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Younger Abstention Doctrine: A Morass of Confusion

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I. INTRODUCTION

Abstention is an exception to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[1] It is a class of "judicially created doctrines which 'justify either rejection or postponement of the assertion of federal court power even though Congress has vested jurisdiction in the federal courts to hear the cases in question.' "[2] The abstention doctrines have been heavily litigated and are the subject of an enormous amount of criticism.[3] One of the most criticized is the doctrine of "Our Federalism" announced in *Younger v. Harris*.[4]

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1. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) [hereinafter *Colorado River*].

2. Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. REV. 321, 335 (quoting MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 233 (1980)).

In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), Justice Marshall, writing the opinion for the Court, stated:

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We 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 constitution.

Id. at 404.

3. *E.g.*, Akhil R. Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1535 (1990); Anthony J. Dennis, *The Illegitimate Foundations of the* Younger *Abstention Doctrine*, 10 U. BRIDGEPORT L. REV. 311 (1990); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1625-26 (1990); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 839 (1989).

4. 401 U.S. 36 (1971). Justice Black, articulating the *Younger* doctrine, referred to its underlying rationale as "Our Federalism." *Id.* at 44; *see also*, A. Frank Koury, *Section 1983 and Civil Comity: Two for the Federalism Seesaw*, 25 LOY. L. REV. 659, 709 (1979) (expounding on the reasons for referring to the *Younger* doctrine as "Our Federalism").

This comment analyzes the *Younger* abstention doctrine. Part II gives a brief summary of the various abstention doctrines. Part III explores the confines of the *Younger* doctrine—first, by surveying *Younger*'s doctrinal background, and second, by examining three current areas of conflict among the federal circuit courts regarding the application of the *Younger* doctrine and the standard of review given an abstention decision. Following the inspection of each circuit conflict, a solution is proposed for the doctrinal conflict examined. Part IV then scrutinizes the problems surrounding the *Younger* doctrine and the illegitimate foundations of *Younger* generally. Part V concludes that *Younger* is a needed doctrine, but one that should be statutorily reconstructed to both legitimize the rule and reduce confusion and misapplication.

II. ABSTENTION DOCTRINES: BACKGROUND

The judicially-created abstention doctrines[5] fall into four general categories:[6] (1) *Pullman* abstention;[7] (2) *Burford* abstention;[8] (3) *Colorado River* abstention;[9] and, (4) *Younger* abstention.[10] Importantly, the doctrinal foundations of each of these forms of abstention vary.[11] In order to better analyze and understand *Younger* abstention, a general understanding of the other three categories of judicial abstention is helpful.

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5. "Abstention is a 'judge-made doctrine . . . , first fashioned in 1941 in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 . . . .'" Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509 (1972) (quoting Zwickler v. Koota, 389 U.S. 241, 248 (1967)).

6. *See Colorado River*, 424 U.S. 800, 814-17 (1976) (recognizing three existing judicial abstention doctrines and creating a fourth). Most commentators recognize four categories of judicial abstention. *E.g.*, Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986). *But see, e.g.*, Lee & Wilkins, *supra* note 2, at 321 (recognizing five categories of judicial abstention); David Mason, Note, *Slogan or Substance? Understanding "Our Federalism" and* Younger *Abstention*, 73 CORNELL L. REV. 852 (1988) (recognizing three general categories of abstention).

7. Railroad Comm'n of Texas v. Pullman, 312 U.S. 496 (1941).

8. Burford v. Sun Oil Co., 319 U.S. 315 (1943).

9. *Colorado River*, 424 U.S. at 800.

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

11. Lee & Wilkins, *supra* note 2, at 338.

A. Pullman *Abstention*

Pullman abstention is the oldest and least controversial type of abstention. The doctrine first originated in *Railroad Commission of Texas v. Pullman Company*.[12] In that case the Pullman Company and others challenged the Texas Railroad Commission's regulation requiring a Pullman conductor to be continuously in charge of all sleeping cars. The issue on appeal was whether the district court had erred in deciding the merits of the Fourteenth Amendment racial discrimination claim when unresolved issues of state law might have been dispositive of the issue. The Supreme Court "held that where state law is uncertain and a clarification of state law might make a federal court's determination of a constitutional question unnecessary, the federal court should abstain until the state court has had an opportunity to resolve the uncertainty as to state law."[13] Thus, pursuant to *Pullman*, abstention should be ordered "where clarification of state law might avoid a federal constitutional [issue]."[14]

Nonetheless, the mere fact that a state law is challenged as unconstitutional does not automatically invoke *Pullman* abstention.[15] *Pullman* only applies where "a tenable interpretation of the state law [would] be dispositive of the case."[16] In other words, if a state law is known or clear on its face, or if the constitutional issue would not be avoided regardless of the state court's interpretation of it, then abstention under *Pullman* is improper.[17]

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12. 312 U.S. 496 (1941).

13. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 12.2.1, at 595 (1989).

14. Lee & Wilkins, *supra* note 2, at 335; *accord* Mason, *supra* note 6, at 854-55.

15. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 236-37 (1984); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 306 (1979); Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83-84 (1975); United Servs. Auto Ass'n v. Muir, 792 F.2d 356, 361 (3d Cir.), *cert. denied*, 479 U.S. 1031 (1987); Corporacion Insular de Seguros v. Garcia, 680 F. Supp. 476, 478 (D.P.R. 1988).

16. Robinson v. City of Omaha, 866 F.2d 1042, 1043 (8th Cir. 1989).

17. *See generally* City of Houston v. Hill, 482 U.S. 451 (1987) (federal court should not abstain if statute is clear on its face); Orr v. Orr, 440 U.S. 268, 278 n.8 (1979) (*Pullman* doctrine is not applicable when issue has already been authoritatively decided); United Fence & Guard Rail Corp. v. Cuomo, 878 F.2d 588 (1989) (abstention improper if federal constitutional issue would not be changed).

In *Pullman*, Justice Frankfurter articulated three justifications for abstention. First, it avoids "the waste of a tentative decision" of an unnecessary constitutional issue which might be avoided by clarification of unclear state law.[18] Second, "abstention reduces the likelihood of erroneous interpretations of state law."[19] Finally, it promotes comity by recognizing the "'rightful independence of the state governments'" thereby reducing needless friction between federal and state courts.[20]

Significantly, "[i]f a court abstains under *Pullman*, it retains jurisdiction while the parties secure a determination of the state law question."[21] Indeed, the Supreme Court has often justified *Pullman* abstention on the grounds that it " 'does not . . . involve the abdication of federal jurisdiction, but only the postponement of its exercise.' "[22] According to the *Pullman* Court, "[f]ew public interests have a higher claim" upon a federal court's equitable use of discretion than does the "avoidance of needless friction with state policies."[23] Because federal courts retain jurisdiction under *Pullman*, the doctrine has been characterized as merely "a matter of timing: when will the federal court hear a case, not will it hear the case at all."[24]

B. Burford *Abstention*

A second type of abstention recognized by the Supreme Court is *Burford* abstention.[25] Although a derivative of *Pullman* abstention,[26] *Burford* abstention differs vastly from its predecessor. The primary difference is that *Burford* reflects a hands-off attitude, requiring federal courts to dismiss actions outright.[27]

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18. *Pullman*, 312 U.S. at 500.
19. CHEMERINSKY, *supra* note 13, § 12.2.1, at 597.
20. *Pullman*, 312 U.S. at 501 (citations omitted).
21. Mason, *supra* note 6, at 855.
22. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964) (quoting Harrison v. NAACP, 360 U.S. 167, 177 (1959)).
23. *Pullman*, 312 U.S. at 500.
24. Mason, *supra* note 6, at 855.
25. Burford v. Sun Oil Co., 319 U.S. 315 (1943).
26. The *Burford* Court relied upon *Pullman*'s precedent to validate the abstention doctrine it was about to create. In *Burford* the Court quoted *Pullman*, stating that "'[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . .'" *Id.* at 332 (quoting *Pullman*, 312 U.S. at 500).
27. *Colorado River*, 424 U.S. 800, 814-15 (1976) (expressly restating *Burford*'s holding).

