Duquesne Law Review

Volume 17 | Number 3 | Article 17

1978

Constitutional Law - Civil Rights Actions - Federal Court Review of State Statutes - Abstention

Jerry S. McDevitt

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation
Jerry S. McDevitt, *Constitutional Law - Civil Rights Actions - Federal Court Review of State Statutes - Abstention*, 17 Duq. L. Rev. 911 (1978).
Available at: https://dsc.duq.edu/dlr/vol17/iss3/17

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

CONSTITUTIONAL LAW — CIVIL RIGHTS ACTIONS — FEDERAL COURT REVIEW OF STATE STATUTES — ABSTENTION — The United States Court of Appeals for the Third Circuit has held that the *Younger* abstention doctrine does not bar a federal court from entertaining a civil rights action seeking injunctive relief against an ongoing state quiet title action since the state had not initiated the underlying state proceeding.

Johnson v. Kelly, 583 F.2d 1242 (3d Cir. 1978).

On October 21, 1975, Doris E. Johnson, Joseph Massey and Joseph and Mary Tunstall filed a proposed class action suit in the United States District Court for the Eastern District of Pennsylvania.[1] The basis of the action was section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.[2] The plaintiffs[3] were former owners of residential property located in Delaware County, Pennsylvania, whose property had been sold at a County Treasurer's tax sale[4] for the alleged nonpayment of local property taxes.[5] Named as defen-

1. Johnson v. Kelly, 436 F. Supp. 155 (E.D. Pa. 1977).

2. 42 U.S.C. § 1983 (1970) provides in relevant part:

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

3. Although the suit was brought in a single complaint, it involved three separate controversies concerning three separate properties. *See* notes 5 & 9 *infra*.

4. The sale was conducted pursuant to the Pennsylvania County Return Act, PA. STAT. ANN. tit. 72, §§ 5971 a - t (Purdon 1968). Section 5971g requires that the record owners of the property be notified prior to the date of sale by either certified or registered mail, as well as by newspaper publication. Further, the failure of the property owner to receive personal notice of the sale does not serve to prejudice the title acquired by the tax sale purchaser as long as the notice was properly sent.

In 1974, the authority of counties of the second class A, such as Delaware County, to collect their taxes pursuant to the County Return Act was withdrawn by the Act of July 3, 1974, Pub. L. No. 451 § 1, *as amended by* PA. STAT. ANN. tit. 72, § 5860.102 (Purdon Supp. 1978). As of January 1, 1976, this amendment required Delaware County to collect taxes pursuant only to PA. STAT. ANN. tit. 72, § 5860.101-.703. Neither statute contains the notice and hearing procedures which the plaintiffs claimed were required by due process. *See* 436 F. Supp. at 165 n.22.

5. Each of the named plaintiffs presented unique factual reasons for nonpayment of the taxes. *See* 436 F. Supp. at 159. The common assertion of all the plaintiffs was lack of notice as to the impending tax sale.

Notice of the tax sale was sent to the trustee of Johnson's property, who in turn forwarded the notice to Johnson by registered mail. After the sale, notice of Johnson's right to redeem the properties within two years, as provided by PA. STAT. ANN. tit. 72, § 5971o (Purdon 1968),

dants were Grace Building Company, Inc. and Curtis Building Co., Inc., the tax sale purchasers of the properties in question, as well as Robert F. Kelly, Prothonotary of the Delaware County Court of Common Pleas.[6] The plaintiffs requested a declaratory judgment stating that the tax sales held pursuant to the County Reform Act[7] violated due process in that the County Return Act neither required personal notification prior to the sales nor a judicial determination that the taxes were in fact delinquent.[8] Further, plaintiffs sought injunctive relief to prevent tax sale purchasers from commencing or proceeding with state court actions to quiet title to properties acquired as these tax sales,[9] as well as to restrain defendant Kelly from filing quiet title actions in his official capacity as Prothonotary of the Delaware County Court of Common Pleas.[10]

The district court concluded that in deference to the principles of

was again mailed to the trustee. The trustee forwarded this notice by registered mail to both Johnson and her attorney. 436 F. Supp. at 159. The Tunstalls were notified of the sale by certified mail, and the return receipt bore the signature of Mrs. Tunstall. After the sale, they too were informed of redemption rights by registered mail. *Id.* at 160. The Masseys were twice notified by certified mail of the impending sale. The first return receipt bore the signature of a daughter, and the second the signature of Mrs. Massey. Again, notice of redemption rights was mailed to the same address. *Id.* at 161. In each instance, the plaintiffs either denied receipt, had no recollection of it, or disputed the authenticity of the signatures.

6. *Id.* at 158.

7. *See* note 4 and accompanying text *supra.*

8. 436 F. Supp. at 157.

9. It was the contention of the plaintiffs that they first learned of the tax deficiencies upon notification of the quiet title actions instituted in state courts by Grace and Curtis. Despite personal service upon Johnson, she neither filed an answer nor in any way defended the quiet title action, thereby suffering a final judgment by default. *Id.* at 159. Service was made upon the Tunstalls in the quiet title action by leaving a copy of the complaint at their residence with their adult daughter. The Tunstalls likewise did not defend the action and also suffered a final judgment by default. *Id.* at 160. The trial in the quiet title action against Massey had not yet commenced when the federal suit was filed, and was being held in abeyance. *Id.* at 161.

