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Abstaining Equitably

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The doctrine of Younger *abstention—which counsels federal courts not to interrupt ongoing state criminal proceedings—balances dueling considerations. On the one hand, the doctrine preserves federal courts' ability to exercise Congressionally conferred, properly invoked jurisdiction to prevent irreparable violations of the federal constitution. On the other, the doctrine provides space for autonomous state courts to carry out their traditional role in the realm of criminal justice. This Essay identifies four central features of the* Younger *doctrine that maintain this balance. By protecting these features, federal courts can ensure that* Younger *remains a doctrine of equitable restraint, instead of inequitable abdication.*

First, the Supreme Court has narrowly construed what it means to interfere with an ongoing proceeding. Not all federal legal proceedings that run parallel to a criminal proceeding should be classified as "interference." Second, the Court does not stay its hand when an underlying proceeding fails to provide adequate opportunity to raise federal claims. Third, the Court has constructed a set of related exceptions to Younger *to ensure that federal courts do not abdicate their role in abating irreparable harm. Fourth, the Court has rejected a general exhaustion requirement in Section 1983 suit, except when a trial and appeal form the same unitary process. Put differently, a federal plaintiff need not avail oneself of every available state proceeding. One has a choice of a federal or state forum. Preserving this choice is crucial to ensuring that restraint does not morph into total abdication.*

There is a pressing need to reaffirm these four tenets in light of recent lower court developments that have the potential to undermine the Supreme Court's careful balance.

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INTRODUCTION

The majestic, enigmatic phrase "Our Federalism" is a consistent refrain in the world of constitutional law and federal jurisdiction.[1] There is less written, however, about the case that gave birth to this phrase, and the brand of abstention that opinion announced. Under *Younger v. Harris*—and resultant doctrine of *Younger* abstention—federal courts may not disrupt an ongoing state criminal proceeding by means of an injunction or declaratory judgment if that state proceeding provides an adequate opportunity for the aggrieved party to raise federal constitutional objections.[2]

This doctrine reconciles two dueling concepts that animate federal courts: obligations and restraint. Dating back to the early nineteenth century, federal courts have long insisted that they have an obligation to entertain federal cases within their jurisdiction,[3] and to provide federal equitable remedies that abate irreparable harm.[4] Further, during the Reconstruction era, Congress extended those obligations to settings in which state and local actors violate federal rights.[5] On the other hand, federal courts are also mindful of comity—the idea that federal courts should show due respect toward, and avoid

1 *See, e.g.*, Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. CHI. LEGAL F. 113, 113 (2015) ("[T]he debate over 'our federalism' is a longstanding one . . . ."); John Minor Wisdom, *Foreword: The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1063, 1077 (1984) ("The New Federalism is not the federalism of the Framers. It would have shocked Madison and Hamilton. John Marshall could not have lived with it. It involves a recognition of states' rights that seems to extend beyond 'Our Federalism' of Justice Black.").

2 *See* Younger v. Harris, 401 U.S. 37, 44 (1971).

3 *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); *see also* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845 (2017).

4 *See generally* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

5 *See* Patsy v. Bd. of Regents, 457 U.S. 496, 504 (1982) ("The 1871 Congress intended § 1 to 'throw[] open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights . . . and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary.") (quoting CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871) (statement of Rep. Lowe)); *see also* Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057 (2022).

unnecessary friction with, the states.[6] As the Reconstruction Amendments from the nineteenth century took hold during the twentieth century,[7] the role of federal courts substantially grew, an expansion that was tempered by comity-informed restraint.

Younger abstention balances these competing considerations. The doctrine ideally preserves federal courts' ability to prevent irreparable harm, while providing space for autonomous state courts to carry out their traditional role in the realm of criminal justice. This Essay identifies four central features of the *Younger* doctrine that maintain this balance. By protecting these features, we can ensure that *Younger* remains a doctrine of equitable restraint, instead of inequitable abdication.

First, the Supreme Court has narrowly construed what it means to interfere with an ongoing proceeding.[8] Not all federal legal proceedings that run parallel to a criminal proceeding should be classified as "interference." Second, the Court does not stay its hand when an underlying proceeding fails to provide adequate opportunity to raise federal claims.[9] Third, the Court has constructed a set of related exceptions to *Younger* to ensure that federal courts do not abdicate their role in abating irreparable harm.[10] Fourth, the Court has rejected a general exhaustion requirement in § 1983 suits, except when a trial and appeal form the same unitary process.[11] Put differently, a federal plaintiff need not avail oneself of every available state proceeding. She has a choice of a federal or state forum. Preserving this choice is crucial to ensuring that restraint does not morph into total abdication.

There is a pressing need to reaffirm these four tenets in light of recent lower court developments that have the potential to undermine the Supreme Court's careful balance.

In an article published four years ago, *Abstention in the Time of Ferguson*, I wrote about a series of recent cases challenging state and local systems that criminalize poverty. This Essay offers something of a descriptive update. In the past several years, federal appellate courts have rejected *Younger* defenses when plaintiffs have challenged criminal justice processes that effectively incarcerate indigent persons

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6 *Younger*, 401 U.S. at 44.