In *Burford*, the Supreme Court dismissed an action to enjoin an order of the Texas Railroad Commission granting Mr. Burford a permit to drill new oil wells.[28] The action had been filed in federal court based upon diversity jurisdiction. At issue was whether or not the district court should have abstained "as a matter of sound equitable discretion" since adequate state court review of the administrative order was available.[29] The Supreme Court held that "a sound respect for the independence of state action requires the federal equity court to stay its hand."[30]

Under *Burford*, abstention is ordered either "(1) when 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' "[31] or (2) where it is required" 'to avoid needless conflict with the administration by a state of its own affairs.' "[32] In light of these principles, *Burford* has been characterized as an illustration of "administrative" abstention.[33] The underlying premise of this type of abstention is that federal courts should refrain from intervening in particular areas of the law when such action would have a disruptive effect on "state efforts to establish a coherent policy with respect to a matter of substantial public concern."[34]

C. Colorado River *Abstention*

The newest form of abstention is *Colorado River*. "Unlike previous abstention doctrines, which are founded upon prudential concerns,[35] *Colorado River* abstention is founded primarily upon notions of judicial economy."[36] This doctrine permits dis-

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28. *Burford*, 319 U.S. at 315.
29. *Id.* at 318.
30. *Id.* at 334.
31. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) [hereinafter *NOPSI*] (citation omitted).
32. Lee & Wilkins, *supra* note 2, at 345 (quoting CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 52, at 308 (4th ed. 1983)).
33. Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1154 (1974).
34. *Colorado River*, 424 U.S. 800, 814-15 (1976) (noting that *Burford* abstention avoids the disruptive effects of federal review on state policy concerns).
35. "The main prudential concerns . . . are the need to avoid unnecessary constitutional decisions (*Pullman*), the desire to defer resolution of unclear state law issues to state courts (*Pullman* and *Thibodaux*), and judicial hesitancy to intrude upon important state administrative or judicial schemes (*Burford* and *Younger*)." Lee & Wilkins, *supra* note 2, at 356-57 n.213.
36. Lee & Wilkins, *supra* note 2, at 356-57; *see also* Mullenix, *supra* note 6, at

missal of federal jurisdiction "in the event of an exercise of concurrent jurisdiction" in state court.[37] Although widely criticized by legal scholars,[38] this type of abstention has been heralded by the Court as " '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.' "[39] As with the other abstention doctrines, the Court has stressed that *Colorado River* " 'is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.' "[40]

Importantly, the Supreme Court has outlined some factors to be considered in deciding whether *Colorado River* abstention is appropriate.

> It has been held, for example, that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. . . . In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. No one factor is

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Because this doctrine does not rest on "considerations of state-federal comity or on avoidance of constitutional decisions," Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 14-15 (1983), there is some question as to whether the Supreme Court actually recognizes it as a form of abstention. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-28, at 197 n.10 (2d ed. 1983). Commentators, however, do generally recognize *Colorado River* as an abstention doctrine. *See, e.g.*, Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 82 (1989); Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention Based Interest Analysis*, 56 U. CHI. L. REV. 263, 279 (1989); Gary Thompson, Note, *The* Rooker-Feldman *Doctrine and the Subject Matter Jurisdiction of Federal District Courts*, 42 RUTGERS L. REV. 859, 896-901 (1990). Additionally, federal circuit courts have recognized the doctrine as a form of abstention. *E.g.*, Privitera v. California Bd. of Medical Quality Assurance, 926 F.2d 890, 896 (9th Cir. 1991); Gonzalez v. Cruz, 926 F.2d 1 (1st Cir. 1991); United States v. Pennsylvania Dep't of Envtl. Resources, 923 F.2d 1071, 1073 (3d Cir. 1991); A.G. Edwards & Sons v. Public Bldg. Comm'n, 921 F.2d 118 (7th Cir. 1990); Government Employees Ins. Co. v. Simon, 917 F.2d 1144, 1147 (8th Cir. 1990). Thus, this comment will treat *Colorado River* as an abstention doctrine.

37. *Colorado River*, 424 U.S. at 818.

38. *E.g.*, Allan Ashman et al., *Federal Abstention: New Perspectives on its Current Vitality*, 46 MISS. L.J. 629, 652 (1975); Lee & Wilkins, *supra* note 2, at 356; Mullenix, *supra* note 6, at 99.

39. *Colorado River*, 424 U.S. at 817 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)).

40. Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 14 (1983) (quoting *Colorado River*, 424 U.S. at 813).

> necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required.[41]

In addition, the Supreme Court has indicated that this is not a "mechanical checklist," but a balancing type test "heavily weighted in favor of the exercise of jurisdiction."[42]

III. *Younger* ABSTENTION[43]

Over a decade ago *Younger* abstention was characterized as one of the most controversial and changing doctrines in the federal system.[44] Today, though *Younger* abstention is frequently invoked, it remains highly controversial. More importantly, the doctrine continues to be refined and developed. This part of the comment analyzes the doctrinal background of *Younger* abstention and examines three current areas of conflict among the federal circuit courts of appeals.

Specifically, section A surveys the doctrinal framework of *Younger* abstention. Section B examines the application of the doctrine to administrative proceedings. Section C examines the applicability of *Younger* abstention when money damages are sought. And section D examines the standard of review given a district court's decision to abstain on *Younger* grounds. Each examination concentrates on a less-developed, frequently-litigated area of the law and concludes with a proposal for resolution of the doctrinal conflict at issue.

A. Background

" '*Younger* abstention' arises out of the federal courts' hesitance to interfere with a state's good faith efforts to enforce its own law in its own courts."[45] In *Younger v. Harris*,[46] the Supreme Court ruled that "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the

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41. *Colorado River*, 424 U.S. at 818-19 (citations omitted).
42. *Moses H. Cone Memorial Hosp.*, 460 U.S. at 16.
43. Younger v. Harris, 401 U.S. 37 (1971).
44. Koury, *supra* note 4, at 709 ("There is no doctrine in the federal courts which presently elicits more controversy and comment than 'Our Federalism.' ").
45. Duty Free Shop, Inc. v. Administracion De Terrenos, 889 F.2d 1181, 1182 (1st Cir. 1989) (citations omitted).
46. 401 U.S. at 37.

federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury."[47] Although this type of abstention was originally only applicable to criminal proceedings, today the Supreme Court has expanded the doctrine to include quasi-criminal,[48] civil,[49] and administrative[50] proceedings. However, *Younger* abstention is only proper in noncriminal settings when "important state interests are involved."[51]

"Abstention under *Younger* is fueled by the notion that courts of equity should not intervene where a party has an adequate remedy at law . . . ."[52] "*Younger*, however, [i]s not grounded solely on principles of equity."[53] Writing for the *Younger* Court, Justice Black indicated that the decision was supported "by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions."[54] "This 'proper respect for state functions' was capsulized by the phrase 'Our Federalism.' "[55]

Although *Younger* is premised upon both notions of equity and comity, the principles of equity established the doctrine. Thus it appeared that the Court's decision was "little more

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47. Samuels v. Mackell, 401 U.S. 66, 69 (1971).

48. Mannheim Video, Inc. v. County of Cook, 884 F.2d 1043, 1044 (7th Cir. 1989) ("*Younger*, which involved a state criminal prosecution, has been applied to quasi-criminal actions as well.").

49. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (*Younger* abstention extended to civil proceedings).

50. Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 (1986) (*Younger* abstention is applicable to administrative proceedings); Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 434-35 (1982).

51. Moore v. Sims, 442 U.S. 415, 423 (1979).

52. Cecos Int'l, Inc. v. Jorling, 895 F.2d 66, 70 (2d Cir. 1990) (citations omitted).

53. Lee & Wilkins, *supra* note 2, at 350.

54. 401 U.S. at 44.

55. Justice Black explained "Our Federalism," in a now famous quotation, stating that it

> 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.

