaintiff's* properly pleaded complaint) (citation omitted). However, it should be noted that Congress has passed a removal statute that allows a defendant to remove a case to federal court on the grounds that the state proceeding is violating his or her civil rights under 28 U.S.C. § 1983. *See* 28 U.S.C. § 1444 (2003). Nevertheless, the Court has readily refused to hear § 1983 claims on *Younger* abstention grounds. *See* discussion *supra* notes 75-77 and accompanying text. Therefore, a number of cases where a federal defense would give rise to a removal power under § 1444 will not be heard because of *Younger* abstention.

215. *See* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); *supra* text accompanying note 24.

216. *See* Althouse, *supra* note 115, at 1083-90 (arguing that *Pennzoil* eliminates the state interest test as a requirement for abstention).

217. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 721 (1996) (stating that while the Supreme Court has held that a federal court may stay an action for damages on abstention principles, it has never held that those principles support the outright dismissal or remand of damages actions). This distinction follows from the observation that only cases seeking declaratory or injunctive relief have resulted in the outright dismissal or remand of an action for abstention reasons.

218. 401 U.S. 37 (1971).

219. *E.g.*, *Quackenbush*, 517 U.S. at 721.

220. Samuels v. Mackell, 401 U.S. 66 (1971).

221. *Quackenbush*, 517 U.S. at 719.

Fair Assessment in Real Estate Ass'n v. McNary.[222] In that case, the Court determined that the claim for monetary relief required a determination that the statute was unconstitutional, and therefore, it operated much like a request for injunctive relief.[223] However, the great majority of pecuniary claims do not require the district court to strike down a state statute. Therefore, the potential application of *Younger* to all the other types of monetary claims is an important issue.

As mentioned in Part III, the Court has applied *Younger* to claims that seek solely monetary relief, but only to the extent that the federal claim can be stayed until adjudication of the state claim has been completed.[224] The Court has never authorized the outright dismissal or remand of federal claims seeking solely monetary relief.[225] However, this apparent limitation on the application of *Younger* to claims for damages is more illusory than real. Again, the doctrine of res judicata or collateral estoppel will cause the stay to operate as the practical equivalent of an order to remand or dismiss the case.[226] Therefore, a state court litigant that is removed to federal court can seek a stay of the federal claim on *Younger* abstention grounds and can effectively eviscerate the other party's right to a federal forum.

In sum, when a case is removed to the district court on federal question grounds, *Younger* abstention will be applied if the movant can satisfy the state interest test. Once the court determines that abstention is appropriate, the action it takes will depend on the type of relief that is being requested. If the requested relief is injunctive or discretionary in nature, the case will be dismissed or remanded to the state court.[227] However, if the claim only seeks money damages, the court will stay the federal claims pending resolution of the state claims in the state court.[228] Nevertheless, the existence of the preclusive effects of res judicata and collateral estoppel principles will cause the stay to operate as a bar of the litigant's right to have the federal claims heard in federal court.[229] Consequently, any litigant whose case is removed to district court on federal question grounds can defeat the removal by asserting *Younger* abstention, as long as he or she can satisfy the state interest test. Again, the stay versus dismissal distinction is irrelevant. By permitting a stay of civil claims for damages, the Court has effectively applied *Younger* ab-

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222. 454 U.S. 100 (1981).
223. *Id.* at 113-14.
224. *Quackenbush*, 517 U.S. at 721.
225. *Id.*
226. *See* discussion *supra* Part III, pp. 211-214.
227. *Quackenbush*, 517 U.S. at 721.
228. *Id.*
229. *See* discussion *supra* Part III, pp. 211-214.

stention to all civil claims and eviscerated the right to a federal forum under the removal jurisdiction statute.

D. Removal Jurisdiction in Diversity Cases

The role of abstention in cases that are removed on diversity grounds is far more pronounced. First, cases that are removed solely on diversity grounds typically do not satisfy the standards for removal on federal question grounds. Therefore, claims that are removed solely on diversity grounds always implicate state law. Consequently, virtually any diversity case will satisfy the illusory state interest requirement. Since the state interest test is not a factor, the action taken for abstention reasons will again depend on the type of relief being requested. However, because of the semantic distinction between stays and dismissals, any decision to abstain will result in an abdication of a party's right to a federal forum.

A diversity case that seeks injunctive or declaratory relief will almost certainly result in a dismissal or remand of the case.[230] The application of *Younger* abstention to these types of cases is well established, and the remedy has invariably been dismissal or remand.[231] This alone is sufficient to demonstrate the enormous impact that abstention doctrines have on removal jurisdiction. Any number of declaratory actions that turn on issues of contract law, property law, tort law, or any state statute will merit abstention, regardless of diversity of citizenship. Moreover, a diverse party that seeks to enjoin the operation of a state law or ordinance will be unable to seek redress in the unbiased federal courts.[232] The impact of this type of abstention alone is enormous. However, the abstention doctrine's practical evisceration of removal jurisdiction does not end there.