7 *See generally* Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2290–93 (2018).

8 *See* Gerstein v. Pugh, 420 U.S. 103 (1975).

9 *See* Gibson v. Berryhill, 411 U.S. 564 (1973).

10 Smith, *supra* note 7, at 2296 (describing these exceptions).

11 *See* Patsy v. Bd. of Regents, 457 U.S. 496, 502–07 (1982); Huffman v. Pursue, Ltd., 420 U.S. 592, 607–08 (1975); *see also* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 369 (1989) ("For *Younger* purposes, the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in midprocess would demonstrate a lack of respect for the State as sovereign.").

who cannot afford bail, fines, or fees. For example, federal courts in the Fifth,[12] Ninth,[13] and Eleventh[14] Circuits have rejected the application of *Younger* to cases challenging rigid bail systems—that is, systems that impose bail on indigent persons in pretrial detention without regard to their ability to pay. These cases broke no doctrinal new ground. They are consistent with the Supreme Court's admonitions against applying *Younger* when a federal remedy would not interrupt an ongoing proceeding, or where there is no adequate opportunity to raise a federal constitutional objection in the underlying state proceeding.

This doctrinal trend is showing signs of cracking, however. In January 2022, the Fifth Circuit issued an en banc opinion in a case challenging a rigid bail system in Dallas.[15] That court expressed that in a future proceeding, it wished to take "a fresh look at *Younger*."[16] The Fifth Circuit observed that in that future proceeding, it would "have authority to re-evaluate [its] own precedent."[17]

The developments have been even more ominous in the Eighth Circuit, a court that the Supreme Court unanimously overturned less than a decade ago for applying *Younger* too broadly.[18] For context, in the 2013 case of *Sprint v. Jacobs*, the Supreme Court ruled that the Eighth Circuit imposed *Younger* abstention on civil administrative proceedings in which that doctrine did not apply.[19] The Supreme Court explained that *Younger* abstention should not sprawl beyond a narrow series of settings.[20] In explaining these limitations, the Court reasoned: "Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'. . . Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'"[21]

In the years that have followed, the Eighth Circuit has continued to apply *Younger* in ways that outpace Supreme Court doctrine. In 2018, for example, in *Oglala Sioux Tribe v. Fleming*, the Eighth Circuit dismissed a suit by Native American parents who claimed that their

12 ODonnell v. Harris Cnty., 892 F.3d 147, 156 (5th Cir. 2018).

13 Arevalo v. Hennessy, 882 F.3d 763, 766 (9th Cir. 2018).

14 Walker v. City of Calhoun, 901 F.3d 1245, 1255 (11th Cir. 2018).

15 Daves v. Dallas Cnty., 22 F.4th 522 (5th Cir. 2022).

16 *Id.* at 548.

17 *Id.*

18 Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69 (2013).

19 *Id.* at 72–73.

20 *Id.* at 73.

21 *Id.* at 77 (first quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821); and then quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

children were being routinely taken from their custody without adequate due process.[22] Relying on *Younger*, the Court reasoned that even if there was no adequate opportunity to raise the federal constitutional objections in the underlying state proceedings, the parents could file a mandamus action in state court.[23] This outcome is difficult to reconcile with the Supreme Court's rejection of an exhaustion requirement in § 1983 cases.[24]

More recently, in the 2020 case of *Dixon v. St. Louis*, the Eighth Circuit vacated a federal district court's injunction that prohibited the imposition of a rigid bail system on indigent defendants without regard to their ability to pay.[25] It concluded that the district court had insufficiently weighed issues of comity, as well as subsequent corrective developments in the Missouri courts.[26] Among other cases, the *Dixon* court cited the Jim Crow era case of *Railroad Commission of Texas v. Pullman Co.*, in which the Supreme Court concluded that it should refrain from deciding whether racially segregated railcars in Texas violated the Equal Protection Clause, given that there was a potential state-law basis to resolve the case.[27] On remand in *Dixon*, the federal district court declined to reinstate the injunction, concluding that it was moot in light of Missouri's policies aimed at correcting the violations.[28] And while that court ruled on mootness grounds, it also appealed to comity. Citing Eighth Circuit precedent, it explained that the "principle of comity takes on special force when federal courts are asked to decide how state courts should conduct their business."[29] "The era of micromanagement of government functions by the federal courts is over."[30] The Supreme Court's extant *Younger* abstention jurisprudence already balances these important comity considerations with federal courts' obligations: to entertain cases within their jurisdiction, to uphold the republican commitments of the Fourteenth Amendment, and to prevent irreparable harm. These recent developments in the Fifth and Eighth Circuits portend a world in which federal courts superimpose an additional comity-infused "mood" of deference

22 904 F.3d 603 (8th Cir. 2018).

23 *Id.* at 613.

24 Patsy v. Bd. of Regents, 457 U.S. 496, 498 (1982).

25 Dixon v. City of St. Louis, 950 F.3d 1052 (8th Cir. 2020).

26 *Id.* at 1056.

27 *Id.* (quoting R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941)) ("Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . .").