Younger, 401 U.S. at 44.

than a return to the established rule . . . that courts of equity should refuse to enjoin pending criminal proceedings except in extraordinary circumstances."[56] It is the notion of comity, however, that has, in limited circumstances, justified application of *Younger* to civil and administrative proceedings.[57]

Younger abstention is a dynamic doctrine that has been in a state of flux and development since its inception.[58] In fact, the same day that the doctrine was announced the Court refined it.[59] Significantly, the refinement and development of the doctrine have been ongoing concerns for the Supreme Court for the last twenty years. Most important for purposes of this comment, however, are the recent developments in the areas of civil and administrative proceedings. It is only in the last decade or two that *Younger* has been conclusively applied in these areas.[60]

In *Middlesex County Ethics Committee v. Garden State Bar Association*,[61] the Supreme Court articulated a three-part test to be used as a guide in determining when *Younger* abstention is justified.[62] The Court held that *Younger* abstention is necessary and thereby justified when "(1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims."[63] But, even if justified by the three-part test,

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56. Lee & Wilkins, *supra* note 2, at 350 (citing Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943)).

57. *See* Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619 (1986) (justifying *Younger* abstention in an administrative proceeding by notions of comity); Trainor v. Hernandez, 431 U.S. 434 (1977) (premising *Younger* abstention in a civil proceeding primarily upon notions of comity); Juidice v. Vail, 430 U.S. 327 (1977) (justifying expansion of *Younger* abstention to civil proceedings by notions of comity).

58. *See supra* text accompanying notes 45-57 and *infra* note 59.

59. Samuels v. Mackell, 401 U.S. 66 (1971). Decided the same day as *Younger*, *Samuels* refined the *Younger* doctrine by holding that federal courts may not grant declaratory relief to a plaintiff who is subject to a pending state criminal proceeding. *Id.* *Younger* was for injunctive relief only. *Younger*, 401 U.S. at 39.

60. *See Ohio Civil Rights Comm'n*, 477 U.S. at 619 (justifying *Younger* abstention in an administrative proceeding by notions of comity); *Trainor*, 431 U.S. at 434 (premising *Younger* abstention in a civil proceeding primarily upon notions of comity); *Juidice*, 430 U.S. at 327 (justifying expansion of *Younger* abstention to civil proceedings by notions of comity).

61. 457 U.S. 423 (1982).

62. *Id.* at 432.

63. Schall v. Joyce, 885 F.2d 101, 106 (3d Cir. 1989) (citing *Middlesex County*

> *Younger* abstention is not appropriate if . . . (1) the state proceedings are being undertaken in bad faith or for purposes of harassment or (2) some other extraordinary circumstances exist, such as proceedings pursuant to a flagrantly unconstitutional statute, such that deference to the state proceeding will present a significant and immediate potential for irreparable harm to the federal interests asserted.[64]

After *Middlesex*, *Younger* abstention, at least on the surface, appeared to be a straight-forward and easily-applied doctrine. Underneath, however, it remained a morass of confusion.[65] The next three sections of this part of the comment examine doctrinal conflicts regarding *Younger* abstention and suggest possible solutions for these conflicts.

B. Application of the Younger *Doctrine to Administrative Proceedings: "Ongoing State Proceeding" Requirement*

The first prong of the *Middlesex* test requires that there be an "ongoing" or "pending" state proceeding that is judicial in nature before a federal court can abstain on *Younger* grounds.[66] This is not a new requirement; in both *Younger*[67] and *Samuels v. Mackell*,[68] the Court relied heavily upon the fact that there were pending state proceedings to hold that the respective injunctive and declaratory actions were inappropriate.[69] Four years later, however, this deference to "ongoing" state actions was expanded to include "state criminal proceedings . . . begun against the federal plaintiffs *after* the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court."[70]

Ethics Comm'n, 457 U.S. at 432). For additional cases setting forth the *Middlesex* test see, e.g., Cecos Int'l, Inc. v. Jorling, 895 F.2d 66, 71 (2d Cir. 1990); Telco Communications, Inc. v. Carbaugh, 885 F.2d 1225 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1923 (1990).

64. *Schall*, 885 F.2d at 106 (citations omitted).

65. *See* discussion *infra* part IV-A.

66. *Middlesex*, 457 U.S. at 432.

67. 401 U.S. 37, 41 (1971).

68. 401 U.S. 66, 73 (1971).

69. *Younger*, 401 U.S. at 41 ("expressing 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"); *Samuels*, 401 U.S. at 73-74 (limiting *Younger*'s application to cases in which state prosecution is pending).

70. Hicks v. Miranda, 422 U.S. 332, 349 (1975) (emphasis added).

Today the "pending state proceeding" requirement continues to be a source of contention in *Younger* abstention litigation, particularly with regards to administrative proceedings. This development is the result of the recent application of *Younger* abstention to administrative proceedings—the last realm of that doctrine to be developed. Although application of *Younger* to purely civil proceedings was endorsed by the Court in 1977 in the decisions of *Juidice v. Vail*[71] and *Trainor v. Hernandez*,[72] it was not until 1986, in *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,[73] that the doctrine was found to be applicable to administrative proceedings which are judicial in nature.[74]

1. *Exhaustion of state remedies*

One problem concerning the application of *Younger* to administrative proceedings is recognized in *New Orleans Public Service, Inc. v. Council of New Orleans (NOPSI)*.[75] That case involved an appeal from a federal district court's decision to abstain from exercising jurisdiction. New Orleans Public Service, Inc., (NOPSI) had brought suit in federal court seeking injunctive and declaratory relief from a state rate-making authority's decision not to allow complete reimbursement for the utility's costs despite a finding of reasonableness by the Federal Energy and Regulatory Commission (FERC).[76] The *Younger* issue presented on appeal to the Supreme Court was whether NOPSI was required to exhaust its state appellate remedies before seeking relief in federal court.[77]

In traditional judicial proceedings, a party to a suit is required to " 'exhaust [its] state appellate remedies before seek-

71. 430 U.S. 327, 334-36 (1977).
72. 431 U.S. 434, 443-44 (1977).
73. 477 U.S. 619 (1986). Although *Middlesex* was the first case decided by the Supreme Court that arguably extended *Younger* to administrative proceedings, the Court in that case was able to base its decision, at least in part, on the fact that the disciplinary proceedings initiated by a state ethics committee were part of an ongoing judicial proceeding. *See* Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 432-34 (1982). Because the proceeding in that case was deemed to be a judicial proceeding by the Court, it could not be conclusively stated until *Ohio Civil Rights* that *Younger* applied to administrative proceedings.
74. *NOPSI*, 491 U.S. 350, 370 (1989).
75. *Id.* at 350.
76. *Id.* at 355.
77. *Id.* at 368-69.

ing relief in the District Court.' "[78] The rationale is that litigation, from first filing on through the appellate process, is a unitary process that should not be disrupted.[79] In *NOPSI*, however, the proceeding was strictly administrative. The respondents, nonetheless, urged the Supreme Court to equally apply *Younger* abstention principles to actions "where the initial adjudicatory tribunal is an agency."[80] The Supreme Court expressly declined to decide that issue.[81] Instead the Court merely ruled that the Council proceeding in *NOPSI* was not "the sort of proceeding entitled to *Younger* treatment."[82]

Although the Supreme Court has refused to squarely face the issue of whether or not *Younger* applies to proceedings "where the initial adjudicatory tribunal is an agency,"[83] federal circuit courts have decided the issue.[84] In this regard, the Alleghany Corporation cases are of particular importance.[85] The factual background of those cases, decided by the Seventh and Eighth Circuits, are virtually indistinguishable from one another. Nevertheless, the opinions of the respective courts in those cases are antithetical.

In each of the Alleghany Corporation cases, the Alleghany Corporation sought to purchase either an insurance company or

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78. *Id.* at 369 (quoting Huffman v. Pursue Ltd., 420 U.S. 592, 608 (1975)).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. Alleghany Corp. v. Pomeroy, 898 F.2d 1314 (8th Cir. 1990); Alleghany Corp. v. McCartney, 896 F.2d 1138 (8th Cir. 1990); Alleghany Corp. v. Haase, 896 F.2d 1046 (7th Cir. 1990), *vacated as moot sub nom.*, Dillon v. Alleghany Corp., 111 S. Ct. 1383 (1991).
85. *See Pomeroy*, 898 F.2d at 1314; *McCartney*, 896 F.2d at 1138; *Haase*, 896 F.2d at 1046.