Johnson's attorney did not learn that his client had suffered a default judgment until after the federal complaint was filed. He then filed a petition to have the default judgment opened in the Delaware County Court of Common Pleas. *Id.* at 159. The Tunstalls, in March of 1972, petitioned the Delaware County Court to reopen the default judgment against them, which the court granted. *Id.* at 160. A subsequent favorable trial verdict was reversed and remanded in Curtis Bldg. Co. v. Tunstall, 21 Pa. Commw. Ct. 81, 343 A.2d 389 (1975)(testimony that notice not received insufficient to overcome the presumption of regularity). Thus, when the federal complaint was filed, quiet title actions against all three named plaintiffs were pending in state courts.

10. Defendant Kelly became a Judge of the Delaware County Court of Common Pleas during the course of the federal action. Pursuant to Fed. R. Civ. P. 25(d)(1), E. Jack Ippoliti, the new Prothonotary, was substituted for Kelly. 436 F. Supp. at 167 n.30.

Younger v. Harris[11] and its progeny, it was constrained from reaching the merits and thus dismissed the complaint.[12] In arriving at this conclusion, the district court reviewed two judicially created abstention doctrines. First, the court held that *Pullman*[13] abstention was inapplicable as its purpose is to avoid needless adjudication of constitutional issues. Since, according to the district court, the County Return Act clearly did not provide for the two procedures which the plaintiffs argued were required by due process, there was no possibility of a state court construing the statute in a manner which would preclude the need to address the constitutional issues.[14] The second judicially created abstention doctrine, *Younger* abstention,[15] is based on notions of equity, comity and federalism.[16] Although the district court conceded that the *Younger* doctrine has not been held to apply to all civil litigation, it nonetheless insisted that the decision of the Supreme Court in *Trainor v. Hernandez*[17] indicated that the linchpin of *Younger* abstention is simply the

11. 401 U.S. 37 (1971) (federal courts forbidden to stay or enjoin pending state criminal prosecutions).

12. 436 F. Supp. at 158.

13. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). In *Pullman* abstention, federal jurisdiction is retained while the parties submit their claims to the state courts. After the relevant state statutes are construed, the federal court can then hear the constitutional claims if necessary. *Id.* at 501. *See also* note 18 *infra*.

14. 436 F. Supp. at 162.

15. 401 U.S. 37. This doctrine actually evolved from six cases decided the same day as *Younger.* The other five cases are Byrne v. Karalexis, 401 U.S. 216 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971) (no showing of irreparable injury sufficient to justify federal intervention when the federal plaintiff had not been threatened with prosecution); Samuels v. Mackell, 401 U.S. 66 (1971) (*Younger* principles apply when federal court asked to issue declaratory judgment).

16. The equitable restraint component of *Younger* follows the traditional equity maxim that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. 401 U.S. at 43. Among its purposes is to avoid duplication of legal proceedings where a single suit would be adequate to protect the rights asserted. *Id.*

The policy of equitable restraint is reinforced by an even more vital consideration—the notion of "comity"—which is a peculiar outgrowth of a federal system. Comity and federalism are synonymously defined as:

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

Id. at 44.

17. 431 U.S. 434 (1977) (federal court must abstain from interfering with an ongoing state civil enforcement proceeding).

pendency of a state proceeding.[18] The district court stated that abstention was appropriate if the state's underlying interest in the pending action was likely to be as great as it would be in a criminal proceeding.[19] Although the pending action in *Johnson* involved disputes between purely private parties, the court concluded that the state's interest in vindicating the validity of its official actions in conducting tax sales was nevertheless sufficient to warrant abstention.[20]

Plaintiffs Johnson and Massey,[21] on behalf of themselves and the class they sought to represent, appealed to the United States Court of Appeals for the Third Circuit which vacated the order of the district court.[22] Chief Judge Seitz, speaking for the court, held that outside the context of a challenge to civil contempt proceedings, the *Younger* doctrine should not be extended to cases in which the state proceedings have not been initiated by the state itself.[23] Moreover, Seitz stated that in reaching its decision the district court had improperly interpreted the Supreme Court's most recent pronouncement in *Trainor v. Hernandez*. The predominant feature in *Trainor*, as expressed in the plurality and concurring opinions, was the fact that the state had instituted the civil enforcement proceedings sought to be enjoined.[24] Since the jurisdictional limitation of the Federal Anti-Injunction Act[25] is inapplicable to cases brought pur-

18. 436 F. Supp. at 162. In contrast to *Pullman*, which requires a federal court to retain jurisdiction pending the state court resolution, *Younger* mandates outright dismissal of the federal action.

19. *Id.* at 164.

20. *Id.* at 165.

21. Although the Tunstalls presumably remained members of the proposed class the state quiet title action against them proceeded after the district court's dismissal and resulted in an adverse verdict. *See* Curtis Bldg. Co. v. Tunstall, 387 A.2d 1370 (Pa. Commw. Ct. 1978) (notice provisions of the County Return Act satisy due process; methods exist whereby the alleged tax delinquency can be challenged). The Tunstalls' petition for allocatur to the Pennsylvania Supreme Court was pending when the Third Circuit announced its opinion. Johnson v. Kelly, 583 F.2d 1242, 1244 n.1 (3d Cir. 1978). The Tunstalls had previously been through the state court system on the same matter. *See* note 9 *supra*.

22. Johnson v. Kelly, 583 F.2d 1242 (3d Cir. 1978).

23. *Id.* at 1249. *See* Juidice v. Vail, 430 U.S. 327 (1977) (federal court must abstain from interfering with ongoing state civil contempt proceeding).