Again, cases that seek solely monetary relief have only been found to warrant a stay of the claim and not an outright dismissal or remand of the case.[233] If a case that was removed on diversity grounds sought both injunctive and monetary relief, the damages claim would be stayed and the claim for injunctive relief would be remanded to state court.[234] However, the litigants in state court will be required to bring their damages claim in state court or else the doctrine of res judicata claim preclusion will bar their right to have the district court hear it.[235] If the litigant does bring the damages claim in state court, the district court will be barred from rehearing the claim by

230. *Quackenbush*, 517 U.S. at 721.
231. *Id.*
232. *See* Baird, *supra* note 62.
233. *Quackenbush*, 517 U.S. at 721.
234. *See id.* at 706.
235. *See* discussion *supra* Part III, pp. 211-214.

virtue of collateral estoppel.[236] Accordingly, the preclusive effects of the state court litigation will frequently bar the litigant's right to have the district court revisit the damages claim after the conclusion of the state proceeding.

Again, the vast majority of diversity removal cases will warrant abstention. However, the abstention that is used in this context will frequently be *Burford* abstention and not *Younger* abstention. *Younger* abstention involves deference to ongoing state proceedings.[237] In the removal context, *Younger* is applied when a federal claim improperly removes a case from the state court that should have remained in the state court because of the state interest involved.[238] However, in the context of damages claims, the only action that is taken is a stay of federal or unique damages claims pending resolution of the other claims in the state court.[239] In diversity cases that do not invoke federal question jurisdiction, there are no multiple claims that can be split between the federal court and the state court. Because remand or dismissal is improper in cases seeking only damages,[240] there is no action that the district court can take on *Younger* abstention grounds. However, *Burford* abstention is not based on a need to defer to a concurrent state court proceeding.[241] Rather, *Burford* counsels that a district court should abstain from hearing a case if the case involves a difficult question of state law or if it implicates a state regulatory scheme,[242] regardless of the presence of an ongoing state proceeding.[243] Admittedly, the court still cannot remand or dismiss a claim for damages on *Burford* abstention grounds.[244] However, the district court can stay the claim in federal court pending the resolution of some question of state law.[245] Because cases that are removed solely on diversity grounds necessarily implicate state law, there are a vast number of cases where the federal claim will have to be stayed pending resolution of some issue of state law. If the unclear state law involves a question about a regulatory scheme or a vague area of the common law, the claim in federal court could languish almost indefinitely under a stay.

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236. *See* discussion *supra* Part III, pp. 211-214.

237. *See* cases cited *supra* note 191.

238. *See* Lutz v. Calme, 1999 WL 1045163 (6th Cir. 1999) (unpublished opinion); Employers Res. Mgmt. Co. v. Shannon, 65 F.3d 1126 (4th Cir. 1995); City of Chesapeake v. Sutton Enterprises, Inc., 138 F.R.D. 468 (E.D. Va. 1990).

239. *Quackenbush*, 517 U.S. at 721.

240. *Id.*

241. *See, e.g.*, cases cited and accompanying text *supra* note 206.

242. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989).

243. *See, e.g.*, cases cited and accompanying text *supra* note 206.

244. *Quackenbush*, 517 U.S. at 721.

245. *Id.*

V. A CRITIQUE OF RECENT DEVELOPMENTS IN ABSTENTION JURISPRUDENCE

A. The Conflict Between Abstention and the Duty to Exercise Federal Jurisdiction Where It Exists

Federal district courts have an imperative duty to exercise their jurisdiction when faced with the removal of diversity cases from state court. The judicial authority of federal courts to hear diversity cases arose from Article III, Section 2 of the Constitution[246] and is codified pursuant to the Article III authority of Congress in 28 U.S.C. § 1332 (2000). Congress alone has the authority to define and limit the jurisdiction of the federal courts of the United States.[247] Pursuant to this obligation, Congress has endowed the district courts with the original jurisdiction to hear cases that are removed from state court.[248] Among other things, the removal jurisdiction statute authorizes the removal of any case to federal court that has diversity of citizenship.[249] Anyone that removes a case to federal court under this statute has properly invoked the Article III jurisdiction of the district court.

The various abstention doctrines all involve the refusal of a federal court to exercise jurisdiction where it exists.[250] However, the Supreme Court has repeatedly held that federal courts have a virtually unflagging obligation to exercise the jurisdiction given them.[251] In fact, this principle is so old and venerated that it can be traced to the Supreme Court's decision in *Cohens v. Virginia* all the way back in 1821.[252] The *Cohens* court stated that "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the

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246. U.S. CONST. art. III, § 2, cl. 1.