Although the Seventh Circuit's decision in *Alleghany Corp. v. Haase*, has been vacated by the Supreme Court because the appeal became moot on the way to the Court, Dillon v. Alleghany Corp., 111 S. Ct. 1383 (1991) (citing United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950) (in dealing with civil cases which have become moot on the way to the Supreme Court or pending that Court's decision on the merits, it is established practice for that Court to "vacate the judgment below and remand with a direction to dismiss" so that "the rights of all parties are preserved")), the rationale behind the decision is still valid—though without precedential value. Importantly, the Seventh Circuit is at liberty to decide a factually similar case the same way since the Supreme Court has not ruled on the legal issues. Therefore, the Seventh Circuit's rationale in *Haase* continues to be relevant and insightful in determining whether *Younger* abstention applies when the initial state adjudicatory tribunal is an agency.

an insurance holding company in the states of Indiana, Wisconsin, North Dakota, and Nebraska. Pursuant to the laws of those states Alleghany was required to seek pre-purchase approval for the prospective acquisitions from the insurance commissions of the respective states. In each instance Alleghany's application was denied.[86] Consequently, Alleghany filed suit in the respective federal courts seeking declaratory judgments holding the state laws and regulations unconstitutional.[87]

a. Eighth Circuit's decisions. In both *Alleghany Corp. v. Pomeroy*,[88] and *Alleghany Corp. v. McCartney*,[89] the Eighth Circuit held that the administrative actions were "ongoing judicial proceedings" from which the district courts were required to abstain pursuant to *Younger*.[90] In both cases the court had to jump two hurdles to reach this result. First, it had to find that the insurance commission's administrative proceedings were judicial in nature.[91] Second, the court had to find that those proceedings were still "pending" even though the administrative decisions were final.[92]

In both *Pomeroy* and *McCartney* the court found that the proceedings were judicial in nature "because the Commissioner 'investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.' "[93] More importantly, in both instances the court found

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86. *Pomeroy*, 898 F.2d at 1314; *McCartney*, 896 F.2d at 1138; *Haase*, 896 F.2d at 1046.

87. It is important to note that in each case Alleghany was not challenging the various state insurance commissions' decisions, but rather, the laws governing the application process. *Pomeroy*, 898 F.2d at 1317 ("Alleghany does not challenge the Commissioner's findings"); *McCartney*, 896 F.2d at 1142; *Haase*, 896 F.2d at 1049-50. Had Alleghany challenged the decisions themselves, a very different case for abstention would have been presented.

88. 898 F.2d at 1314.

89. 896 F.2d at 1138.

90. *Pomeroy*, 898 F.2d at 1316; *McCartney*, 896 F.2d at 1143.

91. Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 628 n.2 (1986) (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 237-39 (1984) ("if state law expressly indicates that the administrative proceedings are not even 'judicial in nature,' abstention may not be appropriate")).

92. The first requirement of the *Middlesex* test is that there be an "ongoing state proceeding" that is judicial in nature. Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982). In both *McCartney* and *Pomeroy* the Eighth Circuit, after finding that the administrative proceedings were judicial in nature, proceeded to ascertain whether the "*Middlesex* requirement, that there be pending state proceedings," was satisfied. *Pomeroy*, 898 F.2d at 1316-17 (following *McCartney*, 896 F.2d at 1143).

93. *Pomeroy*, 898 F.2d at 1316 (quoting *McCartney*, 896 F.2d at 1143 (quoting

that the administrative proceedings were still "pending" even though they were final as a matter of law.[94] The court's decisions, in both cases, that the insurance commissions' proceedings were pending for the purposes of *Younger* abstention, was premised upon *Huffman v. Pursue, Ltd.*[95]

In *Huffman*, the Supreme Court stated that "[f]ederal post-trial intervention, in a fashion designed to annul the results of a state trial, . . . deprives the States of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction."[96] The *Huffman* Court also concluded that "a necessary concomitant of *Younger* is that a party . . . must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*."[97]

Accordingly, the Eighth Circuit maintains that " 'an administrative proceeding to which *Younger* applies cannot be challenged in federal court even after the administrative action has become final.' "[98] The basis of the decision being that interests of comity, such as those found in *Huffman*, support abstention sufficiently to deem the pending requirement satisfied.[99]

b. Seventh Circuit's position. Contrary to the Eighth Circuit, the Seventh Circuit, in *Alleghany Corp. v. Haase*,[100]

NOPSI, 491 U.S. 350, 370 (1989) (quoting Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908))). But note that in *NOPSI*, *Younger* was not applicable because the administrative proceeding was not judicial in nature. *NOPSI*, 491 U.S. at 371.

94. *See Pomeroy*, 898 F.2d at 1316-17 (finding the pending "element of the *Middlesex* test satisfied"); *McCartney*, 896 F.2d at 1144 (holding "all three *Middlesex* requirements had been established").

Notably, the decisions were final as a matter of law unless Alleghany appealed the administrative rulings. If appealed, the decisions were judicially reviewable by state courts. *Id.* at 1141 (noting that "[u]nder Neb. Rev. Stat. § 84-917 (Reissue 1987), Alleghany had thirty days after service of the final decision to commence proceedings for review in the [state] District Court . . . ."); *see also Pomeroy*, 898 F.2d at 1319 (decided under similar statutory insurance law).

95. 420 U.S. 592 (1975).

96. *Id.* at 609.

97. *Id.* at 608. For an outline of the exceptions to *Younger* abstention, see *supra* text accompanying note 64.

98. *McCartney*, 896 F.2d at 1144 (quoting *NOPSI*, 491 U.S. 350, 369 n.4 (1989)). The *NOPSI* Court noted that *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986) possibly suggests such a result, although the Supreme Court has never "squarely faced the question." *NOPSI*, 491 U.S. 350, at 369 n.4 (1989).

99. *See* Alleghany Corp. v. Pomeroy, 898 F.2d 1314, 1317-18 (8th Cir. 1990).

100. 896 F.2d 1046 (7th Cir. 1990) *vacated as moot sub nom.* Dillon v. Alleghany

found that "there is no general requirement of exhausting state judicial or administrative proceedings before bringing a federal suit . . . ."[101] Nevertheless, that court does recognize that "[e]xhaustion of judicial remedies is sometimes required."[102]

In *Haase*, the Seventh Circuit consolidated three appeals "from two closely related suits brought by Alleghany Corporation to invalidate, on federal constitutional grounds, portions of the insurance holding company statutes of Wisconsin and Indiana."[103] The court, rejected the defendants' assertion that the administrative proceedings were judicial in nature, and also their desire to characterize the administrative proceedings plus state judicial review as a unitary judicial proceeding.[104]

In rejecting the contention that the administrative proceedings were judicial in nature, the court relied upon the Supreme Court's decision in *NOPSI*.[105] Comparing *NOPSI* to the present case, the court of appeals stated that it could not "see any difference between the refusal by a state agency to allow a power company to raise its rates and the refusal by a state agency to allow one company to buy another."[106] The court explained that "[i]f federal judicial intervention does not demonstrate disrespect for state sovereignty in the first case, neither does it in the second."[107] Thus, following the lead of the Supreme Court in *NOPSI*, the Seventh Circuit held that the administrative proceedings were not judicial in nature and that *Younger* abstention was not applicable to the consolidated cases being appealed in *Haase*.[108]

More importantly, the *Haase* court recognized that it could not create a general rule requiring a party to exhaust its state appellate remedies without spelling the demise of *Ex parte Young*,[109] something that it was not authorized to do.[110] *Ex*

Corp., 111 S. Ct. 1383 (1991). It is noteworthy that the *Haase* case is a compilation of two cases: one from Wisconsin and the other from Indiana.

101. *Haase*, 896 F.2d at 1050.