28 Dixon v. City of St. Louis, No. 19-cv-0112, 2021 WL 4709749, at *9 (E.D. Mo. Oct. 8, 2021).

29 *Id.* (quoting *Dixon*, 950 F.3d at 1056).

30 *Id.* (quoting Ahmad v. City of St. Louis, 995 F.3d 635, 642–43 (8th Cir. 2021)).

on top of this careful balance.[31] And while deference has its place, it should not come at the expense of the four components of *Younger* that allow federal courts to meet their obligations to intervene in federal constitutional illegalities when necessary.

I. RESTRAINING JUDICIAL OBLIGATIONS

A classic debate in federal courts scholarship is the extent to which a federal court can decline to exercise jurisdiction over a case that falls within its constitutionally and congressionally prescribed power. On one view, abstaining to exercise jurisdiction over a case can, as Professor Gerald Gunther once put it, amount to "a virulent variety of free-wheeling interventionism."[32] A generation later, Professor Martin Redish wrote that "abstention doctrines amount to such usurpation" of legislative rule, by effectively overturning federal statutes that properly confer jurisdiction.[33] He expressed particular concern about doctrines that presume that "state court adjudication of federal rights against the states is generally to be preferred to federal court adjudication. These 'total abstention' theories would effectively prohibit the federal courts from enforcing federal civil rights laws, in particular section 1983, and from exercising their congressionally-vested jurisdiction to enforce those laws."[34]

On the other side of this debate, there have been prominent proponents of prudential and discretionary limitations on federal judicial limits. Professor Alexander Bickel famously contended that federal courts could invoke "passive" doctrines like standing and the political question doctrine to avoid invalidating democratically enacted legislation.[35] Instead of upholding or invalidating legislation, federal courts "may do neither, and therein lies the secret of its ability to maintain itself in the tension between principle and expediency."[36] Further, Professor David Shapiro directly disputed the view that declining to exercise jurisdiction over a case amounted to ignoble usurpation.[37] He contended that doctrines like abstention, exhaus-

31 *Cf.* Williams v. Taylor, 529 U.S. 362, 386 (2000) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951)) (reasoning that federal courts should engage in a "mood" of state deference in habeas proceedings).

32 Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964) ("[A] virulent variety of free-wheeling interventionism lies at the core of [some] devices of restraint.").

33 Redish, *supra* note 3, at 72.

34 *Id.*

35 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111 (2d ed. 1986).

36 *Id.* at 69.

37 *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

tion, and justiciability had "ancient and honorable roots," and merely amounted to an "open acknowledgment of reasoned discretion [which] is wholly consistent with the Anglo-American legal tradition."[38]

This Part will document this tug of war in judicial doctrine—a battle of competing principles that is especially pronounced in federal cases about state wrongs. United States Supreme Court doctrine reflects an attempt to balance these two competing sets of principles.

A. Obligations

A core assertion in federal judicial doctrine is that federal courts are obligated to hear cases that fall within their jurisdiction. There are at least two germane versions of that theme. First, dating back to opinions of Chief Justice Marshall, federal courts have asserted that jurisdiction conferred upon them by Congress and the Constitution is mandatory. Acting beyond properly conferred jurisdiction is impermissible; failing to act within the bounds of one's jurisdiction is also impermissible. Second, federal courts' power and obligation to correct state actors' constitutional mistakes is amplified by the Reconstruction Amendments and the Reconstruction era laws like the Ku Klux Klan Act of 1871.

The mandatory jurisdiction obligation. Two of the earliest potential clashes of comity and jurisdiction came in 1821 and 1824 via *Cohens v. Virginia*[39] and *Osborn v. Bank of the United States*,[40] respectively. In an earlier case, *Martin v. Hunter's Lessee*, the Supreme Court held that it had the power to review state supreme court's rulings on matters of federal law.[41] The question in *Cohens* was whether the Supreme Court had such jurisdiction over federal legal appellate claims emerging from state criminal prosecutions.[42] One of Virginia's lawyers, Alexander Smyth, attempted to distinguish *Martin v. Hunters Lessee*. "[T]he case now before the Court, is very different from that of *Martin v. Hunter*. This is a writ of error to revise a judgment given in a criminal prosecution, and in a case wherein a State was a party."[43] The Supreme Court ultimately exercised appellate jurisdiction, however.[44] And in doing so, Chief Justice Marshall relied in part on a robust endorsement of the view that when the Supreme Court had jurisdiction, it had an

38 *Id.* at 545.
39 19 U.S. (6 Wheat.) 264 (1821).
40 22 U.S. (9 Wheat.) 738 (1824).
41 14 U.S. (1 Wheat.) 304, 351 (1816).
42 *Cohens*, 19 U.S. (6 Wheat.) at 321.
43 *Id.* at 312–13.
44 *See id.* at 430.

obligation to exercise that jurisdiction. "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."[45] He added: "The one or the other would be treason to the constitution."[46] A few years later in *Osborn*, the Supreme Court relied on its statutorily and constitutionally conferred jurisdiction to issue an injunction against a state actor who, in violation of federal law, had seized money from the Bank of the United States.[47]