247. *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) (stating that "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States"); Sheldon v. Sill, 49 U.S. 441, 448-49 (1850) (stating that since the inferior federal courts created by Congress do not exercise all the Article III powers not given to the Supreme Court, there remains no conclusion except that Congress must define their respective jurisdictions).

248. 28 U.S.C. § 1441 (2000).

249. *Sheldon*, 49 U.S. at 448.

250. *See* Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 188 (1959) (stating that the doctrine of abstention is one in which a district court may decline to exercise or postpone the exercise of its jurisdiction).

251. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996); Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992); New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989); Deakins v. Monaghan, 484 U.S. 193, 203 (1988); Murray v. Carrier, 477 U.S. 478, 519 (1986); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817-18 (1976); England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 415 (1964).

252. 19 U.S. 264, 404 (1821).

[C]onstitution."[253] Consequently, the entire practice of abstention is one that on its face risks treason to the Constitution. It is this fact which forced the Supreme Court to recognize that "[t]he doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."[254]

While the early abstention cases were narrowly construed, there were indications of the tremendous expansions of the doctrine that would occur in later years. It is this fact which led to the extensive and vigorous dissent by Justice Brennan in *Louisiana Power & Light Co. v. City of Thibodaux*.[255] In *Thibodaux*, the district court abstained from hearing a case that had been removed from state court on diversity grounds.[256] The case involved the exercise of the City of Thibodaux's eminent domain power for the purpose of expropriating property that belonged to the Power & Light Company.[257] Because the statutory authority for the expropriation had never been interpreted by the Louisiana Supreme Court, the United States Supreme Court held that it was within the district judge's discretion to stay the case on abstention grounds until the parties secured a declaratory judgment in the state courts.[258] However, the absence of a state court opinion interpreting the relevant statute hardly reflected the type of narrow and extraordinary circumstances that traditionally brought a case within the scope of the abstention doctrine.

The obligation of federal courts to interpret state law is one that pervades a substantial number of cases in federal court. Since the Supreme Court's landmark decision in *Erie Railroad Co. v. Tompkins*, it has been beyond question that federal courts in diversity cases are to apply the law of the states.[259] As a concomitant outgrowth of the *Erie* doctrine, federal courts are necessarily called upon to interpret the various laws of the states.[260] In fact, virtually every case that is before a federal court by virtue of diversity jurisdiction calls for the interpretation of state law. It is this fact which undermines the Supreme Court's decision in *Thibodaux*. As Justice Brennan observed in his *Thibodaux* dissent, the majority's decision to abstain for the purpose of avoiding the interpretation of state law would open the door for abstention to virtually any case that invokes

253. *Id.*
254. *Allegheny County*, 360 U.S. at 188-89.
255. 360 U.S. 25, 31 (1959) (Brennan, J., dissenting).
256. *Id.* at 26.
257. *Id.* at 25.
258. *Id.* at 30-31.
259. 304 U.S. 64, 78 (1938).
260. Meredith v. City of Winter Haven, 320 U.S. 228, 237 (1943) (stating that *Erie R.R. Co. v. Tompkins* did not free federal courts from the duty of deciding questions of state law in diversity cases; rather, it placed a greater responsibility on federal courts to interpret and apply state laws in cases within their jurisdiction where federal law did not apply).

the diversity jurisdiction of the federal courts.[261] Indeed, Brennan stated that the majority's holding flatly ignored clear precedent from prior cases that limited the narrow area in which abstention was permissible and required jurisdiction to be exercised in all cases that did not satisfy the extraordinary criteria for abstention.[262] Justice Brennan went on to say that the departure from prior limitations on abstention would allow district courts to refer cases of state law to state courts in even the routine negligence and contract actions.[263]

While Brennan's dissent in *Thibodaux* demonstrated remarkable prescience, the case had a weak majority and it would not be until many years later that Justice Brennan's parade of horribles would become a reality. In fact, the Court's decision in *Thibodaux* predated even *Younger v. Harris*. However, it was not the mere development of *Younger* abstention that would consummate Brennan's worst fears. After all, the original *Younger* opinions were confined to cases that sought an injunction against a state court criminal proceeding. Strictly speaking, this application of the abstention doctrine did not do violence to the narrow construction of the doctrine.