24. 583 F.2d at 1249. In *Trainor*, Justice White wrote the plurality opinion, joined by the Chief Justice and Justices Powell and Rehnquist. Justice Blackmun concurred in the judgment. Justices Brennan, Stewart, Marshall and Stevens dissented.

25. 28 U.S.C. § 2283. The Act provides: "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

suant to section 1983,[26] and *Younger* abstention was inappropriate, Seitz concluded that the district court had jurisdiction which it was required to exercise.[27]

Chief Judge Seitz then reasoned that the extension of *Younger* principles to all civil litigation, coupled with the Supreme Court's definition of "pending state litigation" in *Hicks v. Miranda,*[28] would impose upon the section 1983 plaintiff a requirement of exhausting state judicial remedies. This, he postulated, would undermine the holding of *Monroe v. Pape,*[29] in which the Supreme Court held state judicial exhaustion is not required of a section 1983 plaintiff. Such a requirement would be inconsistent with his understanding of *Huffman v. Pursue, Ltd.*[30] concerning *Younger*'s relationship to section 1983 claims.[31]

Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.*

26. In Mitchum v. Foster, 407 U.S. 225 (1972), § 1983 actions for injunctive relief were held to be within the "expressly authorized by Act of Congress" exception to the prohibitions of § 2283. *See* note 25 *supra. Younger* was decided one year prior to *Mitchum* and had left open the possibility that in certain limited circumstances federal injunctive relief might be proper. These circumstances were great and irreparable harm to the federal plaintiff, the presence of a state law that was flagrantly or patently violative of express constitutional prohibitions, or evidence that the prosecution was brought in bad faith. 401 U.S. at 53.

In *Mitchum,* the district court held that § 2283 left it without power to act upon a § 1983 claim, if a state proceeding was then pending. The Supreme Court recognized that to affirm the district court would require that *Younger* be overruled, for if § 2283 were an absolute bar, then federal injunctive relief would not be proper even under the extreme circumstances specified in *Younger. See* 407 U.S. at 231. In finding § 1983 to be an "expressly authorized" exception to § 2283, the Court employed three criteria. First, the federal law need not expressly refer to § 2283 to qualify as an "expressly authorized" exception. Second, the federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as the exception. Third, in order to qualify as an "expressly authorized" exception to § 2283, the federal law must have created a specific and uniquely federal right or remedy which could be given its intended scope only by the stay of a state court proceeding. 407 U.S. at 237-38. Having determined that § 1983 met the above criteria, the Court indicated that *Younger* considerations would temper the use of federal injunctive power. *Id.* at 243.

27. 583 F.2d at 1250.

28. 422 U.S. 332, 349 (1975) (where state criminal proceedings are begun against the federal plaintiff after the federal complaint is filed, but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger* apply in full force).

29. 365 U.S. 167 (1961). For discussion reaching a contrary conclusion, see notes 90-92 and accompanying text *infra.*

30. 420 U.S. 592 (1975) (federal court must abstain from interfering with ongoing civil nuisance proceeding).

31. 583 F.2d at 1250 (citing Huffman v. Pursue, Ltd., 420 U.S. 592, 609 n.21 (1975)). *See* note 90 *infra.*

Despite its rejection of a state interest test for civil abstention, the court found that if that were to be a factor, the state's interest in quiet title actions between private litigants is minimal.[32] The interest of the state in the outcome of quiet title actions is not appreciably greater than its interest in any other private lawsuit in which state legislation is challenged on federal constitutional grounds.[33] Seitz thus reasoned that to dismiss a federal complaint in the face of such a lessened state interest was fundamentally inconsistent with the Congressional decision to create in section 1983 a federal forum for the adjudication of constitutional claims of the type presented by *Johnson v. Kelly.* Seitz concluded by relying upon the Supreme Court's admonition that abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it, and therefore held that the court erred in extending the *Younger* doctrine.[34]

Judge Aldisert dissented,[35] and in the process proffered a conceptual framework for the application of *Younger* abstention in a civil context. His analysis began with the premise that federal courts are required by *Younger* to withhold their power to enjoin state criminal proceedings. The only exception to this principle emerges when the federal plaintiff demonstrates the extraordinary circumstances that the danger of irreparable loss is both great and immediate and cannot be eliminated by his defense in a single state proceeding. In Aldisert's view, this exception to the *Younger* rule should form the basis of the test in civil cases as well.[36] He maintained that when the federal protection asserted by a federal plaintiff can be interposed by him as an effective defense in a state civil proceeding, a federal court should withhold its power to enjoin the state proceeding.[37]

32. 583 F.2d at 1251. The relief sought by the federal plaintiffs, in the event the County Return Act was found to be constitutionally deficient, was an extension of the two-year redemption period allowed by state law. *See* PA. STAT. ANN. tit. 72, § 5971o (Purdon 1968). The court stated that the effect such an extension would have upon the willingness of future purchasers to buy at tax sales was mere speculation, since purchasers were already faced with the potential exercise of redemption rights. Also, the court noted that Delaware County was no longer conducting tax sales pursuant to the County Return Act. 583 F.2d at 1251. *But cf.* note 4 *supra* (neither the past nor the present taxing statute contains the notice and hearing procedures which the federal plaintiffs claim are required by due process).

33. 583 F.2d at 1251-52.

34. *Id.* at 1252 (citations omitted).

35. *Id.* (Aldisert, J., dissenting).