Over the past two centuries, the Supreme Court has frequently cited this mandatory view of jurisdiction.[48] To be sure, over the course of the nineteenth century, the Court has endorsed a number of abstention doctrines that do invite federal courts to practice restraint, even when they do have jurisdiction. *Pullman* abstention, for example, encourages federal courts to decline to decide federal constitutional questions when there is an antecedent unclear question of state law that must be answered first.[49] *Colorado River* abstention encourages federal courts to sometimes stay a federal case when a parallel civil proceeding is ongoing in state court.[50] And as noted, *Younger* abstention asks federal courts to decline to issue injunctions that will interfere with ongoing criminal prosecution. But even as courts have adopted these abstention doctrines, they have made appeals to federal courts' mandatory jurisdiction to explain why abstention doctrines should be construed narrowly. In the 2013 case *Sprint v. Jacobs*, for example, the Court cited its "virtually unflagging" obligation to hear cases within its jurisdiction to explain why *Younger* abstention should to extend beyond the narrow boundaries that the Supreme Court has delineated.[51] A broader invocation of *Younger* would violate the

45 *Id.* at 404.

46 *Id.*

47 Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 871 (1824).

48 *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 358–59 (1989) ("Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred."); Willcox v. Consol. Gas Co., 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . ." (citing *Cohens*, 19 U.S. (6 Wheat.) at 404)); Chicot Cnty. v. Sherwood, 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." (first citing Suydam v. Broadnax, 39 U.S. (14 Pet.) 67 (1840); and then citing Union Bank of Tennessee v. Vaiden, 59 U.S. (18 How.) 503 (1855))).

49 *See* R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500 (1941).

50 *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976).

51 Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77 (2013) (quoting *Colorado River*, 424 U.S. at 817).

Supreme Court's "dominant instruction that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'"[52]

The Reconstruction obligation. Whatever obligation existed in *Cohen* and *Osborn* to exercise jurisdiction over claims that state actors violated federal law, that obligation almost certainly found even firmer footing in the years after the Civil War. Those years ushered in the passage of the Fourteenth Amendment, expressly prohibiting states from violating equal protection under the laws and due process. Those years also brought the passage of the Ku Klux Klan Act of 1871, which codified the super statute commonly known today as § 1983. That law permits individuals to bring suit, at law or equity, against state actors who violate federal rights. Moreover, in 1875, Congress significantly expanded federal question jurisdiction.

Early after the passage of these acts, the Supreme Court recognized the significant shift that these constitutional amendments and statutes had on the federal government's relationship to states, including its state courts. In the 1880 case of *Ex parte Virginia*,[53] a state judge challenged his conviction for willfully excluding Americans from serving on juries on account of their race. He argued that the federal statute giving rise to his conviction was beyond the scope of Congressional power. Relying on the Reconstruction Amendments, the Supreme Court disagreed. The Court explained that the Reconstruction Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress."[54]

Subsequent cases have reaffirmed the role that the Reconstruction Amendments played in expanding the federal government's power to regulate states and, by extension, the federal government's power to enforce those regulations. In *Mitchum v. Foster*,[55] for example, the Supreme Court confronted whether a federal court could enjoin a state court proceeding under § 1983. The Founding-era Anti-Injunction Act purports to ban such injunctions absent, among other exceptions, express Congressional authorization. The Supreme Court held that § 1983 constituted the kind of Congressional authorization. The Court explained that § 1983 was "an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional

52 *Sprint*, 571 U.S. at 81–82 (quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984)).

53 100 U.S. 339 (1880).

54 *Id.* at 344–45.

55 407 U.S. 225 (1972).

amendment."[56] The Court further reasoned that "Section 1983 was . . . a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted."[57] In its view, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[58] Enjoining such state actors is authorized under the plain terms of § 1983; the statute "expressly authoriz[es] a 'suit in equity' as one of the means of redress."[59]

B. Restraint

Alongside doctrinal references to federal judicial obligations, federal courts have also made frequent appeals to notions of judicial restraint. Throughout much of the twentieth century, the Supreme Court adopted limits on judicial power while relying on concepts like democratic values and federalism. In the way of federalism, the form of restraint that has come to be called *Younger* abstention is one of the best examples. In embracing that form of abstention, the Court concluded that interfering with a state criminal proceeding is improper when the plaintiff "has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[60] Among the concepts the Court cited for this limitation was the "the notion of 'comity,' that is, a proper respect for state functions."[61] Famously, the Court also asserted: "'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."[62]

II. *YOUNGER*'S BALANCE

Younger, then, is at a key intersection. Obligations to entertain cases within federal courts' jurisdiction—including cases against state actors—date back to the earliest days of the Republic and are amplified all the more by Reconstruction-era amendments and legislation. But federal judicial doctrines have also expressed attentiveness to federalism-informed comity, autonomy, and relative expertise. These concerns are all heightened in the context of criminal law.