102. *Id.* (citing Parratt v. Taylor, 451 U.S. 527 (1981) *overruled by* Daniels v. Williams, 474 U.S. 327 (1986) (exhaustion of *judicial* remedies sometimes required)). In particular, § 1983 actions do not require exhaustion of state judicial proceedings. Ellis v. Dyson, 421 U.S. 426, 432-33 (1975) (citations omitted).

103. *Haase*, 896 F.2d at 1048.

104. *Id.* at 1053. *Contra* Alleghany Corp. v. Pomeroy, 898 F.2d 1314, 1316 (8th Cir. 1990); Alleghany Corp. v. McCartney, 896 F.2d 1138, 1143-44 (8th Cir. 1990).

105. *Haase*, 896 F.2d at 1052-53.

106. *Id.* at 1053.

107. *Id.*

108. *See id.*

109. 209 U.S. 123 (1908).

parte Young "holds that federal courts have the power to enjoin threatened state action that, if carried out, would violate [a] plaintiff's federal rights."[111] Since the administrative proceedings were final, and because there were no issues pending in the state courts, the Seventh Circuit recognized that it, and the lower federal courts, had the power to consider whether the state administrative proceedings were unconstitutional as an unreasonable burden on commerce. The court also ruled that state "administrative proceedings plus judicial review" were not a unitary process.[112]

Agreeing with the Seventh Circuit, the First[113] and Third[114] Circuits also renounce any possibility of a final administrative proceeding precluding access to federal courts.[115]

2. *Merit of the Seventh Circuit's position*

Finalized administrative proceedings should not preclude plaintiffs from litigating in the forum of their choice.[116] Administrative proceedings and subsequent state appellate and trial processes should not be characterized as a unitary judicial proceeding. Separate and distinct questions or problems are at issue in these divergent proceedings.

At issue in each administrative hearing preceding the *Alleghany* cases was the question of whether the various insurance commissioners should give their approval to the Alleghany Corporation to purchase the prospective insurance subsidiaries.[117] By contrast, what the Alleghany Corporation was attempting to put at issue in its federal suits was the constitu-

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110. *Haase*, 896 F.2d at 1050.

111. *Id.* at 1049 (explaining the holding of *Ex parte Young*, 209 U.S. 123 (1908)).

112. *Id.* at 1053.

113. Kercado-Melendez v. Aponte-Roque, 829 F.2d 255, 258-62 (1st Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988).

114. *See* Ford Motor Co. v. Insurance Comm'r, 874 F.2d 926, 933-35 (3d Cir.) (holding that the district court properly refused to abstain on *Younger* grounds, thus implicitly recognizing that administrative proceedings, plus judicial review, are not a unitary process requiring abstention if state courts are available to adjudicate constitutional claims on appeal from administrative decisions), *cert. denied*, 110 S. Ct. 418 (1989).

115. *Contra* Alleghany Corp. v. McCartney, 896 F.2d 1138, 1144 (8th Cir. 1990).

116. *See infra* text accompanying notes 189-92.

117. *See* Alleghany Corp. v. Pomeroy, 898 F.2d 1314, 1315 (8th Cir. 1990); *McCartney*, 896 F.2d at 1140; Alleghany Corp. v. Haase, 896 F.2d 1046, 1048 (7th Cir. 1990) *vacated as moot sub nom.* Dillon v. Alleghany Corp., 111 S. Ct. 1383 (1991).

tionality of each state's application process for purchasing insurance companies.[118]

Administrative agencies, like insurance commissions, generally do not (and indeed many cannot) rule on the constitutionality of statutory provisions outlining insurance company purchase processes.[119] Therefore, because the issues before the administrative agencies and courts in the *Alleghany* cases were separate and distinct, and since the functional decisions to be made by those entities were vastly different, the Alleghany Corporation should not have been prevented from litigating the constitutionality of the various insurance statutes in federal court.

In each of the *Alleghany* cases, Alleghany did not challenge the decisions of the various state insurance commissions denying its purchase applications. Rather Alleghany merely challenged the statutes mandating the application process. Thus, the state interests in each of Alleghany's constitutional challenges were the same as with any other statutory challenge of state law in federal court: no more, no less.

Accordingly, notions of comity, the essential justification of *Younger* abstention in administrative proceedings, were no more significant in the *Alleghany* cases than they are when any state statute is constitutionally challenged in federal court. In other words, the mere challenge of a state statute pursuant to the Constitution does not constitute an extraordinary event justifying abstention. Hence, abstention on *Younger* grounds was inappropriate in the *Alleghany* cases.

Furthermore, because "there is always a potential question of 'ripeness' in an attack on merely threatened action,"[120] the plaintiff corporation in the *Alleghany* cases had no real choice but to go through the purchase application process before chal-

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118. *See Pomeroy*, 898 F.2d at 1314; *McCartney*, 896 F.2d at 1138; *Haase*, 896 F.2d at 1046.

119. In *Haase* the insurance commissioners conceded that they could not "determine the constitutionality of the statutes they enforce . . . ." 896 F.2d at 1051. While there is some question as to whether this concession was premature, the *Haase* decision does recognize that some states, like California, constitutionally prohibit administrative agencies from ruling on the constitutionality of statutes. *Id.* In addition, that case recognizes that there are a large number of cases which are explicit in this limitation even without a corresponding statutory or constitutional provision. *Id.* Furthermore, it was noted that "47 states have nearly identical [insurance] statutes." *Id.* at 1048.

120. *Haase*, 896 F.2d at 1049 (citations omitted).

lenging it. Moreover, there is also the possibility that the corporation would have lacked standing to bring a suit before it applied to the various state insurance commissions.[121] Such negation of federal jurisdiction after administrative proceedings have been finalized effectively denies a plaintiff the opportunity to litigate in federal court.[122]

The better rule is that when administrative proceedings are finalized, and if the outcomes of the proceedings are not being directly challenged, the plaintiffs should be able to choose the forum in which they wish to litigate their cause. However, if a plaintiff directly challenges an administrative decision, the issue becomes significantly different. When state administrative decisions are directly challenged the state's interests regarding comity are arguably greater than when statutory law alone is challenged. Since the state's interest in such cases are enhanced by the direct challenge to its decision making ability, federal courts should abstain in favor of the normal administrative appeals process.

But this was not the situation in the *Alleghany* cases. In those cases, it was the statutory framework of the individual insurance holding company acts that was challenged, not the underlying decisions by the insurance commissioners. Thus, the position of the Seventh, First, and Third Circuits, that abstention is not required in such circumstances is correct and should be followed by all federal courts.

C. Applicability of Younger *When Money Damages are Sought*

Another area of current disagreement among the federal circuit courts concerns the issue of whether *Younger* abstention is applicable when money damages are being sought. Like the "pending" administrative proceeding problem that was just examined, the circuit conflict at issue in this section is a direct result of the lack of precedent and continued evolution of the *Younger* doctrine.

Initially, *Younger* and its progeny merely held that "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irrepara-

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121. *See id.*
122. *See infra* text accompanying notes 189-92.

ble injury."[123] The doctrine was premised upon the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[124]

As noted previously, *Younger* was not grounded solely upon principles of equity.[125] Moreover, it was acknowledged that it is the notion of comity that has justified the expansion of that doctrine.[126] Prior to the expansion of *Younger* beyond its original criminal confines, courts did not question whether abstention on *Younger* grounds was inappropriate when money damages were sought.[127] Nonetheless, expansion of the doctrine has forced the development of new rules governing its application.[128] The contours of these new rules have arguably endorsed the application of *Younger* to actions for money damages. The Supreme Court, however, has chosen not to reach this issue.[129]

In *Deakins v. Monaghan*,[130] a section 1983 action was brought by a construction company seeking damages and injunctive relief against New Jersey law enforcement officers following an allegedly illegal search of the business.[131] In that case the Supreme Court ruled that it was improper for the district court to dismiss rather than stay the respondents' claims for damages and attorney's fees.[132] But the Court refused to "decide the extent to which the *Younger* doctrine applies to a federal action seeking only monetary relief . . . ."[133]

Notwithstanding the Supreme Court's refusal, several circuits have decided this issue. Not surprisingly, the circuits are not in agreement. Rather, there are currently three differ-