36. *Id.*

37. *Id.* Implicit in this statement is a different reading of the significance of *Monroe v.*

Aldisert noted that prior to the Supreme Court's decision in *Mitchum v. Foster,*[38] the legislative authority for a federal court to enjoin a state court proceeding was never addressed. The exercise of federal injunctive power, until *Mitchum,* was contrary to the express prohibition contained within the Federal Anti-Injunction Act. The source for both creating this exception to the Congressional mandate in the Anti-Injunction Act, and then restricting its application in *Younger,* was raw judicial power.[39] Only after the judicial power was exercised, then restrained, did *Mitchum* explain its source. Since *Mitchum* represents the only principled statement of how this judicial power is derived from section 1983 as an "expressly authorized" exception to the Anti-Injunction Act,[40] Aldisert stated that *Mitchum* is as important as *Younger,* for it is *Mitchum* that determines federal subject matter jurisdiction in state court injunction cases.[41] Although *Mitchum* declared that section 1983 was an "expressly authorized" exception to the Anti-Injunction Act, the *Mitchum* Court was careful to qualify the application of section 1983 as an exception by expressly reaffirming that the *Younger* principles of equity, comity, and federalism would restrain the exercise

---

Pape than that adopted by the majority. Aldisert did not view *Monroe* as authorizing the conversion of a federal defense in a state court to a federal cause of action in a federal court.

38. 407 U.S. 225 (1972). For a detailed discussion of *Mitchum,* see note 26 and accompanying text *supra.*

39. 583 F.2d at 1253 (Aldisert, J., dissenting). Ex Parte Young, 209 U.S. 123 (1908), recognized the authority of federal courts to enjoin state officers from instituting a state proceeding to enforce statutes found to be in violation of the federal constitution. This federal power to enjoin commencement of state proceedings made no distinction between criminal and civil proceedings. *Id.* Aldisert contended that this judicially created exception reached its zenith in Dombroski v. Pfister, 380 U.S. 479 (1965), in which the Court held federal injunctive relief to be permissible when the federal plaintiff alleged a threat of irreparable loss of his federally protected rights.

In Harkrader v. Wadley, 172 U.S. 148 (1898), one of the few early cases to apply the predecessor of the current Anti-Injunction Act, the Court construed the Act as forbidding injunctions not only against state courts, but also against state officials who were litigating the pending state court proceeding. Neither *Young* nor *Dombroski* deviate from that principle. Rather, they treat the threat of unwarranted prosecutions as being akin to a trespass, and the prohibitions of the Anti-Injunction Act do not bar the prevention of this "trepass" so long as actual proceedings in the state court have not begun. *See* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 966 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

40. *See* note 26 *supra.* Aldisert refers critically to "the Supreme Court's unabashed love affair" with § 1983 in Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload,* 1973 ARIZ. ST. L.J. 557, 563.

41. 583 F.2d at 1254 (Aldisert, J., dissenting).

of federal injunctive powers.[42] Therefore, Aldisert saw no barrier to applying *Younger* principles to civil cases, especially since *Mitchum* itself was a civil case.[43]

Aldisert next maintained that the most vital consideration behind the *Younger* doctrine, that of comity, or the proper respect for state court functions, is equally as pertinent in a civil context as it is in the criminal context.[44] He observed that even *Ex Parte Young,*[45] which sanctioned the use of the fourteenth amendment to halt, as well as defend against, unlawful state action, explicitly stated that a federal court could not interfere where the proceedings were already pending in a state court.[46]

Judge Aldisert also questioned the majority's dispositive reliance upon *Trainor,* particularly its reliance upon Justice Blackmun's concurring opinion, since Blackmun neither discussed the limitations on federal intervention set forth in *Mitchum,* nor responded to Justice Stevens' observations.[47] In *Trainor,* Stevens maintained in dissent that when the state is a party to the pending proceedings, a point of controlling significance to Chief Judge Seitz, it should be *less* objectionable to have the constitutional issue adjudicated in a federal forum then if only private litigants are involved. Stevens believed it to be untenable that abstention is proper only if the state is a party, unless federalism requires greater deference to a state's own prosecutorial interest than to its interest in providing a forum for others in the community.[48]

Contrary to the majority, Aldisert reasoned that the approach taken by Justice Stevens in *Trainor* should form the centerpiece of a civil abstention doctrine.[49] Stevens had dissented because the state procedure did not afford a plain, speedy, and efficient remedy

---

42. 407 U.S. at 243. The Court stated that "we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *See also* note 26 *supra.*

43. 583 F.2d at 1255. (Aldisert, J., dissenting). In *Mitchum,* the prosecuting attorney of Bay County, Florida, initiated a proceeding in a Florida state court to close down a bookstore as a public nuisance under Florida law. 407 U.S. at 227. *Mitchum* was a civil proceeding in the same sense that *Huffman* was a civil proceeding. Insofar as the state was a party in *Mitchum,* it is distinguishable from *Johnson.*

44. 583 F.2d at 1256 (Aldisert, J., dissenting) (citations omitted).

45. 209 U.S. 123 (1908). *See* note 39 and accompanying text *supra.*

46. 583 F.2d at 1256 (Aldisert, J., dissenting).

47. *Id.*

48. 431 U.S. at 464 (Stevens, J., dissenting) (emphasis in original).