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56 *Id.* at 238.
57 *Id.* at 242.
58 *Id.* (quoting *Ex parte Virginia*, 100 U.S. at 346).
59 *Id.* at 242.
60 Younger v. Harris, 401 U.S. 37, 43–44 (1971).
61 *Id.* at 44.
62 *Id.* at 44–45.

One risk is that, without careful attention, judicial restraint can turn to abdication. Without "safety valves," a rule against any federal judicial interaction with state criminal proceedings could result in rules that deny victims of federal constitutional violations a federal forum in some of the cases that fall at heart of Congressional goals when it passed § 1983.

This Part will show how *Younger* doctrine aims to guard against total abdication of federal judicial obligations in four ways. The failure to protect *any* of these tenets creates an undue risk that restraint will morph into abandonment of longstanding federal judicial obligations.

A. Interference Requires Interfering

The doctrine of *Younger* abstention applies when a federal remedy would "interfere" with an ongoing state proceeding. Importantly, the Court has narrowly construed that constitutes interference.

Parallel proceedings do not inherently constitute interference. In the years after *Younger*, the Court made clear that for the state to establish interference, it is insufficient to show that federal proceeding runs alongside, or is related to, a state criminal proceeding. In *Gerstein v. Pugh*,[63] arrestees sued a Florida county that had been placing them in jail for long periods without timely preliminary hearings. While the county claimed that the federal suit violated *Younger* abstention principles, the district court, Fifth Circuit and United States Supreme Court disagreed. A judicial mandate of prompt hearings can coexist with the prosecution of those individuals. The United States Supreme Court held: "The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions."[64] It reasoned that

> [t]he injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.[65]

Incidental effect on future or non-party cases is not interference. The state does not establish "interference" merely by arguing that a federal judicial ruling will have an impact on other criminal cases. For example, in *Steffel v. Thompson*,[66] the Supreme Court held that "federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of

63 420 U.S. 103 (1975).

64 *Id.* at 108 n.9 (citing *Younger*, 401 U.S. 37).

65 *Id.*

66 415 U.S. 452 (1974).

enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied."[67] Under those circumstances, invalidating a criminal statute will effectively prevent future prosecutions of the plaintiff. But under *Younger*, that does not amount to interference with an ongoing criminal proceeding. Moreover, in *Gerstein*, the inevitable result of requiring prompt probable cause determinations is that during the course of other arrests, other individuals' criminal proceedings would be impacted because they would be able to avail themselves of that right. *Gerstein* meant future individuals would receive a prompt bail hearing. This kind of incidental impact on other proceedings does not amount to interference.

This is a sound and important bulwark between restraint and abdication. Whenever a federal court invalidates a state criminal statute, or issues a ruling about an illegal practice in a state's criminal apparatus, there is always the possibility (or likelihood) that other defendants will seek to avail themselves of that holding. Abstaining that ground alone would place more weight on *Younger*'s comity rationale than it can bear.

B. Adequate Underlying Proceeding

Another fundamental safeguard built into *Younger* is that the doctrine does not apply unless there is an adequate opportunity in the underlying state proceeding to raise one's federal constitutional claims. When the basis of someone's claim, for example, is that they have been held without a hearing, *Younger* does not apply. By the time an arrestee could raise any such claim in their state proceeding, they already will have experienced irreparable harm. Moreover, as I have written elsewhere, "a structurally or systemically infirm forum is never 'adequate,' both because such a forum *is* irreparable harm and because such a forum *facilitates* irreparable harm."[68]

C. Exceptions to Abate Irreparable Harm

Beyond the general unavailability of *Younger* abstention when there is no adequate opportunity to raise constitutional claims, the Supreme Court has identified some concrete settings in which federal courts should not defer to the underlying state process to abate irreparable harm. First, federal courts should not defer to a state proceeding when the prosecution is a result of bad faith or harassment. The bad faith prosecution is, after all, a part of the irreparable harm

67 *Id.* at 475.

68 Smith, *supra* note 7, at 2339.

that the litigant is trying to redress. To ask a criminal defendant to seek redress in the bad faith prosecution is to ask the criminal defendant to subject herself to more of that harm. What is more, where there is evidence that a bad faith prosecution is a form of harassment of a criminal defendant, no dismissal of any single criminal proceeding can effectively guarantee that the harassment will not continue. A defendant under those circumstances may choose to forgo constitutional protected conduct to avoid perpetual prosecution, even if the net result is perpetual dismissals of the charges. Second, where the state decisionmaker is demonstrably partial, the Supreme Court may address constitutional challenges, rather than relying on state decisionmakers to cure their own bias. Otherwise, here too, *Younger* doctrine would essentially compel a federal plaintiff to subject oneself more substantially to the procedural harms they are attempting to redress.