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123. Samuels v. Mackell, 401 U.S. 66, 69 (1971).
124. *Younger*, 401 U.S. at 43-44.
125. *See supra* text accompanying note 54.
126. *See supra* text accompanying note 57.
127. *See* Deakins v. Monaghan, 484 U.S. 193, 202 (1988).
128. *NOPSI*, 491 U.S. 350 (1989); Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977).
129. *Deakins*, 484 U.S. at 202.
130. *Id.* at 193.
131. *Id.* at 196-97.
132. *Id.* at 204-05.
133. *Id.* at 202.

ent views regarding the application of *Younger* to damage claims in the circuit courts. At present, "a plurality of Circuits" ruling on the issue have held that *Younger* is applicable to actions for money damages.[134] The rationale for this position is that "[s]o long as the plaintiffs have an opportunity to raise their federal claims in the state action, '[n]o more is required to invoke *Younger* abstention.' "[135] Therefore, "several circuit courts have abstained where [a section 1983 damage action] would have had a substantially disruptive effect upon ongoing state criminal proceedings."[136]

"By contrast, the Fifth and Sixth Circuits both hold that *Younger* has no applicability to a claim for damages . . . ."[137] This minority position is apparently premised upon the "virtually unflagging obligation" of federal courts to exercise the jurisdiction that is theirs.[138] Analytically, this position is also supported by the possibility of a res judicata effect, or the risk that a statute of limitations might run on a damage claim if a federal court is required to abstain from a damage action pursuant to *Younger*.

Finally, at least three circuits have avoided the damage issue altogether.[139] These circuits have held that whether or not *Younger* applies to damage claims, a district court has no discretion to dismiss rather than stay such a claim.[140] This view, taken by the Second, Third and Fourth Circuits, is the Supreme Court's position in *Deakins v. Monaghan*.[141] This position recognizes both the claim preclusive effect that dismissing a damage action on *Younger* grounds can have and the issue preclusive effects of adjudicating a damage claim on its merits.

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134. *Id.* at 208 (White, J., concurring) (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)).

135. Pernsley v. Harris, 474 U.S. 965, 967 (1985) (Burger, C.J., dissenting in a memorandum decision in which certiorari was denied) (citation omitted).

136. *Mann*, 781 F.2d at 1449 (citation omitted).

137. *Deakins*, 484 U.S. at 208 n.3 (White, J., concurring) (citation omitted).

138. *Id.* at 206.

139. Suggs v. Brannon, 804 F.2d 274, 279 (4th Cir. 1986); Crane v. Fauver, 762 F.2d 325, 329 (3d Cir. 1985); Giulini v. Blessing, 654 F.2d 189, 193 (2d Cir. 1981).

140. *Suggs*, 804 F.2d at 279; *Crane*, 762 F.2d at 329; *Giulini*, 654 F.2d at 193.

141. 484 U.S. 193, 202 (1988).

Avoiding the damage issue, however, leaves the development of *Younger* abstention in that area of the law in a deep abyss. Although the Second, Third, and Fourth Circuits' avoidance effectively skirts the damage issue, it does not resolve the inconsistent results among the circuits, nor does it create uniformity in federal law. Thus, the Supreme Court should rule on the issue or legislative action should be taken to decide conclusively whether or not *Younger* abstention applies to damage actions.

In deciding the issue, the Supreme Court or Congress should rule that *Younger* is applicable to damage actions. Allowing federal courts to abstain from adjudicating damage actions would avoid disruption of state proceedings—the disruption stemming from a decision in federal court being dispositive of issues concurrently before the state court. Abstention would also save both time and money by reducing or preventing duplicative proceedings in state and federal court.

In addition to allowing federal courts to abstain from damage actions on *Younger* grounds, the Supreme Court should adopt the alternative rule of staying the federal damage claim until final disposition of state proceedings. In *Deakins*, the Supreme Court indicated that the "rule is sound."[142] "It allows a parallel state proceeding to go forward without interference from its federal sibling, while enforcing the duty of federal courts 'to assume jurisdiction where jurisdiction properly exists.' "[143]

Pursuant to this new hybrid rule, a damage action would not be dismissed on *Younger* grounds, but instead stayed until completion of the state proceedings. Such a rule would be advantageous in that it would avoid the preclusive effect that giving full application of *Younger* to damage actions might have. It would permit a party to litigate in federal court if jurisdiction existed. It would also create uniformity in law among the circuits.

The problem with such a rule is that it expands *Younger* beyond current precedent by authorizing stays of jurisdiction instead of dismissals.[144] Nevertheless, this expansion would

142. *Id.* at 202.
143. *Id.* at 202-03 (footnote and citation omitted).
144. *See, e.g., NOPSI*, 491 U.S. 350 (1989); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987); Younger v. Harris, 401 U.S. 37 (1971).

be justified on grounds that it avoids inequity in the administration of *Younger* abstention—the inequity arising from the preclusive effects that outright dismissal would have in certain instances. In any event, legislative action needs to be taken or, at the very least, the Supreme Court needs to rule on this issue.

D. Review of Lower Courts' Decisions to Abstain Upon Younger *Grounds: De Novo v. Abuse of Discretion*

The last area of confusion among federal circuit courts that will be analyzed in this comment is the standard of review that a circuit court uses in reviewing the decision of a district court to abstain on *Younger* grounds. Although this issue is somewhat ancillary to the previous analyses involving the fundamental elements of *Younger* abstention, the standard of review given an abstention decision is relevant to a survey of *Younger* abstention since it involves a discussion of the basic rationale behind the *Younger* doctrine.

The standard of review given a lower court's decision is extremely important because it can be determinative of the outcome of an appeal.[145] Significantly,

> the extent of the review that will be undertaken will depend on the nature of the alleged error, as well as whether the proceeding below was a jury or nonjury trial. The fullest scope of review, not surprisingly, is for errors of law; the appellate court will decide questions of law *de novo*.[146]

The rationale behind this type of review is that the "appellate court . . . is in as good a position as the trial court to decide . . . legal questions and, indeed, ruling on questions of law is one of its functions."[147]

In contrast, appellate review for *abuse of discretion* "reflects the desire of the appellate courts not to intrude on the trial process too readily, particularly when the trial judge may be in the best position to make the determination involved."[148] "[A]ny rulings that are within the discretion of the

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145. *See* Pullman-Standard v. Swint, 456 U.S. 273 (1982).
146. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 600 (1985) (emphasis added) (footnote omitted).
147. *Id.* at 601.
148. *Id.* at 605.

trial judge will be reviewed under an *abuse of discretion* standard. As a practical matter, this means that only if an appellate court is convinced that the court below was clearly wrong will it reverse a discretionary decision."[149]

As noted, there is disagreement among the circuits regarding which standard of review should be used to evaluate the propriety of a district court's decision to abstain pursuant to *Younger*. At present, the Sixth,[150] Ninth,[151] and Tenth[152] Circuits have ruled that review of a district court's decision should be conducted *de novo*. The Second,[153] Third,[154] Fifth,[155] and Eighth Circuits,[156] however, contend that appellate review of the abstention doctrines, including *Younger*, should be conducted for *abuse of discretion*.

Although circuits "generally review decisions to abstain for *abuse of discretion*,"[157] many of those same circuits use the *de novo* standard when *Younger* abstention decisions are reviewed.[158] The Tenth Circuit typifies the position taken by

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149. *Id.* (emphasis added) (footnote omitted).

150. Federal Express Corp. v. Tennessee Pub. Serv. Comm'n, 925 F.2d 962, 967 (6th Cir. 1991) ("We conduct a *de novo* review of a district court's abstention decision."); Litteral v. Bach, 869 F.2d 297, 298 (6th Cir. 1989) (per curiam) (giving *de novo* review to a *Younger* abstention decision).

151. World Famous Drinking Emporium v. Tempe, 820 F.2d 1079, 1081 (9th Cir. 1987) ("The decision whether to abstain under *Younger* is reviewable *de novo*.").