49. 583 F.2d at 1257 n.7 (Aldisert, J., dissenting).

for the plaintiffs' federal claim.[50] Based upon Stevens' approach, Aldisert considered the availability of a state forum in which a federal plaintiff could assert his federal defense to be the key factor of a civil abstention doctrine.[51] While ostensibly rejecting Justice Blackmun's pronounced state interest test articulated in *Trainor*, Aldisert insisted that even if the test were so conceptualized, the state has a pronounced interest in maintaining the viability and integrity of its own court system.[52]

Judge Aldisert concluded with the historical note that at no time before or after *Mitchum* had the Supreme Court permitted federal courts to enjoin state civil proceedings solely on the strength of section 1983 subject matter jurisdiction. In order for a federal court to intervene with an ongoing state proceeding, the Supreme Court has always insisted that the federal plaintiff prove that exceptional circumstances are present whch warrant federal intervention.[53]

At its inception, the *Younger* doctrine was a federal policy whereby federal courts declined to exercise jurisdiction when requested to enjoin a pending state criminal proceeding.[54] The *Younger* Court explicitly stated that only by the exercise of a judicial exception to the Anti-Injunction Act could federal courts lay claim to the power to enjoin a state proceeding.[55] This judicial exception, which the Court acknowledged, would not be invoked absent a showing of absolute necessity, which required proof of irreparable injury that was both great and immediate.[56] Although recognizing the availability of a federal injunctive power in extraordinary circumstances, the Court clearly indicated that when federal courts are asked to enjoin pending proceedings in state courts they normally should refrain from issuing the injunction.[57] *Mitchum v. Foster* reaffirmed the availability of a federal power to enjoin state proceedings, but significantly did so on the basis that the source of the power was legislative in nature, in that section 1983 was held to be an "expressly authorized" exception to the Anti-Injunction Act.[58]

50. 431 U.S. at 470 (Stevens, J., dissenting).
51. 583 F.2d at 1257 (Aldisert, J., dissenting). *See* note 79 and acompanying text *infra*.
52. 583 F.2d at 1257 (Aldisert, J., dissenting).
53. *Id.* at 1258.
54. 401 U.S. 37 (1971). *See* notes 11 & 15 *supra*.
55. *Id.* at 43.
56. *Id.* at 45.
57. *Id.*
58. 407 U.S. at 243. *See also* note 26 *supra*.

However, the power to enjoin was to be exercised only in the extreme circumstances specified in *Younger.*[59]

Since *Younger,* federal courts have been required to withhold their injunctive powers in non-criminal state proceedings as a result of the Supreme Court's decisions in *Huffman v. Pursue, Ltd.,*[60] *Juidice v. Vail,*[61] and *Trainor v. Hernandez.*[62] In *Huffman,* the court noted that the matter before them was more akin to a criminal matter than a civil proceeding, yet stated that the comity and federalism aspect of *Younger* applied to a civil proceeding in much the same manner as it does to a criminal proceeding.[63] Thus, *Younger* abstention was held to be appropriate when the state sought to enforce a public nuisance statute.[64]

In holding that *Younger* abstention was appropriate even if the state statute in question could not be deemed criminal or quasi-criminal in nature,[65] *Juidice* further extended the doctrine into the civil area. Under the statutory scheme at issue in *Juidice,* a judgment debtor who failed to appear at a deposition to give information relevant to satisfaction of the judgment could be held in contempt of court.[66] The fine imposed upon the debtor was payable to the creditor who had brought the action.[67] In no way was the state a party in *Juidice* other than to provide a forum for private parties engaged in a monetary dispute. The *Juidice* Court stated that the more vital consideration behind the *Younger* doctrine is comity,[68] which is implicated by federal interference that reflects negatively upon the state courts' ability to adjudicate federal constitutional principles.[69] Abstention was thus proper in the context of a challenge to the state civil contempt proceedings, since the vindication of state judicial authority was at stake.[70]

In *Trainor,* the state brought a civil action in state court seeking a return of welfare payments alleged to have been wrongfully re-

59. *Id. See* text accompanying note 56 *supra.*
60. 420 U.S. 592 (1975). *See* note 30 *supra.*
61. 430 U.S. 327 (1977). *See* note 23 and accompanying text *supra.*
62. 431 U.S. 434 (1977). *See note 17 supra.*
63. 420 U.S. at 604.
64. *Id.*
65. Juidice v. Vail, 430 U.S. 327, 335 (1977).
66. *Id.* at 329.
67. *Id.* at 330.
68. *Id.* at 334. For the definition of comity, see note 16 *supra.*
69. *Id.* at 336. *See also* note 95 and accompanying text *infra.*
70. *Id.* at 335.

ceived. Pursuant to state law, a writ of attachment was executed against the property of the federal plaintiffs without notice or hearing.[71] A divided Court held that *Younger* applied to an ongoing civil enforcement proceeding brought by the state so long as the constitutional challenge to the state's attachment statute could be raised as a defense in the state proceeding.[72]

In the three principle Supreme Court decisions concerning the application of *Younger* in a civil context, the court has explicitly deferred ruling on the extent to which the abstention doctrine applies in civil proceedings, thereby leaving its development to the lower federal courts.[73] By taking the position that it did in *Johnson,* the Third Circuit has refused to extend *Younger* any further than absolutely required by these Supreme Court precedents. Such a narrow reading of those cases seems unwarranted, for in each instance that the Supreme Court extended the *Younger* doctrine, it rejected a mechanical application by the lower federal courts of its previous decisions, conducting instead a searching analysis of the need for federal intervention under the specific facts of the case.[74]

The majority also failed to draw an adequate factual distinction between *Juidice* and *Johnson.* In *Juidice,* the state was not a party

71. 431 U.S. 434, 436 (1977).