Third, federal courts may intervene when there is not a *timely* opportunity for a federal plaintiff to raise her claim in the underlying state proceeding. In *Gibson v. Berryhill*,[69] for example, when the court adopted the bias exception to *Younger*, the Court was not moved by the argument that the litigants could raise the issues on a state appeal. The *Younger* doctrine "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved."[70] A federal court is not required to abstain "simply because judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the administrative proceedings."[71]

Fourth, federal courts are permitted to intervene if the state law being wielded against the criminal defendant is patently unconstitutional in "every clause, sentence and paragraph."[72] This exception has never been applied by the Supreme Court. I have offered elsewhere:

> Perhaps the best way to understand the exception, then, is to understand the principle that animates the other exceptions: avoiding the irreparable harm that attends a structurally corrupt proceeding in which one's constitutional interests are at stake. If a statute is not only facially invalid but also so flagrantly and indisputably unconstitutional that no reasonable person could

69 411 U.S. 564 (1973).

70 *Id.* at 577.

71 *Id.*

72 Younger v. Harris, 401 U.S. 37, 53–54 (1971) (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)) (stating that federal intervention would be warranted in the "conceivable" situation in which a statute was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it").

possibly conclude otherwise, this raises the question: Why is the state wielding such a law against its populace?[73]

D. Exhaustion

A final path the Court has charted for protecting federal rights under *Younger* is the Court does not require a federal plaintiff to exhaust every available state-law remedy before bringing a federal claim. To be sure, a criminal defendant is required to exhaust the criminal appellate process before filing a federal suit that would interfere with a criminal proceeding.[74] As the Court has explained, "[f]or *Younger* purposes, the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign."[75]

Outside that unitary system, the Supreme Court has never required exhaustion of other state remedies, like mandamus. Presumably, the general rule from *Patsy v. Board of Regents of Florida* controls in that setting. That case rejected a general exhaustion requirement for § 1983 claims. The Court explained: "The 1871 Congress intended § 1 to 'throw[] open the doors of the United States courts' to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights . . . and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary."[76]

The rejection of a general exhaustion requirement—other than when there is a unitary appellate process—is one of the most important safeguards of *Younger*. A state could presumably always identify a state remedy a plaintiff could attempt to seek: i.e., mandamus or a state-issued injunction from a court of general jurisdiction. But to demand that federal plaintiffs file such suits is to effectively deprive federal plaintiffs of the choice to use a federal forum to vindicate federal rights, a choice that the Reconstruction Congress granted Americans when they face unconstitutional state abuse.

III. SAFEGUARDS ON TRIAL

In recent years, as litigants have brought federal cases challenging state regimes that criminalize poverty, the doctrine of *Younger* abstention has experienced something of a revival in prominence. In

73 Smith, *supra* note 7, at 2303.

74 Huffman v. Pursue, Ltd., 420 U.S. 592, 608 (1975).

75 New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 369 (1989).

76 Patsy v. Bd. of Regents, 457 U.S. 496, 504 (1982) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 376 (1871) (statement of Rep. Lowe).

2018, I contended that *Younger*'s "[s]afety valves for bad faith, untimely proceedings, biased proceedings, and even patently unconstitutional laws are united by that longstanding conception of the federal judiciary's equitable role. . . . The time is ripe to assess whether these exceptions are working as intended."[77]

Since that writing, a number of federal appellate courts have addressed states' arguments that *Younger* abstention should impede federal cases challenging rigid money bail systems.[78] In other instances, federal appellate courts have applied *Younger* in legal challenges to other systemic or structural flaws in a state legal process in ways that have direct implications for the legal challenges to systems that criminalize poverty.[79] These newer cases present additional opportunities to explore the efficacy of *Younger*'s built-in mechanisms to maintain a federal forum for grave, irreparable harms.

This Part begins with cases from the Fifth, Ninth, and Eleventh Circuits that have rejected states' *Younger* abstention arguments when plaintiffs have launched challenges to rigid bail systems. The Part then turns to cases in which states' *Younger* claims have met more success: a Fifth Circuit case which threatens to upend its earlier jurisprudence, and a set of cases out of the Eighth Circuit. In some ways, the latter cases do not so much suggest the need for the Supreme Court to create new safeguards as opposed to the need to reaffirm those that already exist.

A. Younger*'s Safeguards in Action*

In 2018, three federal circuits rejected the application of *Younger* abstention to cases in which plaintiffs challenged rigid bail schedules in state systems. The Fifth Circuit case of *ODonnell v. Harris County*,[80] for example, involved a challenge to a money bail system in Houston that fail to account meaningfully for criminal defendants' ability to pay. In an opinion by Judge Edith Brown Clement, the court explained that for *Younger* to apply, "[t]here must be (1) 'an ongoing state judicial proceeding' (2) that 'implicate[s] important state interests' and (3) offers 'adequate opportunity' to 'raise constitutional challenges.'"[81] In its view, "[t]he third prong of this test [was] not met."[82] The court relied heavily on *Gerstein v. Pugh*, where the

77 Smith, *supra* note 7, 2304–05.

78 *See, e.g.*, ODonnell v. Harris Cnty., 892 F.3d 147 (5th Cir. 2018); Walker v. City of Calhoun, 901 F.3d 1245, 1254 (11th Cir. 2018).

79 *See, e.g.*, Arevalo v. Hennessy, 882 F.3d 763 (9th Cir. 2018).

80 *ODonnell*, 892 F.3d 147.

81 *Id.* at 156 (quoting Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982)).