152. Seneca-Cayuga Tribe of Oklahoma v. Oklahoma, 874 F.2d 709 (10th Cir. 1989) (because *Younger* abstention is not discretionary, court's review is *de novo*).

153. Law Enforcement Ins. Co. v. Corcoran, 807 F.2d 38, 40 (2d Cir. 1986) (grouping the abstention doctrines into four categories and universally applying an abuse of discretion standard on review), *cert. denied*, 481 U.S. 1017 (1987).

154. Ayers v. Philadelphia Hous. Auth., 908 F.2d 1184, 1195 (3d Cir. 1990) (finding that district court abused discretion by abstaining), *cert. denied*, 111 S. Ct. 1003 (1991); Schall v. Joyce, 885 F.2d 101, 106 (3d Cir. 1989) ("review the district court's decision to abstain [on Younger grounds] for abuse of discretion").

155. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 850 F.2d 1069 (5th Cir. 1988) (finding that the district court's decision to abstain is reviewable for abuse of discretion only) *rev'd on other grounds*, 491 U.S. 350 (1989).

156. Middle S. Energy, Inc. v. Arkansas Pub. Serv. Comm'n, 772 F.2d 404, 419 (8th Cir. 1985) (concluding that district court's resolution of the abstention doctrines of *Burford*, *Younger*, and *Pullman* was not an abuse of discretion), *cert. denied*, 474 U.S. 1102 (1986).

157. *E.g.*, Federal Deposit Ins. Corp. v. Nichols, 885 F.2d 633, 637 (9th Cir. 1989) (emphasis added); *see also* Seneca-Cayuga Tribe of Oklahoma v. Oklahoma 874 F.2d 709 (10th Cir. 1989) (citing Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1356, 1356 n.2 (9th Cir. 1986) (although abuse of discretion is appropriate for reviewing other forms of abstention, it is an inappropriate standard in the *Younger* context)).

158. *E.g.*, *Seneca-Cayuga Tribe of Oklahoma*, 874 F.2d at 709; World Famous

the circuits which find that review of *Younger* abstention should be conducted *de novo*. In *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*,[159] the court justified this distinction on the grounds that *Younger* abstention is not discretionary once the three prongs of the *Middlesex* test[160] have been met.[161] Implicit within this assertion is the assumption that *Younger* can be mechanically applied without any type of discretionary judicial balancing.

The problem with this position is that it fails to take into account the Supreme Court's pronouncement in *Pennzoil Co. v. Texaco, Inc.*,[162] that *Younger* abstention is not always appropriate whenever a civil proceeding is pending in state court.[163] In *Pennzoil*, a jury returned a verdict against defendant Texaco for an amount in excess of $11 billion. Pursuant to Texas law the judgment gave Pennzoil significant rights allowing them to attach Texaco's property before appeal, unless a bond in excess of the judgment amount was posted. Texaco challenged the constitutionality of Texas' judgment lien and appeal bond provisions by initiating a federal action. The federal district court ultimately enjoined attempts to enforce the judgment or to obtain a lien.[164] The Supreme Court reversed, finding that *Younger* required the district court to abstain from hearing the constitutional claims. Nonetheless, the Supreme Court qualified its holding by stating that it "does not hold that *Younger* abstention is always appropriate whenever a civil proceeding is pending in a state court."[165] In other words, the *Pennzoil* Court recognized that federal courts must exercise discretion when making a decision regarding whether to abstain pursuant to *Younger*. The discretionary decision is necessarily made when an individual federal court weighs a state's interests in making the abstention decision.[166]

Drinking Emporium v. Tempe, 820 F.2d 1079 (9th Cir. 1987).

159. 874 F.2d at 711.

160. *See supra* text accompanying notes 61-64 (discussing the three prongs of the *Middlesex* test).

161. *Seneca-Cayuga Tribe of Oklahoma*, 874 F.2d at 711.

162. 481 U.S. 1 (1987).

163. *Id.* at 14 n.12.

164. *Id.* at 7.

165. *Id.* at 14 n.12.

166. *See* Schall v. Joyce, 885 F.2d 101, 109 (3d Cir. 1989) (stating that "*Pennzoil*'s limiting principle is its focus on the special interest that a state has in enforcing the orders and judgments of its courts").

Although *Younger* abstention may, at times, result from the mechanical application of the *Middlesex* test,[167] appellate review for abuse of discretion rightfully recognizes that the decision to abstain has traditionally been discretionary.[168] Abstention on *Younger* grounds is only appropriate when the state's interest is such that abstention will protect "'the authority of the [state] judicial system, so that its orders and judgments are not rendered nugatory.'"[169] Thus, while an appellate court may be in as good a position as a district court to decide whether or not abstention is appropriate, deference should be given to the district court's decision.[170]

Consequently, appellate review for abuse of discretion, as endorsed by the Second, Third, Fifth, and Eighth Circuits, is the better rule.[171]

IV. CRITICISMS OF ABSTENTION GENERALLY — *Younger* PARTICULARLY

A. Younger *Abstention is a Morass of Confusion*

"The doctrine, referred to by Justice Black in *Younger* as 'Our Federalism' has been variously characterized as one of comity, deference, equitable restraint, or abstention."[172] It has been applied to criminal,[173] quasi-criminal,[174] civil,[175] and administrative[176] proceedings. It has been invoked in state bar proceedings, proceedings brought to protect abused chil-

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167. Arguably, *Younger* can be mechanically applied in areas of the law such as bar proceedings where the state interest is always found to outweigh any countervening federal interest and where Supreme Court decisions have solidified, beyond question, the applicability of *Younger*.

168. *See Pennzoil*, 481 U.S. at 14 n.12 (indicating that *Younger* is discretionary).

169. *Id.* (quoting Judice v. Vail, 430 U.S. 327, 336 n.12 (1977)).

170. *See supra* text accompanying notes 145-46.

171. *See supra* notes 153-55.

172. Howard B. Stravitz, *Younger Abstention Reaches a Civil Maturity:* Pennzoil Co. v. Texaco Inc., 57 FORDHAM L. REVIEW 997, 998 (1989).

173. Younger v. Harris, 401 U.S. 37, 56 (1971).

174. Mannheim Video, Inc. v. County of Cook, 884 F.2d 1043, 1044 (7th Cir. 1989) ("*Younger*, which involved a state criminal prosecution, has been applied to quasi-criminal actions as well."), *cert. denied*, 110 S. Ct. 2561 (1990).

175. Huffman v. Pursue, Ltd., 420 U.S. 592, 594 (1975) (*Younger* abstention extended to civil proceedings).

176. Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627-29 (1986) (*Younger* abstention is applicable to administrative proceedings); Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 434-35 (1982).

dren, and contempt proceedings.[177] But, more importantly, it has been continuously and repeatedly litigated.

Today the doctrine is quite different from what it was when it was first formulated in *Younger*. Over the years the doctrine has been modified, developed, and even extended to areas of the law not contemplated when it was first created. Importantly, the doctrine is still developing and changing. However, with all this change comes uncertainty regarding the doctrine's application. Adding to the confusion, it has been suggested that the Supreme Court has made "arbitrary distinctions between cases"[178] and that comity has been used "as a device to obscure the lack of good reasons for [the] distinctions."[179] For all these reasons, *Younger* is a "doctrinal quagmire."[180]

Further contributing to the *Younger* confusion are the problems of misapplication and misinterpretation of the doctrine. Circuit courts have complicated the matter by combining two or more abstention doctrines. This is arguably what the Second, Third and Fourth Circuits did when they ruled that, pursuant to *Younger*, a district court should only stay its hand, rather than dismiss jurisdiction, in damage actions while "pending" proceedings are entertained in state court.[181] Requiring district courts to stay rather than dismiss an action, as these Circuits have done, blurs the distinction between *Younger* and *Pullman* abstention. The more indistinguishable categories of abstention become, the more difficult it is to meaningfully apply one rather than another. This does not mean, however, that the individual abstention doctrines are invalid or of no practical use. To the contrary, the rationale and need for the doctrines remains unchanged. But the value of these individual concepts decreases as the larger body of abstention law develops through a merging of the individual concepts.