72. *Id.* at 446.

73. *See, e.g.,* Trainor v. Hernandez, 431 U.S. 434, 444 n.8 (1977); Juidice v. Vail, 430 U.S. 327, 336 n.13 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 607 (1975).

For examples of the application of *Younger* to pending state civil proceedings, see Duke v. Texas, 477 F.2d 244, 252 (5th Cir. 1973), *cert. denied,* 415 U.S. 978 (1974) (invocation of jurisdiction of federal district court after state trial court had entered its order was no more than the exercise of appellate jurisdiction by a federal court vested only with original jurisdiction); Lynch v. Snepp. 472 F.2d 769 (4th Cir. 1973), *cert. denied,* 415 U.S. 983 (1974); Cousins v. Wigoda, 463 F.2d 603 (7th Cir.), *stay denied,* 409 U.S. 1201 (Rehnquist, Circuit Justice, 1972) (plausible claim of constitutional infringement insufficient to enjoin state proceedings). For cases applying *Younger* to disputes between private parties, see cases cited in Johnson v. Kelly, 436 F. Supp. 155, 165 (E.D. Pa. 1977).

74. The development of the state interest test follows a pattern of admitting that the state's interest is not as great in the case under consideration as it was in previous precedents, yet is significant enough to warrant abstention. In *Huffman,* the state's interest in its criminal justice system was not present as in *Younger,* yet "an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding." 420 U.S. at 604. In *Juidice,* the state's interest in its contempt process was "not quite as important as is the State's interest in the enforcement of its criminal laws, *Younger,* . . . or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman* . . . . But we think it is of sufficiently great import as to require application of the principles of those cases." 430 U.S. at 335. *Accord,* Trainor v. Hernandez, 431 U.S. 434, 444 (1977).

to the proceedings enjoined by the district court.[75] In an effort to show that the state was a party in *Juidice,* the *Johnson* majority merely stated that by exercising his power of civil contempt, a state court judge becomes a real party to the proceedings in a unique way.[76] Moreover, the *Johnson* court maintained that an injunction against the exercise of a state judge's contempt power implicates the comity strand of *Younger* to a far greater extent that does an injunction preventing private litigants from pursuing quiet title actions in state court.[77] The court failed to explain, however, why a challenge to a single judicial power, albeit an important one, implicates the comity strand of *Younger* to a greater degree than does a challenge to the entire judicial function of a state court. The holding of *Juidice* was dictated by respect for the judicial function, not the importance of the challenged judicial power. This is illustrated by the manner in which the *Juidice* Court phrased the issue, which questioned whether it was proper to entertain the federal plaintiff's 1983 action when the state provided an available forum to raise constitutional issues.[78] In answering that it was not proper, the *Juidice* Court stated that to invoke *Younger* abstention no more was required than the *opportunity* to present federal claims in a state proceeding.[79] The *Johnson* decision curiously ignored this factor, since not only could the federal plaintiffs have raised the defense in state court; one had already done so.[80]

Thus, while *Juidice* indicates that the state need not be a party in the pending proceeding for *Younger* abstention to apply, the *Johnson* court relied upon *Trainor* as establishing that abstention is proper only when the state is a party. The district court in *Trainor*

75. 430 U.S. at 330. *See* text accompanying notes 67 & 68 *supra.*

76. 583 F.2d at 1249.

77. *Id.*

78. 430 U.S. at 330.

79. *Id.* at 337 (emphasis in original). The Delaware County Court of Common Pleas, in which the quiet title actions were pending, specifically allowed the Tunstalls to amend their complaint to place at issue the constitutionality of the notice provisions of the County Return Act. Each of the Tunstalls due process arguments was addressed by a state appellate court. *See* note 21 *supra.* The due process arguments raised by the Tunstalls in the state courts were identical with those raised in the federal action by the proposed class. *Compare* Curtis Bldg. Co. v. Tunstall, 387 A.2d 1370, 1371-72 (Pa. Commw. Ct. 1978) *with* Johnson v. Kelly, 583 F.2d 1242, 1245 (3d Cir. 1978). There can be no serious contention that the state courts would not or did not provide a forum in a timely fashion to hear the constitutional arguments.

80. The *Johnson* Court noted without comment the status of the Tunstalls' case in the Pennsylvania courts. 583 F.2d at 1244 n.1. *See also* note 79 and accompanying text *supra.*

had discounted the importance of the state's presence in the suit as mere happenstance, since the challenged state Attachment Act allowed a private cause of action as well.[81] Justice White answered this by stressing the fact that although several options were available, the state chose a civil enforcement procedure to safeguard its interests, and therefore the statutory scheme was of obvious importance to the state.[82] If White perceived abstention to be proper solely because the state was a party, the remainder of his analysis would have been unnecessary. White's opinion clearly indicated that it is the state's interest, and not their presence, which is the paramount consideration. The state's presence in *Trainor* only made their interest more obvious. Justice Blackmun's concurrence followed similar reasoning, with the primary inquiry focusing on the substantiality of the state's interest.[83] Thus, *Trainor* in no way suggested that notions of comity are disengaged when the state is not a party litigant.