82 *Id.*

Supreme Court rejected the application of *Younger* because "[t]he injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution."[83] Moreover, the Fifth Circuit relied on the district court's trenchant observation that "the adequacy of the state court review of bail-setting procedures is essential to ODonnell's federal cause of action. In short, '[t]o find that the plaintiffs have an adequate hearing on their constitutional claim in state court would decide [its] merits.'"[84]

The Ninth Circuit also rejected the application of *Younger* in a challenge to a $1 million bail that a state criminal defendant named Erick Arevalo could not afford to pay. In that case, Mr. Arevalo filed a federal habeas petition (as opposed to a § 1983 petition) to secure his release.[85] The federal district court, sua sponte, applied *Younger* abstention.[86] The Ninth Circuit disagreed.[87] Like the Fifth Circuit in *ODonnell*, the court concluded that "*Younger* abstention is not appropriate in this case because the issues raised in the bail appeal are distinct from the underlying criminal prosecution and would not interfere with it. Regardless of how the bail issue is resolved, the prosecution will move forward unimpeded."[88] The Ninth Circuit also reasoned that given the absence of an adequate state hearing to assess Mr. Arevalo's ability to pay, he was suffering irreparable harm.[89] As such, the Ninth Circuit held that the "case fit[] squarely within the irreparable harm exception."[90]

Finally, in *Walker v. City of Calhoun*,[91] the Eleventh Circuit also rejected the application of *Younger* in a § 1983 case challenging a town's rigid bail schedule.[92] As an initial matter, the court observed that "[a]bstention . . . has become disfavored in recent Supreme Court decisions."[93] For that proposition, the court cited *Sprint v. Jacobs*,[94] where the Court reaffirmed, "[j]urisdiction existing, . . . a federal court's 'obligation' to hear and decide a case is 'virtually unflagging,'"

83 Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975).

84 ODonnell v. Harris Cnty., 892 F.3d 147, 156 (5th Cir. 2018) (citation omitted), *overruled by* Daves v. Dallas Cnty., 22 F.4th 522 (5th Cir. 2022).

85 Arevalo v. Hennessy, 882 F.3d 763 (9th Cir. 2018).

86 *Id.* at 764.

87 *Id.*

88 *Id.* at 766.

89 *Id.* at 767 (noting that Mr. Arevalo "has been incarcerated for over six months without a constitutionally adequate bail hearing").

90 *Id.* at 766.

91 901 F.3d 1245 (11th Cir. 2018).

92 *Id.* at 1255–56.

93 *Id.* at 1254.

94 571 U.S. 69 (2013).

and "only exceptional circumstances . . . justify a federal court's refusal to decide a case in deference to the States."[95] More directly, like other courts before, the Court found that "*Younger* does not readily apply here because Walker is not asking to enjoin any prosecution. Rather, he merely seeks prompt bail determinations for himself and his fellow class members."[96]

B. Younger*'s Safeguards Cracking?*

There are other cases, however, that suggest a pending circuit split as to whether *Younger* applies to federal suits by pretrial detainees challenging systems that impose rigid money bail amounts without regard to their ability to pay. Notably, the Fifth Circuit has sapped *ODonnell* of its precedential weight in the circuit. In January 2022, an en banc Fifth Circuit panel considered whether *Younger* abstention should block a suit by pretrial detainees in Dallas who challenged that city's money bail system.[97] The court observed that "*Younger* has been barely mentioned in most of the briefing. Working backward temporally, none of the parties' *en banc* briefing cited *Younger* . . . ."[98] It surmised,

> [p]erhaps the relative silence as to abstention can be explained by the fact that our court's first *ODonnell* opinion, which rejected *Younger* abstention in the similar context of bail practices in Harris County, was handed down on February 14, 2018, a month after this suit was brought but before motions to dismiss were filed.[99]

Given the importance of comity, however, the Fifth Circuit expressed that on a remand, the district court should consider the applicability of *Younger*.[100] Mindful that the appellate court decisions are generally binding on district court decisions, the Fifth Circuit instructed the district court that was not bound by *ODonnell*, or any previous Fifth Circuit opinion:

> Our limited remand will give the district court the opportunity, through such proceedings as it directs, to have abstention fully explored, both factually and legally. The *ODonnell* court's *Younger* analysis is not binding on this remand. When the case returns, none of our precedent will be binding on us. Thus, in light of the district court's consideration of the issue after the *en banc* court has received the case, we give the district court authority on remand to reach the result it considers appropriate even if it is inconsistent

95 *Walker*, 901 F.3d at 1254 (quoting *Sprint*, 571 U.S. at 77–78).
96 *Id.*
97 Daves v. Dallas Cnty., 22 F.4th 522, 529 (5th Cir. 2022).
98 *Id.* at 546.
99 *Id.*
100 *Id.* at 548.

> with any of this court's precedent. What we have actually held in this opinion to be the law, though, must be applied as precedent.[101]

The court further explained that "[a]fter the remand, the *en banc* court will take a fresh look at *Younger*, at which time we will have authority to re-evaluate our own precedent."[102] Because the opinion does not present a clear description of where, precisely, it believes the *ODonnell* court erred, it is not evident whether the *ODonnell* opinion will withstand remand and future evaluation from the Fifth Circuit.