B. Younger *Abstention Today: Going Beyond Justifiable Limits*

The case for abstention in claims that seek an injunction of state criminal proceedings is arguably consistent with one of the original extraordinary circumstances that justified the application of the doctrine. Among the other limited justifications for abstention, the Court sanctioned abstention on the ground of comity with the states—discussed as the need to avoid decisions that create needless friction with state policies.[264] To whatever extent this is a valid basis for abstention, one can easily see how an injunction of a state court criminal proceeding would create extensive and unnecessary friction with state prerogatives. The problem lies in the dramatic expansions of the *Younger* abstention doctrine, particularly its application to civil claims for damages between purely private parties. Because of the extensive expansions of the *Younger* abstention doctrine discussed in this Comment, virtually any case that is removed to federal court can be refused under *Younger*. With the doctrine of abstention virtually eviscerating the removal jurisdiction statute, it seems clear that the Court has abandoned the narrow and extraordinary construction of the doctrine that was required in light of the federal courts' virtually unflagging obligation to exercise jurisdiction where it exists.

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261. *Thibodaux*, 360 U.S. at 36-37 (Brennan, J., dissenting).
262. *Id.* at 36.
263. *Id.* at 44.
264. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941) (stating that few public interests have a higher claim upon the discretion of a federal court than the avoidance of needless friction with state policies).

It is entirely uncertain from the Court's extensive abstention jurisprudence why the interests of comity are constitutionally sufficient to repudiate the jurisdiction which Congress has placed upon them through the exercise of its Article III powers.[265] This is particularly true in light of the Court's numerous observations regarding the duty of federal courts to exercise the jurisdiction that Congress has given to them.[266] While some commentators have rejected the notion that federal courts have an absolute duty to exercise their jurisdiction,[267] even the Court's own abstention cases make it clear that a refusal to exercise jurisdiction should not be undertaken lightly.[268] While some extraordinary cases may require a district court to refuse the exercise of its jurisdiction, it seems almost axiomatic that such refusals must not rise to the level of repudiating an entire area of jurisdiction that was created by a clear and unequivocal act of Congress. While many scholars have expressed great disdain for diversity jurisdiction, federal courts must not be allowed to unilaterally act to eliminate that entire area of jurisdiction for the purpose of clearing their dockets. However, this is precisely what the modern developments in the *Younger* abstention doctrine have done. By essentially eliminating the right of a party to remove a case to federal court on diversity grounds, and to a lesser extent on federal question grounds, the Court has substantially interfered with the Article III prerogatives of Congress.

VI. CONCLUSION

The final frontier of *Younger* abstention is defined by the virtual abdication of all the limitations that purportedly restrain the use of the abstention doctrine in federal courts. Having undergone a long series of unprecedented expansions, the *Younger* abstention doctrine stands to defy the operation of the removal jurisdiction statute in the vast majority of civil cases. While some commentators, lower courts, and practitioners have refused to believe that *Younger* abstention applies in the context of removal, they should be reminded of the $11 billion lesson that Texaco endured at the hands of the Supreme Court. Every aspect of the Court's development of the doctrine indi-

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265. For a great discussion of this issue, see HART & WECHSLER, *supra* note 175, ch. 8, § 5, at 1257 (canvassing the Court's decisions requiring the exercise of jurisdiction and its opinions that call for abstention and discussing the apparent contradiction of these two positions).

266. *See* cases cited *supra* note 251.

267. Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978 (1950).

268. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996); New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989); Deakins v. Monaghan, 484 U.S. 193, 203 (1988); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 15 (1983); Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817-18 (1976).

cates that it will be readily applied in this context. Moreover, the Court has demonstrated that abstention in general is about far more than merely showing deference to concurrent state proceedings. Abstention is a doctrine designed to prevent any intrusion whatsoever by federal courts on the sovereignty of the states. Such a doctrine will not yield to the mere technical requirement of an ongoing state proceeding.

For many, the application of *Younger* abstention in the removal context is hard to swallow because of what it represents. Such abstention represents a sweeping judicial abdication of congressionally mandated jurisdiction. It is difficult to justify the enormous scope of the modern abstention doctrines in light of the paramount duty of federal courts to exercise the jurisdiction that Congress has given to them. Nevertheless, the virtual destruction of the congressionally created removal power is the precise reality that we are now faced with.

For anyone who believes that this is not possible, I would remind them of the tremendous effect that *Younger* abstention has already had on civil rights claims under § 1983. The very purpose of § 1983 was to interpose the federal courts between people and the states to ensure the proper vindication of federal rights. A litigant that wishes to challenge an ongoing state proceeding has every right to bring a § 1983 claim in federal court. Nevertheless, the Court has refused to exercise its congressionally mandated jurisdiction in this context as well. If the Court is willing to scrap § 1983 when abstention is warranted, you can bet that it will do the same with the removal jurisdiction statute. Indeed, a number of lower courts have already applied *Younger* abstention to cases that have been removed. Today, we are merely waiting for confirmation from the Supreme Court. In the meantime, the application of *Younger* abstention in the removal context represents a dangerous, questionable, and important development in the world of everyday litigation.