As it did in *Juidice,* the *Trainor* Court phrased the issue for decision in a manner that questioned the appropriateness of federal intervention when the federal plaintiff could tender his federal claims as a defense in the ongoing state proceedings.[84] Again the Court concluded that the pendency of the state court proceeding called for federal restraint, unless extraordinary circumstances were present warranting federal interference or unless the state did not provide a forum to litigate federal due process claims.[85] The emerging concept behind the Supreme Court cases in this area is that once the state court has shown a willingness to hear the federal claim, it should have the opportunity to do so,[86] including apellate review to correct errors committed by the trial courts.[87] Resort to the federal

81. 431 U.S. at 439. After finding that the challenged statute authorized private, as well as public suits, the district court in *Trainor* mechanically applied *Huffman v. Pursue, Ltd.*, concluding that *Huffman* required abstention only when the challenged statute gave an exclusive right of action to the state. *Id.*

82. *Id.* at 444.

83. *Id.* at 448. (Blackmun, J., concurring).

84. *Id.* at 440.

85. *Id.* at 446. It is significant that the *Trainor* Court did not know if the federal plaintiffs could raise their federal due process claims in the state courts. Having rejected all other reasons for federal intervention, the Court ordered the district court on remand to inquire into the availability of a state forum. *Id.* at 447. This disposition in *Trainor* was a departure from earlier decisions which held that the federal court must provide relief when the availability of a state remedy is uncertain. *See* 431 U.S. at 465 (Stevens, J., dissenting).

86. *See* Juidice v. Vail, 430 U.S. 327, 337 (1977).

87. *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 608 (1975). Aside from the negative

system is to occur only after exhaustion of state review, and then only by the United States Supreme Court.[88]

Perhaps the *Johnson* majority's most serious flaw is in its statement that *Monroe v. Pape* would be undermined by an extension of *Younger* principles to all civil litigation.[89] This, the *Johnson* court said, would be inconsistent with the dictates of *Huffman* concerning the application of the *Younger* doctrine to Civil Rights actions.[90] However, *Monroe* simply made available the federal courts to persons whose federal rights had been violated by state officials, with section 1983 providing subject matter jurisdiction.[91] In *Monroe,* there was no state proceeding pending against the federal plaintiff. The issue was simply whether the federal plaintiff has to initiate his cause of action in the state courts if state law provided a remedy, not whether he had to defend an ongoing proceeding.[92] *Monroe* is not undermined by *Younger* for the simple reason that the essential requisite for *Younger* abstention, pendency of state court action, was lacking in *Monroe.*[93] Thus viewed, *Monroe* fails to implicate that aspect of *Younger* which the Supreme Court has found increasingly distasteful; that is, disrespect for state court functions,[94] the foremost of which is to adjudicate federal constitutional challenges

---

inferences upon state appellate courts that the alternative would provide, the fact that federal courts do not have the same latitude in narrowing state statutes as do state courts is behind the requirement. *See* Trainor v. Hernandez, 431 U.S. 434, 445 (1977).

88. Where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to the United States Supreme Court is available as a matter or right. 28 U.S.C. § 1257(2) (1970). *See also* Huffman v. Pursue, Ltd., 420 U.S. 592, 606 (1975).

89. 583 F.2d at 1250.

90. *Id.* (citing 420 U.S. at 609 n.21). The precise quote relied upon by the *Johnson* court for this statement reads:

> By requiring exhaustion of state appellate remedies for the purposes of applying *Younger,* we in no way undermine *Monroe v. Pape.* . . . There we held that one seeking redress under 42 U.S.C. § 1983 for a deprivation of federal rights need not *first initiate* state proceedings . . . *Monroe v. Pape had nothing to do with the problem presently before us,* that of the deference to be accorded state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues.

420 U.S. at 609 n.21 (emphasis added). *But see* note 96 and accompanying text *infra.*

91. 365 U.S. at 167-68.

92. *Id.* at 172.

93. *See* Steffel v. Thompson, 415 U.S. 452, 462 (1974) (*Younger* principles have little force in the absence of a state proceeding).

94. *See, e.g.,* Juidice v. Vail, 430 U.S. 327, 337 (1977), where Justice White indicated that the state need not bring the federal plaintiff before it "by force" for *Younger* to apply.

to its laws.[95] The *Johnson* court completely misread *Huffman,* which made it clear that *Monroe* held only that the potential section 1983 plaintiff need not first initiate, as a state *plaintiff,* a state cause of action that parallels the federal remedy.[96] That the Supreme Court does not view a *Younger* extension to civil actions as undermining *Monroe* is further supported by its statement in *Huffman* that *Monroe* had nothing to do with the deference to be accorded state proceedings already initiated in which a competent tribunal was afforded for the resolution of federal issues.[97]

In holding that abstention should not apply in civil actions unless the state is a party to the proceedings, *Johnson v. Kelly* represents a philosophy inconsistent with the underlying policy of the *Younger* doctrine, which involves a growing respect for the competency of state courts to adjudicate federal constitutional claims.[98] *Juidice v. Vail* represents the zenith of this attitude, in that state courts were asked to pass upon the constitutionality of one of their own powers.[99] *Johnson,* however, allows a party to have a federal court intervene in a state civil proceeding upon a bare allegation of naked section 1983 subject-matter jurisdiction, with no more than a fourteenth amendment claim.[100] Yet in each section 1983 case the Supreme Court has decided in which there was a pending state proceeding, it has required the plaintiff to demonstrate either extraordinary

95. U.S.CONST. art VI, § 2 provides in part: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the land; and the judges in every state shall be bound thereby . . . ." *See* Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975), where the Court expressed the view that the Supreme Court will not assume state judges are unfaithful in this constitutional obligation.