Another jurisdiction in which *Younger* safeguards are showing signs of cracking is the Eighth Circuit. In *Dixon v. City of St. Louis*,[103] the Eighth Circuit reviewed a district court opinion that had rejected *Younger* abstention in a federal challenge to a bail system that inadequately accounted for detainees' ability to pay. That district court had relied on identical reasoning as *ODonnell*: "'To find that the plaintiffs have an adequate hearing on their constitutional claim in state court would decide its merits.' . . . Further, the 'non-discretionary procedural safeguards' sought would 'not require federal intrusion into pretrial decisions on a case-by-case basis.'"[104] However, observing that the City of St. Louis had taken steps to amend its bail policies to bring them into constitutional compliance, the Eighth Circuit vacated the district court's holding.[105] In its view, the district court should have given more weight to comity considerations in light of the city's revisions. It explained: "The district court, in fact, considered the effect of the rule changes on the question of mootness. . . . But it failed to adequately account for their effect on the question of whether a preliminary injunction served the public interest in comity between the state and federal judiciaries."[106] On remand, the district court found that the case was moot.[107]

In some ways, the more concerning Eighth Circuit opinion regarding *Younger*'s endangered safeguards is *Oglala Sioux Tribe v. Fleming*.[108] That case involved federal legal claims by an indigenous tribe and Native Americans parents who argued that, in violation of their federal rights, the state had been removing children from the

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101 *Id.*

102 *Id.*

103 950 F.3d 1052 (8th Cir. 2020).

104 Dixon v. City of St. Louis, No. 19-cv-0112, 2019 WL 2437026, at *9 (E.D. Mo. June 11, 2019) (quoting ODonnell v. Harris Cnty., 892 F.3d 147, 156 (5th Cir. 2018)), *vacated and remanded*, 950 F.3d 1052 (8th Cir. 2020).

105 *Dixon*, 950 F.3d at 1057.

106 *Id.* at 1056 (first citing *Dixon*, 2019 WL 243702, at *13 n.10; and then citing *In re* SDDS, Inc., 97 F.3d 1030, 1040–41 (8th Cir. 1996)).

107 Dixon v. City of St. Louis, No. 19-cv-0112, 2021 WL 4709749, at *9 (E.D. Mo. Oct. 8, 2021).

108 904 F.3d 603 (8th Cir. 2018).

tribe's parents without adequate due process.[109] The Eighth Circuit ruled that this litigation could not proceed in light of *Younger*.[110]

That opinion was in significant tension with three of *Younger*'s safeguards, however. As an initial matter, the court construed the term "interference" much more broadly than the Supreme Court has. The plaintiffs noted that none of them had pending proceedings at the time that the case was filed: "According to the plaintiffs, they sought only prospective relief aimed at future 48-hour proceedings, and the federal proceeding would not interfere with a pending state proceeding."[111] Putting to one side the potential implications of this fact for standing under cases like *O'Shea v. Littleton*,[112] the fact that the plaintiffs were not seeking interference with any ongoing proceeding should have been sufficient to defeat the *Younger* defense.

The opinion is also at odds with two additional *Younger* safeguards: (1) the requirement of an adequate opportunity in the underlying proceeding to raise federal claims; and (2) the Supreme Court's lack of an exhaustion requirement beyond the underlying proceeding's unitary process. The *Oglala* court wrote:

> Although the plaintiffs complain that state court proceedings do not afford parents an adequate opportunity to raise broad constitutional challenges under the Due Process Clause, they have not established that South Dakota courts are unwilling or unable to adjudicate their federal claims. State courts are competent to adjudicate federal constitutional claims, . . . and "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.[113]

The Supreme Court has never said that federal courts may abstain because a plaintiff is able to file an entirely new case in a state court. Indeed, if that were the law, *Younger* abstention claims would virtually always prevail, and plaintiffs would be steered to bring these federal claims in state courts. Extant *Younger* jurisprudence does not countenance that level of abdication when plaintiffs ask federal courts to correct grave claims of unconstitutional, irreparable harm.

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109 *Id.* at 606.

110 *Id.* at 607.

111 *Id.* at 610.

112 414 U.S. 488 (1974).

113 *Oglala Sioux Tribe*, 904 F.3d at 613 (first citing Moore v. Sims, 442 U.S. 415, 430 (1979); and then quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 15 (1987)).

CONCLUSION

The Supreme Court has constructed safeguards to ensure that abstention does not morph into abdication. These safeguards include: narrowly interpreting what it means to interfere with an ongoing proceeding, refusing to apply *Younger* when the underlying state proceeding lacks an adequate opportunity to raise federal claims, applying exceptions to *Younger* that allow federal courts to abate irreparable harm, and recognizing that *Younger* does not require the exhaustion of state remedies beyond direct appeals that form the same "unitary process." Roughly fifty years after *Younger* was decided, those safeguards are facing an important crucible in the lower courts.