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177. Robert B. Funkhouser et al., Texaco Inc. v. Pennzoil Co.: *Some Thoughts on the Limits of Federal Court Power Over State Court Proceedings*, 54 FORDHAM L. REVIEW 767, 806-07 (1986).

178. Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59, 60 (1981).

179. *Id.*

180. Stravitz, *supra* note 172, at 997.

181. *See* Crane v. Fauver, 762 F.2d 325, 329 (3d Cir. 1985); *supra* text accompanying notes 139-40.

Arguably, this is the current condition of *Burford* and *Younger* abstention. Under both of these abstention doctrines a court is required to dismiss an action outright. Moreover, since *NOPSI*, which made *Younger* applicable to administrative proceedings, both categories of abstention can be and are applied to administrative proceedings. Consequently, courts have at times, refused to distinguish between these two forms of abstention.[182]

The end result of merging and misapplying an abstention doctrine is further confusion. Importantly, confusion and lack of development of the *Younger* doctrine increases litigation of that doctrine which ensuingly escalates trial costs and delays the adjudication of the original issues in dispute. Notably, *Younger* litigation will continue to be voluminous until the doctrine matures and the confusion surrounding it dissipates. Nevertheless, because the "wheels of Justice" often grind slowly, it could be years until *Younger* abstention matures. Moreover, until *Younger* has fully matured, its application throughout the nation will be far from uniform. In the meantime, inequities stemming from application of the doctrine will result.[183] Thus, as numerous commentators have suggested, *Younger* abstention, and perhaps all of the abstention doctrines, should be statutorily reconstructed.[184]

B. "Judge-made [A]bstention [C]onstitutes [J]udicial [L]awmaking"[185]

As noted previously, abstention is a class of judicially created exceptions to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[186] "The federal courts have long assumed the authority to decline to exercise jurisdiction explicitly vested in them by Congress[,] . . . . even in the absence of legislative history or statu-

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182. *See, e.g.*, Bettencourt v. Board of Registration in Medicine, 904 F.2d 772, 779 (1st Cir. 1990).

183. *See* Alleghany Corp. v. Pomeroy, 898 F.2d 1314 (8th Cir. 1990); Alleghany Corp. v. McCartney, 896 F.2d 1138 (8th Cir. 1990); Alleghany Corp. v. Haase, 896 F.2d 1046 (7th Cir. 1990), *vacated as moot sub nom.*, Dillon v. Alleghany Corp., 111 S. Ct. 1383 (1991).

184. *E.g.*, Friedman, *supra* note 3, at 545; Lee & Wilkins, *supra* note 2, at 362.

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

186. *Colorado River*, 424 U.S. 800, 817 (1976).

tory language authorizing such a refusal to act."[187] Because the abstention doctrines are unsupported by legislative history or statutory language, they have been criticized as being a usurpation of congressional power.[188]

One factor that has aggravated the controversy surrounding the abstention doctrines is the "widespread perception that the forum of litigation may be as outcome-determinative as the underlying merits. This perception [whether justified or not] accounts for the importance of the abstention doctrines."[189] At the heart of this aggravated controversy is the problem of rejecting a plaintiff's otherwise valid choice of forums.[190] Traditionally, if jurisdictional qualifications are met, a plaintiff has the choice of litigating in federal or state court. Abstention denies a plaintiff's choice of forums.

The typical justifications given to support the rejection of a plaintiff's otherwise permissible choice of forums, is that it promotes comity and federalism, and is within the equitable powers of the court.[191] "[B]ut why these considerations often require a refusal to exercise congressionally granted jurisdiction, . . . is almost anyone's guess."[192] Abstention might be less controversial if not for the fact that the Constitution vests Congress with the power to determine the jurisdictional reaches of the "inferior" federal courts and to "ordain and establish" those courts.[193]

Younger and its progeny, however, fly in the face of both this constitutional vestiture of power and legislative action defining the jurisdictional reaches of the lower federal courts. Thus, the *Younger* abstention cases have been criticized as being contrary to, and inconsistent with, established legislative

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187. Redish, *supra* note 185, at 71.

188. *See* sources cited *supra* note 3.

189. Friedman, *supra* note 3, at 530; *see also* Michael G. Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings*, 66 N.C. L. REV. 49, 51 (1987) (noting that the presumption that state courts are as competent as federal courts to decide federal questions is hotly debated).

190. Kelly D. Hickman, Note, *Federal Court Abstention in Diversity of Citizenship Cases*, 62 S. CAL. L. REV. 1237, 1254 (1989).

191. Friedman, *supra* note 3, at 531; Hickman, *supra* note 190, at 1238 (footnotes omitted).

192. Friedman, *supra* note 3, at 531.

193. U.S. CONST. art. III, § 1.

history.[194] For example,

> The Anti-Injunction Act, a legislatively mandated abstention rule designed to further the same interests of federalism and comity upon which *Younger* is erected, . . . permits federal court injunctions where "expressly authorized by Act of Congress."[195] One of the express exceptions to the Anti-Injunction Act is 42 U.S.C. section 1983. Although "[t]he very purpose of section 1983 was to interpose the federal courts between the States and the people . . . to protect the people from unconstitutional action under color of state law," the Supreme Court has erected *Younger* abstention as an independent obstacle to section 1983 litigation. *Younger*, in short, operates to frustrate an assertion of federal jurisdiction authorized by Congress, notwithstanding an express congressional determination that abstention is inappropriate.[196]

The argument relied upon by proponents of the abstention doctrines is that Congress has acquiesced to judicially created abstention by failing to abrogate it when it reenacted relevant jurisdictional legislation.[197] Another argument is "that federal court jurisdiction to enforce federal constitutional rights contains an implied authority to modify or limit the exercise of that jurisdiction in order to avoid friction within the federal system."[198]

Nevertheless, the "reliance on a congressional failure to overrule a limiting judge-made doctrine, even in a recodification, effectively condones through legislative inertia what was initially an improper and unauthorized judicial usurpation of legislative authority."[199] Furthermore, such rationale fails to recognize that congressional inaction may be the result of oversight, inattention, or a crowded agenda, rather than an implied acquiescence.[200] Thus, even though "[a]n implied del-

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194. *See* sources cited *supra* note 3.

195. "28 U.S.C. § 2283 (1982). Section 2283 provides that a 'court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.' " Lee & Wilkins, *supra* note 2, at 367 n.272 (citation omitted).

196. Lee & Wilkins, *supra* note 2, at 367 (footnotes omitted).

197. Redish, *supra* note 185, at 81.

198. *Id.* at 80.

199. *Id.* at 82.

200. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 22-23 (1985).

egation argument . . . has been suggested as justification for both *Younger* and *Pullman* abstention[,] . . . . the argument fails to support either."[201] Consequently, because *Younger*, like all the judicially created abstention doctrines, has never been expressly, nor impliedly authorized by Congress, it "constitutes judicial lawmaking of the most sweeping nature" and is therefore inappropriate.[202]

V. CONCLUSION

Although the *Younger* doctrine is much more refined today than it was years ago, it is still confusing and troublesome to the plaintiff who wishes to litigate in federal court as well as to the law firm which cannot rely upon a single uniform federal law. Also troublesome is the fact that the appropriateness of abstention as a judicially created doctrine is questionable. Notwithstanding the confusion and the illegitimate foundations of *Younger* abstention, the doctrine is needed to promote comity and prevent duplicative litigation in federal and state courts.[203]

Nevertheless, in spite of its value in our federal system, the *Younger* doctrine is in desperate need of clarification. Realistically, however, full judicial development of the doctrine may be years away. Legislation, on the other hand, could immediately clarify applicational details, create uniformity that would reduce delays and injustices, and in general legitimize the abstention doctrines. Unfortunately, legislation will not likely be forthcoming.[204] Thus, *Younger* abstention is likely to remain a morass of confusion for years to come.

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201. Redish, *supra* note 185, at 84.
202. *Id.*
203. *See supra* text accompanying notes 45-57.
204. *Cf.* REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 48 (April 2, 1990) (recommending further study on legislative proposals reforming abstention, but taking no position on the proposals).