96. *See* note 90 and accompanying text *supra.* The viability of *Monroe,* even when construed in this manner, is not without doubt. In Paul v. Davis, 424 U.S. 693 (1976), a § 1983 plaintiff with a presumptive due process claim was remanded to the state courts to *initiate* what the Court considered to be classical cause of action for defamation. *Id.* at 697. *Monroe* was distinguished as stating a valid federal complaint under the fourteenth amendment because the plaintiff also alleged a violation of a specific constitutional guarantee, the fourth amendment sanction against unreasonable search and seizure.

97. *See* note 90 *supra.*

98. *See, e.g.,* Trainor v. Hernandez, 431 U.S. 434, 446 (1977); Juidice v. Vail, 430 U.S. 327, 336 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975).

99. 430 U.S. 327 (1977). *See* text accompanying notes 75-77 *supra.*

100. It has been suggested that the very language of § 1983 implicates those aspects of comity at the core of the *Younger* doctrine. When utilized to enjoin a pending state court proceeding, it is an assertion that the state courts have been deficient in guaranteeing constitutional rights, or have actively engaged in the denial of these rights. *See* Gunther, *The Supreme Court 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 217 (1972).

circumstances, bad faith of state officials, or lack of an efficient state remedy as a prerequisite to federal intervention.[101] Arguably, this sort of proof is necessary for proper subject matter jurisdiction, since if the state courts are protecting federal rights, the material allegation of a 1983 claim is inoperative.[102] At a minimum, a requirement for such proof also alters the analytical starting point from a presumption of state court indifference to one of state court sensitivity to federal constitutional claims. The motivating force behind section 1983's enactment was not incompetence, but indifference, a distinction wholly lost if a naked 1983 claim is sufficient to enjoin a state court proceeding.[103]

The essential question raised by *Younger* is what factors need to be present for the federal courts to intervene in a purely civil setting. The *Johnson* majority's answer was that it is proper to intervene on all occasions when the state has not initiated the underlying proceeding.[104] Yet of those factors identified in *Younger* and its progeny to be sufficient to warrant federal intervention, only one ought to be of federal concern in a purely private civil action, that being whether the federal constitutional claim can be raised in the state court.[105] Bad faith prosecutions or harassment by state officials are not at issue when one private citizen sues another. The federal challenge in *Johnson* was not to the conduct of a state plaintiff, but solely to the constitutionality of a state law.[106] The state courts were asked only to render a dispassionate judgment about procedures employed in conducting a tax sale. Federal intervention in that context can reflect nothing but a negative inference upon the competency of state courts. In permitting such intervention, the

101. 583 F.2d at 1258 (Aldisert, J., dissenting). For a typical review of the circumstances that warrant federal relief, see Trainor v Hernandez, 431 U.S. 434, 446 (1977). *See also* the dissenting opinion of Justice Harlan in Dombroski v. Pfister, 380 U.S. 479, 499 (1965) (Harlan, J., dissenting), in which he stated that the assumption that state courts are not as prone as federal courts to vindicate constitutional rights is especially unwarranted absent a showing that such is true in the given case. Harlan's view was that a § 1983 claim did not justify federal intervention if it alleged that state officials were acting badly, but rather only if the state courts were acting badly could federal intervention be justified. *Id.*

102. *See* notes 2 & 101 *supra.*

103. *See generally* Mitchum v. Foster, 407 U.S. 225, 241-42 (1972).

104. 583 F.2d at 1249.

105. This is the cornerstone of Aldisert's test in *Johnson.* 583 F.2d at 1257. *See* text accompanying note 51 *supra.* This factor is also absolutely essential before a federal court can abstain, for the ability to decide correctly assumes a willingness to hear the federal claim.

106. *See* text accompanying note 8 *supra.*

Johnson decision not only denigrates efficient jurisprudence,[107] but introduces an unnecessary strain upon federal-state relations.[108]

Jerry S. McDevitt

---

107. The Tunstalls had a default judgment removed, two trials, two reviews of these trials at an appellate level and a petition for allocatur pending in the Pennsylvania Supreme Court before the *Johnson* Court rendered its decision. *See* 583 F.2d at 1244 n.1 and notes 9 & 22 *supra*. After the *Johnson* court's decision, the Tunstall's petition for allocatur was denied. Curtis Bldg. Co. v. Tunstall, 387 A.2d 1370 (Pa. Commw. Ct. 1978), *allocatur denied,* No. 3746 (Nov. 15, 1978). This is a final judgment for purposes of appeal to the United States Supreme Court. 28 U.S.C. § 1257(2) (1970). *See* HART & WECHSLER, note 39 *supra*. No appeal as of right, pursuant to § 1257(2), was taken, nor was a petition for certiorari filed pursuant to 28 U.S.C. § 1257(3) (1970).

When the federal complaint is resumed in district court, aside from possible issue preclusion arguments, the court will have to address the class certification issue in light of the possibility that res judicata bars the Tunstalls from becoming members of the proposed class. *See* Huffman V. Pursue, Ltd., 420 U.S. 592, 606 n.18 (1975).

108. In his dissent in *Monroe v. Pape,* Justice Frankfurter foresaw the potential problems that section 1983 would create, remarking:

> We cannot expect to create an effective means of protection for human liberties by torturing an 1871 statute to meet the problems of 1960 . . . It is very queer to try to protect human rights in the middle of the Twentieth Century by a leftover from the days of General Grant.

365 U.S. 167, 244 (1960) (Frankfurter, J., dissenting) (citations omitted).